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Brown and Lush Browning and Lushington's Reports
Bruce . . . *Bruce's Reports, Court of Session*
Buck . . . Buck's Cases in Bankruptcy
Bulst. . . . Bulstrode's Reports
Bunb. . . . Bunbury's Reports
Burnett . . *Burnett's Criminal Law*
Burr. . . . Burrow's Reports
Burr. S. C. . Burrow's Settlement Cases
Bynk. . . . Bynkershoek

C. or Codex . Divi Justiniani Codicis libri duodecim ; in Corpus Juris Civilis. [The fragment precedes, the book and title (within brackets) succeed, the initial.]
C. A. . . . Court of Appeal
C. B. . . . Common Bench Reports, or Manning, Granger, and Scott's Reports
C. B., N. S. . Common Bench Reports (New Series)
C. C. . . . Cases in Chancery or Crown Cases
C. C. Ct. Cas. Central Criminal Court Cases
C. C. R. . . Crown Cases Reserved
C. Feud. . . Consuetudines Feudorum (printed at the end of the Corpus Juris Civilis)
C. L. R. . . Common Law Reports
C. & J. or Cromp. & J. Crompton and Jervis' Reports
C. & M. or Cromp. & M. Crompton and Meeson's Reports
C. M. & R. or Cromp. M. & R. Crompton, Meeson, and Roscoe's Reports
C. P. . . . Common Pleas
C. T. N. . . Cases *temp.* Northington
Ca. *temp.* F. . Cases *temp.* Finch
Ca. *temp.* Holt. Cases *temp.* C. J. Holt
Ca. *temp.* H. Cases *temp.* Hardwicke
Ca. *t.* K. . . Cases *temp.* King, Chancery
Cab. & El. . Cababe and Ellis' Reports
Cald. S. C. . Caldecott's Settlement Cases
Calth. . . . Calthorpe's Reports
Camp. . . . Campbell's Reports
C. & K. or Car. & Kir. Carrington and Kirwan Reports
Car. & M. . Carrington and Marshman
C. H. & A. . Carrow, Hamerton, and Allen, Session Cases
C. & P. or Car. & P. Carrington and Payne Reports
Carp. P. C. . Carpmael's Patent Cases
Cart. . . . Carter's Reports
Carth. . . . Carthew's Reports
Cas. Pra. C. P. Cases of Practice Common Pleas
Cas. *t.* Talb. . Cases *temp.* Talbot
Ch. Ca. . . Cases in Chancery
Ch. D. . . . Law Reports (New Series), Chancery Division
Cl. & Fin. . Clark and Finnelly's Reports
Clay . . . Clayton's Reports
Clerk & Scrope *History of the Exchequer*
Cliff. & Rick. Clifford and Rickard's Reports
Cliff. & Steph. Clifford and Stephen's Reports
Cod. or Cod. Jur. Civ. Codex (Juris Civilis), Justinian Codex
Cockb. & Rowe Cockburn and Rowe's Reports
Co. . . . . Coke's Reports
Co. Lit. . . Coke on Littleton (1 Inst.)
Co. M. C. . . Coke's Magna Charta (2 Inst.)
Co. on Courts Coke's fourth Institute
Co. P. C. . . Coke's Pleas of the Crown (3 Inst.)
Coke . . . Coke's Institutes of the Law of England, 1817
Coll. C. R. . Collyer's Chancery Reports
Coll. Jurid. . Collectanea Juridica
Colt. . . . Coltman's Registration Cases
Com. . . . Comyn's Reports
Comb. . . . Comberbach's Reports
Connell, Tithes *Connell on the Law of Scotland respecting Tithes*
Com. Law Rep. Common Law Reports
Connell, Parishes *Connell's Treatise on the Law of Parishes*
Com. P. D. . Law Reports (New Series), Common Pleas Division
Coop. G. . . Cooper, G., Chancery Reports
Coop. *temp.* Cott. Cooper, C. P., *temp.* Cottenham
Co. Rep. . . Coke's Reports

Corb. & D. . Corbett and Daniell's Cases
Coup . . . *Couper's Justiciary Reports*
Cowp. . . . Cowper's Reports
Cox, Cr. Ca. . Cox's Criminal Cases
Craig . . . Craig, Jus Feudale
Cr. & Ph. . . Craig and Phillips' Reports
Cr. & St. . . Craigie and Stewart's Reports
Cunn . . . Cunningham's Reports
Curt. . . . Curteis' Ecclesiastical Reports

D. . . . . *Dunlop's Series of the Court of Session Reports (the Second Series)*, 24 vols., 1838–62
D. (followed by a bracket) or Dig. Justiniani Digestorum seu pandectarum libri quinquaguinta; in Corpus Juris Civilis. [The fragment precedes, the book and title succeed, the initial.]
D. & Mer. . Davison and Merivale's Reports
D. H. L. . . *Dunlop's Reports (House of Lords part), vols.* 17 *to* 24, 1854–62
D. & L. . . Dowling and Lowndes' Practice Cases
D. & Ry. . . Dowling and Ryland's Reports
Dal. . . . Dalison's Reports
Dallas, Styles. *Dallas' Styles of Writs, 2nd ed.*
Dalr. . . . *Dalrymple's Decisions, Court of Session*
Dan. . . . Daniel's Reports
Dan. & Ll. . Danson and Lloyd's Mercantile Cases
Davis . . . Davis' (Sir John) Reports
Deac. . . . Deacon's Bankruptcy Cases
Deac. & Ch. . Deacon and Chitty's Reports
De G. . . . De Gex's Bankruptcy Reports
De G. F. & J. De Gex, Fisher, and Jones' Reports
De G. & J. . De Gex and Jones' Reports
De G. J. & S. De Gex, Jones, and Smith's Reports
De G. M. & G. De Gex, Macnaughten, and Gordon's Reports
De G. M. & G. Bank De Gex, Macnaghten, and Gordon's Bankruptcy Cases
De G. & Sm. . De Gex and Smale's Reports
Dea & Sw. . Deane and Swabey's Reports
Dears. C. C. . Dearsley's Crown Cases
Dears. & B. . Dearsley and Bell's Crown Cases
Deas & And. *Deas and Anderson's Reports*
Delane . . Delane's Decisions, Revising Courts
Den. . . . Denison's Crown Cases
Dickson Evidence *Dickson on the Law of Evidence in Scotland, Grierson's ed.*
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D. & S. . . Doctor and Student
Dod. . . . Dodson's Reports
Doug. . . . Douglas' Reports
Doug. Q. B. . Douglas' Reports, Queen's Bench

Dow . . . Dow's Reports
Dow & Cl. . Dow and Clark's Cases
Dow. & R. M. C. Dowling and Ryland's Magistrates' Cases
Dow. & Ry. N. P. Dowling and Ryland's Nisi Prius
Dowl. P. R. . Dowling's Practice Reports
Drew. . . . Drewry's Reports
Drew. & Sm. Drewry and Smale's Reports
Duff . . . *Duff on Feudal Conveyancing*
Dugd. Orig. . Dugdale's Origines
Duncan Par. Ecc. Law *Duncan on Parochial-Ecclesiastical Law, 2nd ed.*
Durn. & E. . Durnford and East, or Term Reports
Durie . . . *Durie's Reports*
Dy. . . . . Dyer's Reports

E. & A. . . Ecclesiastical and Admiralty Reports
Eag. & Y. . . Eagle and Younge's Tithe Cases
East . . . East's Reports
East P. C. . East's Pleas of the Crown
Eden. . . . Eden's Reports
Edg. . . . *Edgar's Reports*
Edw. . . . Edward's Reports
El. B. & S. . Ellis, Best, and Smith's Reports
El. & Bl. . . Ellis and Blackburn's Reports
El. B. & E. . Ellis, Blackburn, and Ellis' Reports
El. & E. . . Ellis and Ellis' Reports
Elch. or Elchies *Lord Elchies' Court of Session Decisions (and in vol.* 24 *of Morison's Dictionary)*
Eq. Ca. Abr. . Equity Cases Abridged
Eq. Rep. . . Equity Reports
Ersk. or Ersk. Inst. *Erskine's Institute of the Law of Scotland, by J. B. Nicolson*
Esp. . . . . Espinasse's Reports
Ex. . . . . Welsby, Hurlstone, and Gordon's Reports
Ex. Div. . . Law Reports (New Series) Exchequer Division

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Falc. & F. . Falconer and Fitzherbert's Election Cases
Farg. . . . *Ferguson's Consistory Reports*
Ff. . . . . Pandectæ (Juris Civilis)
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Fin., T. . . Finch's (T.) Reports
Fisher's Dig. . Fisher's Analytical Digest
Fitz-G. . . Fitz-Gibbon's Reports
For. . . . . Forrest's Reports
Forbes . . . *Forbes' Decisions*
Forester . . Chancery Cases, *temp.* Talbot
Fort. de Laud. Fortesque de laudibus Angliæ Legum
Fortes. . . . Fortescue's Reports

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Freem. Chy. . Freeman's Chancery Reports
Freem. K. B.. Freeman's K. B. Reports

G. & D. . . Gale and Davison's Reports
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Gaii. . . . Gaii Institutionum Commentarii IV.
Gif. . . . . Giffard's Reports
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Gilb., C. P. . Gilbert's Common Pleas
Gilb., R. . . Gilbert's Reports, Chancery
Gilmour . . *Gilmour's Reports*
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Gleyg . . . *Gleyg on the Law of Reparation*
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Goudy . . . *Goudy on Bankruptcy, 2nd ed.*
Gouldsb. . . Gouldsborough's Reports
Gow . . . . Gow's Nisi Prius Cases
Gro. de J. B.. Grotius de Jure Belli
Gwill. . . . Gwillim's Tithe Cases

H. . . . . Hare's Reports
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H. & N. . . Hurlstone and Norman's Reports
H. L. Rep. . Clark's H. of Lords' Reports
H. P. C. . . Hale's Pleas of the Crown
H. & Tw. . . Hall and Twells' Reports
Hag. Adm. . Haggard's Admiralty Reports
Hag. Con. . Haggard's Consistorial Reports
Hag. Ec. . . Haggard's Ecclesiastical Reports
Hailes . . . *Hailes' (Sir David Dalrymple) Court of Session Decisions*
Hale C. L. . Hale's Common Law
Harcarse . . *Harcarse's Decisions*
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Hare . . . Hare's Reports
Har. & Ruth. Harrison and Rutherford's Reports
Har. & W. . Harrison and Wollaston's Reports
Hawk. P. C. . Hawkins' Pleas of the Crown
Hein. . . . Heineccius
Hem. & M. . Hemming and Miller's Reports
Het. . . . Hetley's Reports
Hob. . . . Hobart's Reports
Hodg. . . . Hodge's Reports
Holt. . . . Holt's (Sir John) Reports
Holt N. P. . Holt's Nisi Prius Reports
Home (Clk.) . *Clerk Home's Reports*
Hop. & Colt. . Hopwood and Coltman's Reports
Hop. & Ph. . Hopwood and Philbrick's Reports
Hope, Min. Pract. *Hope's Minor Practicks, Spottiswood's ed.*
Horn & H. . Horn and Hurlstone's Reports
Hov. Suppl. . Hovenden's Supplement to Vesey, jun.
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Hugh . . . Hughes' Entries
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Hume, Com. . *Baron Hume's Commentaries on the Law of Scotland respecting Crimes, 3rd ed., Bell's ed., with Supplemental Notes*
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Jac. . . . Jacob's Reports
Jenk. . . . Jenkyn's Reports
John. . . . Johnson's Reports
John. & H. . Johnson and Hemming's Reports
Jones T., or Jon. 2 Jones' (Sir T.) Reports
Jones W., or Jon. 1 Jones', Sir William, Reports
Journ. of Juris. *Journal of Jurisprudence*
Jur.. . . . Jurist Reports
Jur. N. S. . Jurist (New Series)
Jurid. Rev. . *Juridical Review*, 1887–96
Just. Inst. . Justinian's Institutes

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Kames' Rem. D. *Kames' Remarkable Decisions.*
Kames' S. D. . *Kames' Select Decisions*
Kay . . . Kay's Reports
Kay & J. . . Kay and Johnson's Reports
Keb. . . . Keble's Reports

Keen . . . Keen's Reports
Keil. . . . Keilwey's Reports
Kel. . . . Sir John Kelyng's Reports
Kel. W. . . Wm. Kelynge's Reports
Kent Comm.. Kent's Commentaries on the Law of United States
Keny. . . . Kenyon's Notes (Hanmer)
Kilk. . . . *Kilkerran's Decisions*
Kn.. . . . Knapp's Reports
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L. R. C. P. . English Law Reports, Common Pleas
L. R. Eq. . . English Law Reports, Equity
L. R. Exch. . English Law Reports, Exchequer
L. R. H. L. . English Law Reports, House of Lords
L. R. P. C. . English Law Reports, Privy Council
L. R. P. & D. English Law Reports, Probate and Divorce
L. R. Q. B. . English Law Reports, Queen's Bench
L. R. Sc. Ap. English Law Reports, Scottish and Divorce Appeal, 1865–75
L. J. . . . Law Journal
L. J., N. S. . Law Journal (New Series)
L. Mag. . . The Law Magazine
L. Q. R. . . Law Quarterly Review
L. T. . . . Law Times
L. T., N. S. . Law Times (New Series)
L. & Welsb. . Lloyd and Welsby's Commercial Reports
La. . . . . Lane's Reports
Lat. . . . . Latch's Reports
Ld. Ken. . . Kenyon's Reports
Ld. Raym. . Lord Raymond's Reports
Leach . . . Leach's Crown Cases
Leg. Burg. . *Leges et Consuetudines Quatuor Burgorum in Regiam Majestatem*
Lee *temp.* H. . Lee's Cases, *temp.* Hardwicke
L. Malc. . . *Leges Malcolmi, in Regium Majestatem*
Le. & Ca. . . Leigh and Cave
Leon. . . . Leonard's Reports
Lev. . . . Levinz's Reports
Lew. C. C. . Lewin's Crown Cases
LexMerc.Red. Lex Mercatoria, by Beawes
Ley . . . . Ley's Reports
Lil. . . . . Lilly's Reports or Entries
Lit. . . . . Littleton's Reports
Ll. & Wels. . Lloyd and Welsby, C. C.
Lofft . . . Lofft's Reports
Long Quinto. Year Book, pt. 10, K. B.
Lud. E. C. . Luder's Election Cases
Lush. . . . Lushington's Admiralty Reports
Lut.. . . . Lutwyche's Reports
Lut. R. C. . . Lutwyche's Registration Cases

M. . . . . *Macpherson's Series of the Court of Session Reports (Third Series)*, 11 *vols.*, 1862–73
M. D. & D. . Montagu, Deacon, and De Gex's Reports
M. H. L. . . *Macpherson's Reports, House of Lords part*
M. & S. . . Maule and Selwyn's Reports
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M'Cle & Yo. . M'Cleland and Young's Reports
MacFarlane . *MacFarlane's Reports, Jury Court*
Mac. & G. . Macnaghten and Gordon's Reports
Macdonald or Macd.Crimes *Macdonald's Criminal Law of Scotland, 3rd ed.*
Mackay, Pract. *Sheriff Mackay's Practice of the Court of Session*, 2 *vols.* 1879
Mackay, Manual *Sheriff Mackay's Manual of Practice of the Court of Session*, 1 *vol.*, 1893
Macl. & R. . *Maclean and Robinson's Appeals*
M'Laren, A.S. *Collection of Public General Statutes and Acts of Sederunt down to* 1861
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Mar. . . . March's Reports
Mar. Cas. . . Maritime Cases
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Marsh . . . Marshall's Reports
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Mer. . . . Merivale's Reports
Mod. Rep. . Modern Reports
Mo. . . . . Moore's Reports, K. B.
Mont. . . . Montagu's Reports
Mont. & Ayr . Montagu and Ayrton's Reports
Mont. & Chit. Montagu and Chitty's Reports
Mont. D. & De G. Montagu, Deacon, and De Gex's Reports
Mont. & M'A. Montagu and M'Arthur's Reports
Moo. & M. . Moody and Malkin's Reports
Moo. P. C. C. . Moore's Privy Council Cases
Moo. Ind. Ap. Moore's Indian Appeal Cases
Moo. & R. . Moody and Robinson's Reports
Moo. J. B. . . J. B. Moore's Reports
Moo. & P. . . Moore and Payne's Reports
Moo. & S. . . Moore and Scott's Reports
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Moore, Q. B. . Moore, Sir F., Reports

More's Notes	*More's Notes to Edition of Stair's Institutions of the Law of Scotland*
Morr. B. C.	Morrell's Bankruptcy Reports
Mor.	*Morrison's Dictionary of Decisions*, 1540–1808
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Myl. & K.	Mylne and Keene's Reports
N. Benl.	New Benloe, K. B. Reports
Nels.	Nelson's Reports
N. L.	Lutwyche, Reports by Nelson
N. R.	New Reports, by Bosanquet and Puller
N. R.	Not reported
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N. & P.	Neville and Perry's Reports
New Rep.	New Reports
Nic. Ha. C.	Nicholl, Hare, and Carrow, Railway Cases
North	Northington's Reports, by Eden
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O. Benl.	Old Benloe's Reports
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Ow.	Owen's Reports
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P. L. M.	*Poor Law Magazine*, 1857–96
P. Wms.	Peere Williams' Reports
Pal.	Palmer's Reports
Par.	Parker's Reports
Pat.	*Paton's Appeal Cases*
Pea.	Peake's Reports
Peak. Ad. Cas.	Peake's Additional Cases
Peak. N. P. C.	Peake's Nisi Prius Cases
Peck.	Peckwell's Election Cases
Per. & K.	Perry and Knapp, Election Cases
Ph.	Phillip's Reports
Phillim.	Phillimore's Reports
Pig. & R.	Piggott and Rodwell's Election Cases
Plowd.	Plowden's Reports
Pol.	Pollexfen's Reports
Poph., 2 Poph.	Popham's Reports
Pothier Tr. des Oblig.	Pothier Traité des Obligations
Pow. R. & D.	Power, Rodwell, and Dew's Election Cases
Price or Pr.	Price's Reports
Q. B.	Adolphus and Ellis, Queen's Bench Reports, New Series
Quinti Quinto	Year Book, 5 Hen. 5
R.	*Rettie's Series of the Court of Session Reports (Fourth Series)*, 1873–96
R. H. L.	*Rettie's Reports, House of Lords part*, 1873–96
R. J. C.	*Rettie's Reports, Justiciary Court Cases*, 1873–96
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Rail. C.	Railway Cases
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Ray., Sir T.	Sir Thos. Raymond's Reports
Reg. Maj.	*Regiam Majestatem*
Rep. Ch.	Reports in Chancery
Rep. Eq.	Gilbert's Reports in Equity
Rep. *temp.* Finch	Finch's Reports, Chancery
Ridg. *t.* H.	Ridgway *temp.* Hardwicke
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L.R.	
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S.	*Shaw's Court of Session Reports (First Series)*, 16 *vols. There are two editions of the first* 5 *vols., to the first of which the references are usually (but not invariably) made*, 1822–38
S. C. C.	Select Chancery Cases
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Sav.	Savile's Reports
Say.	Sayer's Reports
Sc. Jur.	*Scottish Jurist*
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Sess. Ca. . . Sessions Cases, and see C. H. and A.
Seton . . . *Seton's Practice of Heraldry*
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Sim. . . . Simon's Reports
Sim. & St. . Simon and Stuart's Reports
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Skin. . . . Skinner's Reports
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Stair Repts. . *Stair's Reports*
Stark . . . Starkie's Reports
Staunf.. . . Staunforde's Pleas of the Crown
Steph. Com. . Stephen's Commentaries
Stra. . . . . Strange's Reports
Stuart, M., & P. *Stuart, Milne, and Peddie's Reports*
St. Tri. . . State Trials
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Tyrw. . . . Tyrwhitt's Reports
Tyr. & Gr. . Tyrwhitt and Granger's Reports

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Vent. . . . Ventris' Reports
Vern. . . . Vernon's Reports
Ves. or Ves. sen. Vesey's, sen., Reports
Ves. jun. . . Vesey's, jun., Reports
Vin. Abr. . . Viner's Abridgment
Vin. Supp. . Viner's Supplement
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GREEN'S ENCYCLOPÆDIA

OF

THE LAW OF SCOTLAND

Abandoning Child.—To leave an infant exposed is a crime; and if death be caused, constitutes culpable homicide (Hume, i. 299; Alison, i. 162; Macdonald, 173); or, it may be, murder (*Kerr*, 3 Irv. 645). It is also a statutory offence (52 & 53 Vict. c. 44, s. 1).

Abandonment of Action: Court of Session.—When the pursuer of an action desires to pass from the instance, and at the same time to preserve his right to bring a new action, his course is to abandon. This enables him to avoid decree of absolvitor, and entitles him to obtain an interlocutor of dismissal, which is no bar to a fresh action upon the same grounds, if otherwise competent. In the Court of Session, the method by which abandonment is effected depends upon the stage which the proceedings have reached. It may be either (1) at common law; (2) under the Judicature Act and relative Act of Sederunt; or (3) under the Court of Session Act, 1868.

1. *Abandonment at Common Law.*—This is competent only before the record is closed, and requires the leave of the Lord Ordinary. Its conditions are in the discretion of the Court, and it is not imperative to find expenses due to the defender (*Caledonian Iron Co.*, 1831, 10 S. 133).

2. *Abandonment under the Judicature Act* (6 Geo. IV. c. 120, s. 10) *and relative Act of Sederunt* (11 July 1828, s. 115).—After the record is closed, the pursuer is entitled, as matter of right (except in the course of a jury trial or proof), to abandon the cause at any time before an interlocutor has been pronounced (*Western Bank*, 1862, 24 D. 859, at p. 924), assoilzieing the defender in whole or in part, or leading by necessary inference to such absolvitor. The condition of the privilege is payment of the defender's expenses; and after the record is closed there can be no abandonment, with the right to bring a new action, except under this condition (cp. *Hare*, 1882, 9 R. 910, with *Mackay*, 11 Dec. 1895, 3 S. L. T. No. 291). Abandonment under the Act is effected by the pursuer lodging in process a minute in the following terms: "*A. B.* [*counsel for the minuter*] stated to the Lord Ordinary [*or the Court*] that the pursuer abandoned, and hereby abandons, this cause in terms of the Statute." The Court then, upon motion, appoints the defender to lodge his account of expenses, and remits it, when lodged, to the auditor for taxation.

The account is taxed as between party and party (*Lockhart*, 1845, 7 D. 1045). If, after taxation, the pursuer pays the account, and lodges the receipt in process, he can, upon motion, have an interlocutor pronounced allowing him to abandon, and dismissing the action. The process is not at an end until the authority of the Court is interponed to the abandonment (*Muir*, 1849, 11 D. 487). If by mistake an interlocutor of absolvitor is pronounced in place of an interlocutor of dismissal, the pursuer's right to bring a new action will not be barred (*Shirreff*, 1836, 14 S. 825).

3. *Abandonment under the Court of Session Act*, 1868 (31 & 32 Vict. c. 100, s. 39). This applies only to cases in which the pursuer desires to abandon during the course of a proof or jury trial. The Statute provides: "Any action may, with leave of the judge, be abandoned, on the conditions contained in the 10th sec. of the Act 6 Geo. IV. c. 120, and relative Act of Sederunt, s. 115, in the course of a trial, at any time before the judge has commenced to charge the jury, or, where there is no jury, at any time before the judge has made avizandum with the evidence: Provided that such abandonment shall not be competent without the leave of the judge, who shall be of opinion that it is just and proper in the circumstances: Provided further, that in granting such leave the judge shall specify the time within which the expenses shall be paid to the defender; and if the expenses shall not be paid within such time, the defender shall be entitled to be assoilzied from the conclusions of the action, with expenses."

When a minute of abandonment has been lodged under the provisions of the Judicature Act, and the pursuer fails to pay or consign the taxed amount of the expenses within a reasonable time, the defender is entitled to absolvitor. This is specially provided in regard to jury trials, after issues have been adjusted, by A. S. 16 Feb. 1841, s. 46; and the same rule is applied in other cases (L. Adam in *Ross*, 1889, 16 R. 871; *Donnelly*, 14 March 1895, 2 S. L. T. No. 574, L. Kyllachy).

Abandonment of an action is within the presumed mandate of counsel (*Duncan*, 1874, 1 R. 329), but not of the agent (*Urquhart*, 1857, 19 D. 853, L. J. C. Hope). After service of the summons, an action cannot be effectually withdrawn or abandoned extrajudicially (*Nelson*, 1874, 1 R. 1093).

An appeal from the Sheriff Court to the Court of Session is held to be abandoned by failure on the part of the appellant to print, box, lodge, and furnish timeously the necessary prints (A. S., 10 March 1870, s. 3 (1) and (2)). The effect of this presumed abandonment is that unless the appellant has been reponed (A. S., *ut supra*, s. 3 (3)), the judgment or judgments complained of become final (s. 3 (5)). So, too, any right of action may be held to be abandoned by the failure of a party to insist, or to comply timeously with some statutory enactment or order of Court (*Gallie*, 1842, 7 D. 301; *Duncan's Factor*, 1874, 1 R. 964). In such cases the abandonment is held to be a final passing from the claim, and there is no right to bring a new action.

[See Shand, *Practice*, i. 343–5; Mackay, *Practice of the Court of Session*, i. 119, 133, 134, 539, ii. 39; *Manual of Practice*, 24, 25, 34, 284–6, 642; Coldstream, *Procedure in the Court of Session*, 108–10; Balfour, *Handbook of Court of Session Practice*, 58, 78, 87, 201.] See Action; Amendment of Record; Disclamation of Action; Advocate; Law Agent.

Abandonment of Action: Sheriff Court.—Where the petition has been executed but not called, abandonment is made by a letter of abandonment, accompanied by express abandonment in the action

which is substituted (*Laidlaw*, 1834, 12 S. 538; *M'Aulay*, 1873, 1 R. 307). An extrajudicial letter by itself is insufficient, but a minute in the new action is enough (*Nelson*, 1874, 1 R. 1093; *M'Aulay, ut supra; Campbell's Trs.*, 1863, 1 M. 1016). If no expense has been caused, it is unnecessary to find expenses due (*M'Aulay, ut supra*).

When the petition has been enrolled, the power of abandonment is regulated by the Act of Sederunt of 10 July 1839, s. 61, which permits "the pursuer, before any interlocutor of absolvitor is pronounced, to enter on the record an abandonment of the cause, on paying full expenses to the defender, and to bring a new action, if otherwise competent." Abandonment may take place at any time during the action, so long as no interlocutor of absolvitor has been pronounced, even though opinions adverse to the pursuer have been given (*Western Bank*, 1862, 24 D. 859). The mode of entering on the record is by minute that the pursuer abandons the action in terms of the Act of Sederunt, without qualification or reservation (*Adamson*, 1867, 6 M. 347). Expenses must be paid or consigned before the abandonment is effectual (*Lawson*, 1845, 7 D. 960; *Aitken*, 1863, 1 M. 1038; *Kennedy*, 1876, 3 R. 813); and if not paid, the action proceeds as usual (*Ross*, 1889, 16 R. 871). Expenses are taxed as between party and party (*Lockhart*, 1845, 7 D. 1045). The abandonment must be sanctioned by the Court to make it effectual (*Cormack*, 1846, 8 D. 889; *Muir*, 1849, 11 D. 488); and till this has been done, and expenses paid, the minute may be withdrawn on payment of any expense caused by it (*Dalgleish*, 1886, 23 S. L. R. 552; *Todd & Higginbotham*, 1879, 16 S. L. R. 718). The proper interlocutor following on abandonment is "to hold the action as abandoned in terms of the 61st sec. of the Act of Sederunt of 10 July 1839." Like the minute, the interlocutor should be made without reservation or qualification (*Adamson, ut supra*). Decree of absolvitor is wrong, and if pronounced in error does not bar a new action (*Shirreff*, 1836, 14 S. 825: *Stewart*, 1868, 6 M. 954).

An agent has no implied authority to abandon: he must get it from his client (*Urquhart*, 1857, 19 D. 853; *Orr*, 1867, 36 Sc. Jur. 557).

See ACTION; LAW AGENT.

Abandonment, in Bankruptcy.—1. *ABANDONMENT OF A BANKRUPT'S ESTATE BY HIS CREDITORS.*—A sequestrated bankrupt may become reinvested in estate falling under the sequestration through the creditors abandoning it to him. Express retrocession in such estate is not essential. "The acts of the trustee and creditors in relation to it may be such as to indicate that the bankrupt is, according to their desire, to be deemed to be in future the master or the owner of the property, and that they have abandoned and rejected it" (per L. Watson in *Northern Herit. Secur. Invest. Co.*, 1891, 18 R. (H. L.) 37). Knowledge by the creditors that the bankrupt is carrying on a trade or business does not of itself imply an abandonment of their claim to his acquisitions (Bell, *Com.* i. 126, 127; *Troughton*, Amb. 630); although it will operate as a bar to their claiming these acquisitions to the exclusion of new creditors (*Christie*, 1835, 14 S. 191; *Taylor*, 1879, 7 R. 128; per L. P. Inglis, *Abel*, 1883, 11 R. 149). The creditors on a sequestrated estate may, in the exercise of their discretion in the realisation of the estate, resolve to abandon claims competent to them, and such a resolution, if not set aside on appeal, forms a bar to action at the instance of the trustee (*Gray*, 1850, 12 D. 684). They cannot, however, gratuitously discharge valuable claims (*Caledonian Ry.*

Co., 1875, 2 R. 917). Nor can a majority of creditors, by resolving to abandon a claim competent to them, preclude an individual creditor, who offers to prosecute it, from doing so (*Sprot*, 1828, 6 S. 1083; *Spence*, 1832, 11 S. 212; *M'Kay*, 1866, 4 M. 333). In so suing, the individual creditor proceeds at his own risk: and, on the other hand, should he recover more than sufficient to pay his own debt in full, he must hand over the surplus to the trustee, for the benefit of the general body of creditors (*Spence, ut supra*; Bell, *Com.*, 5th ed., ii. 415). He is entitled to the use of the trustee's name in suing, on giving security to keep the trustee and the sequestrated estate *indemnis* (*Sprot, ut supra*). Or he may purchase the claim from the creditors and sue in his own name, taking from the trustee an assignation to his right (*Spence, ut supra*).

2. *Abandonment of Onerous Contracts by Trustee.*—Where a bankrupt at the time of his sequestration is under contracts of an onerous nature, such as leases or feu contracts, the trustee has the option of adopting or abandoning these. He must exercise his option within a reasonable time (*Anderson*, 1875, 2 R. 355). Adoption need not be express, but may be inferred from actings (*Dundas*, 1857, 20 D. 225; *Kirkland*, 1838, 16 S. 860; cp. *Stead*, 1835, 13 S. 280; *M'Gavin*, 1891, 18 R. 576). If the trustee once adopt a contract, he is bound personally for performance, and cannot thereafter abandon it. Abandonment exposes the sequestrated estate to a claim of damages for breach of contract at the instance of the other contracting party (*Kinloch*, 1836, 14 S. 905).

[Bell, *Com.*, 5th ed., ii. 413, 415; Goudy on *Bankruptcy*, 276, 295, 299, 317, 386.] See Sequestration.

Abandonment (in Marine Insurance).—The doctrine of abandonment is not peculiar to policies of marine insurance, but is part of every contract of indemnity. "Whenever there is a contract of indemnity, and a claim under it for an absolute indemnity, there must be an abandonment, on the part of the person claiming the indemnity, of all his right in respect of that for which he receives indemnity" (*Kaltenbach*, L. R. 3 C. P. D. 467, L. J. Brett's Opinion, p. 471). Thus, to take the simplest illustration: where a vessel, insured to her full value, is sunk, the underwriter is entitled to the benefit of anything that may be realised from the wreck, on his paying the sum contained in the policy. Abandonment, validly made or accepted by the underwriter, transfers the property in the thing abandoned from the insured to the insurer, but only so far as it was covered by the policy; *e.g.* if goods valued at £500 are only insured to the extent of £300, the remains existing after a loss has occurred are only transferred to the underwriter on abandonment to the extent of three-fifths of their value, the insured being entitled to the remaining two-fifths of any salvage ultimately recovered. In order to be valid, and so to operate a transfer of ownership, the abandonment must be absolute, unconditional, and by the true owner, or by one having authority to act for him. It takes effect from the time when the casualty occurred, and transfers all the liabilities, as well as privileges, which arise from ownership, from the insured to the insurer.

It follows from this doctrine, that if a vessel is abandoned as a constructive total loss after she has arrived at her destination, the underwriters are entitled to the freight of the cargo which she has on board, or to the proportion corresponding to the amount of the insurance (*Stewart*, 1846, 8 D. 323; affd. 2 Cl. & Fin. 159). But this does not constitute a total loss of

freight so as to entitle the assured, holding a separate policy on freight, to recover from the underwriters on freight (*Scottish Marine Insur. Co.*, 1853, 15 D. (H. L.) 33, 1 Macq. 339). The loss to the shipowner, in such a case, arises not from any of the perils insured against, but because he has to transfer the freight to the underwriters of the ship as a condition of his recovering as for a total loss of same.

The right to abandon arises equally where the loss is an actual total loss and where it is a constructive total loss. In the former case, no *notice of abandonment* is requisite; in the latter case, the general rule is, that notice of abandonment must be given in order to make the insurers liable as for a total loss. The necessity of notice, which is peculiar to marine insurance, arises from equitable considerations. Marine losses may occur in any part of the world, and, as a rule, the underwriter only obtains his information of what has occurred from the assured. If, therefore, the assured, after full knowledge of the casualty, were entitled to suspend his decision as to whether he would or would not abandon the subject-matter of the insurance to the underwriter until he ascertained how the markets might turn out, the underwriter would be placed at a disadvantage, and might suffer serious prejudice. It is therefore an implied term in every contract of marine insurance, that, as a condition precedent to the assured claiming as for constructive total loss, he should give notice of abandonment to the underwriter. If he fails to do so, he loses his claim entirely if he is insured only against total loss; and where he is also insured against particular average, he will only have his claim against the underwriters for the average loss.

The importance of the notice of abandonment arises from the fact that, in the case of goods conveyed by sea, the insurance is generally "free from average"; and, in the case of ships, that they are usually insured on valued policies, and on condition that the insured must himself bear a proportion of any average loss that may occur. If marine insurance were merely a contract of indemnity, like insurance against fire, it would be of little consequence whether the insured received the value of the subject insured, less the value of any salvage, or whether he recovered the whole value, transferring to the underwriters the salvage. But where the insurance policy only covers total loss, or, in the event of total loss, may entitle the assured to a sum greatly in excess of the value of the subject lost, the interest of the underwriters to insist upon strict compliance with the implied condition as to notice of abandonment becomes apparent. It is, accordingly, on this branch of the subject that litigation has most frequently arisen, and it is of the greatest practical importance.

As the right to give notice of abandonment only occurs when there is *constructive total loss*, it is necessary to consider what constitutes a constructive total loss. The criterion in the case of a vessel is, that she has been so injured by the perils insured against that she cannot be repaired, except at an expense exceeding her value after she is repaired. In the case of goods, however, a distinction requires to be taken where the loss occurs during the voyage, and where the goods actually arrive at their destination, although in a damaged condition. In the former case, if the goods are so damaged that they are not worth the expense of forwarding them to their destination, the assured may recover a total loss if he has given notice of abandonment. In the latter case, if the goods arrive in species, although damaged to such an extent that they are not worth the freight, the assured is not entitled to give notice of abandonment. The goods being warranted free from average, no degree of damage, however

great, will be considered as a total loss entitling the assured to give notice of abandonment (*Farnworth*, L. R. 2 C. P. 204).

Notice of abandonment need not be in writing, although it usually is so; nor does it require to be in any particular form; but there must be an unequivocal offer by the assured, to abandon to his underwriters the whole interest in the property covered by the policy. To be effectual, the notice must be given within a reasonable time after the assured has obtained certain and accurate information as to the nature of the damage. If the information be such as to disclose that the subject-matter of the insurance is in imminent danger of becoming and continuing a total loss, he must at once give notice of abandonment, unless there be some cogent reason to the contrary. If he delays doing so, he will lose his right altogether, even although he is able to prove beyond question that a constructive total loss has occurred.

If there is nothing to abandon, a notice of abandonment need not be given (*Rankin*, 1873, L. R. 6 E. & I. App. 83). Thus, if simultaneously with the information that a constructive total loss has occurred, the assured is informed that the salvage has been sold under circumstances which rendered such a course justifiable, the assured is not bound to give notice of abandonment; but wherever there is a possibility of some advantage accruing to the underwriter from notice being given, he is entitled to receive such notice as a condition of his being liable on the policy (*Kaltenbach, ut supra*). In a case of reinsurance, no notice of abandonment requires to be given to the reinsurer (*Uzielli*, 1884, 15 Q. B. D. 11).

If the underwriter accepts a notice of abandonment, a contract is concluded under which he becomes liable to pay the amount covered by the policy; and, at the same time, he has transferred to him the remains of the property insured. His acceptance may be express, or it may be implied from acts which are consistent only with the view that he has acquiesced in the abandonment. Mere silence will not signify acceptance. On the contrary, the inference in that case rather is, that the underwriter does not mean to accept. Once accepted, the notice becomes irrevocable (*The Prov. Insur. Co. of Canada*, 1874, L. R. 6 P. C. 224).

As a general rule, however, the underwriter does not accept the notice of abandonment. He suffers no prejudice by not accepting it; whereas, if he accepts it, he is precluded from maintaining that there was not such a loss as entitled the assured to abandon. If he has not accepted the notice, he may repair the subject and restore it, so as to defeat the assured's right to abandon, which does not become indefeasible until action is actually brought. Thus, if between the date of the notice and the date of the action, a submerged vessel is successfully floated by the underwriters, and restored to the owners, the notice of abandonment, even when validly given, becomes inoperative. Or again, if a vessel which has been captured be recaptured before the action is brought, and restored to the possession or control of her owners, the assured cannot recover as for a total loss. But this is subject to the condition that the vessel, when restored, is not in such a condition of disrepair as to be then a constructive total loss; and also that the ship be brought to the country of the owner under such circumstances that he may reasonably be expected to take possession of her. Similarly, in the case of detention or embargo of a vessel by a foreign Government, where there is a probability of the owner being thereby deprived for an indefinite time of the control of the ship, the assured has the right to abandon, on giving notice to the underwriters; but if the embargo is removed before the action is actually brought, the notice falls.

An attempt was made in the case of *Shepherd* (1881, 8 R. 518; affd. 9 R. (H. L.) 1) to induce the Scotch Courts to adopt the American and French rule on the subject, and to hold, contrary to the law as settled in England, that a notice of abandonment, once validly given, is not afterwards defeasible by any action on the part of the underwriter, or by the restoration of the subject insured. Although the point was not expressly decided, the strong probability is that the English rule would be held applicable to Scotland.

Where notice of abandonment is not accepted, it may be waived by the assured treating the loss as partial; but a waiver is not inferred from the master of a vessel dealing with the ship or goods in the manner in which a prudent owner, uninsured, would have done. The master is not merely the agent of the assured in such circumstances, but he is also the agent of the underwriters; and it is his duty to act in the interests of all concerned.

The danger of not acting with promptitude, in abandoning where a constructive total loss has occurred, is well illustrated by the case of *Fleming*, 1846, 8 D. 627; affd. 6 Bell, 278. Questions of difficulty often arise as to whether a constructive total loss has occurred. A vessel which is stranded is not necessarily a constructive total loss. It will depend on the extent of the injury it has received, and also on the probabilities of salvage, in each particular case, whether the owner is justified in treating it as a constructive total loss. And a sale by the master, on behalf of all concerned, after notice of abandonment has been given, will not convert what was then a partial loss into a total loss, although in fact the owner recovers nothing of the proceeds (*Currie*, 1869, L. R. 3 P. C. 72). A sale, however, which is made without the consent of the assured, but at the instance of salvors or captors, may convert what was only a constructive total loss into a total loss, and so render unnecessary a notice of abandonment (*Cossman*, 1887, L. R. 13 App. Cas. 160; *Stringer*, 1869, L. R. Q. B. 676).

The same rules which regulate abandonment, in the case of ships and goods, also apply where the subject-matter insured is freight. If no freight be earned, there is usually a total loss, which entitles the assured to sue without notice of abandonment; but if any freight is earned, there is no liability to indemnify the assured, even though it never reaches the pocket of the shipowner. A constructive total loss of freight arises where there has been a constructive total loss of the ship. Where the ship has been justifiably sold abroad, and the shipowner is thereby deprived of the power of earning a freight, there is a total loss which makes notice of abandonment unnecessary (*The Red Sea*, L. R. 1895, P. D. 283).

[The doctrine of abandonment is not exhaustively dealt with in any Scotch text-book of authority. It is briefly noticed in Bell, *Com.*, 7th ed., ii. 654, and in Bell, *Prin.* s. 480–8. It is more fully and accurately treated, however, in Arnould, *Marine Insurance*, Part III. chaps. 6, 7, & 8.] See MARINE INSURANCE.

Abatement.—See LEGACY; LEASE; RATING.

Abbey, Retiral to.—This phrase and its equivalent, "retreat to the sanctuary" (see 19 & 20 Vict. c. 79, s. 7), are used to denote the privilege of sanctuary, in virtue of which all civil debtors (other than Crown debtors) have, from a very remote period, been entitled to obtain immunity

from personal diligence by retreating within the precincts of Holyrood House. The area over which the privilege extends covers a circuit of about four and a quarter miles, including Arthur's Seat and Salisbury Crags. The privilege, although not abolished, has, since the passing of the Debtors Act, 1880 (43 & 44 Vict. c. 34), become practically obsolete in the case of all ordinary debtors, who are exempt from imprisonment under the provisions of that Act. By the Act 1696, c. 5, retiral of an insolvent debtor to the Abbey, combined with diligence by horning or caption, was declared to constitute notour bankruptcy. By the Bankruptcy Act, 1856 (19 & 20 Vict. c. 79, s. 7), it is enacted that notour bankruptcy shall be constituted, *inter alia*, by insolvency, concurring with a duly executed charge for payment, followed, where imprisonment is competent, by retreat to the sanctuary for twenty-four hours. This mode of constituting notour bankruptcy has, in the case of all ordinary debtors, been superseded by the provisions of the Debtors Act, 1880, but remains applicable to debtors (other than Crown debtors) who are not exempted from imprisonment by that Act.—[Bell, *Com.* ii. 461; Ersk. iv. 3. 25; Bell, *Prin.* s. 2315; Goudy on *Bankruptcy*, 70. 66.] See SANCTUARY.

Abbreviate of Adjudication.—This is an abridgment or abstract of the decree of adjudication, made out and signed by the extractor of the Court of Session at the same time as the extract of the decree. It contains the names of the debtor and creditor, the lands adjudged, and the amount of the debt. It had its origin in the "allowance" or approval of the apprising under the old law. The allowance or decree was indorsed on the apprising, and signed by authority of the Court, so as to make it in effect a decree-conform. It was upon this allowance that the superior was charged to enter the appriser. By the Act 1661, c. 33, these allowances were to be recorded within sixty days, otherwise a posterior comprising, if first recorded, was to be preferred. By Regulations 1695, c. 24, and 1696, art. 3, abbreviates were ordained to be made of all adjudications after the manner of the former allowances. Abbreviates are now recorded within sixty days of the date of the decree of adjudication in the Register of Adjudications. A certificate of the registration is written on the abbreviate. A copy of the abbreviate is appended to the extract of the decree, on which likewise the registration is certified.

The abbreviate in competitions is only of consequence in a question with posterior adjudgers. Failure to record it does not prejudice the adjudger in a question with the debtor: but, in a question with other adjudgers, the want of it may cost the prior adjudger his preference. But although the abbreviate be not recorded, the adjudger can, by taking infeftment upon the decree of adjudication, obtain a preference over creditors adjudging subsequent to the infeftment, but always subject to the right of *pari passu* ranking of adjudgers who complete the like diligence within year and day of the decree of the first adjudication. If registration takes place within year and day of the decree in the first effectual adjudication, it will preserve the right of *pari passu* ranking with that adjudication.

"A recorded abbreviate completes the security where the rights are personal; and in the adjudication of real rights it imports, though no infeftment be taken, a right of *pari passu* ranking with the first effectual, if recorded within year and day of the date of the decree in the first effectual. In questions with the debtor himself, a recorded abbreviate is not essential" (Parker, p. 43).

If the year and day are nearly elapsed, the Court may, on cause shown, dispense with the *inducia*, and pronounce decree, reserving all objections *contra executionem*, so as to enable a creditor to record his abbreviate, and so to rank with the first effectual. If the abbreviate has not been recorded in due time, the Court may pronounce a new decree before extract, so as to provide the adjudger with a new date from which the sixty days will run (*Seton*, 1750, Kilk. 18; *Stewart*, 1888, 15 R. 383). If an abbreviate has not been ordered when the decree was extracted, the Court may authorise one to be prepared and recorded.

One of the main uses of the abbreviate under the old law was to provide a means of charging the superior to enter the adjudger, and this could only be done if the abbreviate was recorded. But now, by the constructive entry of the Conveyancing Act of 1874, the abbreviate is no longer required for this purpose.

By s. 129 of the 1868 Act, and s. 65 of the 1874 Act, an adjudger of heritable securities may complete his title to them by recording the abbreviate in the appropriate Register of Sasines.

Abbreviate of Sequestration.—Under the Bankruptcy Act, 1856, sequestration has attached to it the force of an inhibition and of citation in an action of adjudication from the date of the first deliverance on the petition (19 & 20 Vict. c. 79 s. 48). To secure this privilege, however, it must be published in the records (*ib.*). This is done by registering an abbreviate of the petition and of the first deliverance thereon in the Register of Inhibitions at Edinburgh. The abbreviate must be in the form given in Schedule A. appended to the Act, and must be presented for registration before the expiry of the second lawful day after the first deliverance in the case of a Bill Chamber petition, or must be presented or transmitted by post before the expiry of the same time in the case of a petition to the Sheriff. The duty of registration lies on the party applying for sequestration (*ib.*). The recording of the abbreviate has the effect, as from the date of the first deliverance, of rendering the debtor incapable of voluntarily granting any deed or incurring any debt that may affect his heritage to the prejudice of his creditors (Bell, *Com.* ii. 134), and of rendering his heritage litigious and incapable of attachment by one creditor to the prejudice of any other (Bell, *Com.* ii. 144–6; *Jarvie*, 1865, 4 M. 79). Delay or error in recording the abbreviate in terms of the Act does not nullify the sequestration proceedings (Bell, *Com.*, 5th ed., ii. 325), but may enable creditors to acquire preferences prior to its rectification (see *Munro*, 1851, 13 D. 1209). Where such delay or error occurs, the Court of Session, *ex nobili officio*, is in use to grant authority for registration, upon a petition being presented to either Division of the Court (*Morrison*, 1874, 1 R. 392; *Harrison*, 1880, 18 S. L. R. 187; *Stark*, 1886, 23 S. L. R. 507).—[Goudy on *Bankruptcy*, 156–7; Murdoch on *Bankruptcy*, 217.] See SEQUESTRATION.

Abduction—The forcible carrying off or confinement of any person, without lawful authority. The crime may be aggravated by its purpose, as, for example, to compel a woman to marriage, or to perpetrate a rape, or to affect the administration of justice, as by preventing a witness from attending a court to give evidence. The carrying off of a voter for the purpose of affecting an election is a crime at common law, and also by special Statute. It is not necessary that there should be any special

purpose. Malicious intention, although not connected with any special cause, is sufficient, and such malice will be presumed from the act itself.

The Courts of the *locus* from which a voter has been abducted have jurisdiction to try the case, although the abduction carried the person outside the bounds of that jurisdiction.—[Hume, i. 310, 311; Alison, i. 226, 227, 642, 643; Macdonald, 171, 255, 256; Abduction of Voters Act, 17 & 18 Vict. c. 102, s. 5; *Douglas & Irving*, 1866, 5 Irv. 265, and 2 S. L. R. 181.]

A previous conviction of any offence of personal violence will be an aggravation of abduction, if violence was committed (Criminal Procedure Act, 1887, s. 64).

Aberdeen Act (5 Geo. IV. c. 87).—See ENTAIL.

Abettor —See ACCESSARY.

Abeyance.—When the holder of a peerage descendible to females dies, and the next heir is one of several sisters, the eldest sister, or her heir, by Scots law inherits without division; by English law the peerage falls into abeyance among the co-heiresses until the sovereign calls it out in favour of one of them.—[Stair, iii. 5. 11; Seton, 338.] See PEERS.

A peerage is said also to be in abeyance after it has been resigned into the hands of the sovereign, and until it has been regranted again.

Abiding by.—A judicial declaration that a writing challenged as forged is genuine. It could be required from the defender in the Action of Reduction Improbation, upon the ground of forgery, which was the common case, or from the party founding upon the challenged document in other actions. Its object was to shorten the process of reduction of forged documents (Hume's *Commentaries*, i. 152); for if the defender or other person called upon to abide declined to do so, decree was at once pronounced against him, finding the document to be forged (*Henderson*, Mor. 6755). On the other hand, if he abided by the document as true and genuine, he did so, as it was expressed in the form of declaration, *sub periculo falsi*, and was liable to the penalties of forgery without further proof of his knowledge and participation in the forgery. The declaration required to be signed by the party in court, unless this was dispensed with by the Court on the ground of age, infirmity, or otherwise. To avoid the above risk, attempts were often made to introduce qualifications into the declaration, or explanations or protests along with it; *e.g.* that the defender acquired the document by assignation or succession, and was ignorant as to its origin; or that the signature challenged was, if not genuine, written by authority of the signatory. Many contradictory decisions were given on this point, and are reported in Morison's *Dictionary*, but the final result was to admit qualifications (*Robertson*, 1743, Mor. 6774; *Paterson*, 1828, 6 S. 1098). The admission of qualifications lessened the efficacy of this form of procedure, and other causes have combined to make it doubtful if Abiding by will now ever be resorted to, though it has never been abrogated, and can scarcely yet be called obsolete. This form of process was introduced at a time when the Court of Session itself tried the crime of forgery, and was even deemed, though erroneously, to have a jurisdiction exclusive of

the Court of Justiciary to punish that crime if committed in its own Court. But now the proceedings in cases of forgery before the Court of Session are laid before the Lord Advocate, and the trial, if ordered, takes place in the Justiciary Court. Nor would a declaration Abiding by a document be now held conclusive proof. The Action of Reduction Improbation itself, in which Abiding by was most commonly used, has also become much rarer than it used to be. While there are forty cases of Abiding by reported between 1616 and 1747, it does not appear that there have been more than two such cases in the present century, the last of which was in 1828.—[Stair, iv. 20. 19; Ersk. iv. 4. 69; A. S. 11 July 1828, s. 53; Mackay, *Manual*, 419.] See Reduction; Improbation.

Abjuration, Oath of.—This oath (introduced by 13 Will. III. c. 16, and altered by 6 Geo. III. c. 53) was prescribed to be taken by members of Parliament and public officials. By it they abjured or renounced the Pretender, and recognised the right of Her Majesty under the Act of Settlement; engaged to support her; and promised to disclose all treasons and traitorous conspiracies against her. The Oath of Abjuration was abolished, as a separate oath, by 21 & 22 Vict. c. 46, s. 1; and one oath was substituted for the oaths of allegiance, supremacy, and abjuration. This latter has in turn been superseded, and a new form of oath of allegiance substituted, by the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72). See Oaths; Affirmation; Allegiance, Oath of.

Abortion.—It is a crime to use means causing a woman to abort, unless it be done for a necessary reason, such as to save the woman's life, when she cannot be delivered of a full-grown child, or other similar sufficient medical reason. The woman herself may incur criminal responsibility, if she be a willing participator in what is done. The cases which have been prosecuted are cases either of administering drugs, or using instruments within the body. The administration of such drugs, or such use of instruments with such criminal purpose, is an offence although the attempt be unsuccessful. It is an undecided point whether a woman who, without any accomplice, takes drugs for the purpose of causing herself to abort, can be relevantly charged with crime for doing so. But there seems to be no good reason for holding that a relevant charge can not be made. If a woman commits a crime in allowing another to do acts for the purpose of causing her to abort, it is not easy to see that the same act done by herself should not be held criminal.

If in procuring abortion the life of the woman is lost, the crime is murder.—[Hume, i. 263, 264, 186, 187; Alison, i. 52, 628, 629; Macdonald, 125, 152.]

Abroad—"Outwith the territorial limits of the country."—As a term of municipal law, it denotes the absence of a person from the country to which he belongs by nationality or domicile. Thus, from the point of view of British law, a Briton is *abroad* in France, while a Frenchman is *at home* in that country. "By persons absent from the island must necessarily be understood persons who have been present and within the jurisdiction, so as to have been subject to the process of the Court. It can never be applied to a person who, for aught appears, never was present within or

subject to the jurisdiction" (per L. Ellenborough, in *Buchanan*, 1808, 9 East, 192). As a general rule, persons abroad are not subject to the jurisdiction of the Courts of Scotland. In matters of municipal law, the tribunals of Scotland, England, and Ireland are as independent of one another as if they were the judicatories of independent sovereign States; and so a Scotsman who is furth of Scotland is, in the view of Scots law, *abroad*, even though resident in England or Ireland. Persons resident abroad, who litigate in the Courts of Scotland, may be ordered to find security for costs by sisting a mandatary. But the necessity for doing so is a matter in the discretion of the Court, and the rule has been relaxed since the passing of the Judgments Extension Acts, 1868 and 1883, which provide for the summary enforcement within the United Kingdom of the decrees of the Courts of the three kingdoms respectively. In judging whether or not a mandatary should be sisted, therefore, the Scottish Courts will deem it an important consideration that the party who is called upon to sist is resident within the United Kingdom, and will not order him to do so unless other circumstances than his absence from Scotland render it expedient (*Lawson's Trustees*, 1874, 1 R. 1065; *D'Ernesti*, 1882, 9 R. 655). A Scotsman suing in the English Courts is not now required to give security for costs (*Raeburn*, 1874, L. R. 9 Q. B. 118). For the grounds on which persons abroad may be held amenable to the jurisdiction of Scottish Courts, such as the beneficial possession of immoveable or the arrestment of moveable property within the realm, or the retention of a domicile in Scotland, see JURISDICTION; FOREIGN; DOMICILE. Where there is jurisdiction *ratione domicilii*, *rei sitæ*, or *arresti*, edictal citation is competent against the absent person to the effect of rendering him amenable to the jurisdiction of the Court of Session. See EDICTAL CITATION. Criminal jurisdiction is founded *ratione domicilii* or *ratione delicti*. No criminal trial can take place unless the accused be able to state his defence. Absents therefore cannot be tried. But persons abroad charged with the commission of crimes in Scotland may be cited at their last known place of residence, edictal citation being no longer necessary, and sentence of outlawry pronounced against them in absence. See CRIME; CRIMINAL PROSECUTION. As to the effect of absconding or leaving the country for the purpose of avoiding payment of debts, or of escaping punishment for crime, see ABSCONDING; JURISDICTION; MEDITATIO FUGÆ; OUTLAWRY; FUGITATION; EXTRADITION. The question whether a party is to be regarded, for the purposes of any particular case, as being abroad, is one of fact (Re *Earl of Stamford*, 1895, W. N. 157).

Absconding—Fleeing, or remaining away, from one's usual residence, or the place where one is generally found, in order to avoid legal proceedings. There may be absconding—

1. *Of a Criminal.*—If a person accused of crime absconds or flees out of the jurisdiction of the criminal Courts, this fact is generally libelled on in the charge as an indication of guilt. At the diet of trial an accused person who has absconded will receive sentence of fugitation or outlawry. See FUGITATION; OUTLAWRY; ABSENCE, TRIAL IN.

2. *Of a Witness.*—(a) *In Civil Cases.*—There is no legal compulsitor whereby a witness in a civil cause can be compelled to remain within the jurisdiction of the Court, so that his evidence may be available at the proof. If it is anticipated that a witness will leave the country before the proof, the only method of securing his evidence is to take his deposition on

commission, to lie *in retentis* until the trial of the action takes place (Dickson, *Evidence*, s. 1708). (b) *In Criminal Cases.*—It is incompetent, in criminal cases, to take on commission evidence to lie *in retentis*. But if a prosecutor or prisoner is apprehensive that a witness may abscond before the trial, he may obtain from the Court of Justiciary, or, in an urgent case, from the Sheriff, warrant for the witness's apprehension and imprisonment, until he finds caution to attend and give evidence at the trial (Hume, ii. 375; Alison, ii. 399; Burnett, 469; Macdonald, 419; Dickson, *ut supra*).

3. *Of a Bankrupt.*—By the Act 1696, c. 5, diligence against a debtor by horning and caption along with insolvency, combined with fleeing or absconding for his personal security, constituted notour bankruptcy; and under the Act of 1856 (19 & 20 Vict. c. 79), the same result is reached by insolvency concurring with a duly executed charge for payment, followed by flight or absconding from diligence. As to what constitutes absconding, see *Davis*, 1867, 5 M. 804 (absconding not proved by an execution of search at the house of debtor's father, where he only occasionally visited, and where he was not residing at the time of the search); *M'Bean*, 1858, 7 M. 23 (an averment that an insolvent debtor had openly left the country to fill a permanent situation abroad is not relevant to overcome the presumption that he has absconded, arising from the messenger's return of the execution of search); *Nicholson*, 1872, 11 M. 179 (execution of search by messenger-at-arms or sheriff-officer affords *primâ facie* evidence that the debtor has absconded); *Union Bank*, 1880, 7 R. 655 (there is absconding if, after a charge is executed, the debtor goes away to avoid the diligence, and remains away at the time the charge expires). While the proper evidence of the fact of absconding is the messenger's execution, in certain cases parole proof of it may be admitted (*Richmond*, 1789, Mor. 1113). The debtor may, in any case, adduce parole evidence in disproof of the alleged fact (Bell, *Com.* ii. 162; *Spedding*, 1785, Mor. 1113; *Marshall*, 1834, 13 S. 179; *M'Bean, ut supra*). Under the Act 1621, c. 18, the fraudulent bankrupt was punished with infamy. The Act 54 Geo. III. c. 137, s. 33, which deals with fraudulent bankruptcy, makes this offence punishable with infamy and the other pains specified in the Act 1621. Under these Statutes any attempt to escape from the country with property after bankruptcy amounts to fraudulent bankruptcy (Hume, i. 510; Macdonald, 97). Under the Debtors Act, 1880 (43 & 44 Vict. c. 34), as amended by the Bankruptcy Frauds and Disabilities Act, 1884 (47 & 48 Vict. c. 16), the absconding of a debtor in certain circumstances is made a criminal offence, which may be tried either before the Court of Justiciary or the Sheriff, and, in the latter case, either with a jury or summarily. By sec. 13 (B) (4) of the former Act, it is provided that "if, after the date of granting sequestration or cessio, or within four months prior thereto, he (the debtor) absconds from Scotland, or makes preparations to abscond, for the purpose of avoiding examination or other proceedings at the instance of his creditors, or taking with him property which ought by law to be divided amongst his creditors to the amount of £20 or upwards, or if he fails, having no reasonable excuse (after receiving due notice), to attend the public examination appointed by the Lord Ordinary or the Sheriff, or to submit himself for examination in terms of the Statutes," he "shall be deemed guilty of a crime and offence." As to the apprehension of a debtor about to abscond, see MEDITATIO FUGÆ; see also the Civil Imprisonment (Scotland) Act, 1882 (45 & 46 Vict. c. 42, ss. 3, 4).—[Ersk. iv. 1. 41; Bell, *Com.* ii. 162; Murdoch on *Bankruptcy*, 244; Goudy on *Bankruptcy*, 71, 644; Hume, i. 510; Macdonald, 96; Anderson, *Crim. Law*, 132; Chisholm, *Barclay's Digest*, 2.]

Absence, Decrees in. — 1. *What Decrees are in Absence.* — A decree is said to be a decree in absence when it is pronounced (1) without the defender having entered appearance, or (2) where the defender, having duly entered appearance, has failed to lodge defences within the statutory period (see Appearance, Entering: Defences). In certain cases, *e.g.* in consistorial actions, decree in absence will not be granted without proof; and a pursuer may, if he desires to record and preserve the evidence, be allowed a proof in an ordinary action, even though the defender has not put in defences, and is not present (*Russel's Trs.*, 1865, 3 M. 850). Generally speaking, however, if a cause be enrolled in the Undefended Roll, the Lord Ordinary must grant decree in absence in terms of the conclusions of the action, or subject to such restrictions as may be stated in a minute appended to the summons, without the attendance of counsel or agent. When a case has reductive conclusions, it may be enrolled for the purpose of obtaining an order to satisfy production, and thereafter for further procedure (Mackay, *Manual*, 211, 212); or decree may be taken on the first enrolment in the Undefended Roll *contra non producta*. It is thought reasonable that decree in absence might be avoided by counsel putting in defences at the bar (Mackay, *Manual*, 211): but the practice has been to refuse, unless the penalty of £2, 2s. is paid. Where there are two or more defenders, and one or more fails to lodge defences, the case must be enrolled in the Undefended Roll, for the purpose of getting decree against those failing to lodge defences (*Duke of Devonshire*, 1873, 1 R. 45).

2. *Recall of Decrees in Absence.* — Prior to 1838, if a party desired to be reponed against a decree in absence, he had to make his application in the form of a reclaiming note (*Brackenridge*, 1834, 12 S. 654). Between 1838 and 1868, he proceeded by suspension (1 & 2 Vict. c. 86, s. 5; Shand, *Pract.* 307). By the Court of Session Act, 1868, it is provided that if, before the lapse of ten days from the date of a decree in absence, the defender apply for the recall of the decree by enrolling the cause in the Lord Ordinary's Motion Roll (or, in Vacation, in the Motion Roll of the Lord Ordinary officiating on the Bills), and if, when the cause is moved, the defender produces his defences, and pays to the pursuer the sum of £2, 2s., the Lord Ordinary shall pronounce an interlocutor recalling the decree in absence, and allowing the defences to be received (31 & 32 Vict. c. 100, s. 23). If, however, where there has been personal service, or where the defender has entered appearance, the ten days have elapsed, and the decree has been extracted, and nothing has been done sixty days after the expiry of a charge on it, the party to be reponed must proceed as though the decree was *in foro* (sec. 24). If the ten days have elapsed, but the decree has not been extracted, the defender may have it recalled by reduction; if the ten days have elapsed, and the decree has been extracted and a charge been made, but the sixty days have not expired, he must proceed by suspension.

3. *Expenses.*—It would appear reasonable that the Lord Ordinary should have power to dispense with the payment of the £2, 2s. of expenses exigible under the 23rd sec. of the 1868 Act, if he thinks fit, but, in practice, the £2, 2s. is usually exacted. In an undefended action the Court will not grant decree for expenses if they are not concluded for in the summons. And if concluded and decerned for, they must be taxed (1 & 2 Geo. IV. c. 38, s. 33); but it is not necessary to have the auditor's

report approved of in order to enable the extractor to issue extract decree for the expenses as taxed. If they are not included in the decree, it is competent to move for them prior to the decree being extracted (*Williamson*, 1860, 22 D. 599).

[Mackay, *Manual*, 211–4. Monteith Smith, *Expenses*, 82, 94, 95.] See DECREE; REPONING; SUSPENSION: REDUCTION.

Absence, Decree in: Sheriff Court.—A decree in absence is the decree which is pronounced when a defender fails to enter appearance. It is distinct from a decree by default, where a party fails to obtemper an order of the Court. If appearance is not entered, decree in absence may be taken by the pursuer at any Court on which he chooses to enrol the case after the expiry of the *inducie*. Even after appearance has been entered, if the defender fails to lodge defences within the proper time, decree in absence may be taken, and will be pronounced "in respect of no defences" (Dove Wilson, *Sheriff Court Practice*, 130: *M'Eachran*, 1885, 1 S. L. Rev. 237 (Sheriff Moncreiff, now Lord Moncreiff)); but see Sellar, *Forms*, i. 268, and *Miller*, 1887, 3 S. L. Rev. 83 (Sheriff Muirhead), as to the practice in the Lanarkshire Sheriff Courts, where a decree "in respect of no defences" is treated as a decree by default. If a pursuer fails to bring an action before the Court for a year and a day from the expiry of the *inducie*, the action is dead, and he cannot obtain decree in absence, but must bring a new action (*M'Kidd*, 1882, 9 R. 790). Where a decree in absence has been inadvertently pronounced before the expiry of the *inducie*, it is null, and the defender is reponed without being required to consign expenses (*Downie*, 1841, 4 D. 117) A decree in absence is made in terms of the conclusions of the petition, subject to such restrictions, if any, as the pursuer may have made on his claim (Sheriff Court Act, 1876, s. 14). It carries expenses where asked for, and the omission to ask for them may be remedied at any time, so long as the first decree is not extracted (*Williamson*, 1860, 22 D. 599). The period for allowing extract is seven days after the granting of the decree (Sheriff Court Act, 1876, s. 14): and the Sheriff cannot shorten this period, as the provisions of sec. 32 of the Sheriff Court Act, 1876, apply only to actions which are defended. Decrees in absence upon which a charge is competent are regarded as decrees *in foro* against the defender, subject to certain conditions: but such decrees can always be reduced in the Court of Session. The decree, to have the effect of a decree *in foro*, must have been pronounced after personal service of the petition on the defender, or after the entering of appearance for the defender with his authority, or where there has been a personal charge on the decree. The decree must also not have been recalled under the provisions for reponing, and a charge must have been given which has not been brought under review by suspension. Lastly, it is necessary that six months must have elapsed since the date of the charge. A decree in absence, where a charge is not competent, and where there has been personal service or appearance, becomes final after the lapse of twenty years from its date, unless before that time it has been lawfully recalled or brought under review by suspension or reduction (Sheriff Court Act, 1876, s. 15).

REPONING AGAINST A DECREE IN ABSENCE.—Whether a decree in absence has been extracted or not, the defender may be reponed at any time before implement has followed upon it. At any time within seven days of the decree in absence, the defender may be reponed by consigning the

sum of £2 and lodging his defences with the Sheriff Clerk, and thereafter enrolling the case in the Sheriff's Motion Roll for the first ensuing Court day, and moving the Court to recall the decree in absence. When the motion is made, the Sheriff pronounces an interlocutor recalling the decree and allowing the defences to be received, and the action then proceeds as if appearance had been made in due time. The Sheriff, unless there seems to him to be any special reason to the contrary, orders the consigned money to be paid to the pursuer towards his expenses, and this is done whether the decree in absence has been recalled or not. Until the motion for the recall of the decree in absence has been disposed of, the decree cannot be extracted (Sheriff Court Act, 1876, s. 14 (1)). If the defender fails within seven days to take the steps above mentioned, he may obtain the recall of a decree in absence, whether extracted or not, at any time before implement has followed thereon, or, so far as not implemented, by presenting to the Sheriff a written note in which he sets forth his explanation of his failure to enter appearance in the action, and to take within seven days the steps provided for reponing. Along with the explanation he must lodge any documentary evidence which he has in support of his statements. Further, the defender must lodge his defences in the action and consign the sum of £5. The pursuer does not require to answer the note, and the Sheriff, if satisfied with the explanation given, may recall the decree so far as not implemented (*Smith*, 1881, 18 S. L. Rev. 563), and order payment to the pursuer of his expenses out of the consigned money, including the expense of any charge or diligence upon the decree; or he may refuse the note, or do otherwise as he may think just (Sheriff Court Act, 1876, s. 14 (2)). The reponing note must be intimated to the pursuer or his agent, and, until refused, the note operates as a sist of diligence upon the decree. If the decree is recalled, the action proceeds as if appearance therein had been duly made (Sheriff Court Act, 1876, s. 14 (3)). Any interlocutor, or order recalling, or incidental to the recall, of a decree in absence pronounced under the above-mentioned provisions as to reponing, is final, and not subject to review (Sheriff Court Act, 1876, s. 14 (4)).

Where the provisions of the Sheriff Court Act, 1876, are inapplicable, it may be necessary to proceed under the Sheriff Court Act, 1853. The Act only applies to decrees in absence which have been pronounced where no appearance has been entered. Under this Act a defender may be reponed against a decree, whether extracted or not, at any time before implement has followed thereon, or against such part as may not have been implemented, by lodging with the Sheriff Clerk a reponing note in the form in Schedule B. annexed to the Act, consigning therewith the expenses decerned for, and transmitting a copy of the note to the pursuer or his agent. The Sheriff repones the defender, and appoints the consigned money to be paid over to the pursuer, unless special cause be shown to the contrary. The Sheriff may also decern in favour of the pursuer for the expense, or such part of it as he thinks just, of any charge or diligence which has proceeded upon the decree. A certificate from the Sheriff Clerk that the note has been lodged operates as a sist of diligence. This certificate should be intimated to the pursuer. When the defender has been reponed, the action proceeds in ordinary course (Sheriff Court Act, 1853, s. 2).

If the Sheriff Court Acts of 1853 and 1876 are to be read as not including decrees pronounced where appearance has been entered, but afterwards withdrawn or abandoned, then the procedure as to reponing provided by the Act of Sederunt, 1839, s. 115, may be used (*Chard* and *The Scottish Heritable Securities Co.*, Journal of Jurisprudence, xviii 450). It is provided

that, where a decree in absence has been pronounced or extracted, but has not been implemented in whole or part, a petition may be presented to the Sheriff, craving to be reponed against the decree. With the petition, expenses must also be consigned; and thereupon the Sheriff repones the defender and revives the action. The Sheriff may award the pursuer such part of the expenses as he may think reasonable, and he may make an order for intimation and for appearance of the pursuer (Act of Sederunt, 1839, s. 115).

Implement of a decree in absence operates in preventing reponing. A decree is implemented whenever the property or person of the debtor has been taken in execution of the debt (*Stephenson*, 1852, 14 D. 510; *Rowan*, 1863, 4 Irv. 377; *Maclachlan*, 1854, 16 D. 937); but an arrestment, not completed by a decree of furthcoming, is not implement (see *Paul*, 1889, 3 S. L. Rev. 33 (Sheriff Cheyne)). In cases where there has been part implement of a decree, the defender may be reponed to the effect of disputing his liability for further payment (*M'Eachran*, 1 S. L. Rev. 237 (Sheriff Moncreiff, now Lord Moncreiff).

For decree in absence in Small Debt and Debts Recovery Courts, see SMALL DEBT COURT and DEBTS RECOVERY COURT. See REPONING; REDUCTION.

Absence, Trial in.—1. *Supreme Court.*—A criminal trial cannot be proceeded with in the Court of Justiciary unless both prosecutor and accused are present. If, when the diet is called, neither the prosecutor nor the accused appears, the libel falls, and, in such a case, the Court cannot pronounce sentence of outlawry against the accused. If the prosecutor fails to appear, the Court will desert the diet, unless a valid excuse for his absence is proferred, in which case the diet will merely be adjourned. Nothing in the nature of trial, conviction, and sentence can take place in the absence of the accused. If he fails to appear after his name has been publicly called in Court, and at the door of the court-room, and if no one comes forward on his behalf with a satisfactory explanation of his absence, the proper legal procedure is for the Court to pronounce sentence of fugitation or outlawry (see OUTLAWRY). The Court may also, if the accused has been on bail, declare that the bail-bond has been forfeited. Power to pronounce sentence of outlawry is privative to the Supreme Court; but inferior Courts may forfeit bail-bonds (see BAIL). 2. *Inferior Courts.*—In the Sheriff and Jury Court, and in Courts of Summary Jurisdiction, the rule is that the trial of an accused person can only take place in his presence, unless the charge is brought under a Statute which authorises trial and conviction in the absence of the accused. The Summary Procedure Act of 1864 (27 & 28 Vict. c. 53), s. 7, provides that if the respondent fails to appear after being cited, the Court, on proof of citation, may issue a warrant for his apprehension, or may adjourn the hearing to a future diet; and, in cases where the complaint concludes for a pecuniary penalty only in the first instance, or where the Act of Parliament founded on authorises procedure without the presence of the respondent, the Court may, without adjourning, proceed to hear and dispose of the complaint in the absence of the respondent. But (s. 15) "where the Court shall proceed to dispose of the complaint in the absence of the respondent, judgment shall not be pronounced against him until the complaint has been established to the satisfaction of the Court by such evidence as is competent, unless the special Act authorises conviction in

default of appearance." In cases where it is competent to try the accused in his absence, it is essential that he shall have been properly cited to appear (*Waddell*, 1857, 2 Irv. 611).—[Hume, ii. 265; Alison, ii. 349; Macdonald, 429; Anderson, *Crim. Law*, 230.] See BAIL; CRIMINAL PROSECUTION; OUTLAWRY.

Absence of Appellant.—An appellant, if under sentence of imprisonment, must appear personally at the hearing (38 & 39 Vict. c. 62, s. 10).

Absolute Disposition.—The expression "absolute disposition" is generally applied to a disposition of heritable property which conveys subjects *ex facie* absolutely to the disponee, although the object of the disponer and the disponee is that the disponee should in reality hold the subjects conditionally, *e.g.* in security of a debt or for some other trust purpose. The disposition being *ex facie* absolute, the disponer can, under the Act 1696, c. 25, prove only by writ or oath of the disponee the terms on which the disposition was granted; and the practice, in the case of granting a disposition which is *ex facie* absolute but in reality only in security or for some other purpose, is for the disponee to execute a separate writing, usually called a back-bond or back-letter, setting forth the conditions on which the subjects have been conveyed to him. The absolute disposition does not differ in form from an ordinary disposition of heritage unless as regards the consideration in the narrative clause, which in the absolute disposition (*Juridical Styles*, i. 430) usually bears to be "for certain onerous causes and considerations" (for form of disposition, see DISPOSITION), and the disponee under an absolute disposition takes infeftment in the same manner as a disponee under an ordinary disposition (see DISPOSITION). The Act 1696, c. 25, enacts "that no action of declarator of trust shall be sustained, as to any deed of trust made for hereafter, except upon a declaration or back-bond of trust lawfully subscribed by the person alleged to be the trustee, and against whom, or his heirs or assignies, the declarator shall be intented, or unless the same be referred to the oath of party simpliciter." To constitute a "declaration or back-bond of trust," in the sense of this Statute, it is not necessary that there should be a probative deed. "On the contrary, a trust may be competently proved by writings under the hand of the party, importing an admission or acknowledgment of a trust, as, for instance, by a holograph writing signed by him, or by a writing to which his signature is adhibited, if its authenticity is not disputed, or shall be instructed. And not only so, but the fact of the existence of a trust may also be competently established by the tenor of several writings taken together; and this, although there may, in terms, be no positive declaration of trust, or direct expressions of that import. But then, while that latitude has been allowed, it has never, I apprehend, been so, except with the restriction and limitation (and a most necessary one) that the contents of the writings shall, although not in direct words, amount to an unambiguous acknowledgment of the existence of a trust, or shall be such as not to be capable of being explained in any other way than as an admission that the party holds in trust. They must be perfectly unequivocal" (per L. Wood in *Seth*, 1855, 17 D., at p. 1124; and Re *Parnell*, 1894, 22 R. 74). The books of the alleged trustee kept by himself amount to writ of party in the sense of the Statute 1696, c. 25 (see *Seth, ut supra*);

and if improbative letters or memoranda signed by the disponee under an absolute disposition, or his books kept by himself, show that he holds the subjects conditionally, parole proof will be allowed as to the extent of the obligation to which these writings apply (see M'Laren on *Wills and Successions*, ii. 1067, and cases there cited). Whilst the Statute of 1696, c. 25, requires the granter of an absolute disposition to prove by writ or oath of the disponee the conditions on which the deed was granted, a third party, having an interest, can establish *prout de jure* the existence of a trust, an *ex facie* ownership in the trustee (or disponee) notwithstanding (see L. P. Hope in *Scott*, 1832, 11 S., at p. 26; *Middleton*, 1861, 23 D. 526; *Wink*, 1867, 6 M. 77; *Hastie*, 1886, 13 R. 843; M'Laren on *Wills and Successions*, ii. 1070). Forms of back-letters are given in *Juridical Styles*, i. 421 *et seq.*, 430, ii. 440 *et seq.*

An absolute disposition can be used for constituting a security not only for money lent, but also for money to be lent, *i.e.* for future debts and for obligations *ad factu prastanda*, and in practice it is often used for constituting a security for fluctuating sums. A bond and disposition in security cannot be used as a security for future debts, because the Statute 1696, c. 5, enacts "that any disposition or other rights that shall be granted for hereafter for relief or security of debts to be contracted for the future shall be of no force as to any such debts as shall be found to be contracted after the sasine or infeftment following on the said disposition or right, but prejudice to the validity of the said disposition and right as to other points as accords." It has been held (1) that, under the Act 1696, c. 5, an infeftment in security of debt covers only the sum advanced at the date of the infeftment as opposed to the date of the security writ, and that an infeftment in security, given for an indefinite or contingent sum, is ineffectual against the lands (*Lowis*, 1731, Mor. 1233; *Dempster*, 1750, Mor. 10290; *Pickering*, 1788, Mor. 1155; *Stein's Creditors*, 1789, Mor. 1158, 1236; 1793, Mor. 14127; 1794, 3 Pat. 345; *Brough's Creditors*, 1791, Mor. 1159); but (2) it has also been held that where the debtor grants an absolute obligation to pay the full amount named in the bond, *e.g.* on receiving a search of incumbrances, the bond will be valid in the creditor's favour although a balance is not paid until after infeftment on the bond has been taken (*Fulton*, 1826, 4 S. 740; *Dempster*, *ut supra*); (3) that where the deeds constituting the security are not delivered to the creditor until the sum for which the security was granted has been advanced, the circumstance of the sum having been advanced after the date of the infeftment will not invalidate the security (2 Ross, L. C. 638; *Dunbar*, 1789, Mor. 1156); (4) that an infeftment in security of a debt constituted by bills is not rendered ineffectual by the renewal of the bills (2 Ross, L. C. 671; *Bank of Scotland*, 1781, 2 Ross, L. C. 671; *Bank of Scotland*, 1782, 2 Ross, L. C. 679); and (5) that an infeftment in security may be granted for an obligation *ad factum prastandum* (*Edmonstone*, 1888, 16 R. 1). An infeftment of relief granted to a cautioner in a cash account was found ineffectual as to any debt contracted posterior to the date of the infeftment (*Brough's Creditors*, *ut supra*), but it has been provided by section 7 of 19 & 20 Vict. c. 91 (renewing a former Act, 54 Geo. III. c. 137, which had been repealed) that "it shall be lawful for any person possessed of lands or other heritable property, and desiring to pledge the same in security of any sums paid or balances arising or which may arise upon cash accounts or credits, or by way of relief to any persons who may become bound with him for the payment of such sums or balances, although paid or arising posterior to the date of the infeftment, to grant heritable securities accordingly upon his lands or other heritable property, containing procuratory of resignation and precept of sasine for infefting

any bank or bankers or other persons who shall agree to give such cash accounts or credits, or for infefting such persons as shall become cautioners for him, or jointly bound with him, in such cash accounts or credits: provided always that the principal and interest which may become due upon such cash accounts or credits shall be limited to a certain definite sum, to be specified in the security, such definite sum not exceeding the amount of the principal sum, and three years' interest thereon at the rate of five pounds *per centum*: provided also, that it shall be lawful for the person to whom any such cash account or credit is granted to operate upon the same by drawing out and paying in such sums from time to time as the parties shall settle between themselves, and that the sasines or infeftments taken upon such heritable securities shall be equally valid and effectual as if the whole sums advanced upon such cash account or credit had been paid prior to the date of the sasine or infeftment taken thereon, and that any such heritable security shall remain and subsist to the extent of the sum limited, or any lesser sum, until the cash account or credit is finally closed, and the balance paid up and discharged, and the sasine or infeftment renounced." By sec. 134 of the Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101), the provisions of that Act relative to bonds and dispositions in security are made applicable to all heritable securities; and accordingly a cash-credit bond containing heritable securities can now be in the form, as nearly as may be, of a bond and disposition in security in the statutory form (*Juridical Styles*, i. 427). Specification of the principal sum, with three years' interest thereon at the rate of five per cent., is sufficient to satisfy the requirements of sec. 7 of the Act 19 & 20 Vict. c. 91, as regards the specification of the limit to which the security may extend (*Morton*, 1828, 7 S. 172; affd. 1830, 4 W. & S. 379). It is well settled that an absolute disposition, qualified by a back-bond, is not struck at by the Act 1696, c. 5 (*Riddell*, 1782, Mor. 1154; 2 Ross, L. C. 721); and the provisions of the Act (19 & 20 Vict. c. 91) are not applicable to a security constituted by way of absolute disposition.

The disponee under an absolute disposition, qualified by an unrecorded back-bond, is in a different position from a holder of an infeftment in security, such as the grantee under a bond and disposition in security in the ordinary statutory form (31 & 32, c. 101, s. 118, Schedule (FF) No. 1). The *ex facie* absolute disposition has the effect of vesting the subjects conveyed in the disponee under it, and he can sell or burden the subjects, and can give a valid title to purchasers or incumbrancers who transact with him on the faith of the records, although his doing so is in violation of the terms of an unrecorded back-letter granted by himself. The disponer's interest is reduced to a personal right against the disponee to have the estate, or the proceeds of its sale, as the case may be, reconveyed or paid to him, on payment or under deduction of the debts secured by the disposition (see L. Watson in *Union Bank of Scotland*, 1886, 14 R. (H. L.), at p. 3). Whilst, however, the disponee can so deal with third parties, the substance of the transaction, rather than the form of his title, is considered in a question between him and his disponer, or those in the disponer's right. Accordingly, where a bank obtained and recorded an *ex facie* absolute disposition of certain subjects, and granted a back-letter, which was not recorded, to the effect that the subjects were held in security, until full payment of all sums of money due, or which might thereafter become due by the disponer; and where the disponer assigned her right of reversion in the subjects to another bank, and this assignation was intimated to the first bank; and where

advances were thereafter made to the disponer by both banks,—the House of Lords, reversing the judgment of the Court of Session, held that, in a question between the two banks, the security of the first bank was limited to advances made prior to the date when the assignation was intimated, on the ground that the intimation to the first bank completed the transference of the *jus crediti* vested in the disponer, and placed the first bank under obligation to give effect to the right which had been intimated (*Union Bank of Scotland, ut supra*, 1886, 14 R. (H. L.) 1, revg. 1885, 13 R. 380). It was formerly thought that among the risks to which the granter of an *ex facie* absolute disposition, qualified by an unrecorded back-bond, was exposed, was his disponee's bankruptcy (Bell, *Prin.* § 912), but according to the decision of the House of Lords in the case of the *Heritable Reversionary Co. Lim.* (1891, 18 R. 1166; rev. 1892, 19 R. (H. L.) 43), a trustee on the sequestrated estate of a disponee, holding property in security on an *ex facie* absolute title, does not take the property absolutely, but only subject to the contract with the disponer, and with no greater rights than the bankrupt himself had (Goudy on *Bankruptcy*, 265).

The disponee under an absolute disposition, although qualified by an unrecorded back-bond, cannot poind the ground, because he is, feudally speaking, a proprietor, not a mere incumbrancer (*Scot. Her. Secur. Co.*, 1876, 3 R. 333, in which case an opinion was expressed that, even although the back-letter had been recorded, he could not have used the diligence); and whilst he can collect rents from tenants without resort to an action of maills and duty (see L. P. Inglis in *Scot. Her. Secur. Co., ut supra*, at p. 340), his appropriate remedy for obtaining possession of the subjects conveyed to him, if the disponer himself is in possession, is an action of declarator and removing—not an action of summary ejection (*Rankin*, 1868, 7 M. 126; *Scot. Prop. Invest. Co. Build. Soc.*, 1881, 8 R. 737; Bell, *Prin.* § 912; and see sec. 5 of 57 & 58 Vict. c. 44, as to power of a heritable creditor to evict a proprietor in personal occupation). An absolute disponee cannot be ousted from possession by the trustee in a sequestration of the disponer's estates until the amount due to him has been satisfied (*Lindsay*, 1853, 15 D. 583). Although heritable securities, not excluding executors, are moveable as regards the succession of the creditor (31 & 32 Vict. c. 101, s. 117; and see *Morgan*, 1890, 17 R. 1170), securities by way of absolute disposition, qualified by back-bond or back-letter, are heritable as regards the succession of the disponee (sec. 3 (10)). A heritable right *ex facie* in security may be expressly discharged, or discharged without any deed of discharge, and simply by payment, but the only *habile* method for reinstating the disponer in his rights to the subjects conveyed by an *ex facie* absolute disposition is by granting to him a reconveyance (per L. Fraser in *National Bank of Scotland Lim., ut supra*, 13 R., at p. 400; and see L. P. Inglis in *Scot. Her. Secur. Co., ut supra*, 3 R., at p. 340). Besides, a disposition expressly in security can never become by prescription a disposition in absolute property (see L. Braxfield in *Scott*, 3 Ross, L. C. 467; L. Fraser in *National Bank of Scotland Lim.*, 13 R., at p. 400; and see *Chambers*, 1823, 2 S. 366); but where there is infeftment on an *ex facie* absolute disposition, with possession for the prescriptive period, the party in right of the infeftment will be entitled to the absolute property, and the rights under any relative unrecorded back-bond will be cut down (see L. Fraser in *National Bank of Scotland, ut supra*, 13 R., at p. 400; *Munro*, 19 May 1812, F. C.; and cp. *Smith*, 1879, 6 R. 798, and *Chambers, ut supra*). Further, where an absolute disposition is qualified by a back-bond, the disponer can confer a right of absolute property on the disponee by discharging or destroying

the back-bond (see L. Fraser, 13 R. 400); whilst a discharge of the right of reversion under a heritable security by a debtor does not convert an *ex facie* security title into one of absolute property (see L. Fraser, 13 R., at p. 400; and *Miller*, 1820, Hume, 662).

Securities constituted by absolute disposition, qualified by back-bond, are, as a rule, good to the extent of the value of the subjects for any debt to be incurred, whether before or after infeftment, under the disposition (*Riddel*, 1782, Mor. 1154; *James*, 1836, 15 S. 12; *Maitland*, 1827, 6 S. 109), inclusive of the expense of ameliorations made by the disponee (*Nelson*, 1874, 1 R. 1093). Thus, where a party holds a heritable subject under a title *ex facie* absolute, and the back-bond is general in its tenor, the security created not being limited either expressly or by implication, the disponee may refuse to denude until he is relieved of advances or obligations incurred prior as well as posterior to his acquisition of the property (see L. Fullerton in *Robertson*, 1840, 2 D. at p. 291; and *Creditors of Brough*, 1793, Mor. 2585); and even in cases where the back-bond is not quite general, but specifies particular obligations, the absolute disponee may refuse to denude until not only such particular obligations, but also subsequent advances, have been satisfied (*Russell*, 1829, 7 S. 767; affd. 1831, 5 W. & S. 256; *Tcirney*, 1832, 10 S. 664; L. Fullerton in *Robertson, ut supra*, 2 D., at p. 292; *Balleny*, 1808, N. M.; cp. App. Part I. No. 5; *Dougal*, 1795, Mor. 2607). There is, to use the words of Lord Fullerton in *Robertson*, "another class of cases which support this conclusion, that if the trustee, holding the trust-subjects under an *ex facie* absolute title, shall, in the legitimate exercise of his trust powers, become possessed of sums, the proceeds of the trust-estate, which not only satisfy the special obligations for relief of which the trust was granted, but leave a surplus in his hands, he, if he be creditor of the truster in other debts besides those for securing which the trust-right was granted, may be entitled to plead compensation on these debts against his truster, just as he would have been entitled to do against any other debtor of his whose money had lawfully come into his hands" (*Sturgeon*, 20 Jan. 1813, F. C.; *Murray*, 1744, Mor. 2626). But if the back-bond bears that an *ex facie* absolute disposition was granted in security of one specific debt, and that the disponee is to reconvey, whether the other debts due to him were paid or not, there is no right of retention for these other debts (see L. Fullerton, 2 D. 293); and, moreover, when an absolute disposition is ascertained, *habili modo*, to have been granted in security of a particular debt specially named, and it appears clear that the intention of parties was to limit it to a particular debt, the security constituted by the absolute disposition will not cover debts due prior to the date of the disposition (*Robertson, ut supra*). Where subjects had been conveyed by absolute disposition in security of a bond of credit, it was held that the security did not cover advances made by the disponee on behoof of the disponer subsequent to the date of the latter's sequestration (*Callum*, 1885, 12 R. 1137; and see Bell, *Com.* ii. 223).

If the back-bond (not a duplicate of it, see *Scottish Heritable Security Co., ut supra*) relative to an absolute disposition is recorded in the appropriate register of sasines, the obligation to denude comes to have the force of a real limitation of the disponee's right (Bell, *Prin.* § 912). The security will stand good at least for such sums as were advanced prior to the date of registration of the back-bond when it is general in its terms, and the judicial production of the back-bond, or a judicial demand for a reconveyance in terms of it, is treated as having the same effect as registration (Bell, *Prin.* § 912; Bell, *Lectures*, ii. 1174; Menzies, 861; Bell, *Com.* ii.

223); but it cannot be said to be settled that the registration or judicial production of a back-bond, general in its terms, makes the security inoperative for advances subsequent thereto (see *e.g.* L. J. C. Moncreiff in *Union Bank, ut supra*, 13 R., at 390). The recording or judicial production, however, of a back-bond, specifying a sum for which the absolute disposition has been granted, has the effect of restricting the disposition to a security to the extent specified in the back-bond, if so much has not then been advanced (Bell, *Com.* ii. 223; *Keith*, 1795, Mor. 1163); and after the registration of such a back-bond, the disposition cannot be used as a security for a greater sum than is specified in the back-bond (Menzies, 861).

Notwithstanding an unrecorded back-bond, the disponee, under an *ex facie* absolute disposition, is bound to implement the conditions of the feu prestable by the superior (*Clark*, 1850, 12 D. 1047; *Liquidator of City of Glasgow Bank*, 1882, 9 R. 689). Nor does the mere recording of the back-bond appear to reinstate the disponer in the radical right to the lands contained in an absolute disposition. At all events, a creditor who was infeft in certain burgage subjects, in virtue of an *ex facie* absolute disposition, was treated both by the Court of Session and the House of Lords as the feudal owner of the subjects, although he had put on record a back-bond setting forth that the disposition to him was in security of debt only, and although he afterwards executed and put on record a discharge and renunciation of the security (*Gardyne*, 1851, 13 D. 912; rev. 1853, 1 Macq. 358; and see also *M'Clelland*, 1857, 19 D. 574). In the case of *Gardyne*, the Court of Session held the creditor personally liable in payment of a ground-annual with which the property was burdened, but the House of Lords reversed the decision, on the ground that the person in right of the ground-annual, although the personal obligation to pay the ground-annual continues binding on the original obliger and his representatives, and although he had a right for it against the lands into whosesoever hands they might come, had no personal action against a purchaser of them (see also *Millar*, 1849, 11 D. 495; rev. 1853, 1 Macq. 345). But where, after an action had been raised against a person infeft in certain subjects on an *ex facie* absolute disposition, concluding for implement of certain obligations alleged to be contained in the title of the subjects, he recorded a back-bond and executed a reconveyance of the subjects to his debtor, and obtained a decree in absence ordaining him to register the reconveyance, the Lord Ordinary (Lord Kinnear) expressed the opinion that the recording of the back-bond and the registration of the reconveyance operated a divestiture of the feudal title so far as the absolute disponee was concerned; but the judges of the First Division abstained from expressing any opinion on that point (*Marshall's Trs.*, 1888, 15 R. 762). In the case of *M'Bride* (1894, 21 R. 620), where a disponer by an *ex facie* absolute disposition, qualified by an unrecorded back-bond, had disponed to a creditor certain subjects, and thereafter had them reconveyed by the creditor to him, it was held that he had a good title to sue for alleged damage to the property done to it by the operations of the railway company whilst it was held by his creditor.

As between a bondholder and the subsequent holder of a security constituted by *ex facie* absolute disposition, their rights are not considered as those of security-holder and those of proprietor respectively. It has accordingly been held that the holder of a recorded *ex facie* absolute disposition, qualified by an unrecorded back-bond restricting his right to a right in security, was not entitled to reduce a sale of the security subjects on the ground that a prior bondholder had disregarded certain statutory

provisions embodied in the bond in his favour (*Stewart*, 1882, 10 R. 192); and that a heritable creditor under a bond and disposition in security, who had entered into possession and collected the rents, was bound to relieve a postponed creditor under an *ex facie* absolute disposition of feu-duty paid by the latter in respect of the subjects (*Liquidators of the City of Glasgow Bank*, 1882, 9 R. 689).

The question has been raised whether a creditor holding a disposition *ex facie* absolute has, as in a question between him and the disponer, a power to sell by private bargain, and the better opinion seems to be that he has such power (see *Duncan*, 1893, 21 R. 37; and *Baillie*, 1884, 12 R. 199; *Aiken*, 799, Hume, 551). In the case of *Baillie*, L. J. C. Moncreiff observed: "In regard to the limitations of the creditor's right, it has been well settled that, in the first place, an absolute disposition will give the purchaser under it—where the sale is by virtue of powers to the granting of which the debtor has been a party—an absolute right, and that it will not be in the power of the original proprietor, the debtor, to quarrel that disposition, if the powers of the creditor have been duly and properly exercised. It is another matter where the question is between the debtor himself and the creditor, for if the creditor has not exercised this right—absolute as it is where third parties are concerned—in a fair, reasonable, and equitable manner, the Court will give a remedy, and that remedy will not be by setting aside the sale, but by giving the pursuer, the debtor, an opportunity of proving damage arising from reckless or inequitable use of the powers which the disposition gave him" (see also *Park*, 1880, 7 R. 546). Although a heritable creditor under an absolute disposition and unrecorded back-bond can sell either by private bargain or public roup, the Court may interdict a proposed sale by him, if the debtor can show that no prejudice is likely to arise to the creditor by delay, and that there may be prejudice or injustice to him by an immediate sale (*Lucas, etc.*, 1876, 4 R. 194).

Although the maker of an *ex facie* absolute disposition is not entitled to claim possession of the subjects conveyed by the deed, subject to the disponee's security for advances (*Leckie*, 1854, 17 D. 77), yet if the disponer is allowed to remain in possession, leases granted by him will be valid (*Abbot*, 1870, 8 M. 791).

As opposed to the *ex facie* absolute disposition, qualified by back-bond, and the bond and disposition in security, there is sometimes met in practice a disposition conceived in terms of full conveyance, but expressly in security of a certain transaction, where the precise amount cannot be ascertained; as, for example, in relief of what may be deficient and requisite to be paid of a composition. Dealing with a disposition of this sort, Professor Bell (Bell, *Com.* i. 725), says: "It is a rule in all rights in security, that the debt for which they are granted shall be specific in amount, and in the name of the creditor. And the question here is whether the words of absolute conveyance have the effect of raising an exception to that rule, as in the case of an absolute disposition? The most unchallengeable security in such a case, undoubtedly, is an absolute conveyance, with a back-bond recorded. But it does not appear to be hurtful to the effect of the absolute conveyance, that the deed should also set forth the nature of the transaction. The right conveyed is universal; the condition is a fair one, though the amount of the burden is necessarily indefinite." In *Campbell* (1865, 4 M. 23), however, where the maker of a disposition disponed a right of mid-superiority under redemption, by making payment of certain sums of money, and it appeared from the clauses of the disposition that it was granted in further security of a debt for which a

personal bond had formerly been granted, it was held that the deed was *ex facie* a disposition in security merely, and did not divest the granter of the mid-superiority, but only burdened it.

On the subject of absolute disposition, see Bell, *Prin.* §§ 912, 1367, and 1994; Bell, *Com.* i. 714, 724–5, ii. 223, 272–3; Bell, *Lectures*, ii. 1173–5; Menzies, 860–2; Ross, *Leading Cases*, ii. 721–41; Duff, *Feudal Conveyancing*, 295; *Juridical Styles*, i. 430, ii. 440.

Absolute Warrandice.—See WARRANDICE.

Absolvitor.—Absolvitor is the term applied to a decision favourable to a defender; *condemnator* being the term formerly (but no longer) used to denote a decree in favour of the pursuer. It constitutes *res judicata*, and excludes another action on the same grounds.—[See DECREE; DISMISSAL.]

Abstracted Multures.—Multures (payments in kind for grinding corn, exigible under the practical obligation of thirlage, now almost in disuse) were said to be "abstracted" when the occupants of the lands thirled to a particular mill wrongfully failed to have their victual ground at that mill. If the right of thirlage was not questioned, the remedy of the owner of the mill or his tenant was found in a process of abstracted multures, a petitory action competent either in the Court of Session or in the Sheriff Court (cp. *Stobbs*, 1873, 11 M. 530; *Juridical Styles*, 2nd ed., vol. iii. p. 83). If the right of thirlage was questioned, a declaratory process in the Court of Session was necessary (see ASTRICTION). Multures not pursued for within five years, prescribe, unless proved by writ or oath (1696, c. 14). See THIRLAGE.

Acceleration of Dividends in Sequestration.—Under the Bankruptcy Act, 1856 (19 & 20 Vict. c. 79), fixed periods are defined for payment of dividends, the first being payable on the first lawful day after the expiry of six months, and the second on the first lawful day after the expiry of ten months, from the date of the deliverance awarding sequestration; while subsequent dividends are payable on the first lawful day after the expiry of every three months from the date of payment of the immediately preceding dividend (ss. 129, 131, 132). These periods of payment may, however, be accelerated. Even before the period for the first dividend, it is competent for three-fourths in number and value of the creditors at the meeting after the bankrupt's examination, or any subsequent meeting called for the purpose, to direct the trustee to apply to the Lord Ordinary on the Bills, or the Sheriff before whom the sequestration is proceeding, for authority, on cause shown, to pay the first dividend at an earlier period, not less than four months from the date of the foresaid deliverance, and to accelerate the second and other dividends. (s. 133.) After a second dividend has been paid, the creditors (by a majority in value, s. 101) may themselves determine that future dividends shall be paid at shorter than the statutory intervals, and the affairs of the estate brought to a more speedy close (s. 133).—[Goudy on *Bankruptcy*, 346; Murdoch on *Bankruptcy*, 286]. See SEQUESTRATION.

Acceptance.—See Offer and Acceptance.

Acceptance of Bill of Exchange. — See Bills of Exchange.

Acceptilatio.—*Acceptilatio* is, in Roman law, a formal mode of extinguishing an obligation. It was primarily applicable only to debts contracted by stipulation (*Dig.* 46. 4. 13); and was effectual whether payment had or had not been received (*Dig.* 46. 4. 16). In form an *acceptilatio* must be absolute, not conditional (*Dig.* 46. 4. 4), and must take effect at once, and not at a subsequent date (*Dig.* 46. 4. 5). These restrictions were overcome, and the application of *acceptilatio* widely extended, by converting any kind of obligation into a stipulation by means of a formula, known as the *Aquiliana stipulatio*, and given by Justinian (*Inst.* iii. 29. 2). The new verbal obligation extinguished the old obligation by novation, and was in its turn itself extinguished by the formal *acceptilatio*. With regard to the application of *acceptilatio* in Scots law, see Stair, i. 18. 5, and Erskine (*Inst.* iii. 4. 8). See Acceptilation.

Acceptilation.—A mode recognised in the law of Scotland of extinguishing an obligation by accepting something merely imaginary in payment of the debt or satisfaction of the obligation, or by a declaration that the debt has been paid or the obligation performed, when it has not. The term also covers satisfaction of the debt or obligation upon grounds equivalent to payment or direct performance (Stair, i. 18. 5). An obligation constituted verbally may usually be extinguished by a verbal declaration of satisfaction; but writ or oath is usually necessary to prove renunciation, or payment, of a debt over £100 Scots (£8, 6s. 8d.), though not constituted by writing, if the transaction is not for ready money (*Shaw*, 1877, 5 R. 245). If the obligation be constituted by writing (except bills and promissory notes, 45 & 46 Vict. c. 61, s. 100), the proof of satisfaction must, according to the ordinary rule, be by the writ or oath of the creditor. Discharge by acceptilation may be either express or implied (*Graham*, 1683, Mor. 6534). Imaginary satisfaction, made in the best faith, to one whom the debtor *bonâ fide* took for his creditor, has not the privilege of extinguishing the obligation (*Homes*, 1661, Mor. 1788) which is accorded to real payment or satisfaction made in the same circumstances.—[Stair, i. 18. 3 & 5; Bankt. i. 24. 20; Ersk. *Inst.* iii. 4. 8; Ersk. *Pr.* iii. 4. 3; Bell, *Prin.* s. 582.] See Acceptilatio; Discharge.

Accepting Service.—In petitions and actions (particularly where these are of an amicable nature), it is not uncommon for the agent of the respondent or defender to accept service, and so dispense with formal citation. The acceptance of service ought to be in writing (which ought to be holograph) (*Cullen*, 1829, 8 S. 197), and is usually by indorsation on a copy of the summons; correspondence between agents has, however, been held sufficient (*Wilson*, 1826, 4 S. 623). Service ought to be actual, and not accepted, (1) where diligence is to be used; (2) in competitions where the interests of third parties are concerned; and (3) in actions of constitution and adjudication.—[Mackay, *Manual*, 202.] See Citation.

Access to Children.—See CUSTODY OF CHILDREN.

Accessary.—Guilt by accession may be incurred by counsel or assistance to the principal before the crime, or by concert, or assistance at the time. Counsel must be direct and serious to infer guilt (Hume, i. 278, 279; Alison, i. 57, 58; Macdonald, 4; *M'Donald*, 1 White, 315). A person in authority ordering a subordinate, or any person making use of a child or idiot, are cases in point (Hume, i. 277, 281; Alison, i. 58; Macdonald, 4; *Ross*, 1 Swin. 195). The person giving the order or counsel may be the worse criminal of the two in some cases, as, *e.g.* in a case of bribery (Hume, i. 278, 279; Macdonald, 4). What was instigated must reasonably tend to such a crime as is committed. But if what happened was likely as a result, the instigator is liable (Hume, i. 180; Alison, i. 59; Macdonald, 5; *Reid*, 3 Irv. 235). The instigator is liable although the person instigated procures another to do the deed (Burnett, 266; Alison, i. 59; Macdonald, 5), or commits the crime by mistake on a wrong person (Hume, i. 280; Alison, i. 58). If instigation be not so serious as to infer guilt *per se*, no conviction can follow unless there be evidence of assistance (Hume, i. 276, 277; Alison, i. 60; Macdonald, 6).

Assistance given will infer guilt, if direct, such as supplying poison, or acting as a decoy, although this was done only to obtain a reward from the perpetrator (Hume, i. 274, 275; Alison, i. 59, 60; Macdonald, 6). But it must be in contemplation of the particular crime.

Instigation or assistance must be operative at the time of the crime, not withdrawn in the knowledge of the perpetrator. But withdrawal will not free from guilt, if it do not reach the principal before he has done the deed (Hume, i. 279, 280; Macdonald, 7).

It does not matter where the instigation is given: it makes the instigator guilty of what is done, although in a different place or country (*Duncan*, J. Shaw, 334).

Accession may be given at the time of the offence. Combination at the moment may be enough (Hume, i. 271; Macdonald, 7). Persons watching while others do the crime are guilty (Hume, i. 102, 265; Alison, i. 62, 289–91; Macdonald, 8). But there must be participation in what was done (Hume, i. 266, 267, 270, 271, 280; Alison, i. 63, 64; Macdonald, 8). But this may be presumed, if the general purpose was to commit heinous crime (*Swanson*, 1 Swin. 9). It is a difficult question whether participation can be inferred from non-interference by a person witnessing a crime (Hume, i. 265; Burnett, 270; Macdonald, 9; *Kerr*, 2 Coup. 334). Guilt might be inferred in the case of a magistrate witnessing a crime, and not assisting to prevent it (Hume, i. 397).

Accession after the fact is not held to constitute a crime, except in treason (Hume, i. 282, 283, 533; Alison, i. 616; Macdonald, 3). See ART AND PART; ACCOMPLICE.

Accessio.—The doctrine of accession as a mode of acquiring property is derived from the Roman law. The word *accessio* has been used by commentators not only in its proper sense of increase, but also as denoting the manner in which the increase becomes one's property, and in the latter sense it is here employed. This mode of acquisition is fully recognised in the law of Scotland, as in all legal systems, the effect of its operation being generally this, that when two things have an intimate

connection with or dependence upon one another, the property of the principal thing draws after it that of its accessory. The accessory is merged in the principal, and previous rights of ownership in it disappear (Stair, ii. 1, s. 34; Bankt. i. 506, s. 10; Ersk. ii. 1, s. 14 *et seq*). Accession is either natural or artificial. By natural accession the young of tame and domestic animals belong to the owner of the mother, and the fruits and produce of the earth to the proprietor of the soil. A general exception must, however, be made of industrial fruits, which go with the property of the seed and labour (Bell, *Prin.* s. 1473). By natural accession, likewise the insensible addition made to land by the gradual accumulation of soil carried down by a river or washed in by the sea, accrues to the owner of the ground (see ALLUVIO), and the same rule applies in the case of the gradual deviation of a river from its course. On the other hand, if the change be rapid and violent, as by the tearing away of part of a river bank (see AVULSIO), or the sudden and marked deflection of a river's course (see ALVEI MUTATIO), there is no acquisition by accession, unless by acquiescence of the proprietor whose land is diminished. Natural forces may be set in motion or directed by artificial means; if the operations have been lawful, the same doctrines seem to apply as if the process of change had been natural from the beginning, but a landowner is not entitled to profit by his own wrongful act or any of its consequences (Rankine on *Landowership*, p. 103).

Artificial or industrial accession is produced by the application of skill or industry whereby the value of a thing is increased. It falls under the four general heads of ADJUNCTIO, SPECIFICATIO, COMMIXTIO, and CONFUSIO (*q.v.*). *Adjunctio* includes *ædificatio, plantatio*, and *satio*, where a man builds, plants, or sows on the ground of another. In Roman law it also included the accession of writing to parchment and of paintings to the canvas, but Erskine points out (*Inst.* ii. 1, s. 15) that these more properly fall under *Specificatio*, or the converting of another's materials into a new form or species. These different modes of accession and the rules specially applicable to them are more particularly dealt with under their respective titles, but it may be remarked that in all of them the property of the principal draws after it that of the accessory, the only difficulty being to fix which is the principal. The following rules have been given for ascertaining this: That of two substances one of which can exist separately, the other not, the former is the principal; that where both can exist separately, the principal is that which the other is taken to adorn or complete; that in the absence of these indications, bulk prevails; next value. And in all cases where there can be no separation, the property is with the owner of the principal, leaving to the other a claim for indemnification (Bell, *Prin.* s. 1298; Ersk. ii. 1, s. 14).

Accession to Trust Deed.—The term accession is used to denote the act of a creditor in consenting to the distribution of his debtor's estate under a private trust deed granted by him for the purpose. It is entirely in the option of a creditor to consent to such a course or not, the greater economy of such a mode of distribution, as compared with sequestration, being the usual determining element. Should the creditor decline to accede, he is, notwithstanding, entitled to claim a dividend from the trust estate *pari passu* with acceding creditors, and may sue the trustee therefor (*Ogilvie*, 1887, 14 R. 399); and he may resort to sequestration at any time (*Kyd*, 1880, 7 R. 884). He may also do diligence if the trust deed is

open to challenge on the ground of bankruptcy or insolvency or the trustee has not completed his title to the estate (Bell, *Com.* ii. 386; *Nicholson*, 1872, 11 M. 179). An acceding creditor is barred from doing diligence or applying for sequestration, save where necessary to prevent non-acceding creditors from obtaining preferences (*Jopp*, 1844, 7 D. 260; *Campbell*, 1862, 24 D. 1097). It is an essential condition of accession and its effects, that all the creditors shall have acceded, and that equality is maintained among them according to their respective rights and preferences (Bell, *Com.* ii. 395. 390; *Watson*, 1724, Mor. 6397; *Jopp*, *ut supra*; *Lockie*, 1837, 15 S. 547). Accession may be proved by writ or oath, and, so far as it is founded on to bar a creditor from taking measures inimical to the trust, by facts and circumstances (Bell, *Com.* ii. 393 *et seq.*; *Wilson*, 1762, Mor. 1214; *Heriot*, 1766, Mor. 12, 404; *Thomson*, 1855, 17 D. 455; *Marianski*, 1871, 9 M. 673; *Paterson*, 1868, 5 S. L. R. 503; *Athya*, 1881, 18 S. L. R. 287; *Heritable Secur. Invest. Assoc.*, 1891, 29 S. L. R. 904). Knowledge of the trust, or the lodging of a claim with the trustee, does not infer accession (*Athya*, *ut supra*; *Kyd*, *ut supra*). But it has been inferred from attending a meeting of creditors and acquiescing in a resolution to accede (*Heriot*, *ut supra*; *Wilson*, *ut supra*; *Lea*, 1828, 6 S. 350; see *Sturrock*, 1851, 13 D. 762). As inferring assent to extraordinary conditions of the trust deed (as, for example, clauses providing an artificial scheme of ranking of creditors, or providing for the debtor's discharge on dividend), accession is not, in the general case, proveable by facts and circumstances (Bell, *Com.* ii. 393–5; Goudy on *Bankruptcy*, 505; *Littlejohn*, 2 S. & M'L. 355; *Jopp*, *ut supra*). Proof of accession by parole does not seem to be competent. It would appear that accession binds an assignee, and that it extends to a claim which a creditor has acquired after acceding.—[Bell, *Com.* ii. 393 *et seq.* Goudy on *Bankruptcy*, 504 *et seq.*, 510–11, 513–14; Murdoch on *Bankruptcy*]. See TRUST DEED FOR CREDITORS.

Accessorium sequitur principale.—"The accessory right follows the principal."—See ACCESSIO.

Accessory may be tried, although the principal cannot be brought to justice (Hume, i. 283, 284; Alison, i. 69; Macdonald, 3). See ACCESSARY.

Accessory Actions.—See ACTIONS.

Accessory Obligations.—Pothier (*Tr. des Oblig.* ii. 1. 4 and 6) notes two divisions of obligations into principal and accessory. The first division is derived from the nature of the *things* which are the objects of the obligation; *e.g.* in the sale of an estate, the obligation of using good faith and a proper care of the thing sold, he terms *accessory*, because it is in a manner the consequence and dependence of the principal obligation of sale. His second division arises from the *persons* contracting; *e.g.* the obligation of sureties, who oblige themselves for another, and adopt his, the principal, obligation, is accessory to this last. Our institutional writers, not referring to this distinction, have caused some confusion by defining accessory obligations as those which are accessions to, or make part of, prior or primary obligations, and which do not subsist of themselves (Ersk. iii. 3. 60). The leading examples given are cautionary obligations, obligations to pay interest,

and bonds of corroboration. In modern usage the term is generally applied to cautionary obligations, and those of a cognate character, while the latter examples would probably now be classed as primary. Much subtlety has been expended on the subject (Bell, *Com.*, 7th ed., i. 402, note (8)), and it has been doubted if representations as to character, credit, ability, trade or dealings of any person, for enabling him to obtain credit, money, goods, or postponement of payment of debt, or any other obligation demandable of him (Mercantile Law Amendment (Scotland) Act, 1856, s. 6), are strictly speaking accessory obligations; but, whether accessory or primary, these, together with all guarantees and cautionary obligations, must now be in writing (Mercantile Law Amendment (Scotland) Act, 1856, s. 6). For examples of obligations, apparently accessory, held to be primary, see *Milne* (1869, 8 M. 250) and *Morrison* (1870, 9 M. 35).

[See Stair, i. 17, and More, *Notes*, ciii.; Bankt. iv. 45. 182 (R. 50); Ersk. iii. 3. 60; Ersk. *Prin.* iii. 3. 21; Bell, *Com.*, 7th ed., i. 402, note (8); Bell, *Prin.* s. 245; Pothier, *Tr. des Oblig.* ii. 1. 4 and 6.]

See Cautionry; Guarantee; Bond of Corroboration; Indemnity; Interest; Letter of Credit; Mercantile Law Amendment (Scotland) Act, 1856.

Accident.—An effect is said to be accidental when its occurrence, as a consequence of an act, is not so probable that a person of ordinary prudence ought to take precautions against it (Stephen, *Dig. Crim. Law*, 5th ed., p. 16); or when its occurrence is due to an operation of nature of which human prudence is not bound to recognise the possibility (*Tennent*, 1864, 2 M. (H. L.) 27), or, the possibility being foreseen, when the effect cannot be resisted by any amount of care and skill (*Nugent*, 1876, L. R. 1 C. P. D. 426). Accident is thus distinguished from effects which are due to design or to negligence. Consequently, for an injury arising from accident there is no legal responsibility (*Laurent*, 1869, 7 M. 610).

An example of an accident arising out of a personal act is the case of an injury to a bystander caused by a blow from the stick of a person raising it to separate two fighting dogs (*Brown*, 6 Cush. 292, referred to in *Brown*, 16 Amer. Rep. 382). Examples of natural occurrences which have been considered accidental are injuries from lightning (*Nichols*, 1876, L. R. 10 Exch. 255), violent tempest (*River Wear Comrs.*, 1877, L. R. 2 A. C. 749), extraordinary flood (*Countess of Rothes*, 1882, 9 R. (H. L.) 113), sudden bolting of a horse (*Shaw*, 1885, 12 R. 1186). See Damnum Fatale.

Accident Insurance.—The term accident insurance includes contracts of two different kinds. In its ordinary form an accident insurance policy is an undertaking, similar to that in a life policy, to pay a fixed sum upon the death or disablement by accident of the assured.

Indemnity Accident Policies.—The other form of accident policy is of the nature of a contract of indemnity, and to this extent it is regulated by the same principles as fire or marine insurance. The insurer undertakes to indemnify the assured against any legal liability he may incur in respect of accidental injuries to third parties for which the assured is legally responsible. Such policies are most usually issued to employers of labour to cover their liability under the Employers' Liability Act of 1880. The premium is calculated in the form of a percentage upon the wages paid by the employer, the rate differing in accordance with the risk of accident attending the

particular employment. Similar cases policies are issued to cover the common law liability of owners of public vehicles to members of the public who may be injured by accidents to the vehicles. Such policies include accidents arising from the negligence of the assured's servants, or for defects in his plant, but, on the analogy of other contracts of indemnity, could not validly be made to cover losses arising from the assured's own negligence (Arnould on *Marine Insurance*, 6th ed., pp. 731 and 771). A clause giving effect to this rule is usually made a term of the policy.

These contracts being contracts of indemnity, the principle of contribution is applicable (*Sickness & Accident Assur. Assoc. Ltd.* 1892, 19 R. 977, 980, per L. Low. See CONTRIBUTION; FIRE INSURANCE; MARINE INSURANCE). In such policies the contingency insured against not being injury or death by accident, but a claim for compensation against the assured, questions relating to the meaning of the term "accident" are not involved in the same way as under an ordinary accident policy. Liability depends upon whether a claim for compensation is made out at common law or under Statute.

It should be clearly indicated in the policy whether the limitation of the amount recoverable applies to one accident in which a number of persons may be injured, or to the injury to each individual. In one case (*South Staffordshire Tramways Co.*, 1891, L. R. 1 Q. B. 402), a tramway company was insured against "claims for personal injury in respect of accidents caused by vehicles . . . to the amount of £250 in respect of any one accident." By the overturning of a tramway car belonging to the company, forty persons were injured. It was held that the limitation to the sum of £250 "in respect of any one accident" applied to injury by accident to any one individual, and not to the whole injuries sustained in one accident to the vehicle.

In *ACCIDENT INSURANCE PROPER*, the most important questions relate to the determination of the risk as defined in the policies. It is proposed to refer to the cases under this head in detail; but as regards other questions arising upon accident policies in common with other forms of insurance, to refer to the articles where these questions are dealt with more fully.

THE PROPOSAL.—The proposal for accident insurance is practically the same as that for a life policy, and the same duty rests upon the proposer to make a full disclosure of all facts within his knowledge which affect the risk. The most material of these facts, in the case of an accident policy, are those relating to the occupation of the proposer, his physical condition, and his habits. Sometimes questions are asked as to the earnings of the proposer, as it is not thought desirable to insure for more, in the case of disablement, than the insured would make if in health. Companies also place the same importance as in other forms of insurance upon the fact that applications for insurance have been made to other offices, and have been accepted or refused. The law relating to the representations in the proposal, and to concealment of facts affecting the risk, is the same in the case of accident as of life insurance. (See REPRESENTATION; CONCEALMENT; LIFE INSURANCE. *London Assurance*, 1879, L. R. 11 Ch. D. 363; *Life Association of Scotland*, 1873, 11 M. 351; *Jones*, 1857, 3 C. B. (N. S.) 65; *Fowkes*, 1863, 3 B. & S. 917; *Standard Life Insur. Co.*, 1884, 11 R. 658; and 11 R. (H. L.) 48; 9 App. Ca. 671; *Anderson*, 1853, 4 H. of L. Ca. 484; *London Guarantee Co.*, 1880, L. R. 5 App. Ca. 911; *Bawden*, 1892, L. R. 2 Q. B. 534; *Cruikshank*, 1895, 33 S. L. R. 134).

INSURABLE INTEREST.—Accident policies are usually own-life policies, but there is nothing to prevent anyone insuring the life of another against

accident if he has an insurable interest in that life. Accident policies have been held to be subject in this respect to the provision of the Act 4 Geo. III. c. 48, as regards insurable interest (*Shilling*, 1857, 2 H. & N. 42. See INSURABLE INTEREST; LIFE INSURANCE).

CONDITIONS AS TO PAYMENT OF PREMIUMS.—Accident policies usually contain conditions as to the payment of first premiums and the commencement of the risk similiar to those in life policies (*Sickness & Accident Assur. Assoc.*, 1892, 19 R. 977. See LIFE INSURANCE: PREMIUM). Accident policies are, as a rule, annual contracts, and are terminable on either side at the end of one year, in this respect resembling contracts of insurance against fire. The obligation to pay the sums insured, after the first period of insurance has expired, is accordingly expressly made conditional on the payment of renewal premiums within a specified period thereafter, "so long as the company shall accept the same." Under this provision, unless it is qualified by other parts of the policy, or by statements in the prospectus or advertisements of the company, an accident which happens within the days of grace before the renewal premium has been accepted is not covered by the insurance (*Simpson*, 1857, 2 C. B. (N. S.) 257. See PREMIUM: LIFE INSURANCE; FIRE INSURANCE).

DEFINITION OF THE RISK.—In an accident policy the liability of the insurers is usually expressed to be for injuries caused by "violent, accidental, external, and visible means," and the proper legal construction of these words has been frequently the subject of discussion.

In a recent case the term "visible" was held equivalent to "external," and to point to the intervention of any physical agency external to the person of the assured. "External" was itself held to mean the antithesis of internal, so that any injury not arising from internal weakness or disease is external (*Hamlyn*, 1893, L. R. 1 Q. B. 750).

The violence of the means can in general only be inferred from the fact of the injury, and therefore the term "violent" adds nothing to the other terms of the definition.

The term "accidental" is the crucial term of the definition, and accordingly it has more than once been defined judicially, but generally with the reservation that a definition of universal application could not be given. Certain rules of construction have, however, been laid down. The first is that what is caused by natural disease or internal weakness is not accident. Thus, where the assured was an officer on board a ship trading in the tropics, and was killed by sunstroke, it was held that this was not an accident (*Sinclair*, 1861, 30 L. J., Q. B. 77).

A second rule is that the term "accidental" cannot be applied to means which are the ordinary, or a usual, result of a voluntary act by the assured himself; but that if the result which follows from the voluntary act is one which was not intended and was highly unusual and improbable, then the injury may be said to have resulted from accidental means (*Hamlyn*, 1893, L. R. 1 Q. B. 750; contrast *Clidero*, 1892, 19 R. 355).

When the question is one between suicide and accident, suicide is not to be presumed (*Trew*, 1861, 6 H. & N. 839); and when the assured has died in the water, it is not necessary to prove by direct evidence that he died by drowning, or to exclude the possibility of death by cramp or apoplexy, or some internal disease. It is sufficient that the death happened in such a way as naturally to point to accident; and not necessary to prove negatively that it did not happen from other causes that might be suggested (*Trew, ut supra; Macdonald*, 1890, 17 R. 955).

CONDITIONS LIMITING THE RISK.—In addition to the clause in the

body of the policy defining the risk, there are usually conditions attached to the policy, intended to impose further limitations upon the insurer's liability. A common form of such condition is one which excepts from the risk injury or death caused by internal disease. This merely expresses affirmatively what is implied in the term "accident," and it therefore adds nothing to the operative words of the policy.

A second form of condition is intended to except from the risk cases where internal disease, arising or existing independently of the accident, is either the sole cause of death or injury, or contributes to the death or injury jointly with the accident. This provision is intended to avoid the necessity of investigation as to the true cause of death where accident and natural disease are both present, and where it is doubtful which has been the cause of death or disability.

A third form of condition declares that the policy shall not apply where the accident itself gives rise to one or other of certain enumerated diseases, such as erysipelas or hernia, and where that disease is the direct cause of death.

The last form of condition excepts injuries sustained while the insured is in a state of intoxication, or during somnambulism, or while insensible, or in a fit.

In dealing with a claim upon a policy containing such conditions, the first question to determine is one of fact: what was the cause of death or injury. In general, the law looks only to the cause which is proximate in point of time, and regards this as the sole operative cause. It follows that conditions which contemplate the joint action of different causes are in general inapplicable. This is always the case if the causes are independent, in the sense that one is not the necessary or very usual consequence of the other. This rule is illustrated in the cases of *Winspear* (1880, 6 Q. B. D. 42), *Reynolds* (1870, 22 L. T. Rep. N. S. 820), and *Lawrence* (1881, 7 Q. B. D. 216).

An exception to the rule that the proximate cause in point of time is alone to be regarded, has, however, been recognised where an accident causes injury which leads, as a natural or very usual result, to some form of disease, such as hernia or erysipelas. The accident is then regarded as the cause of the death or disablement which ensues, the whole train of circumstances constituting a single cause (*Isitt*, 1889, 22 Q. B. D. 504). The same principle has been held to apply where the policy expressly provides that the insurance shall not extend to hernia or erysipelas, or other form of disease. Unless the terms of the policy make it clear that the intention of parties is otherwise, the exception will not be held to extend to these diseases where they are the immediate result of the accident. The accident is then regarded as the cause of death or disablement, and the interposed disease as a mere link in the chain of circumstances, and not a separate and independent cause (contrast *Fitton*, 1864, 17 C. B. (N. S.) 122, and *Smith*, 1870, L. R. 5 Exch. 302).

In the case of *M'Kechnie's Trs.* (1889, 17 R. 6), the policy contained an exception from the risk in the case of death or injury from internal disease, although accelerated by accident. Lord Fraser held the exception to apply where the assured, both before and after the accident, was afflicted with Bright's disease, and where he died from that disease accelerated by an accidental fall from his dog-cart. The Second Division adhered, but on the ground that, apart from the terms of the proviso altogether, it had not been proved that the assured died from accident.

A clause excepting accidents while in a state of intoxication has been held to apply whether the intoxication contributed to the accident or

not (*Macrobbie*, 1886, 23 S. L. R. 391; *Mair*, 1877, 37 L. T. Rep. N. S. 356).

Sometimes the exceptions from the risks insured against include accidents happening "by exposure of the insured to obvious risk of injury." This form of exception was considered in the case of *Cornish* (1889, 23 Q. B. D. 453, 456). It was laid down that the exception must not be taken literally, and that some qualification must be put on the words used, otherwise the contract would be rendered practically illusory. The clause was, however, held to have the effect of excluding the two following classes of accident: (1) accidents which arose from the assured exposing himself to risk of injury, which risk was obvious to him at the time; and (2) accidents which arose from the assured exposing himself to risk of injury, which risk would have been obvious to him if he had paid reasonable attention to what he was doing.

Disablement.—As to the construction of the words "wholly disabled from following his usual occupation, business, or pursuits," see *Hooper*, 1860, 5 H. & N. 546.

Notice of Accident.—Most policies contain provisions requiring notice of the accident within a specified number of days. When such notice is made by the terms of the policy a condition precedent, no claim upon the policy is in general maintainable unless it has been complied with (*Patton*, 1887, 20 L. R., I. 93; *Gamble*, 1869, 41 I. R. C. L. 204). In order, however, that such a condition may operate as a condition precedent, it must appear clearly from the terms of the policy that this was intended to be its effect. Otherwise the notice will not be regarded as essential to the right of the assured or his representatives to sue upon the policy (*Stoneham*, 1887, 19 Q. B. D. 237).

In the case of *Shields* (1889, 16 R. 1014), the facts were very special. The insurance was against injury or death by accident to a horse. The horse was so injured by an accidental fall that it became necessary to kill it. Notice was sent to an agent of the company, on the footing that the case was one of death and not of injury. On receipt of this notice the company at once repudiated liability, on the ground that the horse had been killed without their sanction, and that the notice should have complied with the conditions applicable to the case of injury. The Court held by a majority that the case was properly treated by the assured as one of death, and that the notice given was sufficient. It was also held that, after the company had repudiated liability, it was not incumbent on the insured to send in a report by a veterinary surgeon, or take any further steps required by a policy as preliminaries to a claim.

Arbitration.—Accident policies against loss by the death of animals frequently contain clauses of arbitration similar to those in fire policies. The reference is generally to unnamed arbiters, and thus gave rise to questions as to its validity in Scotland. Under a recent Act (the Arbitration (Scotland) Act, 1894 (57 & 58 Vict. c. 13)) reference to unnamed arbiters is declared not to be invalid, so that no such questions can now arise (*Caledonian Insur. Co.*, 1893, L. R. App. Ca. 85; 20 R. (H. of L.) 13; *Bidston*, 1895, 32 S. L. R. 516). See Arbitration; Fire Insurance.

Accidents.—See Fatal Accidents Inquiry (Scotland) Act, 1895.

Accidents—Notice of Accidents Act, 1894 (57 & 58 Vict. c. 28).—Where there occurs in any of the following employments an

accident to an employee, causing death, or bodily injury preventing him from working on any of the three subsequent working days, his employer shall as soon as possible, and in case of an accident not resulting in death not later than six days after the accident, send written notice to the Board of Trade specifying the particulars of the accident, subject to a penalty not exceeding forty shillings (s. 1 (1) (2)). The employments dealt with are:— 1. Construction or working of any work (railway, gaswork, etc.) authorised by any Act of Parliament. 2. Construction by means of scaffolding of any building exceeding thirty feet in height, or use of any such building in which more than twenty servants, other than domestic, are employed— (schedule). The Board of Trade, by order, may direct s. 1 to apply to any specially dangerous employment at which more than twenty servants under the same employer are engaged; may limit the application of s. 1, and prescribe the particulars to be specified in the notice. Such orders are to be published and laid before both Houses of Parliament (s. 2 (2) (3) (4) (5)). Further, the Board of Trade may order a formal investigation of any accident involving loss of life or bodily injury, where it appears to be of sufficient importance (s. 3). The Board may then appoint a paid commissioner, with a skilled assessor (s. 3 (1)), to hold an open investigation into the causes and circumstances of the accident (s. 3 (2)), with the ordinary powers of a Sheriff, and of an Inspector under the Railway Regulation Acts, 1840–89, and also with power to inspect such places, to summon such persons as witnesses and havers as may be necessary, and to examine witnesses on oath (s. 3 (3)). Expenses are allowed to third party witnesses (s. 3 (4)), and the whole costs of the investigation may be awarded against any person summoned to it whose fault is found to have caused the accident (s. 3 (6)). A person refusing to appear after citation, impeding the Court in the execution of its duty, or refusing to produce any document called for by the Court, is liable to a penalty not exceeding £10 (3 (7)). The commissioner makes a report to the Board of Trade, which may be made public, stating the cause and circumstances of the accident, with any observations thought necessary (s. 3 (5)).

The Act applies to service under Government departments, but not to any employment regulated by any Act of Parliament administered by the Secretary of State or by inspectors appointed by him. It does not require notice to be given of any accident requiring to be notified to the Board of Trade by any other Act (ss. 5, 6).

Accommodation Bill.—A bill of exchange drawn and accepted without value having been received by the acceptors, in order to raise money by discounting it; or a bill where the acceptor is in fact a mere surety for another, who may or may not be a party to it (*Oriental Finance Corporation*, 1871, L. R. 7 Ch. 146, 151, and 1874, L. R. 7 E. and I. App., at p. 358). A bill drawn, indorsed, and accepted for the accommodation of a person not a party to it, was held an accommodation bill, though the drawer and indorser were to receive a commission (*Oriental Finance Corporation, ut supra*); but where a bill payable to drawer's order is accepted for value, and indorsed to give it currency by one whose name is well known, it is not an accommodation bill, although the indorser is held to be an accommodation party (Re *Nunn*, 1817; Buck, 113). An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose

of lending his name to some other person (Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, s. 28 (1).

1. *Rights of Parties* inter se.—These rights will be regulated by the real nature of the transaction between the parties, and not by the order of their names on the bill. The person receiving the accommodation is primary debtor, and impliedly engages (1) that he will provide funds for payment at maturity, and (2) that if he fails, and the accommodating party is compelled to pay, he will indemnify him. The accommodating party who is compelled to pay is entitled to the benefit of all securities held by the creditor (*Becherraise*, 1872, L. R. 7 C. P. at p. 377). An acceptor is entitled to retain money belonging to the drawer, coming lawfully into his hands, till a bill accepted for the drawer's accommodation is paid, or he secured against it (*Madden*, 1807, 1 Camp. 12). *Primâ facie* the parties are entitled to relief as if the bill were for value. The acceptor of an accommodation bill will be liable to relieve the drawer or indorser who has paid, unless he proves, *habili modo* (see Bills of Exchange Act, 1882, s. 100), that the bill is for their accommodation (*M'Gregor*, 1831, 9 S. 483). Where a friend of the drawer, knowing the bill to be an accommodation one, indorsed it, and retired it at maturity, he was held entitled to full relief from the acceptor (*Beveridge*, 1852, 14 D. 328). Joint-accommodation acceptors are *primâ facie* entitled to claim a proportional sum from each of their co-acceptors (*Laing*, 1827, 5 S. 790 (new ed.); see *Russell*, 9 S. 163). These presumptions formerly could only be redargued by writ or oath of the party accommodated, but parole proof appears now to be competent under s. 100.

2. *Liability to Holder for Value.*—Each accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not (s. 28 (2)). The holder for value is entitled to rely on the different obligants, according to the several characters in which they sign, and, consequently, to regard the acceptor as primary debtor, though he knew him to be truly a creditor in a question with the drawer of the bill. The presumption is against a bill being an accommodation one. The acceptor is always presumed to have received value, or to have funds of the drawer to the amount of the bill (*Berry*, 1822, 1 S. 328). An indorser was held entitled to recover from the acceptor, where a bill accepted to accommodate the drawer was indorsed by the latter for value when overdue (*Stein*, 1834, 1 C. M. & R. 565). By s. 30 every party whose signature appears on a bill is *primâ facie* deemed to be a party for value, and every holder *primâ facie* deemed to be a holder in due course. Where the drawer transferred, without indorsation, an accommodation bill for value, the transferee, having given value, was found entitled to recover payment from the acceptor (*Hood*, 1890, 17 R. 749 (see s. 31)). It may be proved by parole (s. 100; see *National Bank of Australasia*, 1891, 18 R. 630 (Lords Adam & M'Laren, at p. 638) that the holder is not a holder for value, in which case an accommodation party, although known to be such, can set up the defence of no value, or any other defence arising out of the bill transaction which the accommodated party could plead. (See Chalmers on *Bills*, 88; Thorburn on *Bills of Exchange Act*, 80. But see *Gibson's Trs.*, 1896, iii. S. L. T. No. 384.)

3. *Presentment, Notice, Protest.*—Some exceptions to the ordinary strict rules as to presentment, etc., exist in regard to accommodation bills:—(1) Presentment for payment is dispensed with (*a*) as regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented, *e.g.* where the acceptor is an accommodation

party for the drawer, and the latter discounts, but does not put the acceptor in funds to meet the bill at maturity (see *Shepherd*, 1870, 8 M. 619, and *Terry*, 1837, 6 A. & E. 502); and (*b*) as regards an indorser, where the bill was made or accepted for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented (s. 46 (2) (c) & (d)). (2) (*a*) Notice of dishonour is dispensed with, as regards the drawer, where the drawee or acceptor is, as between himself and the drawer, under no obligation to accept or pay the bill, *e.g.* where a bill is accepted for the drawer's accommodation (*Goldsmid*, 26 May 1814, F. C.; *Sharp*, 1829, 9 B. & C. 44). But where signed by the drawer to accommodate the acceptor, or some of the other parties, the drawer can demand notice (*Sleigh*, 1850, 5 Exch. 514); and where a bill was drawn, accepted, and indorsed by three persons to raise money for the joint benefit, the drawer was held entitled to notice (*Foster*, 1876, 2 C. P. D. 18). (*b*) Notice is dispensed with, as regards an indorser, where the bill is for his accommodation (s. 50 (2) (c) & (d)). (3) Protest is dispensed with by any circumstances which would dispense with notice of dishonour (s. 51 (9)).

4. *Discharge.*—(1) *By payment.*—An accommodation bill is discharged when paid in due course by the party accommodated (s. 59 (3); see *Cook*, 1863, 32 L. J. C. P., at p. 121. (2) *By time or indulgence being given.*—In England the law of principal debtor and surety applies, the real relation of the parties being always considered. The old rule at law (differing from the rule in equity), namely, that the accommodation acceptor was not freed though the holder, knowing that the drawer was the real debtor, should agree to give him time or indulgence, or even a discharge (see *Fentum*, 1813, 5 Taunt. 192), appears to have been departed from, and in such circumstances the acceptor would now be released (*Oriental Financial Corporation*, 1874, L. R. 7 E. and I. App., at p. 360). In Scotland, following the English rule at law, it has been held that where there were two acceptors, one for accommodation, and one for value, the former was not released by neglect to protest against the latter (*Lyon*, 1841, 4 D. 178). Further, where the acceptor was the accommodating party for the drawer, he was found not entitled to resist payment on the ground that the holder had discharged the drawer in return for a security, since, on the face of the bill, the acceptor had no claim of any kind against the drawer (*Lewis*, 1852, 15 D. 260; cp. *Aitken*, 1848, 10 D. 1269; see *Hay*, 1886, 13 R. 777; Thomson on *Bills*, 237). There are no later direct decisions on this subject; but it is thought that the existing English rule would be applied in Scotland.—[See Bell, *Com.* i. 449; Bell, *Prin.* s. 346; Ersk. *Prin.* (Rankine), 285; Ross, *Leading Cases*, i.; Smith, *Leading Cases*, i. 491; Thomson on *Bills*; Byles on *Bills*: Chalmers on *Bills*.] See Bills of Exchange.

In Bankruptcy.—A holder for value of an accommodation bill is entitled to rank in bankruptcy upon the estates of each of the parties to the bill to the extent of drawing twenty shillings in the £ in all (*Anderson*, 1876, 3 R. 608; *ex parte Bloxham*, 6 Ves. 449). The party who has lent his name for accommodation stands in the position of a cautioner towards the party accommodated, and his right to rank on the latter's estate is regulated accordingly. If he pays the bill, he is entitled to rank in the creditor's place for the amount; or if the debt be not yet due, and the holder have not claimed, he may obtain a contingent ranking, to the effect of having a dividend set aside for him. There can be no double ranking of both the holder and the cautioner. But if the latter have in his hands funds or property belonging to the party accommodated which have been specially appropriated for his indemnification, then if both parties become

bankrupt and the holders rank on each estate, the trustee of the party holding the securities is entitled to apply them in recouping the estate the amount of dividends paid by him on the bills. If there be a surplus after so applying the securities, it falls to be handed over to the estate of the owner (*Royal Bank*, 1881, 8 R. 805, and 9 R. (H. L.) 67). In England the rule in such circumstances is that the bill holders are entitled to claim the securities and apply them towards payment of their claim, and then to rank for the balance. It is considered that the estate holding the securities loses the right to use them by its failure to take up the bills. This is known as the rule of *ex parte Waring* (19 Ves. 345; *Powles*, 3 De G. M. & G. 430; *City Bank*, L. R. 5 Ch. App. 773; *Banner*, L. R. 5 E. & I. App. 174; Re *Barned's Banking Co.*, L. R. 10 Ch. App. 198).

The Scotch rule above stated has been held not to apply where the cautioner has in his hands funds belonging to the party accommodated, but not appropriated as security against his liability on the bill. In these circumstances, where the bill holder has ranked both on the estate of the party accommodated and on the estate of the cautioner, the rule against double ranking precludes the trustee on the latter estate from pleading retention of such general debt against the dividends paid from that estate to the bill holder (*Anderson, ut supra*; *Mackinnon*, 1881, 9 R. 393; cp. *Christie*, 1838, 16 S. 1224).

Cross Accommodation Bills.—Where bills are exchanged for mutual accommodation, the general rule is that they form good consideration for each other, and if the bills have not been discounted they are extinguished *hinc inde* (Bell, *Com.* ii. 421). It may be otherwise where the bills have not been exchanged as counterparts, but have crossed by means of separate transactions with third parties (*Curtis*, 1794, Mor. 2589; revd. (H. L.) Feb. 23, 1797, 3 Pat. 540; Bell, *Com.* ii. 423. See Thomson on *Bills*, 586, and *Christie*, 1838, 16 S. 1224, per L. Mackenzie). If bills mutually exchanged have been discounted on one side, the holder can rank on both estates, and no further ranking is competent (Bell, *Com.* ii. 423; *Newbigging*, 1823, 2 S. 427; *Gibb*, 12 May 1838, F. C., and 16 S. 1002). If they have been discounted on both sides, the holders can rank on each estate to the full extent, and there can be no ranking of one estate against the other (*Anderson, ut supra*). A solvent party to the bills who takes up both sets of bills can rank on the bankrupt estate of the other party only for the bills on which the latter was acceptor (*Newbigging, ut supra*). Where both parties to the bills are bankrupt, and one is due a separate debt to the other, retention of such debt against dividends paid by the estate of the former upon acceptances of the latter is excluded by the rule against double ranking (see *Mackinnon, ut supra*). But this only holds good where there is a proper bankruptcy of the party who is creditor in the separate debt, involving divestiture of his estate. Thus it does not apply where he compounds with his creditors without divestiture (*Gibb*, 1838, 16 S. 1002; *Mackinnon, ut supra*).

[Goudy on *Bankruptcy*, 601–6; Bell, *Com.* ii. 420 *et seq.*]

Accomplice.—An accomplice is a competent witness although he has bargained with the prosecutor for exemption from prosecution (Macdonald, 456; *Simond*, Bell, *Notes*, 247; *Dickson*, Bell, *Notes*, 248). See Accessary.

Accountant.—See Chartered Accountant. Also, Remit.

Accountant in Bankruptcy.—An officer of Court appointed by the Bankruptcy Act, 1856 (19 & 20 Vict. c. 79), and conjoined with the Accountant of Court by the Judicial Factors Act, 1889 (52 & 53 Vict. c. 39). See ACCOUNTANT OF COURT.

Accountant of Court.—An officer of Court, originally appointed by the Judicial Factors Act, 1849 (12 & 13 Vict. c. 51), and confirmed with enlarged powers by the Judicial Factors Act, 1889 (52 & 53 Vict. c. 39). His duties may be subdivided as follows:—

I. Bankruptcy Department.—1. *Sequestrations.*—While the administration and management of estates in bankruptcy are vested in the creditors through their nominee, the trustee, and his council of advice, the commissioners, the Accountant supervises their actings, and satisfies himself as to the proper performance of their respective duties, only interfering, upon appeal, or *ex proprio motu*, when the regulations of the Statutes affecting bankruptcy are being disregarded or overlooked.

The progress of each sequestration is ascertained from the information afforded by the certified copies of documents and periodical accounts which the trustee is bound to lodge with him; by the annual return made through the Sheriff Clerks; and by the exhibition, whenever called for, of the Sederunt Book.

The winding up of each sequestration, when it is not closed in its earlier stages by deed of arrangement, composition settlement, or otherwise, but proceeds to a final division of its funds by the trustee, is only authorised after a satisfactory examination of the Sederunt Book (which should contain a complete record of the whole transactions), and after the fulfilment by the trustee of certain statutory requirements.

After the discharge of the trustee, the Sederunt Book in each case is retained by the Accountant, who once a year transmits these books, with the other productions applicable thereto, to the Deputy-Keeper of the Records, in whose hands they remain patent to anyone interested.

Besides his general supervision, the concurrence of the Accountant is required when heritable estate is sold by private bargain, and, if an appeal is intimated, before the trustee can take credit for any commission.

2. *Cessios.*—While the duties of direction devolve upon the Sheriffs, the Accountant has the same powers of supervision as in sequestrations. The trustee must lodge with him a copy of his first circular and of his accounts, and, when applying for his discharge, the Sederunt Book, the discharged law account, and the vouchers for dividends paid. The discharge granted by the Accountant (in the form of a receipt for the Sederunt Book) is effectual as a discharge to the trustee, without the further procedure necessary in sequestrations.

The supervision of judicial factors appointed under sec. 164 of the Bankruptcy Act, 1856, now falls under the Factory department of this office.

The Accountant has to keep, patent to all concerned, a register of sequestrations, the bound-up returns of the Sheriff Clerks, and a register of unclaimed dividends. He does not now require to enter in the last-named book the names of creditors whose dividends do not exceed £1. He has also to frame an annual report to the Court showing the state of each depending sequestration and cessio. This report also contains a variety of useful statistics applicable to the cases, both awarded and wound-up, during the year, and tables of comparison with the particulars of former

years. It is patent to all concerned at the Accountant's chambers for one year, and is thereafter transmitted to the Deputy-Keeper of the Records.

Amongst the special duties which the Court has called upon the Accountant to perform, are those of auditing the trustee's accounts, fixing his commission, and declaring or postponing a dividend, when no creditor could be got to act as commissioner (*Allston's Seq.*, 1894); and of reporting on the bankrupt's conduct in petition for his discharge, when the trustee had died without granting the report required by sec. 146 of the 1856 Act (*Meldrum's Seq.*, 1891). With regard to this latter duty, it would not unfrequently have saved trouble and expense had the requirements of the Bankruptcy Acts included the preparation and engrossment of this report in the Sederunt Book by the trustee, before final delivery.

Since 1890, fees have been charged in this department, and are payable in law-court stamps.

The average amount of unclaimed dividends consigned with the Accountant in one year may be taken at £300, in 50 deposit receipts representing 350 creditors. In terms of the Court of Session Consignations Act, 1895, unclaimed dividends (including interest) are, on the expiry of seven years from the date of deposit, handed over by the Accountant to the Exchequer.

II. Judicial Factory Department.—By the provisions of the Judicial Factors (Scotland) Acts, 1849 and 1889, all factors, except executors-dative, curators chosen by minors on attaining minority, and factors appointed in sequestrations under the 16th sec. of the Bankruptcy Act, 1856, are now brought under the supervision of the Accountant. These include factors *loco tutoris* and *loco absentis*, *curators bonis*, tutors at law, tutors nominate, guardians under the Guardianship Act, 1886, and factors under the 164th sec. of the Bankruptcy Act, 1856.

Annual Audit.—After lodging his bond of caution and his inventory, the factor must once a year submit an account of his intromissions, brought down to a date fixed by the Accountant, with the vouchers and securities; and after audit, the Accountant issues to the factor his report in draft. On receiving it back, with the audit notes, if any, satisfactorily answered, he signs and retains it as a number of process.

Management and Special Powers.—In his annual management the usual discretion of a man of business is generally all that is required; and if special acts are necessary (and discretionary powers given to trustees do not devolve upon the factor appointed in lieu of them), special powers must be obtained by report to the Accountant, followed by his opinion and a petition to the Court. It is not always easy to discriminate between special and ordinary powers; but, as a general principle, whenever the desired purpose is something more than ordinary management, or for which the factor might in future be called to account by interested parties, it is advisable for him to lodge a report with the Accountant, and take his advice as to further procedure.

Investments.—These are regulated by Statute and the Court. Loans over heritable subjects must be first bonds, and for not more than two-thirds of the certified valuation. In curatories, these bonds should be taken in the name of the ward; in judicial factories, in the name of the factor, as such. Colonial Inscribed Stock, Consols, and Stock in most of the leading English railways, have to be taken in name of the factor, as the Bank of England and these railway companies do not recognise trusts, and refuse to accept the provisions of the 13th sec. of the Judicial Factors Act, 1889. In factories following lapsed trusts the Court has, on petition,

authorised the continuance of investments allowed by the trust disposition, but the continuance of funds in trade or business is not approved.

Discharge.—The factor is discharged by the Court on petition, after a final report by the Accountant, and after transfer of the estate under his charge to the party or parties entitled to receive and discharge the same, or after consignation in Court. If the factor dies undischarged, without the purposes of the factory having been fulfilled, the Court will appoint a new factor, on application of parties interested, or on report by the Accountant.

Fees have been charged in this department since its institution in 1849. They are regulated by Act of Sederunt. The Fee Fund was abolished in 1889, and the balance at credit (£10,000) paid to the Exchequer. All fees must now be paid in law-court stamps.

The Accountant makes a yearly report to the Court of Session of all factories under his charge; and this lies patent to all concerned for one year at his chambers, and is then transmitted to the Deputy-Keeper of the Records.

III. Consignations.—In terms of the Court of Session Consignations Act, 1895, the Accountant is the custodian of *all* consignations under orders of the Court, or in virtue of any Act of Parliament. He has to keep registers of these, which are patent to all concerned. All unclaimed consignations are, on the expiry of seven years from the date of deposit, handed over to the Exchequer, without, however, interfering with reclamation rights by interested parties. At the close of 1895 the amount so handed over, including interest, was £34,000.

IV. Testamentary Trust Accounts.—By a very important provision in the Judicial Factors Act, 1889, trustees can obtain the supervision of their investments, and a yearly audit of their accounts, by the Accountant. A somewhat similar provision was made in the Bankruptcy Act, 1856; but it was little known, and never taken advantage of. The present procedure is by petition to the Court, followed by intimation on the Walls and in the Minute Book, other service not being necessary. The initial cost is about £15, chargeable against capital, while the annual audit fee, chargeable against income, is "not more than 7 per cent. on the factor's commission." It is hoped that a simpler procedure may in time be authorised; such as by manuscript petition, signed by a quorum of the trustees and lodged in the Bill Chamber. This would reduce the initial cost to a very small sum, and, if a restricted rate of annual charges were adopted, would allow the very smallest estate to be advantageously placed under supervision.

The Accountant sees that the provisions of the trust are being carried out. He reports annually to the trustees as to the position of the trust and of its investments, and brings under their notice any matters which he thinks should be distinctly laid before them. The trustees are thus kept aware of the exact position of matters, while their full discretionary powers are preserved; and if the directions of the Court are required, they can be obtained through the Accountant by note, without the expense of a special case. The main purposes of a public trustee are thus fulfilled without the rigidity and red tape associated with that office.

V. Private References.—During the year a considerable number of references are made to the Accountant by private parties, for the purpose of fixing commission or of settling questions of accounting. While these do not come under his statutory duties, they are the natural result of his official position. All fees therefrom must be paid in law-court stamps, and form part of the income of the department.

The fees of the combined departments for year to 31st March 1895 amounted to £4319, and the grant for salaries to £3900.

Accounting, Action of.—*When Applicable.*—An action of accounting, or, as it is usually termed, count, reckoning, and payment, is an action in which the pursuer seeks to compel the defender to produce a true state of accounts as between them, and to make payment of such balance as may thereafter be found due. An action of accounting may be brought wherever there is a right to demand, and liability to render, an account. Thus such an action is competent between partners, or between an agent and his client, or a ward and his guardian, or a beneficiary and the trustees under a trust deed; but it is not competent by a discharged bankrupt against his trustee, also discharged (*Burns*, 1869, 7 M. 476).

Conclusions.—(1) The pursuer calls upon the defender to enter into an accounting with him in order to discover the true balance due. (2) The second conclusion is for payment of the said balance. (3) In the event of failure by the defender to produce the accounts, pursuer concludes for a specific sum, usually in excess of the estimated balance, for which judgment will be given against the defender should he fail to appear. This last conclusion, if omitted, may be added by amendment (*Dobson*, 1858, 20 D. 610). In general, the conclusion for accounting is only to the date of citation; and if a continuous accounting is required, it must be concluded for (*Wauchope*, 1860, 23 D. 191; *Wallace*, 1875, 2 R. 1001).

The following is the style or form of action:—"Whereas, etc.—Therefore the defender Ought and Should be Decerned . . . to exhibit and produce before our said Lords a full and particular account of his whole intromissions as factor [*or otherwise*] for the pursuer, whereby the true balance due by him to the pursuer may appear and be ascertained by our said Lords: and the defender Ought and Should be Decerned . . . to make payment to the pursuer of the sum of £ sterling, or of such other sum as shall appear and be ascertained by our said Lords to be due by the defender as the balance of his said intromissions, with the legal interest . . . or, in the event of the defender failing to produce an account as aforesaid, he Ought and Should be Decerned . . . to make payment to the pursuer of the sum of £ sterling, which shall in that case be held to be the balance of his said intromissions, with the legal interest thereof . . . [*insert conclusion for expenses*].

Procedure.—Speaking generally, the procedure is the same as in other actions. It is not imperative that the record should be closed before judgment is pronounced, but this permission is not taken advantage of in practice (Shand, *Pract.* 740, note).

When there is no appearance for the defender, decree is granted for the alternative sum in the summons, but can be recalled in the same way as other decrees in absence. The lodging of accounts is not a condition precedent to the granting of the motion (*Bell*, 1858, 20 D. 718). When there is appearance, parties are heard on the preliminary pleas, and a proof on them, if necessary, allowed; for example, when the defender pleads non-liability to account, it may be necessary to have a proof to show that the position of parties was such as to entitle pursuer to an accounting. The preliminary question being settled, it may then be necessary to have a proof upon the merits; but in practice it is customary before, or in lieu of a proof, to remit the accounts to an accountant to report. The accountant's report may sufficiently deal with the facts to allow the Lord Ordinary to dispose of the case; but if not, a proof is then allowed on any disputed facts. Sometimes proof will be taken upon liability to account and upon the accounting at the same time (*Forbes*, 1857, 19 D. 1008). It appears to be competent to make this

remit before closing of the record, but this is not common in practice (Shand, *Pract.* 739; Mackay, *Manual*, 373; *Mackintosh*, 1830, 8 S. 668: *Findlay*, 1828, 7 S. 130).

Defences.—(1) *Denial of Liability to Account.*—This defence may rest upon a denial of such a relationship between the parties as will entitle either to an accounting, or upon the averment of an agreement that there was to be no accounting.

(2) *Averment that Account has been settled.*—An account in general will be held as settled when duly docqueted by the party entitled to demand it; but docquets may be reduced and an accounting allowed where there is a good ground of reduction, such as fraud or essential error; or even without reduction where there is proof of palpable overcharge and error (*Pollock*, 1851, 13 D. 640, per L. Cunningham), or that sums have been received not stated in the accounts docqueted (*Laing*, 1862, 24 D. 1362; *Law*, 1862, 24 D. 577). Settlement must be proved by competent written evidence (*Hannay*, 1876, 3 R. 399, L. R. 2 App. Ca. 531).—[Mackay, *Manual*, 372–4; Shand, *Practice*, 739–40.]

Accounting, Action of: Sheriff Court.—The prayer of the petition in such an action (otherwise called Action of Count and Reckoning) is to ordain the defender to produce a full account of his intromissions, and to pay to the pursuer such sum as may appear to be the true balance due by him: and, alternatively, failing his producing such account, to ordain the defender to pay a specified sum (39 & 40 Vict. c. 70, Schedule A. (2)). The amount of the specified sum does not limit the amount that may be found due as the result of the accounting (*Spottiswoode*, 1853, 16 D. 59): and the omission to pray for it in the petition may be rectified subsequently by amendment (*Dobson*, 1858, 20 D. 610). Accounts are ordered and given in if the Sheriff sees cause, and thereafter an opportunity is given to the pursuer to lodge objections to them, and to the defender to answer the objections (A. S., 1839, ss. 87, 88, 89). In other respects the procedure is the same as in an ordinary action. See Action, Ordinary Procedure in Sheriff Court.

Account Duty.—By the Act 44 Vict. c. 12, s. 38 (hereinafter cited as the 1881 Act), stamp duties, at the like rates as are charged by the said Act on affidavits and inventories, are made chargeable on accounts of personal or moveable property, to be included therein according to the value thereof. The rates are as follow (s. 27):—

Where the estate is—Above £100 and not above £500 in value,	a duty of £1,	for every £50, and any fractional part of £50.
Where the estate is—Above £500 and not above £1000 in value,	a duty of £1, 5s.	,,
Where the estate is—Above £1000 in value,	a duty of £3,	for every £100, and any fractional part of £100.

The descriptions of property chargeable under the aforesaid Act, as amended by the Act 52 Vict. c. 7, s. 11 (hereinafter cited as the 1889 Act), are as follow:—(*a*) "Any property taken as a *donatio mortis causa* made by any person dying on or after the first day of June 1881, or taken under a voluntary disposition, made by any person so dying, purporting to operate

as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bonâ fide* made three months" [altered to "twelve" months by 1889 Act, s. 11 (1)] "before the death of the deceased" (1881 Act, s. 38 (2) (a)); and any "property taken under any gift, whenever made, of which property *bonâ fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise" (1889 Act. s. 11 (1)).

(*b*) "Any property which a person, dying on or after such day, having been absolutely entitled thereto, has voluntarily caused or may voluntarily cause to be transferred to or vested in himself and any other person jointly, whether by disposition or otherwise, so that the beneficial interest therein or in some part thereof passes or accrues by survivorship on his death to such other person" (1881 Act, s. 38 (2) (b)): and the expression "to be transferred to or vested in himself and any other person" shall be construed to include "any purchase or investment effected by the person who was absolutely entitled to the property either by himself alone, or in concert, or by arrangement, with any other person" (1889 Act, s. 11 (1)).

(*c*) "Any property passing under any past or future voluntary settlement made by any person dying on or after such a day, by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property" (1881 Act, s. 38 (2) (c)). The expression "voluntary settlement" shall be construed to include "any trust, whether expressed in writing or otherwise, in favour of a volunteer, and, if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person, and as if the expression 'such property,' wherever the same occurs, included the proceeds of sale thereof" (1889 Act, s. 11 (1)).

The charge is extended to "money received under a policy of assurance effected by any person dying on or after the first day of June 1889, on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit" (1889 Act, s. 11 (1)).

It was held in a case in which the construction of the 1881 Act, s. 38 (2) (c), was in question, that, as regards that subsection at all events, the earlier Act must be read as having the meaning declared by the later Act (*Theobald*, L. R. 24 Q. B. D. 557; see *Worrall*, L. R. [1895] 1 Q. B. 99).

Exemptions.—Property when not above £100 in value is exempt; and, accordingly, no account is required where it is shown not to exceed that amount. Further, estate upon which account stamp duty has been paid is exempt from payment of legacy duty at the rate of 1, or succession duty at the rate of 1 or 1½ per cent. (1881 Act, s. 41; see 51 Vict. c. 8, s. 21).

Form of Account.—Forms of accounts (C) can be obtained at the Legacy and Succession Duty office, Edinburgh, or at any Inland Revenue stamp office in the country. Accounts when duly filled up must be verified by oath before a justice, or any officer authorised by the Commissioners of Inland Revenue (1881 Act, s. 39). Distributors and subdistributors of stamps, and certain officers of the Legacy and Succession Duty office, Edinburgh, have received such authority. When the oath has been sworn and

the account stamped, it may be presented personally or by an agent at the Legacy and Succession Duty office, Edinburgh, or at any Inland Revenue stamp office in the country, or it may be sent through the post to the Deputy Controller of Legacy and Succession Duties at the Inland Revenue office, Edinburgh. The stamped account will be filed in the office, but, if a duplicate be furnished, a certificate of the payment of the duty when paid will be placed upon it. Every deed or instrument (or a copy thereof) affecting the property comprised in an account, is required to be forwarded for examination with the account. Documents so forwarded will be returned. The duty is chargeable upon the amount or value of the property as it stands at the time of the delivery of the account; including all rents, dividends, or interest accrued on the property between the date of death and the time of assessing the account duty. Effects not consisting of money or securities for money, and not sold, are to be valued at the time the account is rendered, when inventories and proper valuations thereof will be required to be produced. The stocks, shares, etc., are to be valued at the medium price of the day on which the account is dated.

The Dutiable Amount is the amount or value of the property as it stands at the date of the account, with all interim interest or proceeds accrued between the date of death and the time of delivery. Valuations for the purposes of these Acts are exempt from stamp duty (54 & 55 Vict. c. 39, Sch. Appraisement). Where property has been undervalued, a further account must be delivered, stamped so as to cover, with the duty already paid, the dutiable amount. Where duty has been overpaid, the practice is to substitute a new account, and rectify the duty (see *Muir* (*Alston's Tr.*), 1895, 3 S. L. T. No. 228). Where the deceased's whole property is to be included in an account, deduction is allowed for debts and funeral expenses, although there is no statutory authority for the practice.

If the property be so disposed of as to come within the jurisdiction of British Courts, it is chargeable, whatever its locality.

The term "voluntary settlement" does not imply that there may not have been consideration between the parties to it; and in determining whether a settlement is or is not voluntary, the amount of the consideration and the relation of the parties are of the first importance (*Crossman*, L. R. 18 Q. B. D. 256; *Wilson*, 1894, 21 R. 997; cp. *M'Kersies*, 1881, 19 S. L. R. 438). Account stamp duty is chargeable not only on voluntary settlements, but on dispositions in favour of volunteers contained in settlements that are not voluntary, *e.g.* marriage contracts (*Jacobs-Smith*, L. R. [1895] 2 Q. B. 341; cp. *De Mestre*, L. R. [1891] A. C. 264; *Macdonald*, 1893, 20 R. (H. L.) 88). "Voluntarily" does not mean "gratuitously" or "without consideration"; it means rather "freely, without compulsion," and "not under any obligation" (*Ellis*, L. R. [1895] 2 Q. B. 466). Property "passes under" (1881 Act, s. 38 (2) (c)) a settlement, whether the disposition be effected by the terms of the settlement itself, or by an instrument in execution of a power created by it (*Chapman*, L. R. [1891] 2 Q. B. 526; *Gosling*, L. R. [1892] 1 Q. B. 545; *Wendt*, 73 L. T. R. 255). Where it is necessary to the charge to show that an "interest" (see *Heywood*, L. R. 19 Q. B. D. 326) has been "reserved" in the settlement under which the property passes, it will be sufficient if it be secured (*Chapman*, *Gosling*, *Wendt*, *ut supra*). It need not be provided by the deed which transfers the property; nor must it be secured upon, or be payable out of, the property transferred (*Crossman* and *Wilson*, *ut supra*; see, however, *Worrall*, L. R. [1895] 1 Q. B. 99). The common-law right of a husband to revoke a gift to his wife does not bring the gift into charge under the 1881 Act, s. 38 (a), as

amended by the 1889 Act, s. 11. It has been held that the 1889 Act, s. 11, does not apply to a policy assigned to a donee, and thereafter wholly kept up by him (*Robertson*, 1895, 22 R. 568). Heritage passing under a voluntary settlement, containing a trust for sale, is chargeable under the 1881 Act (*Dodd*, L. R. [1894] 2 Q. B. 150). As to the question of the apportionment of the charge, where specific sums have been appointed in the exercise of a power, see Re *Croft's Trusts*, L. R. [1892] 1 Ch. D. 652; Re *Shaw*, L. R. [1895] 1 Ch. 343. The 1881 and 1889 Acts are, in case of persons dying on or after 2nd Aug. 1894, superseded as to account duty by the Finance Act, 1894 (see s. 1 and s. 2 (1) (c) thereof, and Sch. 1).—[See Hanson on the *Revenue Acts*, 1880, 1881; Gossett, *Account Stamp Duty* (the 1881 Act); Norman, *Digest of the Death Duties*.] See Donation; Estate Duty (under 52 Vict. c. 7, s. 5); Estate Duty (under Finance Act, 1894).

Accounts.—Accounts *in re mercatoria* are sustained as probative although neither tested nor probative, if subscribed (*Fell*, 1869, 41 S. J. 236), or authenticated by initials, or by a cross or mark (Dickson, ss. 672, 799). If it be established that the account was filled in above the debtor's signature, it will be rejected, save on proof of his consent or homologation (*Campbell*, 1843, 5 D. 755; Dickson, ss. 677, 800). Even if unsigned, holograph writs in account-books are probative, as the subscription is not, in practice, added to complete the entry (Stair, iv. 42. 6; *Dunlop*, 1839, 1 D. 912, per L. Mackenzie); but it is thought that nowadays this principle would not be applied to scroll accounts (cp. *Ainsly*, 1696, Mor. 12626, and *Millar*, 1708, Mor. 12626, with *Nasmith*, 1665, Mor. 12621). The privilege has been extended to fitted accounts, which, while not *in re mercatoria*, relate to business transactions (*Campbell*, 1822, 1 S. 446; cp. *Stephen*, 1832, 10 S. 279); and sometimes very liberally (*M'Lurg*, 1678, Mor. 16970; *Stuart*, 1680, Mor. 12624). Observe that a bank pass-book is held to be a current and not a fitted account (*Commercial Bank of Scotland*, 1860, 3 Macq. 643; cp. *Couper's Trs.*, 1889, 16 R. 412). It is permissible to correct signed accounts or balance-sheets which show *ex facie* an *error calculi*, or some other obvious error, the means of correcting which are to be found in the writings themselves. Where proof is admissible, the error must be precisely averred (*Maclaren*, 1860, 22 D. 373; 1862, 24 D. 577; *Laing*, 1862, 24 D. 1362).—[Ersk. iii. 2. 24; Dickson, *Evidence*, ss. 797–800, 1231.] See Admissions; Apocha Trium Annorum; Books; Cautionary Obligations; Donation; Interest; Prescription; Presumption.

Accretion.—The rule of law denoted by "accretion" is expressed in the maxim, *Jus superveniens auctori accrescit successori*, and may be generally stated as being that where the title of the granter of a conveyance was at the date of its execution incomplete, its subsequent completion will draw back to the date of the conveyance, and make it as effectual as if the granter's title had then been unexceptionable. Although the rule has its most frequent illustrations in feudal conveyancing, it is not technical or feudal in its origin, but is founded on equitable principles equally applicable to conveyances of every kind of property. The fundamental principle is that, where the granter of a conveyance is either expressly, or, from the onerous nature of the transaction, liable in absolute warrandice, he is not only barred from using to the grantee's prejudice rights of whatever nature subsequently acquired by him,—whether by succession, or

conveyance, or even by Statute (*Viscount Arbuthnot*, Mor. 7751),—which under his obligation of warrandice he would have been bound to make good to the grantee, but is held *fictione juris* to have possessed these rights from the first, so as to make them available to the grantee without a supplementary conveyance. The same rule obtains where, without a clause of warrandice, the granter conveys for all right which he has acquired or shall acquire (Stair, iii. 2. 2; Ersk. ii. 7. 3).

While it was at one time doubted whether accretion was not in its operation confined to questions between granter and grantee (Stair, iii. 2. 2), it has long been settled that it is equally applicable in all questions between competitors deriving right from the common author whose title was originally defective. On the common author's title being completed, that competitor will prevail whose right would have been preferable had the title from the first been unexceptionable. Thus a lease granted by a landlord uninfeft was, on his subsequent infeftment, held binding in a question with a disponee to whom he had meantime conveyed (*Neilson*, Mor. 7768). So, where several dispositions had been granted by a disponer who remained uninfeft until after all his disponees had taken infeftment, the disponee who first took infeftment was preferred, negativing the contention that, as all the infeftments were equally invalid until the disponer was infeft, his infeftment must accresce equally to them all (*Neilson*, Mor. 7773; *Paterson*, Mor. 7775). In both these cases it was further held immaterial that the disponer's infeftment had been procured by the unsuccessful competitor solely with a view to validating his own infeftment. But the retroactive effect obtains only in questions between those deriving right from the same disponer, the completion of title meantime by one holding a right competing with the disponer's interposing, in a question with that competitor, an effectual mid-impediment to the disponee's infeftment being validated, as of its date by the disponer's subsequent infeftment (*Munro*, 1844, 6 D. 1249).

It was until more recently doubted whether accretion could operate where the disponer, at the time of granting the disposition, had absolutely no right, and whether it was not confined to the case where he already had an imperfect right (Bell, *Prin.* s. 882: *Munro*, 1844, 6 D. 1249, per Lords Ivory and Mackenzie); but it is now settled that accretion is fully operative even in such a case (*Swan*, 1866, 4 M. 663; *Smith*, 1869, 8 M. 204). Accretion will thus operate equally whether the disponer acquires, or merely completes, his right subsequent to the date of the disposition granted by him.

It has long been settled that on the disponer's subsequently completing his title, accretion operates in the case of a disponee infeft on a precept originally invalid as flowing from a disponer uninfeft, and also in the case where infeftment has been taken by the disponee on a charter of resignation originally defective, in respect that the procuratory on which it proceeded was inept owing to the granter's being uninfeft, or not being entered with the superior (*Henderson*, 5 July 1821, F. C.: *Innes*, 1844, 7 D. 141). In the case of *Smith* (1869, 8 M. 204), the question arose whether a disposition granted to the disponer after the date of the conveyance by him could be used as a mid link by the disponee thereafter making up his title by notarial instrument. The Lord Ordinary (Lord Barcaple) thought that it could not; but the judges of the First Division, although finding it unnecessary to decide the question, were unanimously of opinion that it could: and Lord Kinloch, with their full concurrence, said: "I think the general principle is that the accruing right is to be considered as, in legal construction, anterior in date to the disposition which it fortifies in all

respects whatever." Another strong illustration of the rule is afforded by a case where precepts of *clare constat*, inept as flowing from a superior whose title was incomplete, were, together with the infeftments taken thereon, validated by the completion of the superior's title after the death of the heir to whom they were granted (*Lockart*, 1837, 16 S. 76). Another instructive illustration of the operation of the rule is afforded by the case of *Henderson* (5 July 1821, F. C.) already cited. There the granter of two dispositions was infeft but unentered. In both cases the disponee's holding was to be *a me*. Both disponees took infeftment, and the second obtained from the superior confirmation of his own disposition and infeftment, but not of the disponer's. Thereafter the first disponee obtained from the superior confirmation both of his own disposition and infeftment and of the disponer's title. In a competition between the two, it was held that the second, although last infeft, fell to be preferred, on the ground that, as the confirmation rendered the disponer's title complete as from the date of his infeftment, the second disponee's title, being first confirmed by the superior, and therefore first completed had the disponer been originally entered, was preferable.

In some early cases (*Earl of Lauderdale*, Mor. 26; *Earl of Lauderdale*, Mor. 27; *Earl of Cassilis*, Mor. 33) it was held that rights acquired by the donator of a forfeited estate accresced to the forfeited owner on his restoration,—decisions which, it is thought, must have proceeded on the ground that the donator was held to have acquired the rights as trustee for the forfeited owner. A similar principle apparently underlies the decisions in *Ruthven* (Mor. 31) and *Duncan* (Mor. 39), where rights acquired by an assignee were held to accresce to the cedent on his reducing the assignation.

But accretion, even although the other requisite conditions be present, will not operate where a title is subsequently completed, not in the person of the disponer whose title was defective, but only in the person of some one representing him. Thus although, at common law, an heir was liable to make good his ancestor's warrandice, yet his infeftment did not validate an infeftment taken on a precept flowing from the ancestor whose title was incomplete (*Keith*, Mor. 1767 and 2933), because the infeftment which the heir is bound to give the disponee "cannot proceed on the precept granted by the ancestor, who never acquired any right which entitled him to grant that warrant." Again, where the precept of sasine proceeded from a trustee uninfeft, the disponee's infeftment will not be validated by the completion of the title in the person of the truster (*Redfearn*, 7 March 1816, F. C.). So, too, the infeftment of assumed trustees does not accresce to and validate precepts granted by the trustees by whom they were assumed, and none of whom have ever been infeft (*Martin*, 1841, 3 D. 485). So, too, where one having a personal right to lands disponed the *dominium utile* to one person and the *dominium directum* to another, and both took infeftment, the infeftment of the latter did not accresce to that of the former so as to constitute him a proper vassal in the lands (*Morton*, 6 July 1813, F. C.).

Another curious illustration of the limitation of the rule is afforded by an early case (*Graham*, 1746, Mor. 7752), where a person who had disponed lands with absolute warrandice, having afterwards acquired debts affecting them, it was held that they did not accresce to the purchaser, but that the disponer, in a question with other creditors of the purchaser, was entitled to hold them as a good security to the extent of the unpaid balance of the price; for here the purchaser, not having fulfilled his part of the contract by paying the price, could not have enforced the disponer's warrandice obligation.

As a consequence of the rule being based on the absolute warrandice of the disponer, there is no room for accretion as to additional rights subsequently acquired by him where the conveyance which he has granted is gratuitous and without absolute warrandice, or is only of a particular right, or expressly of the rights then vested in him, or where the warrandice is only from fact and deed (Stair, iii. 2. 2; Ersk. ii. 7. 4; *Douglas*, Mor. 7748). The case of *M'Gibbon* (1852, 14 D. 605) is cited in Bell's *Dictionary* as supporting the statement that "the doctrine applies to gratuitous as well as onerous deeds," but does not bear this out; for although no warrandice was expressed, the conveyance there in question, being granted by an apparent heir in implement of a family arrangement, and therefore onerous, bore to convey "all right title interest claim of right property and possession "which the granter her predecessors and authors heirs and successors had "have or could claim" in the subjects conveyed. For the same reason, accretion does not apply to the case of a mere consenter subsequently acquiring right to the lands conveyed (Stair, iii. 2. 2; Ersk. ii. 7. 4; *Forbes*, Mor. 7759; *Stuart*, Mor. 7762). Again, where the conveyance is not voluntary but judicial, as by adjudication from a person having no title or only a defective title to the lands adjudged, any subsequent acquisition of right by him does not accresce in favour of the judicial disponee (Ersk. ii. 7. 4; Bankt. iii. 2. 18; *Town of Musselburgh*, Mor. 7759; *Duncan*, Mor. 7772; *Wilson*, 1836, 14 S. 1117), because the judicial conveyance merely transmits any right then vested in the debtor, and imposes on him no obligation of warrandice.

It has been questioned but not decided whether accretion operates in the two following cases:—(*a*) Where the common author's infeftment has proceeded on the diligence of one of the competing parties, does it accresce to all the competitors, or only to the one on whose diligence it proceeded? The latter view is supported by Stair (iii. 2. 2), and undoubtedly would seem to be in accordance with the principle underlying the rule: but the already-cited decisions (*Neilson*, Mor. 7773; *Paterson*, Mor. 7775), that where one of several competitors completes the author's title, it accresces to them all according to the priority of their respective infeftments, appear to point to the opposite conclusion. The question, however, is not now likely to arise. The other question is of great practical importance—(*b*) Where the disponer has become bankrupt, will the subsequent completion of title in his person accresce to and validate dispositions or other rights previously granted by him? It is stated, but without any citation of authority, that it will, in Menzies' *Conveyancing* (p. 785), and Montgomerie Bell's *Conveyancing* (p. 814); and the same view is expressed in Goudy on *Bankruptcy* (p. 271), on the authority of *Edmond* (3 Macq. 116) and *Miller* (1836, 14 S. 1087), neither of which cases, however, involved the precise question. On the other hand, it is suggested by Professor Bell, in his *Principles* (s. 882 (5)), that after bankruptcy no accretion to render valid the securities of particular creditors, to the prejudice of the general body, should take place in consequence of an act of the trustee intended for the general benefit; and the same view is strongly urged by him in his *Commentaries* (i. 738), on the ground that, as accretion rests on the granter's obligation of warrandice, which after his bankruptcy he cannot lawfully fulfil, to the prejudice of the general body of his creditors, "it "would be a strange anomaly to hold that what a trustee for creditors "generally does in order to complete their rights, should be construed as an "act of the bankrupt done in the fulfilment of an obligation which he is "prohibited from fulfilling." If the title is completed in the trustee's person, the question of course does not arise.

Accretion is also used to denote the rule of law by which, in certain cases, the survivors of a class of legatees take the shares of predeceasers. See LEGACY; SUCCESSION; SURVIVOR.

Accumulate Sum.—See ADJUDICATION FOR DEBT.

Accumulation.—The term accumulation, when used technically, has reference to the case where a person has by *mortis causâ* deed conveyed his property to trustees for the purpose of adding to the capital the income thereof as it accrues. At common law, accumulation, where it had a definite beneficial object, might be carried out for an indefinite time, provided this object received the benefit within a reasonable time (*Mason*, 1844, 16 Sc. Jur. 422). By Statute, the time within which trustees may carry on such accumulation without being subject to interference by a beneficial claimant, is now strictly defined. See THELLUSSON ACT.

Accumulation of Prisoners.—Where several persons are charged together, and cause is shown (Hume, ii. 175, 176; Alison, ii. 240–4; Macdonald, 443; *Surrage*, Shaw, 22; *Barnet*, Shaw, 245; *Higgins*, Bell, *Notes*, 182; *Rowbotham*, 2 Irv. 89; *Hawton & Parker*, 4 Irv. 58; *M'Iben & Mullen*, 1 Coup. 390; *Driver & Tyre*, 5 Coup. 680), or it may be oppressive to try all at once (Hume, ii. 179; Macdonald, 443; *Claney*, Bell, *Notes*, 183; *Cleary*, Ark. 7), the Court may order separate trials. But special cause must be shown (*Marr*, 4 Coup. 407). See CRIMINAL PROSECUTION.

Accusation, False.—1. *Against judges.*—At common law, and by the Act 1540, c. 104, it is criminal to make false accusations, either verbally or in writing, against judges, charging them with oppression, corruption, or breach of duty. 2. *Against private persons.*—To render criminal a false accusation against a private person, it must be of the most serious nature, such as an imputation of gross immorality, or a false charge of committing crime. It is criminal for several persons to conspire to make false accusations against anyone.

The punishment is penal servitude or imprisonment.—[Hume, i. 341; Alison, i. 575; Macdonald, 179, 245; Anderson, *Crim. Law*, 84.]

Acids, Throwing.—By the Act 10 Geo. IV. c. 38 (which superseded 6 Geo. IV. c. 126), it is enacted (s. 3): "That if any person in Scotland shall, from and after the passing of this Act, wilfully, maliciously, and unlawfully throw at or otherwise apply to any of His Majesty's subject or subjects any sulphuric acid, or other corrosive substance calculated by external application to burn or injure the human frame, with intent in so doing, or by means thereof, to murder or maim or disfigure or disable such His Majesty's subject or subjects, or with intent to do some other grievous bodily harm to such of His Majesty's subject or subjects, and where, in consequence of such acid or other substance being so wilfully, maliciously, and unlawfully thrown or applied, with intent as aforesaid, any of His Majesty's subjects shall be maimed, disfigured, or disabled, or receive other

grievous bodily harm, such person being thereof lawfully found guilty, actor, or art and part, shall be held guilty of a capital crime, and shall receive sentence of death accordingly." In construing this section, it has been decided (1) that injury must have been done, (2) that the injury must be serious or grievous (*Wood*, 1836, 1 Swin. 283); (3) that the actual victim need not have been the person for whom the injury was intended (*Dewar* or *Beaton*, 1842, 1 Broun, 313). At common law, it is an aggravated assault to throw at or apply to another a corrosive acid, calculated to injure (*Fitchie*, 1856, 2 Irv. 485; *Fitzherbert*, 1858, 3 Irv. 63). If actual injury results, this is an additional aggravation.—[Macdonald, 145, 158; Anderson, *Crim. Law*, 75, 80.] See ATTEMPT TO MURDER.

Acknowledgment.—A term frequently used to describe a written admission that a sum of money has been paid to, or is due by, the party granting it.

1. *FORM.*—Although the term is wide enough to cover discharges or receipts for money paid in satisfaction of a debt (see DISCHARGE; RECEIPT), it is generally used with reference to money paid so as to create debt, *i.e.* on loan. The form, in this latter sense, is not material. It may take the shape of a simple receipt, as in *Martin* (1850, 12 D. 960), *Allan* (1837, 15 S. 1130), *Donaldson* (1711, Mor. 11511); or of a receipt with an agreement to pay interest "if demanded" (*Robertson*, 1858, 20 D. 371); or of a receipt "as per agreement" (*Thomson*, 1861, 23 D. 693); or of an acknowledgment of receipt of money "which I am to pay back with bank interest" (which was held of the nature of a bond, and therefore after-stampable) (*Tennent*, 1878, 5 R. 433), or "for which I shall account" (*Pirie's Reprs.*, 1833, 11 S. 473); or of an I. O. U. (*Williamson*, 1882, 9 R. 859); or simply "on loan" (*Welsh's Trs.*, 1885, 12 R. 851). The acknowledgment may be contained in one document, or inferred from the terms of several (*Ross*, 24 Nov. 1809, F. C.). It is usually holograph or tested; but since it is regarded rather as proof of an obligation than as constituting it, the acknowledgment, if proved to be the genuine writ of the granter, though neither holograph nor tested, will be effectual (*Bryan*, 1892, 19 R. 490; *Nicholson*, 1896, 3 S. L. T. No. 364; cf. *M'Adie*, 1883, 10 R. 741).

2. *EFFECT.*—The legal effect of an acknowledgment of receipt of money is important. "Where a document or writing admitting the receipt of money is given to the party advancing the amount by the party who receives it, it will be presumed that an obligation to repay is thereby constituted, unless the party who has received the money shall establish that it was paid to extinguish some counter-obligation, or to satisfy some other demand which he had against the advancer" (*Haldane*, 1872, 10 M. 537, per L. Cowan, at p. 543; *Duncan's Trs.*, 1873, 11 M. 254, L. Neaves; *Thomson*, 1861, 23 D. 693; see also *Ogilvie*, 1703, Mor. 11510; *Donaldson*, 1711, Mor. 11511; *Ross*, *ut supra*). In such a case parole proof is competent to find *quo animo* the money was paid, and, if necessary, to set up the writing and complete the proof (*Haldane*, 1872, 10 M. 537, per Lords Cowan, Deas, Ardmillan, and Kinloch; *Bryan*, 1892, 9 R. 490; *Mounsey*, 1895, 3 S. L. T. No. 340 (L. Moncreiff); *Nicholson*, 1896, 3 S. L. T. No. 364; *Anderson*, 1883, 11 R. 35; *Williamson*, 1882, 9 R. 859; *Woodrow*, 1861, 24 D. 31; *Thomson*, 1861, 23 D. 693; *Robertson*, 1858, 20 D. 371; *Martin*, 1850, 12 D. 960; *Allan*, 1837, 15 S. 1130; and see *M'Adie*, 1883, 10 R. 741); but not where the writ founded on was a cheque in the defender's favour indorsed by him (*Haldane*, *ut supra*), or a deposit receipt in pursuer's name

indorsed by the defender (*Nimmo*, 1873, 11 M. 446), since these did not infer the contract of loan. In *Neilson's Trs.* (1883, 11 R. 119), L. Young remarks (at p. 123), on the difference in effect between mere acknowledgments of debt and promissory notes or other obligatory documents: "I must assent to the distinction between a mere acknowledgment of debt and a bond or obligatory document" (viz. that an acknowledgment of debt, although evidence of a debt, is not necessarily sufficient and *per se* conclusive, like a bond). "If an implied obligation to pay were in all circumstances equivalent to an expressed obligation, bonds would disappear. But the common law distinguishes between the promise or obligation which an acknowledgment *primâ facie* implies, and an expressed promise or obligation. The holder of a bond or promissory note need not concern himself with the debt for which it is granted, so long as the instrument retains its virtue, for he sues on it, and not on the debt; while the holder of a mere acknowledgment of debt must sue on the debt, with the acknowledgment as evidence, which may be sufficient or not according to circumstances, whether *per se* or aided by other evidence." See the later case of *Welsh's Trs.* (1885, 12 R. 851), for the effect of a holograph acknowledgment of receipt of money "on loan," L. Rutherfurd Clark, at p. 862, cf. L. Young; see also *Christie's Trs.* (1870, 8 M. 461).

3. *Stamp.*—By sec. 101 of the Stamp Act, 54 & 55 Vict. c. 39, any writing whatsoever whereby any money amounting to £2 or upwards . . . is acknowledged or expressed to have been received or deposited or paid, is a receipt in the sense of the Act, and should be stamped as such; but it would appear that a mere acknowledgment needs no stamp (*Welsh's Trs.*, 1885, 12 R. 856, L. Young, and cases referred to there). If the acknowledgment contains a promise to pay a definite sum to a person named at a definite date, or when required, it becomes equivalent to a promissory note, and, unless stamped as such, cannot be regarded in evidence (*Vallance*, 1879, 6 R. 1099; *Blyth*, 1879, 6 R. 1102; see *Pirie's Reprs.*, 1833, 11 S. 473). An acknowledgment in such terms cannot be after-stamped; but where the amount promised to be repaid was indefinite, the document was held capable of being after-stamped, because not a promissory note (*Tennent*, 1878, 5 R. 433; see *Thomson*, 1894, 22 R. 16, and *Henderson*, 1895, 22 R. 895).

[Dickson on *Evidence* (Grierson), ss. 594 and 610.] See Discharge; Receipt; I. O. U.; Loan; Promissory Note; Proof.

A cœlo usque ad centrum.—The owner of land in Scotland enjoys the use and possession, not merely of the surface thereof, but also of what is above and below the surface, *a cœlo usque ad centrum*. As it has been expressed, "the vertical measurement of his property is indefinite—it knows no limits" (*Glasgow City Rwy. Co.*, 1883, 10 R. 894, at p. 902). In virtue of this doctrine, a proprietor of land may, apart from restraint in the interests of the public or of an individual, erect buildings within his boundaries to any height above, and excavate in search of minerals or other substances to any depth below, the surface he pleases.—[Bell, *Prin.* s. 940; Stair, ii. 3. 60; Ersk. ii. 6. 1; Rankine, *Landownership*, 3rd ed., 93, 156. *Dicksons & Laings*, 1885, 13 R. 163.] See Servitude; Building Restriction; Regalia.

Acquiescence.—See Admissions, etc.; Mora; Rei Interventus; Taciturnity.

Acquirenda of Bankrupt.—1. *In Sequestration.*—Under the earlier Statutes, a bankrupt's acquisitions after the date of sequestration did not vest in the trustee, and, in order to assert a right thereto, it was necessary for him either (1) to obtain a supplementary sequestration, or (2) where a second independent sequestration had been obtained, to claim a ranking thereunder *pari passu* with the subsequent creditors (54 Geo. III. c. 137, s. 39; Bell, *Com.*, 5th ed., ii. 478; *Christie*, 1835, 14 S. 191; *Fisken*, 1845, 7 D. 842). Under the present Bankruptcy Act (19 & 20 Vict. c. 79), such acquisitions vest *ipso jure* in the trustee as at the date of acquisition, and he makes his right effectual by means of a petition to the Lord Ordinary on the Bills (s. 103). If the trustee has been discharged, a new trustee will be appointed by the Court of Session on the petition of any creditor (*Thomson*, 1863, 2 M. 325). The bankrupt must notify such acquisitions to the trustee (s. 103). The trustee cannot claim estate which has been abandoned to the bankrupt (*Northern Herit. Secur. Invest. Co.*, 1888, 16 R. 100, and 18 R. (H. L.) 37; *Taylor*, 1879, 7 R. 128), nor estate included in a second sequestration (*Fisken, ut supra*), or cessio (*Abel*, 1883, 11 R. 149), or in an English or Irish adjudication (*Mein*, 1855, 17 D. 435). Nor can he claim, to the exclusion of new creditors, estate acquired in business carried on by the bankrupt with the acquiescence of the old creditors (*Christie, ut supra*; *Fisken, ut supra*). It is not settled to what extent personal earnings of the bankrupt may be claimed (*Barron*, 1881, 8 R. 933).—[Goudy on *Bankruptcy*, 274 *et seq.*, 226; Bell, *Com.*, 5th ed., ii. 478: Murdoch on *Bankruptcy*, 267.] See Sequestration: *Vesting of Estate in Trustee.*

2. *In Cessio.*—Acquisitions by the bankrupt after the date of the cessio do not vest in the trustee, and there are no means open to him of recovering such estate. The individual creditors may, however, do diligence against it in the same way as if no cessio existed (*Reid*, 1894, 21 R. 935).—[Goudy on *Bankruptcy*, 484; Bell, *Com.* ii. 482–3.] See Cessio.

Aquirenda of Married Woman. — See Jus Mariti; Administration (Husband's Right of); Married Women's Property Act.

Acquittal. — The absolving or setting free of a person from a criminal charge. This must be either by a verdict (of *not guilty* or *not proven*), or by the desertion of the charge *simpliciter*.—[Hume, i. 94. 413, ii. 70; Alison, ii. 648.] See Verdict; Tholed Assize; Res Judicata; Absolvitor; Sentence; Criminal Prosecution; Desertion of Diet.

Acre.—See Weights and Measures.

Act and Commission.—See Commission to take Proof, etc.

Act and Warrant of Trustee in Sequestration, commonly called the trustee's confirmation, is the statutory order issued by the Sheriff confirming the trustee's election, and transferring to him the estates of the bankrupt, with power to sue for and recover the same (19 &

20 Vict. c. 79, s. 73). The form is given in Schedule D appended to the Act. It forms conclusive evidence of the trustee's title; and a copy, certified by the Sheriff Clerk and authenticated by a judge of the Court of Session, must be received throughout the British dominions as *primâ facie* evidence of his title to recover the estate (s. 73). A copy must be immediately transmitted by the trustee to the Accountant of Court (s. 73), and an abbreviate must be recorded within twenty-one days in the Register of Adjudications (s. 79, and Schedules E 1 and E 2). If it be not duly recorded, authority to record (under reservation of all objections) may be granted by the Court of Session, *ex nobili officio*, on petition to either Division (*Munro*, 1851, 13 D. 1209: *A. B., petr.*, 1855, 18 D. 286; *Martin, petr.*, 1857, 20 D. 55). The effect of such recording is retroactive, and draws back to the statutory period (*Munro, ut supra*). The act and warrant operates *ipso jure* a transfer to the trustee of the whole property of the bankrupt, heritable and moveable, as at the date of the sequestration, *i.e.* the date of the first deliverance (19 & 20 Vict. c. 79, s. 102). The general principle of this statutory vesting is that "all property, whether heritable or moveable, in which the bankrupt has a beneficial interest, whether the title be in him or in a trustee for him, to the extent of that interest, passes to and vests in the trustee" (*Herit. Rever. Co.*, 1892, 19 R. (H. L.) 43, per L. Watson), but that the trustee takes the estate *tantum et tale* as it stood in the person of the bankrupt (*ib.*). The property which so vests does not include property held by the bankrupt in trust, although on a title *ex facie* absolute (*ib.*): nor a mere *spes successionis* (*Reid*, 1893, 20 R. 510). It includes real property in England, Ireland, or any of Her Majesty's dominions; but as regards freehold, copyhold, and leasehold, the act and warrant must be registered in the chief Court of Bankruptcy in the country where the estate lies (s. 102). The formalities of conveyancing are not dispensed with (*ex parte Rogers*, 1881, 16 Ch. D. 665; *Callender*, 1891, 1 App. Ca. 460). A new or succeeding trustee is, when appointed, invested with the estate under the original act and warrant as from the time when the previous trustee demitted office (s. 102). When a trustee is discharged or dies, then, until another trustee takes office, the formal title of the bankrupt to the estate revives, as there is no one to hold it against him (*Geddes*, 1889, 17 R. 278): but the sequestration remains in force, and any undistributed estate may be vindicated for the creditors by their obtaining the appointment of a new trustee on a petition to either Division of the Court of Session.—[Goudy on *Bankruptcy*, 222, 261 *et seq.*; Bell, *Com.* ii. 333 *et seq.*; Murdoch on *Bankruptcy*, 264.] See SEQUESTRATION.

Act of Adjournal—An enactment by the judges of the High Court of Justiciary.—In the reconstitution of the Justiciary Court by 1672, c. 40, sec. 6 of the part "*Concerning the Justices*" provided: "That it be left and recommended to the judges of that Court to regulate the inferior officers thereof, and order every other thing concerning the said Court." Under this provision, which continued to the Justiciary Court the powers inherent in it as the Court of the King's Justiciar, or Justice General, the Court has passed Acts of Adjournal dealing with the forms of procedure in the Court; with the appointment of circuit ayres: and with the duties and conduct of the various officials of the Court, including the dempster and the circuit trumpeter. As the Supreme Court of criminal jurisdiction in Scotland, and also under various Statutes, the High Court has passed Acts of

Adjournal which affect the procedure of the inferior criminal Courts. Thus, under 6 Geo. IV. c. 23, an Act for the better regulation of the Sheriff, Stewart, and Burgh Courts of Scotland, the High Court passed the Act of Adjournal, 17 March 1827, which is still of force in trials by jury in the Sheriff Courts. Most Statutes dealing with criminal procedure contain a clause empowering the High Court to make, by Acts of Adjournal, such rules and regulations as may be necessary to carry into effect the provisions of the Statute. Acts of Adjournal are recorded in the Books of Adjournal; but some Statutes also require that Acts of Adjournal, passed to carry out their provisions, be laid within a certain period before both Houses of Parliament. Acts of Adjournal lose their force under the same rules as are applicable to Scots Acts of Parliament: they may go into desuetude, they may be repealed, either expressly or by implication, and that either by Act of Adjournal or by Statute.—[See Hume, *Com.* ii. 71; Alison, *Pract.* 64; Adam, *Acts of Adjournal* (1886).

Act of Assembly.—The legislative powers of the General Assembly of the Church of Scotland are (with trifling exceptions) exercised under the restrictions imposed by Act ix. of Ass. 1697, commonly known as the Barrier Act. That Act, which itself followed upon an overture sent down to presbyteries, proceeds on the preamble of the frequent practice of former Assemblies, the probability that deliberation in making Acts, and previous knowledge of them on the part of the whole Church, will conduce to the exact obedience of them, and the desirability of preventing "any sudden alteration, or innovation, or other prejudice of the Church in either doctrine or worship, or discipline, or government," and enacts that, before the General Assembly passes any Act which is to be a binding rule and constitution to the Church, the same must first be proposed as an overture to the Assembly (which may be done by a presbytery, or by a synod, or by members of the House), and, being passed by it as such (*i.e.* as an overture), be remitted to the consideration of the several presbyteries of the Church, and their opinions and consent reported to the next General Assembly, "who may then pass the same into an Act if the more general opinion of the Church thus had agree thereto." Accordingly, it is necessary to the validity of an Act intended to be "a binding rule and constitution" [or of an Act rescinding any Standing Act (see Act viii. of Ass. 1736)], that it should have received the approval of at least forty-three of the eighty-four presbyteries of the Church, unless, indeed, where a proposal has been twice sent down as an overture, and presbyteries have failed to return their opinions, in which case the Assembly may (under Act v. of Ass. 1758) competently pass it into law without again submitting it to presbyteries. With regard to the policy of the Barrier Act, Principal Hill remarks that "any person who considers the momentary impressions incident to all large bodies of men in the heat of debate, or in their zeal for a particular object, will not think it advisable that a Court so numerous as the General Assembly, which sits once a year for ten days, should have the uncontrolled power of making laws upon the spur of the occasion" (*View of Constitution of Church of Scotland*, p. 67). Owing, however, to the negligence of presbyteries in making returns to the overtures transmitted to them, it was found that the effect of the Barrier Act was to produce considerable tardiness in legislation; and with a view to counteract this, the Assembly, whenever circumstances appeared to make it desirable that the proposal embodied in an overture should come into force immediately, were from an early time in use, when sending the

overture down to presbyteries, to enact it as an *interim* Act,—a course which all Church lawyers are agreed has the effect of giving it binding force till the meeting of the next Assembly. As, however, the power of making *interim* Acts was one which might very easily be abused, the Assembly of 1848 enacted (Act xiv.) that no overture "which involves an essential alteration of the existing law or practice of the Church" should be converted into an *interim* Act, it being understood that the prohibition was not to apply to "measures which may be necessary for carrying out more effectually the subsisting regulations or forms of the Church." It may be noted that, besides Acts passed in conformity with the procedure required by the Barrier Act, the annually printed *Acts of Assembly* generally include some enactments in regard to which—either on the ground of inveterate usage or because they deal with matters falling within the judicial or executive, rather than within the legislative, functions of the Assembly—presbyteries have not been consulted, *e.g.* Acts erecting or altering the bounds of a presbytery or a synod,—Acts appointing collections, days of humiliation or days of thanksgiving,—Acts prescribing regulations for the election and appointment of ministers, etc. The Assembly has also generally (though not uniformly) legislated in regard to its own membership without following the Barrier Act.

The Booke of the Universall Kirk of Scotland (of which the most accessible edition is that published by Peterkin in 1839) contains many of the Acts of Assembly for the period 1560–1616, while the Acts of Assemblies 1638–1649, 1690, 1692, 1694–1895, have been published along with abridgments of their proceedings, and since 1779 a copy of the printed Acts has been deposited in the Advocates' Library, and one has been sent to each University in Scotland and to each synod and presbytery. See also CHURCH COURTS.

Act of Bankruptcy is a term of English law used to denote certain kinds of acts on the part of a debtor which have been prescribed by Statute as *indicia* of insolvency, rendering him liable to be adjudged bankrupt. They are analogous to the tests or *indicia* of notour bankruptcy in the law of Scotland. No person is liable to be adjudged bankrupt who has not committed an act of bankruptcy. Acts of bankruptcy are entirely statutory. They were first introduced in the Act 13 Eliz. c. 7, and they have been added to and altered by subsequent Statutes. By the Bankruptcy Act of 1883 (46 & 47 Vict. c. 52), as amended by the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), it is enacted that a debtor commits an act of bankruptcy in each of the following cases:—

(1) If he makes a conveyance or assignment of his property to a trustee for his creditors generally.
(2) If he makes a fraudulent conveyance, gift, delivery, or transfer of any part of his property.
(3) If he makes a conveyance or transfer of his property, or creates any charge thereon voidable as a fraudulent preference.
(4) If, with intent to defeat or delay his creditors, he departs or remains out of England, or departs from his dwelling-place, or otherwise absents himself, or begins to keep house.
(5) If he files in Court a declaration of his inability to pay his debts, or presents a bankruptcy petition against himself.
(6) If he neglects to pay, satisfy, or secure a judgment debt after service of a bankruptcy notice, within the time limited for payment.

(7) If he gives notice to any of his creditors that he has suspended, or is about to suspend, payment of his debts (46 & 47 Vict. c. 52, s. 4 (1)).

An "available act of bankruptcy" means one available as the ground of a bankruptcy petition at the date of its presentation (46 & 47 Vict. c. 52, s. 168).

An act of bankruptcy, when once committed, cannot be purged; but in order that it may be made the ground of a bankruptcy petition, it must have been committed within three months before the presentation of the petition (*ib.* s. 6 (1)). An act of bankruptcy does not deprive the debtor of his title to sue for debts due to him.

The bankruptcy of a debtor is deemed to have relation back to, and to commence at, the time when the act of bankruptcy was committed on which a receiving order is made against him; or, if he is proved to have committed more than one, to the first act committed within three months prior to the petition (*ib.* s. 43). To the date so fixed the title of the trustee to the bankrupt's property draws back, and he may recover it from persons into whose hands it may have come since then, without prejudice, however, to transactions entered into *in bonâ fide*, without notice of any available act of bankruptcy having been committed (*ib.* s. 49).—[Williams, *Bankruptcy Practice*, 2 *et seq.*, 158; Robson on *Bankruptcy*, 132 *et seq.*, 552; Baldwin on *Bankruptcy*, 71 *et seq.*, 158–9, 193.]

Act of God. — See DAMNUM FATALE; NAUTÆ, CAUPONES, STABULARII.

Act of Grace.—The name given to the Scots Act, 1696, c. 32, "anent the aliment of poor prisoners." The Act provides that where any person, imprisoned for a *civil debt* or cause, is so poor that he cannot aliment himself, it shall be lawful for the magistrates of the burgh, upon the complaint and oath of the prisoner that he has no means, to intimate the fact to the incarcerating creditor, and to require him to give security for the debtor's aliment, or consent to his liberation. If the creditor refuses during the period of ten days, and if no other creditor offers security, the magistrate is empowered to liberate the debtor. It has been held that the debtor is entitled to be liberated on the tenth day from the date of intimation (*Hood*, 14 Dec. 1813, F. C.; see *Thomson*, 1878, 5 R. 561), and that the obligation to aliment him runs from the date of the award (*M'Ivor*, 1832, 11 S. 144). Although intended primarily for the relief of royal burghs, the Act operated so as to mitigate the law of imprisonment for debt. It was amended and improved by the Statute of 6 Geo. IV. c. 62 (1825), which, on the preamble that much distress was often suffered by poor prisoners from want of support till aliment was supplied under the Act of Grace, provides that it shall not be lawful for the keeper of any prison to receive or confine a prisoner for civil debt unless ten shillings are deposited by the creditor as a means of aliment (s. 1). In the event of aliment being subsequently awarded under the Act of Grace, the debtor is entitled to claim it out of the deposit, at the rate allowed, from the date of incarceration (s. 2). If, on application by the prisoner, he is refused the benefit of the Act, or if he does not apply for it within thirty days after his commitment, the deposit is returned (ss. 3 and 4). And

where the deposit is not exhausted before liberation, or where the creditor consents to the debtor being liberated without satisfaction before he applies for aliment, the balance is to be returned (ss. 5 and 6). Every prisoner claiming the benefit is bound, when desired, to execute a disposition *omnium bonorum* for behoof of all his creditors; and if he refuses, when required in writing, he is not entitled to aliment so long as he persists in his refusal (s. 7; *Johnston*, 1836, 14 S. 380). Refusal by the debtor to sign an assignation of a certain sum out of his wages, upon which the creditor was willing to liberate, deprived him of the benefit of the Act (*Brechin*, 1842, 4 D. 909). If he has an annuity or pension, he must, unless he has previously done so, assign it, in order to obtain the benefit of the Act (*Arnold*, 1825, 3 S. 645, 4 S. 133). The deed is exempt from stamp duty if granted expressly under the Act (Stamp Act, 1815, 55 Geo. III. c. 184, Schedule 3, s. 5; see *Rae*, 1837, 13 S. 653; M. Bell, *Conv.* i., 2nd ed., 205.)

Procedure.—The debtor had to be actually in prison at the date of his application, and could not claim the benefit if released on a sick bill (*M'Laine*, 1821, 1 S. 61). The application is made by summary petition to the magistrates of the royal burgh, or to the Sheriff of the county (Prisons (Scotland) Amendment Act, 1844, 7 & 8 Vict. c. 34, s. 13), or to the Sheriff-Substitute (Prisons (Scotland) Act, 1860, 23 & 24 Vict. c. 105, s. 76), having jurisdiction where the prison is situated (see 40 & 41 Vict. c. 53, s. 70, and Dove Wilson, *Sheriff Court Prac.* 376). Notice of the application is usually given by service to the incarcerating creditor or his agent. By Act of Sederunt for the Courts of Royal Burghs, 12 Nov. 1825, Part II. c. iv., it is provided that the creditor or his agent shall be allowed to be present when the debtor makes oath, and, *where convenient*, notice may be appointed to be given to the creditor, or his agent, of the day and hour when the debtor is to depone, and they may put all pertinent questions regarding the debtor's "ability to aliment himself in prison." If the prisoner is allowed the benefit of the Act, no reclaiming petition is competent; but, within fourteen days, the creditor shall be allowed to lodge a condescendence of the facts he undertakes to prove for authorising the Court to recall the award, which, however, is to be paid to the prisoner in the interim. Notice of the award of aliment and of the necessity to supply further aliment is given to the creditor, whether he was present at the deposition or not. Review by the Court of Session is competent. If the aliment is exhausted, and a certificate to that effect signed by the keeper of the prison, a warrant to liberate is granted by the Magistrate or Sheriff, and no further notice to the incarcerator appears to be necessary (*Pender*, 1846, 8 D. 408: *White*, 1858, 21 D. 28; *Thomson*, 1878, 5 R. 561). Where, however, the diligence is not used oppressively, reincarceration may take place thereon (*Morison*, 1826, 4 S. 675 (n. e.)): but there ought to be some change in the circumstances (*M'Kenzie*, 1830, 8 S. 306; see also *Denovan*, 1845, 7 D. 378; *Crawford*, 1836, 14 S. 688; *Pender*, and *Thomson*, *ut supra*); and reincarceration is, of course, always competent where the liberation is irregular or premature (*White*, *ut supra*).

Rate of Aliment.—By the Act of Grace, a minimum rate of three shillings Scots was fixed, the amount to be awarded being entirely in the discretion of the Court, subject, as was finally decided, to the review of the Court of Session (*Glaswell*, 1710, Mor. 7460). In many burghs the rate, generally moderate, varied with the position of the debtor, and was sometimes fixed by the magistrates at such a sum that the creditors preferred to

abandon their diligence (Bell, *Com.* ii. 447). It is now provided by the Civil Imprisonment (Scotland) Act, 1882 (45 & 46 Vict. c. 42, s. 8), that the person in whose hands the ten shillings have been deposited, under the Act 6 Geo. IV. c. 62, shall, as from the date of imprisonment, pay out of that sum the aliment of the prisoner, at the rate of not exceeding one shilling per day; and that if the prisoner shall not apply for, or shall not be found entitled to, aliment, any sum expended under the section shall be a debt due by him to the incarcerating creditor. The aliment and other expense incurred are a debt, which may be exacted subsequently if the debtor acquires funds (*Carnaby*, 1 Dec. 1815, F. C., L. Glenlee).

Nature of the Debt.—The Act provides, in general terms, that any person imprisoned for "a civil debt or cause" may claim the benefit. There was formerly much controversy, and conflict of decision, whether a prisoner could be awarded aliment where the debt arose *ex delicto*. But it was finally settled that the Act applied in all cases where the imprisonment was at the instance of a private party for a debt civil in its nature, whether arising *ex delicto* or *ex contractu* (*Douglas*, 1794, Mor. 11795; *Morison*, 1826, 4 S. 675 (n. e.); Bell, *Com.* ii. 445–6).

Aliment was awarded where the debtor was imprisoned on a *meditatione fugæ* warrant (*Smith*, 1776, Mor. 11816); where imprisonment followed non-payment of penalty due, to a private party, for contravening an early Salmon Fishing Act (*Robertson*, 1837, 15 S. 572) (it is doubtful if this would be repeated under the later Statutes on the subject); and where he was imprisoned by the Crown for non-payment of a tax (*Magistrates of Inverness*, 1856, 18 D. 366, double assessment for killing game without a licence); but not where the imprisonment was for fines and penalties due to the Crown (*Stewart*, 1783, Mor. 11817), or a procurator-fiscal for the public interest (*Clark*, 1787, Mor. 11818; Bell, *Com.* ii. 446; Goudy on *Bankruptcy*, 621), or for non-fulfilment of *ad factum præstandum* obligations within the debtor's power (*Turner*, 1709, Mor. 11802; *Brechin*, 1842, 4 D. 909; Ersk. iv. 3. 28).

Recent legislation has greatly narrowed the limits within which the Act applies. By the Debtors (Scotland) Act, 1880 (43 & 44 Vict. c. 34), and the Civil Imprisonment (Scotland) Act, 1882 (45 & 46 Vict. c. 42), civil imprisonment for debt is abolished, except in regard to taxes, fines or penalties due to Her Majesty, and rates and assessments lawfully imposed, or under warrants granted against a person *in meditatione fugæ*, or under a decree *ad factum præstandum*. It has been seen that the Act of Grace does not apply to imprisonment for non-payment of fines and penalties. It is thought (Goudy, *ut supra*, 621) to be doubtful whether a public board could expend its funds in alimenting, under the Act, debtors imprisoned for non-payment of rates and assessments. It has been shown that the benefit cannot be claimed by a debtor imprisoned for not performing a fact within his power (*Turner*, etc., *ut supra*). (An exception to this was the case of a workman imprisoned by his master, under the old common law, to enforce service, Fraser, *Master and Servant*, p. 111). It is doubtful whether imprisonment on this ground is now competent (Fraser, *ib.* p. 382); but it is still permissible to imprison for fourteen days apprentices who have failed to comply with an order directing them to perform their duties (Employers and Workmen Act, 1875, s. 6). These fall under the definition of "civil prisoner" in sec. 71 of the Prisons (Scotland) Act, 1877 (40 & 41 Vict. c. 53), and, it is thought, are entitled to the benefit of the Act. It would appear, therefore, that, with the exceptions last mentioned, the benefit of the Act of Grace can now be competently claimed only by individuals

imprisoned by the Crown for non-payment of taxes, or under *meditatione fugæ* warrants granted at the instance of creditors for the performance of civil obligations.

[Stair, More, *Notes*, 430; Bankt. iii. 20. 8; Ersk. iv. 3. 28; Bell, *Com.* ii. 445; Bell, *Prin.* s. 2320; Goudy on *Bankruptcy*, 620, 629; Dove Wilson, *Sheriff Court Prac.* 376; *Justice's Digest* (Chisholm).] See Imprisonment; Cessio; Lawburrows.

Act of Parliament.—See Statute Law; Parliament; Royal Assent; Desuetude.

Act of Sederunt.—An enactment by the Lords of Session. The Statute of 17 May 1532, which instituted the Court of Session, conferred power on the king to make rules of procedure for the conduct of causes; and this power the king, at the inauguration of the Court, delegated to the Chancellor, President, and Lords of Session. The Statute of 1540, c. 93, which confirmed the institution of the Court, ratified the rules and regulations contained in the Acts of Sederunt already passed, and gave power to the President, Vice-President, and Senators to make Acts for the "ordering of process and hasty expedition of justice." The power thus conferred was occasionally exceeded, and some Acts of Sederunt not merely dealt with procedure, but laid down the law. Some such Acts were declaratory of the existing law, but others went further, and amended the law which existed at their date. The practice was to lay such Acts of Sederunt before the Legislature, and, if approved of by Parliament, they received the sanction of Statute. 1621, c. 18, "Anent unlawful Dispositions and Alienations by Dyvours and Bankrupts," is an example of the statutory ratification of an Act of Sederunt. Several Acts of Sederunt which deal with matters of law have been universally accepted, although never confirmed by Statute. The principal examples of such enactments are: The Act of Sederunt "anent Executors Creditors," of 28 February 1662, which greatly simplified the law by which the estate of a deceased debtor might be made available to his creditors; and the Act of Sederunt "anent Removing," of 14 December 1756, which, besides some regulations in regard to procedure, contains enactments as to the general law of leases and removings, as to which it is at least questionable whether they did not alter the law as then existing. Since 1756, however, the Court has been careful to confine the exercise of the power of passing Acts of Sederunt within the limits laid down by its original constitution or subsequent Statute. Thus power is frequently conferred by a Statute upon the Court of Session to pass an Act of Sederunt to construct or regulate the machinery necessary to carry the purposes of the Statute into effect. In the exercise of this power the old quorum of nine judges is required (48 Geo. III. c. 151, s. 11). An Act of Sederunt has the force of Statute, yet, being the enactment of the Court and not of the Legislature, the Court, where a formal and innocent failure to conform to an Act of Sederunt has occurred, may allow the error to be rectified (*Young*, 19 Feb. 1875, 2 R. 456). Like a Scots Statute, an Act of Sederunt may lose its force either by repeal, express or implied, or by disuse. The earlier Acts of Sederunt were embodied among the Acts of Parliament even when there was no express ratification, although their proper place was in the Books of Sederunt. The most authoritative collections of the earlier Acts are—(1) Acts of Sederunt

from May 1532 to January 1553, published by L. P. Hay Campbell from records discovered in 1811; (2) the Acts of Sederunt from 15 January 1553 to 11 July 1790, collected by William Tait, advocate (1790); (3) from 1790 to July 1831, collected and published by the Faculty of Advocates. Since 1831 the Acts of Sederunt have from time to time, as they were enacted, been printed and published under the warrant of the Court, and from all these sources were compiled Alexander's *Abridgment of the Acts of Sederunt*, which, with his two supplements, and Adam's *Abridgment*, contains the Acts of Sederunt in force down to October 1886.—[See Ersk. i. 1. 40; Stair, i. 1. 16; Bankt. i. p. 28; Shand, *Pract.* i. 45; Mackay, *Pract.* i. 5, 23.]

Act of Union.—See UNION.

Act of Warding.—A decree or warrant issued by the magistrates of a royal burgh, authorising the imprisonment of an inhabitant of the burgh for civil debt. The privilege of granting acts of warding is confined to royal burghs; and the warrants can be issued only against inhabitants of the burgh who are subject to the jurisdiction of the magistrates, which all persons are who have resided forty days within the royalty (Ross, *Lect.* i. 255). In *form*, diligence against the person is authorised by this procedure only as a *second* step of execution, the fiction (probably a reality at first) being that the town-officer has already reported that he has made search for moveables belonging to the debtor, in order to poind them, but has failed to find any such. Ross (*ut supra*) says: "Excepting the caption issued by the ecclesiastics against persons excommunicated, the act of warding is not only the earliest, but what is still more worthy of observation, it continues at this moment (*i.e.* in 1822) to be the only direct and reasonable execution for payment of debt in this kingdom; all the rest are indirect, or, properly speaking, fictions of the law. The common execution of a royal decree is by poinding and imprisonment. It corresponds to the Statute of Robert I., with this variation, that the Statute appoints the body of the debtor first to be seized, and then his goods comprised and delivered for payment; whereas the practice in the act of warding agreed with the original law of the island, which directs the moveable goods of the party to be applied to payment of the debt before the person could be touched. According to the present practice, the town-officers in Edinburgh, at least, never give themselves the trouble of searching for moveables; but they scruple not to certify with great solemnity that they have done so. The act of warding, therefore, is a direct execution against persons within borough, simple in its principles, and prompt in its execution. . . . It can, or at least ought to, be issued only for liquid debts, and not *ad facta prastanda*; because no poinding or apprisement of moveables can proceed but upon a clear and special debt, as merchants' debts, for the recovery of which the execution was originally intended."

The act of warding was superseded, though not abrogated, by the simpler forms introduced by the Personal Diligence Act, 1838 (1 & 2 Vict. c. 114); and by the Debtors (Scotland) Act, 1880, and the Civil Imprisonment (Scotland) Act, 1882, imprisonment for civil debt in Scotland has now been restricted within limits so narrow as to render this diligence unknown in practice.—[See also Kames, *Stat. Law Abridged, s.v.* "Personal

Execution"; Stair, iv. 47, s. 1; Bell, *Com.* ii. 431; Bell, *Conveyancing.* Lect. i. 518–19.] See DILIGENCE; IMPRISONMENT.

Actio in Roman Law.—*Actio* is the mode prescribed by law for the enforcement of rights by the aid of the State. The term is also commonly used in the more restricted sense of "right of action"—*jus persequendi judicio quod sibi debetur* (*Inst.* iv. 6 pr.).

In the history of Roman law three principal systems of judicial procedure prevailed successively.

1. During the early period the only modes of procedure recognised by law were the *legis actiones*, regarding which our main source of information is the somewhat mutilated account of Gaius (*Inst.* iv. 11 *et seq.*). These *legis actiones* were five in number: *legis actio sacramento*, the oldest and most general form of action; *legis actio per judicis postulationem*; *legis actio per condictionem*: *legis actio per manus injectionem*; and *legis actio per pignoris capionem.* The latter two of these processes were, more properly, modes of execution. The *legis actiones* were competent only between Roman citizens. The procedure in all of them was quite inelastic, rigidly formal, and full of pitfalls for the ligitants, who had in person to go through every step in the process, for representation by an agent was not permitted. A single mistake in a single word or act involved the loss of the whole suit, and equitable defences were of no avail against a pursuer's strict technical right.

2. Under the prætors a new system of legal procedure was developed, more flexible and better adapted to promote a judgment on the merits of a case. The elaborate ceremonial and rigorous technicality of the *legis actiones* gradually fell into discredit, and were superseded by the use of *formulæ.* The prætors, dispensing with the ancient forms, appointed a single *judex*, or, in certain cases, several *recuperatores*, to determine the matter at issue between the parties. The characteristic feature of the new system was the *formula* (*litigare per formulas*). The *formula* was a written issue, stating the precise question upon which a verdict was required, prepared by the magistrate after hearing the parties informally and being satisfied that there was a relevant case. This written instrument, containing the appointment of the *judex*, and certain concise instructions to him, was delivered to the *judex* by the magistrate. The contents of the *formula* varied somewhat, according to the nature of the case. Its essential parts were the *intentio*, which embodied a statement of the pursuer's claim, so far as it was relevant, for decision by the *judex*; and a clause marking out the duty of the judge—in other words, in the ordinary case, giving him power to award damages (*condemnatio*), or, in actions for the division of property, power to assign different parts of the joint property to the several claimants (*adjudicatio*). Frequently, also, the facts and circumstances of the dispute required to be briefly stated, and when this was necessary, it was done in a clause known as the *demonstratio*, which stood first in the *formula.* Upon the *formula* there might also be grafted an EXCEPTIO (*q.v.*), the statement of a plea for the defender, as well as a REPLICATIO (*q.v.*), an answer by the pursuer to the defender's *exceptio.* As to further extensions of the formula, due to the prætor's bold recognition of equity, see articles FICTIONS; BONÆ FIDEI ACTIO, etc.

It may be presumed that the *prætor peregrinus* was the first to introduce the formulary procedure. Soon, however, the new procedure of the *jus gentium* began to dislodge the *legis actiones* of the *jus civile*, even in the

court of the *prætor urbanus*, whose jurisdiction was confined to cases where both parties were citizens. The *lex Aebutia* (about B.C. 150), by sanctioning the institution of a *judicium* in the court of the *prætor urbanus* merely by means of a *formula*, without preliminary ceremony, finally rendered the formulary procedure legally available, even in strictly civil law cases. By means of *formulæ*, legal procedure at Rome was stripped of its old formalism, and acquired elasticity. The *formula* was comparatively unfettered, was capable of indefinite expansion, and was readily adaptable to claims of all kinds.

3. Besides this formulary procedure, there were, during the classical period, cases, mainly of an administrative character, which the prætor himself heard and decided. The procedure in cases of this sort, in which no *judex* was appointed, was to begin with *extra ordinem*, *i.e.* out of the regular order. From the fact that the entire proceedings took place before the magistrate *in jure*, these trials were also termed *cognitiones*, and the decisions were *decreta* or *interdicta*, as distinguished from *sententiæ*, the verdicts or judgments of a *judex*. In this procedure *per cognitionem*, as distinct from that *per formulam*, the official power (*imperium*) of the magistrate had free play. It was natural, then, that in the later empire, with its increasing tendency towards officialism, the procedure *per cognitionem* should grow in importance. It became more and more the custom for the various officials of the empire to hear and decide all suits themselves, without appointing a *judex*. This change in procedure was a gradual one, and we do not know exactly how and when it came about. A law of Diocletian, A.D. 297 (Cod. iii. 3. 2), directing the governors of provinces to decide cases themselves, as far as their public duties allowed them, is generally regarded as the beginning of the change; while a law of Constantius, A.D. 342 (Cod. ii. 57. 1), forbidding the use of "hair-splitting" *juris formulæ*, definitely marks the abolition of the formulary procedure. Thus it came about that in the Justinianian period "all trials are now *extra ordinem*" (*Inst.* iv. 15. 8, iii. 12 pr.). Every action had, in short, in point of form, become wholly a proceeding *in jure*, conducted before the magistrate or his deputy. In other words, the procedure *extra ordinem* of the classical period was the ordinary procedure during the later period of the empire. The new procedure, however, was, after all, merely a new machinery for applying the law, and thus the modifications in the law, introduced by means of the *formulæ*, remained as before.

During the republic, no appeal, properly so called, in a civil case existed (see INTERCESSIO). But the fact that the judgment in the later law was the judgment of an official, resulted in the development of a great system of appeals, the aim of which was to substitute, in place of the decision of the lower official, the decision of a higher one, and, in the last instance, the decision of the emperor himself, as representing the highest court of appeal. Every judge was now a public officer, and every judgment was a judgment in the emperor's name, and under the control of the central authority.

The first step in an ordinary action, in the classical law, was the *in jus vocatio*, or summons. The summons was served on the defender by the pursuer personally. Under the later empire, however, the defender was summoned, not by the pursuer, but by the prætor through a public officer (cp. *Dig.* 42. 1. 53. 1). The notice was repeated three times, and if the defender did not appear, the case was proceeded with in his absence (Paul. *Sent.* v. 52. 7). In Justinian's time, actions were generally begun by a written statement (*libellus conventionis*) of the pursuer's claim, delivered to the judge, and by him communicated to the defender. When the parties had appeared in court, the pursuer,

in the classical law, stated his case and applied to the magistrate for a *formula* (*actionis postulatio*). If the defender did not succeed in showing that the pursuer had no relevant case, or in getting his application thrown out on some other ground, the magistrate prepared a *formula* and appointed a *judex*. The delivery of the *formula* to the *judex* marked the moment of *litis contestatio*, which ended the proceedings *in jure* (see LITIS CONTESTATIO). The parties then appeared before the *judex* (*in judicio*), with their witnesses. Before him the proof was taken, the parties were heard on the evidence, and the case was argued (*altercatio*). The *judex* was frequently aided by advisers or assessors learned in the law, who were said *in consilio adesse*; but the *judex* alone was empowered to give judgment (*sententia*), which was pronounced orally in court, in presence of the parties or their advocates. For execution, it was necessary to apply again to the magistrate. As already pointed out, this formular procedure was in the later law supplanted by the system of *cognitiones extra ordinem*, in which the functions of magistrate and *judex* were combined in all cases. The whole subject is fully treated in *Keller's Civil Process* (ed. Wach), and in *Die römische Civil Process*, by Bethmann-Hollweg. The *jus quod ad actiones pertinet* occupies Gaius, *Inst.* iv. *passim*, and Just. *Inst.* iv. 6 *et seq.* As to agency in actions in Roman law, see PROCURATOR. The different classes of actions, as well as the particular actions, in so far as they are relevant to Scots law, are treated in separate articles, *e.g. Actio redhibitoria*, see REDHIBITORIA ACTIO; *Actio de in Rem Verso*, see VERSO, ACTIO DE IN REM.

Actio directa, Actio contraria.—In the Roman law, the nature and the name of the action by which an obligation could be made effectual depended upon the nature of the contract or fact which gave rise to the obligation. If the object of the contract was to bind the one party to a performance, and the other party to a counter-performance as an equivalent for it, each of the parties, being at once debtor and creditor, could bring an *actio directa* (or *principalis*) against the other. Thus, in sale, the seller's *actio venditi* and the buyer's *actio empti* were both direct actions, and it was the same in the other bilateral contracts. If the contract was unilateral, *i.e.* imposed an obligation on the one side only (*e.g. mutuum* or *stipulatio*), there was only one action competent—an *actio directa* at the instance of the creditor. Certain obligations and contracts, however, stood midway between these two categories, and were called by the civilians "imperfectly bilateral." The primary and essential obligation was upon one of the parties, and could be enforced against him by *actio directa*; but there might be a subsidiary obligation upon the other party, resulting from incidental circumstances connected with the contract, and it might give rise to an independent action, called *actio contraria*. Thus, in commodate, the leading obligation was upon the borrower to return the thing lent, and if he failed, the lender had his remedy in the *actio commodati directa*; but it might happen that the borrower had incurred extraordinary expenses, or had suffered damage, or had some other equitable counter-claim under the contract, and in that case he could avail himself of the *actio commodati contraria*, if he had not obtained satisfaction of his claim otherwise, *e.g.* retention or set-off. The contracts of pledge, deposit, and mandate, and also some of the quasi-contractual relations, such as tutory and *negotiorum gestio*, belonged to this class.—[*Dig.* 13. 6. 17. 1; *ib.* 18. 2. 3. 22; Ersk. *Inst.* i. 7. 32, iii. 1. 24.]

Actio personalis moritur cum persona — "An action for strictly personal wrong dies with the person."—This maxim is used to indicate briefly the rule of law with respect to a special class of actions, which fall by the death of the person originally entitled to sue or liable to be sued, and do not transmit to executors. The expression *actio personalis* must not be understood here to extend to all the actions which fell under that designation in the civil law, or which would be included under the term "personal action" as ordinarily used in modern law. The meaning it is intended to bear in the maxim will be best understood by a reference to the rules regarding the transmission of actions to and against heirs (1) in the Roman system, and (2) in the law of England and Scotland.

Roman Law.—The maxim, although it is undoubtedly of considerable antiquity, does not appear to be derived from the Roman law. It does not occur in the Latin texts, and the Latinity suggests a post-classical origin. The term *actio personalis* is found in a few places in the *Corpus Juris*, but it is always employed as an equivalent for *actio in personam*, *i.e.* it has reference to the primary division of actions into *actiones in personam*, those which were brought against a determinate opponent to enforce an obligation founded on contract or delict, and *actiones in rem*, those which were intended to settle a question of status, of ownership, or other real right, alleged by the pursuer as against all the world. Even in this sense the term is not of frequent occurrence, perhaps because there was no epithet to balance it, *realis* being a mediæval coinage not found in any ancient author.

Now, if the maxim be taken as applying to all personal actions in the technical sense of the Roman lawyers, it will at once be evident that it does not square with their rules regarding the transmission of actions (*Inst.* iv. 12. 1). The general rule was that a cause of action did not fall by the death of either party; it was transmissible both "actively" and "passively," as the civilians express it, that is, both to and against the successors of the parties. *Actiones heredi et in heredem competunt.* There were, however, certain exceptions—

(1) Actions *ex delicto* did not transmit *against* the heirs of the wrong-doer in so far as they were brought to recover a penalty (*Dig.* 47. 1. 1, pr.); and even so far as their object was simply to obtain indemnification for patrimonial loss (*quod ex patrimonio nostro abest*), they were transmissible only to the extent to which the wrong-doer's representatives had been enriched by his delict (*Dig.* 44. 7. 35; 50. 17. 38). The principle of the exception in the case of penal actions is thus expressed: *in pœnam heres non succedit*; but it is limited by another rule, that the heir should not be a gainer by the wrong-doing of his ancestor; accordingly, he was liable to a *condictio ex injusta causa*, on the ground that the estate falling to him had been increased without justifiable cause. On the other hand, where the ancestor had acted fraudulently in a contractual or quasi-contractual relationship, the heir was liable *in solidum* (*Dig.* 50. 17. 152, 3).

Again, (2) certain actions, viz. the *actio injuriarum*, and actions of that type, did not transmit actively, that is, to the heirs of the person who had had a title to raise them. Generally speaking, actions *ex delicto* did transmit actively, *e.g.* those brought to recover damages for injuries to property; it was held that the heir had a title to sue in respect of the wrong done to him and his ancestor jointly by the diminution of the estate of the defunct. But the *actio injuriarum* was considered to be in a peculiar position: it was founded upon an *injuria* in the narrower sense of the word (=*contumelia*, ὕβρις, *Inst.* iv. 4, pr.)—an affront or insult, something said or done with the intention of wounding a man in his honour or good name, such as slander,

libel, assault, etc.; and although it had pecuniary conclusions, it was really intended to appease the wounded feelings rather than to repair patrimonial loss. [A similar distinction is given effect to in Scots law also; see *M'Naughton*, 17 Feb. 1809, F. C.; *Morrison*, 25 May 1809, *ib.*] The same peculiarity was remarked in the *actio de calumnia*, *actio sepulcri violati*, the action for recovery of a donation on the ground of ingratitude, the *querela inofficiosi testamenti*, and some others. It was a specialty of the last-named action that any clear manifestation, in the lifetime of the person aggrieved, of an intention to challenge the will, was sufficient to keep alive the right of challenge for his heirs. This small group of actions has been called by the commentators "vindictive" (*actiones vindictam spirantes*: cp. *Dig.* 37. 6. 2. 4, "*injuriarum actio . . . magis vindictæ quam pecuniæ habet persecutionem*"). Such being the gist of these actions, the reason for their exceptional treatment may readily be understood. The wrong involved in these cases was a violation of the "primordial rights" of the individual; and the idea was, that if he did not choose to resent the wrong by taking legal proceedings, it was not for his heirs to resuscitate an affront which he had once allowed to rest, presumably because he had made up his mind to condone it. Condonation extinguished the right to sue (*Inst.* iv. 4. 12); and it was inferred, if no steps were taken to obtain redress within a year.

[The *actio injuriarum* must be distinguished from the action of damages for personal injuries caused by wilful fault or want of due care on the part of another. The ground of action and the remedies available in such a case were quite distinct from the cause of action afforded by an *injuria*. If the injured person was a slave, any wrongful act which deprived him of life or limb was regarded as damage to property (*damnum injuria datum*), and compensation was recoverable for the delict by action under the Aquilian Statute. Where the sufferer was a free man, and the injuries did not prove fatal, the prætor allowed him to sue for reparation in his own right by an adaptation of the action on that Statute (*utilis actio legis Aquiliæ*, *Dig.* 9. 2. 13, pr.); but if he was killed, it appears that no action was maintainable in respect of his death *quia liberum corpus nullam recipit æstimationem* (*Dig.* 9. 3. 1. 5, and 9. 1. 3), just as was the case in England prior to Lord Campbell's Act. It should be observed that all these actions under the Aquilian Statute followed the general rule with respect to the transmission of penal actions, *i.e.* they were actively but not passively transmissible: *hanc actionem et heredi ceterisque successoribus dari constat; in heredem vel cæteros hæc actio non dabitur, cum sit pœnalis, nisi forte ex damno locupletior heres factus sit* (*Dig.* 9. 2. 23, 8).]

Lastly, (3) None of the foregoing restrictions upon the survival of causes of action applied, if the action had been instituted and followed out to the stage of litis-contestation in the lifetime of the original party.

Such being the Roman doctrine of transmission, the maxim can only be reconciled with it in one of two ways: either we must assume (as has been suggested), that *personalis* is a mistake for *pœnalis*, in which case the maxim so corrected might be used to express the special rules governing penal actions; or we must attach a non-classical meaning to the term *personalis actio*, limiting it to action for contumelious wrong done to the person (*injuria*), as opposed to actual damage done to the property (*damnum*). In that sense, the *actio injuriarum* might be characterised as personal, in the same way as a usufruct is sometimes said to be *jus personalissimum*, (*i.e.* it is so closely attached to the personality of the fructuary that it expires with him), or as an action for breach of promise of marriage is held to be strictly personal.

Modern Law.—The maxim has long been a favourite with English lawyers, but its origin has not been made out, and its application has varied with the development of the law. There is the same difficulty attending its use in modern discussions as in harmonising it with the civil law—the leading term "personal action" must be understood in some very restricted sense, otherwise it is a misstatement of the law. In *Finlay* (1888, 20 Q. B. D. 494), where the history and scope of the maxim were remarked upon, it is pointed out that in the older English law survival of causes of action was the rare exception, non-survival being the rule even in actions based on contract; and although judges and text-writers in modern times have been in the habit of explaining that only actions *ex delicto* were within the operation of the principle, "that is a gloss or limitation forced upon the maxim by the exigencies of a growing society" (per L. J. Bowen). The modern interpretation of the maxim is that it applies to torts, and does not extend to such personal actions as are founded "upon any obligation, contract, debt, covenant, or any other duty to be performed." There are, however, many exceptions on the one side and on the other. As regards torts, the rule of the common law has been greatly abridged by statutory exceptions, such as Lord Campbell's Act (see Broom, *Maxims*, 860 *et seq.*), and by the principle laid down in *Phillips* (1883, 24 Ch. Div. 439), that the remedy for a wrongful act done by a deceased person can be pursued against his estate in all cases where property, or the proceeds or value of property, belonging to another person have been appropriated by the deceased person and added to his estate. As regards actions *ex contractu*, it has been decided that an action for breach of promise of marriage, where no special damage is alleged, does not survive against the personal representatives of the promisor, nor in favour of the representatives of the promisee (*Finlay, ut supra*); and, generally, "with respect to injuries affecting the life or health of the deceased . . . the maxim as to *actio personalis* is applicable, unless some damage done to the personal estate of the deceased be stated on the record" (Broom, 858).

Scots law has followed very closely the Roman classification of actions into personal and real, and again into petitory and penal (Ersk. *Inst.* iv. 1. 10 and 14); and the Roman law rules of transmission have been adopted generally. The maxim is not appropriate to Scots law, except in the sense above indicated in connection with the Roman law, and its use is perhaps to be deprecated, owing to the risk of confusion. It does not seem to have been current in Scotland until a very recent period. Thus in the leading case of *Tulloch* (1860, 3 Macq. 783), where an action of damages was sustained against the representatives of a bank director for fraudulent misrepresentations inducing purchase of shares, on the ground that the representatives were *lucrati*, it was argued successfully that the maxim was not a rule of the law of Scotland. It has since been considered and commented upon in *Auld* (1874, 2 R. 191), and in *Bern's Exr.* (1893, 20 R. 859). In the latter case the question arose, in a general form, whether an executor has a title to institute an action of damages for personal injury to the deceased person whom he represents, and a majority out of seven judges decided against the claim of the executor, except in cases like *Auld*, where he can relevantly aver that the injury to the deceased resulted in specific damage to the executry estate. See, on the other hand, *Wight* (1883, 11 R. 217). In *Evans* (1885, 12 R. 1295), it was decided that an action of damages for seduction, under circumstances where there was no element of real damage, but only a claim for *solatium* for wounded feelings, might be constituted and enforced against the representatives of the wrong-doer.

Actio quanti minoris.—See Quanti minoris; Sale of Goods.

Actio Redhibitoria.—See Redhibitoria Actio.

Actions, Divisions or Classes of.—The divisions of actions, afterwards fully treated under their respective titles, will be here briefly explained. There is no division of actions according to the law of Scotland, based on their natural order, which would make the division depend on the classification of the rights to be vindicated or asserted, or the injuries to be prevented or remedied. Such a natural order would require the action which arises from each right possessed, or each injury committed, to be separately treated. Though convenient for some purposes, and attempted as regards common law rights and remedies in some English treatises, even as regards these this method of division has never been, and scarcely admits of being, made exhaustive, as new circumstances give rise to new actions, for which the English law provided by the action on the case and suits in equity, and the Roman by the *actio in factum* and the *actio utilis*. Scottish institutional writers, and writers on practice who have followed them, arrange or group actions according to general forms, which may be readily adapted to the particular case so as to secure the appropriate remedy. When so arranged or grouped, a simple classification, which includes more than one division, and depends for the most part upon the terms of the conclusion of the summons or remedy sought, is useful and familiar in Scottish practice.

Civil and Criminal Actions.

The most general division of actions is into *civil* and *criminal*, but *criminal actions* are commonly called *prosecutions*, when conducted, as they almost invariably are, in the criminal Courts, and will be dealt with under Criminal Prosecution. A few cases in which the Court of Session punishes criminally, as for Malversation in certain offices, or Contempt of Court, will be dealt with under these heads and that of Petition and Complaint, the form used when a written complaint in the Court of Session is necessary. It requires, however, to be kept in view that a crime is also a civil wrong, and as such proper to be dealt with under Civil Actions, which provide an appropriate remedy for the injury done by it to the civil right.

Civil Actions and Petitions.

The most general division of *civil actions* is the formal one of *actions* and *petitions*, for a petition is also an action in the wider sense; nor is there anything essential in this formal distinction, as is shown by the fact that an action in the Sheriff Court is called a petition, because its initial writ is in the form of a petition, and not of a summons, as in the Court of Session. The former term lays stress on what is done by the pursuer, and the latter on what is asked or prayed to be done by the Court, but in every case the party who originates proceedings must both raise his suit and state his remedy. In Court of Session procedure *actions* are distinguished from *petitions*. The former are ordinary suits, the latter are extraordinary equitable or statutory remedies. The former are commenced by a summons with definite conclusions, which embody the remedy asked. The latter conclude with a prayer, which, though it also contains a statement of the remedy prayed for, generally adds an alternative, craving such other

remedy as the Court may think proper in the circumstances. Although both may become contentious, and contradictors are called in both, who are styled defenders in actions and respondents in petitions, actions are from the outset more definitely contentious, and contemplate particular parties, who will be bound by the issue of the suit. In petitions it is a question now for the most part depending on Statute who will be bound by the decree, and to what effect they will be bound.

Division of Civil Actions according to Conclusions.

Civil actions, as distinguished from petitions, are divided, according to their conclusions, into declaratory, rescissory, petitory, possessory, competitions, and actions relative to execution, called in Scottish law, diligence, because it excuses the user of negligence when carried into execution timeously (Stair, iv. 41. 1), and so confers a preference in competition with creditors who have not used diligence. They are also divided, according to their position in the course of procedure (*Cursus Curiæ*), into Outer and Inner House, Principal and Accessory: but Inner House actions have almost disappeared, and Accessory actions have been almost entirely superseded by motions.

A declaratory action or Declarator is an action whose conclusions clear or declare by a definite statement the nature or extent of a right which is contested, or which is imperfectly defined by the terms of its title. It has been praised by English lawyers, who seldom approve peculiarities of Scottish procedure, and copied in The Legitimacy Declaration Act (21 & 22 Vict. c. 93). An action of Constitution to ascertain what is the amount of a debt on open account, or that a debt was due by a deceased debtor and remains due from his estate, is a declaratory action. A Rescissory action has been called a negative Declarator, for its object is to rescind or annul a pretended right which has been expressed in writing by a deed, contract, or the minute of a resolution of a meeting, or entries in or docquets of accounts, upon the ground that the writing challenged is either invalid or fictitious. Rescissory actions are (1) simple or single Reductions, or (2) Reductions improbation, the latter of which are or were used when the right to be annulled arose from a document actually forged, or by fiction alleged to be forged. The summons adds to the conclusions of simple reduction, conclusions for improbation, by which it is declared that the document "shall be held false and forged and make no faith in judgment or outwith"; "to make faith" being the legal expression for a document which is probative or capable of use as proof. Reduction improbation has now almost gone out of use, and simple reduction is used even in case of forgery. All Reductions might have been expressed by declaratory conclusions, *e.g.* that the document challenged is not valid or shall not make faith, but the conclusion which calls for production of the documents to be reduced under the certification (penalty) that if not produced they will be reduced, as well as some other advantages in the forms of older procedure, gave reduction, especially when joined with improbation, a stronger effect. Stair says that the process of Reduction improbation, "invented since the College of Justice, is peculiar to this nation, and is a more absolute security of men's rights than any form of process in Roman law or in any neighbouring nation" (Stair, iv. 20. 8). But now the common form of summons and procedure might well be used in all Reductions. They have been found sufficient for rescissory actions so far as introduced into the Sheriff Court. Reduction is the form also used to set aside decrees, but when so used it is a process of review and not an original action. A Petitory action,

as distinguished from a Possessory, is not one which asks the Court to decree something, for that is common to all actions, but one which asks for decree on the question of absolute or permanent right, and not merely of the right of possession, which is by its nature limited, and forms the proper object of a possessory action. Actions for payment, or for count and reckoning, delivery, implement, or damages, are all petitory actions. The action of Poinding the Ground is a petitory action by which the superior for his feu-duty relief or composition, or a heritable creditor for his debt, obtains letters of poinding the moveables on the land belonging to the debtor or his tenants (to the extent of their rents due). The action of Maills and Duties, to recover rents, when founded upon title alone without possession, is also a petitory action, and all persons with competing titles must be called as defenders. Many Interdicts, especially when brought in the Sheriff Court, and other actions which, though not called interdicts, have the effect of maintaining the state of possession for a longer or shorter period, according to circumstances, are possessory actions. Interdicts in the Court of Session may be obtained either in the process of Declarator and Interdict or of Suspension and Interdict, called simply Interdict in the Sheriff Court. The action of Removing the possessors of land and houses, and the action of Maills and Duties, to recover rents, when founded on a *primâ facie* title and possession, are also deemed possessory actions when not brought by the party who has the absolute right of property; and so in the Sheriff Court is any action which seeks to retain the possession held for the last seven years, to the decree in which is given the special name of possessory judgment. In modern practice, Possessory actions all, or almost all, take the form of Interdicts: but in older practice, Molestations, Ejections, Spuilzies, now obsolete or superseded by simpler forms, fell within this class.

Competitions are actions in which otherwise than by direct action more than one party claims the same right or property, of which Multiplepoinding is the common example. Multiplepoindings are generally limited to moveable property or rights for which a third party is bound to account to the common debtor of the claimants; and there may be competition in other actions, as in all actions of the nature of diligence, such as Adjudications in the case of heritable or real estate, Furthcomings in respect of moveable estate in the hands of a third party, and Ranking and Sale of the bankrupt debtor's land, or Sequestration of his whole estate, when more than one creditor claims right to the debtor's property, or part of it.

Adjudication is the action by which a creditor asks to have his debtor's heritable property adjudged to him for his debt, whether in security or with or without power of redemption. Poinding is the action by which a creditor asks to have his debtor's moveable property in the debtor's possession adjudged. Furthcoming, which follows on arrestment, is the action by which a creditor asks to have his debtor's moveable property or money arrested in the hands of a third party, called the common debtor, transferred to him. Sequestration is the action by which, in case of bankruptcy, the whole of a debtor's estate is transferred to the trustee for the purpose of equitable distribution amongst his whole creditors. Apart from ordinary Interdicts with reference to possession common to both the Sheriff Court and Court of Session, the latter Court has a form of action special to itself relative to the execution of diligence, called Suspension, which must be distinguished from Suspension as a process of review. The object of this action is to stay the execution of real or personal diligence. It is divided into Suspension and Suspension and Interdict, which apply to the former, and Suspension and Liberation, which applies to

the latter, but is seldom now necessary, as civil imprisonment is now limited to decrees for taxes or aliment, or *ad factum præstandum*. These actions or forms of process will be treated under the heads of BILL CHAMBER and SUSPENSION. They are taken through the Bill Chamber of the Court of Session with the supposed object of expedition; but as they afterwards pass into the Court of Session, the result is to create delay by double litigation, and this part of Court of Session procedure should be reformed.

CONSISTORIAL AND MARITIME ACTIONS.

The foregoing division of actions relates to their form; but there are two classes of action which require separate treatment, because of their substance—Consistorial actions, relating to marriage, and Maritime actions, relating to ships. Consistorial actions belonged to the Ecclesiastical Courts of the bishops' officials, at the Reformation succeeded by commissaries of the Protestant Consistorial Courts, and, after some changes in the constitution of the Commissary Court, were finally transferred to the Court of Session by 1 & 2 Will. IV. c. 69, s. 33; 13 & 14 Vict. c. 36, s. 16. Maritime civil actions formerly belonged to the Court of the Admiral, but have also been transferred to the Court of Session by the Act 1 Will. IV. c. 69, s. 21. Each of these classes of action retains peculiarities of procedure, in part from their origin in other Courts and in part from their nature, which make it expedient they should be considered under the titles of CONSISTORIAL and MARITIME, as well as under the special actions which fall within these general heads.

PRINCIPAL AND ACCESSORY ACTIONS.

The division of actions into Principal and Accessory depended on the necessity which arises in the course of the action called Principal to invoke the aid of the Court to enable its object to be carried on, or carried out, in incidental or in unexpected circumstances. An action of Wakening was necessary where, in an ordinary action in the Outer House, no step had been taken by either party for a year and day; but this does not apply to Summary Petitions or Sequestrations, and a motion for wakening under the Court of Session Act, 1868, is now substituted for it. An action of Transference was necessary to transfer the suit in the case of the death of a party, but this was not necessary in the case of a pursuer since 1693, c. 15, or of a defender since the Act of 1868 substituted a similar motion for this action. A supplementary action, commonly called a Supplementary Summons, was at one time necessary to restrict, alter, or add to the parties or conclusions of the original summons. But restrictions of the conclusions are now competent by minute on the summons, (31 & 32 Vict. c. 100, s. 23); and the power of amendment is so wide under s. 29, that it is thought the only cases in which a supplementary summons is necessary, is where it is required to introduce an additional independent pursuer in any case, or an additional defender without his consent. Some think these rules are inexpedient, and that the power of amendment should extend to the introduction of new parties to the record; but the failure to call the proper parties is a blunder so gross, and their being called alters so materially the nature of the action, that it is probably better it should be done by a new summons. It must be kept in view that a party can always sist himself if he has an interest as defender (*Gill* v. *Cutler*, 1895, 33 S. L. R. 218), and that the proper representative of a party, or a party who comes into existence pending process, can always be called.

Another accessory action, the action of Exhibition for the production of a document, and of Transumpt, the name given to it when it is desired to transcribe a copy of the document, is rarely if ever used, though still retained in Books of Style, for its purpose is more expeditiously attained by a commission and diligence to recover documents for the purpose of proof. This action must, however, be distinguished from that of Exhibition *ad deliberandum*, to enable an heir to decide whether he shall make up his title, which is a principal action (*Juridical Styles*, 3rd ed., iii. 21); and also from the action of exhibition and delivery, in which the pursuer claims right to the delivery of a document as his property. The accessory action called Proving the Tenor is brought to restore from drafts, scrolls, or otherwise the terms of a lost document, that it may be used as equivalent to the original. It is still necessary, except when the document is a step of process in an action (other than the interlocutor sheet), in which case a copy may be proved in the process (31 & 32 Vict. c. 100, s. 15).

Inner and Outer House Actions.

The division of actions into Inner and Outer House actions, once of much, is now of little, importance, for the ordinary action now always commences before one of the Lords Ordinary in the Outer House, and reaches the Inner House only by reclaiming note, or, exceptionally, by report of the Lord Ordinary. The following actions, however, are still called Inner House actions, and certain steps in their procedure are taken in one of the Divisions of the Court, and not before a Lord Ordinary, as will be explained under their respective titles:—(1) Proving the Tenor, (2) Division of Commonty or Runrig, (3) Ranking and Sale, (4) Cognition and Sale.

Division of Petitions.

The division of Petitions into those (1) which must be brought before the Inner House in one of its Divisions, (2) which must be brought before the Junior Lord Ordinary, (3) which may be brought before any Lord Ordinary, and (4) which may be brought in vacation as well as in session, is a division of importance in practice, but will be more properly explained under Petitions, as it depends little on principle, and almost entirely on real or supposed convenience in the distribution of business. The only point of principle is that petitions based on the supreme equitable jurisdiction of the Court of Session (see Nobile Officium) must be brought before one of the Divisions.

Besides the classes of action above explained, there are a few kinds of actions which have special conclusions — the action for Choosing Curators by minors, the action for Making up Tutorial or Curatorial Inventories, the action for Cognition of Insane Persons, which alone retains the older name of brieve, and is in the form of a petition presented to the Lord President (31 & 32 Vict. c. 100, s. 101), and the actions of Division of Heritable Estate and of Division and Sale, which will be best explained under their respective titles. Procedure by Special Case, which is always presented to one of the Divisions, introduced by 31 & 32 Vict. c. 100, s. 63, has largely superseded Multiplepoindings in amicable suits, cases on the construction of Wills or Statutes, or any cases in which parties can agree as to the facts and the questions of law they desire to have decided. But the case must always raise a definite dispute in law between the proper parties, and the test is that the dispute is one which might be tried by action between the parties to the case. The parties may

agree to exclude appeal, and as to expenses; but if there is no agreement, appeal to the House of Lords is open, and the Court may award expenses. [Stair, iv. 3, 569 *et seq.*; Ersk. iv. 1. 18 (Nicolson's ed., 1080 *et seq.*); Mackay, *Manual of Practice*, 175–82; *Juridical Styles*, 3rd ed., iii. 8 *et seq.*]

Actions, Ordinary Procedure in Court of Session.—An *action* is the name for the proceeding in a Court of law by which a right is defined, vindicated, or enforced, or a wrong is redressed by restitution of the right, or by reparation for its loss or injury. It was more briefly defined in Roman law, from which the term was taken, as "*Jus quod sibi debetur judicio persequendi*," and is frequently called a suit in popular language and English procedure. It is itself a right, and one of the most important rights, competent to every citizen, and in some cases to persons who are not citizens (see ALIEN; TITLE TO SUE). It has been described as a right in action whose owner asserts its existence by legal process; for whenever attacked or threatened, every right has its appropriate action, and every wrong its appropriate remedy. By right must be understood a right which the law recognises; for there may be imperfect rights, sometimes called moral as distinguished from legal, which the law does not recognise, and imperfect laws which do not recognise all the legal rights which are recognised in better systems of jurisprudence. It is proposed here to follow, from the preparation of the summons to the extract of a final decree, the normal course of an ordinary action in the Court of Session, as distinguished both from actions which have specialties in procedure and from petitions. Its course on APPEAL to the HOUSE OF LORDS will be treated under that head. The course of any action, in so far as it differs from the normal, will be dealt with under the titles of such actions, *e.g.* ACCOUNTING, DIVORCE, SUSPENSION, REDUCTION; and the course of appeal from the Sheriff will be dealt with under APPEAL FROM THE SHERIFF COURT. The steps in procedure will also be treated in detail under their own titles, *e.g.* SUMMONS, CITATION, APPEARANCE, DEFENCES, and only the outline of an action will be here given. An action for payment of a sum of money alleged to be presently due may be taken as the representative of an ordinary action.

SUMMONS.

An action commences by a summons, which is addressed in the name of the sovereign to messengers-at-arms, as his sheriffs or executive officers, sets forth the names and designations of the pursuer and defender, and refers to the grounds of action stated in the annexed condescendence and pleas-in-law. It concludes that the defender should be decerned and ordained by the Lords of Council and Session to pay to the pursuer the sum sued for, with legal interest either from the date of citation or from an earlier date, if interest was due earlier, and a sum named as expenses of process, or "such other sum as the Lords shall modify," and ends with what is called the Will, stating the will of the sovereign that the messenger shall summon the defender to appear before the Lords to answer in the matter libelled at the legal dates after citation (*inducie*), with certification, which means that if he does not appear decree may be given against him in absence, in terms of the conclusions. The *inducie* are seven days when the defender is in Scotland, unless in an island of Scotland, and fourteen days when he is in an island or furth of Scotland (31 & 32 Vict. c. 100, s. 14).

The Will, after the summons is signeted, becomes the warrant for citation, and there may also be inserted warrants to arrest and inhibit on the depend-

ence (31 & 32 Vict. c. 100, s. 18), by which the defender's property, subject to the diligences of arrestment and inhibition, is attached to abide the issue of the action.

Condescendence and Pleas-in-Law.

The condescendence which follows states in articulate articles the facts constituting the grounds of action. Argumentative and, still more, libellous matter is improper, and the Court may order it to be deleted. The condescendence does not, as a rule, enter into details of evidence. This rule, however, requires qualification in certain cases, as when fraud is averred, in which case the mode of fraud, and parties charged with it, must be clearly stated (*Thomson & Co.*, 1895, 22 R. 472), or in equitable actions which depend on a series of facts and circumstances. The details of the subject are more appropriate to the article on Pleading (*q.v.*). The condescendence is followed by a note of pleas-in-law, which consists of a concise statement in articles of the legal propositions on which the action is rested, and commonly concludes with a general plea that, in the circumstances stated in the condescendence, the pursuer is entitled to decree as concluded for. The form of summons is regulated by 13 & 14 Vict. c. 36, where examples are given in Schedule A, and by 31 & 32 Vict. c. 100.

The summons, condescendence, and pleas are in one paper, signed on each page by a law agent.

Signeting of Summons.

The summons having been drawn in this form by a law agent or advocate, the next step is to have it signeted. This is done by the Deputy Keeper of the Signet sealing the Writ with the signet, and all summonses must before signeting be subscribed by a Writer to the Signet on the last page, which he is bound to do, on request of a law agent, for 2s. 6d. (31 & 32 Vict. c. 100, s. 13). As the responsibility rests solely on the law agent, this formality should be abolished. The date of signeting is the date of the summons. After signeting, it is served on the defender, and such service is called citation; after which the action depends (*Aitken*, 1863, 1 M. 1638; *Alston*, 1887, 15 R. 78; *Symington*, 1894, 21 R. 424), necessary motions may be made in it, the pleas of *lis alibi* or *pendente lite nihil innovandum* are applicable, and the long prescription, both positive and negative, is interrupted, though after seven years the citation itself prescribes (1669 c. 10).

Citation.

Citation may be (1) personal, by delivery of a copy by a messenger-at-arms, or sheriff officer when there is no messenger-at-arms (31 & 32 Vict. c. 100, s. 19), (2) at the dwelling-place by such officer, under the Act 1540, c. 75, (3) by registered letter, under 45 & 46 Vict. c. 77, which is now the almost universal method, or (4) edictal, when the defender is outwith Scotland, by delivery of a copy at the office of the Keeper of Edictal Citations in the Register House, Edinburgh (A. S. 24 Dec. 1838, s. 7). Personal citation or by registered letter is expedient when possible; for the forms of the Act 1540, c. 75, are technical, and mistakes may easily be made. Edictal citation alone should, if possible, be avoided. In consistorial actions, if the defender can be found, there must be personal service or by registered letter; and when he cannot, service on the children of the marriage and one or more of the next of kin, when known and within the United Kingdom, is necessary (24 & 25 Vict. c. 86, s. 10). In all cases where the defender is resident in England or Ireland, there must be, in addition to edictal citation, reasonable notice of the summons to his known agent in Scotland, or to the defender at his residence or place of

business (A. S. 18 Dec. 1868, s. 182). Service may be accepted and citation dispensed with by consent of the defender's agent, except in a consistorial action (24 & 25 Vict. c. 86; Conjugal Rights Act, 1861, s. 10), and an action of constitution and adjudication (31 & 32 Vict. c. 101, s. 60; Titles to Land (Scotland) Act, 1868).

The Court is strict with regard to the forms of citation, but its importance is less since it has been provided that no one after appearing can object to the regularity of his citation (31 & 32 Vict. c. 100, s. 21).

Calling.

After the expiry of the term of citation in the summons (*inducia*), the summons may be called on any sederunt day in session, or box day in vacation or the Christmas recess. To enable it to be called in session, one day, and in vacation two days, before the calling-day, the pursuer's agent or his clerk lodges with one of the assistant clerks the summons itself, with a note on the margin (called the Partibus) stating the names and designations of the parties, the name of the pursuer's counsel and agent, the Lord Ordinary and Division of the Court before whom the action is to proceed, for the pursuer has the choice of these, unless altered subsequently by the Lord President, and also an inventory of process in duplicate, in which the description of the summons and any papers produced with it are entered (A. S. 11 July 1828, s. 27), and a blank interlocutor sheet, in which all interlocutors and decrees of Court are subsequently entered.

Entering Appearance.

The defender's agent may enter appearance on the day of calling, or either of the two days following, and the summons cannot be enrolled to take decree in absence till the last of these days, unless by special leave of the Inner House, which is rarely asked or given (A. S. 12 July 1828, s. 29), and was refused even when the day before their expiry was the last of the session (*Zizinias*, 1861, 5 M. 1177). After entering appearance, the defender's agent is entitled to borrow the process, and is bound to return it on or before the tenth day thereafter; and if he does not, the clerk of process recovers it by process caption (31 & 32 Vict. c. 100, s. 12).

Procedure in Absence.

When no appearance is entered before the expiry of the second day after calling, or no defences are lodged before the expiry of the tenth day after calling, the action may be enrolled either in the Lord Ordinary's Roll of Undefended Causes, or, if any explanation is necessary, in the Motion Roll for decree in absence either in session or vacation. Defences, when tendered, have sometimes been received at this stage (*Thomson* v. *Munro*, 1882, not reported), and process has been sisted to allow a pauper to apply for admission to the Poor's Roll. Other urgent and necessary motions might be made, but in general nothing is done until the case is in the Adjustment Roll after defences are lodged, and in the Roll of Undefended Causes if they are not. In the Roll of Undefended Causes the Lord Ordinary, according to the Statute, shall, without attendance of counsel or agent, grant decree in absence in terms of the conclusions, or subject to such restrictions as may be written on the summons by the pursuer's agent. The practice is for the Clerk of Court to write the decree and hand it to the Lord Ordinary, who signs it, generally without consideration: but it would be desirable that no decree even in absence should be signed without the same consideration which the judge gives to decrees in petition procedure.

In session, within ten days from the date of the decree in absence, the defender may enrol the cause in the Motion Roll, and move for recall of the decree; and on lodging defences, and payment of £2, 2s. to the pursuer, he is entitled to have it recalled. If the ten days expire in vacation or recess, the defences are lodged with the clerk of process, and the decree is recalled at the next sitting of the Lord Ordinary on the Bills (31 & 32 Vict. c. 100, s. 93). Decrees in absence are not granted without proof in consistorial actions, or in provings of the tenor; and possibly a pursuer might be allowed, on cause shown, to lead proof in any case (Stair, iv. 3. 2). It was allowed in an undefended declarator of property (*Russell's Trs.*, 1856, 3 M. 850). But the decree after such proof would still be a decree in absence if no defences were lodged. After ten days and taxation of expenses, decree in absence may be extracted. Such decree, if a charge follows on it not suspended within sixty days, or if a charge cannot follow, after twenty years, provided there has been personal service or appearance for the defender, is entitled to the effect of a decree *in foro* (31 & 32 Vict. c. 100, s. 24). A decree in absence may be brought under suspension by 1 & 2 Vict. c. 86, upon consignation of expenses, within sixty days from a charge, or under reduction within forty years, usually only on condition of payment of expenses; but if there has been personal service or appearance, only within twenty years. The *onus* is on the defender, who has allowed decree to be taken, to show it ought not to have been pronounced.

Protestation.

The defender has a remedy called protestation, which is the counterpart of the decree in absence, when the pursuer does not timeously proceed with his action. The only protestation now used is for not calling the summons within three days after the expiry of the *inducice*. This is done by lodging a note with one of the Outer House Clerks of Court "for not calling and insisting in the summons," stating its description and date of signeting, with the name of the counsel and agent for the defender. After being marked by the clerk, it is returned to the defender's agent, who delivers it to the keeper of the Minute Book, by whom it is entered of the date it is received, and the Minute Book, being published, conveys notice of the protestation to the pursuer's agent. Extract of the protestation is competent after nine free days; but the pursuer can be reponed by lodging the summons, with a view to calling, not later than ten days after the protestation has been given out for extract, on paying the defender £3, 3s., or consigning that sum in the hands of the clerk of process (13 & 14 Vict. c. 36, s. 23.) If this is not done the action is at an end, and, unless by consent of the defender, a new summons must be raised if the pursuer desires to proceed further with his suit. Even without protestation, the summons cannot be called after a year and day from its date. The protestations for not enrolling and insisting are no longer used, for if the pursuer does not print the record within eight days after defences have been lodged, the defender is entitled to move for decree by default, which is a more effective remedy (31 & 32 Vict. c. 100, s. 26), or he may himself print the record and proceed with the action.

Defences.

Defences are due on or before the tenth day after calling of the summons, but if on a Saturday or Sunday, on the Monday following (6 Geo. IV. c. 120, s. 3; A. S. 11 July 1828, s. 114). They are in the same form as the condescendence and pleas-in-law to which they are the answers; but when the defender has a counter case depending on a separate series of

facts, it is proper for him to make a separate statement of facts, in articles similar to the condescendence. For the sake of avoiding specific answers or an order of revisal, it is not uncommon to make such statement in the guise of an explanation in one or more of the answers to the condescendence; but this is not proper pleading when there is truly a counter case, and not merely a denial or different explanation of the facts which the pursuer makes the ground of his case. Defences with their pleas-in-law must be signed by counsel, although the summons with the condescendence and pleas-in-law is signed by an agent. The answers or statement of facts contain only the facts which constitute the necessary ground of defence. Irrelevant, argumentative, or defamatory matter is improper, and may be ordered to be expunged. Defences may be dilatory or preliminary, which, if successful, only put an end to or suspend the particular summons or instances; or peremptory or on the merits, which finally decide the case raised between the parties; but the different kinds of defences require separate treatment under that title.

Revisal and Adjustment of Record.

After defences have been lodged, either party may, under the Statute, move for a revisal (31 & 32 Vict. c. 100, ss. 25, 26); but now alterations are, as a rule, made on adjustment, without order for revisal. Where the defender has made a separate statement of facts, the pursuer should answer specifically the defender's statement (*Reid*, 1887, 14 R. 770). The pursuer is bound to print the record, and within eight days from the lodging of the defences or revised pleadings he must deliver the printer's proofs to the agent of the defender and to the clerk to the process, who transmits them to the Lord Ordinary. The Lord Ordinary then directs the case to be put to the Adjustment Roll not less than four or more than six days thereafter, when the record is adjusted and closed. If the pursuer fails to deliver these proofs, the defender can enrol and take decree of absolvitor by default (31 & 32 Vict. c. 100, s. 26), and such decree is a decree *in foro* (*Forrest*, 1875, 3 R. 15).

Large alterations are frequently made at adjustment, and even new grounds of action or new pleas are stated. In many cases this is the stage when senior counsel are first consulted. Revisals are now seldom ordered or allowed, but, on cause shown, adjournments are allowed in the Adjustment Roll, to enable the record to be completed on full information.

Procedure when Record closed.

When the record is closed, the procedure which the action will afterwards take should be fixed; and this is usually done by an order for proof, or by sending the case to the Procedure Roll. The procedure at closing the record, regulated by the provisions of A. S. 10 March 1870, ss. 1, 4, which have been substituted for those of 31 & 32 Vict. c. 100, s. 27, is—(I.) If the parties renounce probation, the Lord Ordinary appoints the cause to be debated in the Debate Roll, and the clerk of the Lord Ordinary enrols it forthwith in that roll, without prejudice to the Lord Ordinary or Inner House ordering proof at any after stage. A separate Debate Roll is now rarely made up, and even cases in which probation is renounced are sent to the Procedure Roll. (II.) If any of the parties do not renounce probation, the Lord Ordinary requires them to state what proof they propose; and if the parties agree that proof is necessary, and the Lord Ordinary is satisfied of the propriety of the proof proposed, he orders it to be taken. (III.) If the parties are at variance whether there shall be proof or what proof is required, or if any of them contend that certain pleas shall be disposed of before proof,

the Lord Ordinary appoints the cause to be enrolled in the Procedure Roll, and this is done forthwith by the Lord Ordinary's clerk.

Present Practice as to Debates in Outer House.

Practice has somewhat modified these proceedings. The Debate Roll is now practically abolished, and parties are not asked to renounce probation. When proof is not at once ordered, the question of its necessity and its extent are discussed in the Procedure Roll. Cases in the Procedure Roll are now often heard only after considerable delay, owing to (1) the disuse of a Debate Roll, (2) the number of proofs fixed and the inexpediency of detaining witnesses, and (3) the number of causes in which some counsel are engaged, which renders it difficult to obtain their attendance, notwithstanding the rules the Court has made to obtain it (A. S. 15 July 1865, amended by A. S. 2 November 1872), for these rules are often broken by consent of agents and counsel, and no sufficient compulsitor has yet been found to secure their observance. This could be done by enforcing the same rules in the Outer as in the Inner House. After debate by one counsel on each side, the Lord Ordinary disposes of the action if possible, and generally by a decree which is final in the Outer House; but if it appears to him necessary, he makes a remit, or orders a proof, or postpones the decision of some part of the case.

Modes of Proof.

When the action requires proof before discussion, owing to the parties being at issue on material facts, and this occurs more frequently in modern practice on account of the reluctance of judges to decide cases upon the relevancy, the mode of proof requires to be considered. Proof before the Lord Ordinary under the Evidence Act (29 & 30 Vict. c. 112), is now the general mode, and, in the ordinary action of debt, whose course is here followed, will be adopted if proof is necessary. The cases in which Jury Trial or Proof by Commission is competent or necessary will be stated under these titles. The proof before a Lord Ordinary may be granted "before answer," when questions of relevancy are reserved, or may be limited to any part of the case which the Lord Ordinary thinks proper for proof. But the usual proof granted is a proof to each party of his averments, and to the pursuer a conjunct probation (*Mags. of Edinburgh*, 1862, 1 M. 13).

The defender must lead his proof in answer to the pursuer's proof along with his own proof, for a proof in replication is rarely granted. The pursuer generally leads his whole proof at once, and does not avail himself of the allowance of a conjunct probation. The proof is taken at a diet fixed by the Lord Ordinary, and, in practice, always in Edinburgh, though it might be competent to fix the proof elsewhere. The proof must be taken continuously, unless on special cause shown for an adjournment (31 & 32 Vict. c. 100, s. 3; *Birrel*, 1868, 6 M. 621). The diet may be either in session or vacation; and it is provided that all cases ready for proof at the end of the summer or winter session shall be tried before the Lord Ordinary, or some other judge for him, at his sittings in the ensuing vacation (31 & 32 Vict. c. 100, s. 33). But there is so great an indisposition on the part of all persons concerned to try cases in vacation, that this is seldom done except during a few days after the close of session.

Producion of Documents.

The time and manner of the production of documents is an important matter in the practical conduct of an action, and formerly strict rules

were enforced with regard to it. But now, while it is proper to produce documents founded on in the summons or defences along with the pleadings, there is no incompetency in producing any document later (31 & 32 Vict. c. 100, s. 99), and the condition of payment of expenses is seldom enforced. Nor in proof before the Lord Ordinary does the rule in jury trials apply, that documents should be produced eight days before the trial (A. S. 16 Feb. 1841, s. 19). If surprise is apprehended, or it is necessary for the opposite party to see documents not produced in order to prepare his proof, his course is to apply for a diligence to recover them.

Incidental Motions.

A variety of incidental motions may require to be made in the course of an action, usually in the Outer House, prior to the closing of the record, but sometimes subsequent to that stage, or in the Inner House. The principal of these are the motions to sist a mandatary, when a litigant is not resident in Scotland; to sist a new party to the action; to sist the action itself; for leave to amend; for commission and diligence to recover documents from havers, *i.e.* holders of the documents; for wakening, transference, or wakening and transference; to remit or transmit on the ground of contingency; to conjoin actions; for judicial remit to a skilled person to report, or reference to an arbiter; and for leave to abandon or to disclaim an action. Notice of motions ought to be given at twelve o'clock noon two days before the motion appears in the Lord Ordinary's Motion Roll, and if for Tuesday's Motion Roll, on the Saturday preceding (A. S. 11 Aug. 1787). This Act is often neglected, and shorter notice given; but if attention is drawn to it, it must be enforced. The subjects of these motions, which form important points in practice, will be given under their respective titles. Steps of process other than the summons and interlocutor sheet may be borrowed on receipt, and when not returned can be recovered by the diligence of process caption.

Proof before Lord Ordinary.

The conduct of the proof before the Lord Ordinary or other judge is similar to that in jury trial (*Stewart*, 1870, 8 M. 821), and is generally subject to the rules of the Jury Trial Acts of Sederunt. The evidence is taken either (1) by a shorthand writer at length, or (2) dictated to him by the judge, or (3) by the judge himself. The first is the common method, although particular passages are often dictated by the judge to the shorthand writer. The method of allowing the shorthand writer to take the whole, often prolongs proofs and adds to their cost. After the proof is closed on both sides, counsel are heard either at once or at an adjourned diet, and thereafter the Lord Ordinary at once, or after taking time to consider, pronounces judgment, and issues an interlocutor in terms of it.

Reclaiming Notes.

Unless reclaimed against within twenty-one days, the time allowed for reclaiming against interlocutors on the merits (6 Geo. IV. c. 120, s. 18: 13 & 14 Vict. c. 36, s. 11; *Bannatine's Trs.*, 1869, 7 M. 817: *Fraser*, 1872, 10 M. 421), the decree of the Lord Ordinary becomes final, and may be extracted and put into execution. It is as decisive of the action as a judgment of the Inner House or the House of Lords, and no appeal to the House of Lords is competent without first reclaiming to the Inner

House. When the party against whom the judgment has been given determines to reclaim, the procedure is as follows:—

If the interlocutor, either by itself or in connection with prior interlocutors, disposes of the whole subject-matter of the cause (31 & 32 Vict. c. 100, s. 53; *Baird*, 1882, 9 R. 970), the party desiring to reclaim must present, within twenty-one days from its date, a reclaiming note to one of the Divisions, praying to have the interlocutor recalled, and he must at the same time box copies of the note to the judges, and deliver six copies to the known agent of the opposite party (6 Geo. IV. c. 120, s. 18). Failure to present the reclaiming note within twenty-one days is fatal to it, but failure to deliver the copies to the opposite party may be excused by the Court (*Campbell*, 1868, 6 M. 563). If the reclaiming days expire on Sunday, the note may be lodged on Monday (*Russell*, 1874, 2 R. 82). A mistake as to the running of the reclaiming days is not a mistake or inadvertency which will entitle a party to have his reclaiming note received after their expiry under 48 Geo. III. c. 15, s. 16 (*Williams*, 1841, 3 D. 1014). But other mistakes or inadvertencies have been excused under that Act upon a reclaiming petition, now note, being presented with leave of the Lord Ordinary (*Miller*, 1829, 7 S. 716; *Plock*, 1841, 4 D. 271; *Alexander*, 1845, 7 D. 814; *Waterston*, 1852, 14 D. 546). The reclaiming note in an ordinary action is moved in the single Bill Roll in the Division of the Inner House to which it has been marked in the partibus, and if no objection is taken to its competency, is sent to the Long Roll, a section of which is put out usually twice a week by the President of the Division for hearing in the Short Roll, stating the first day on which the cases in it may be heard. As soon as it is so put out, the agents are entitled to instruct counsel to attend, and if the note is withdrawn subsequently, the party who withdraws it is liable in the fees of counsel (*Wylie*, 1837, 16 S. 111). If withdrawn before counsel are instructed, a modified sum of £2, 2s. only is usually allowed.

Debate in Inner House.

The reclaiming note is debated in the Inner House usually by two, but in short or unimportant cases by one counsel on each side; judgment is generally given after the debate, though in cases of difficulty it may be reserved, and when there is serious difficulty or division of opinion the Court may send the case for argument before seven judges or the whole Court. The Inner House determines the question of expenses at the same time as the merits (6 Geo. IV. c. 120, s. 21); and though it may fix the amount, usually remits to the Auditor to tax the account of the successful party.

Taxation.

The taxation is conducted before the Auditor of Court in his chambers, under the rules of A. S. 6 Feb. 1806, 11 July 1838, and 11 July 1876; and although his report may be objected to, the Court rarely alters his findings in this matter, and only upon a question of principle or large amount. If the objector is unsuccessful, he must pay the expenses of the discussion on the taxation; but if the Auditor reports a point for the consideration of the Court, or the Court reviews the Auditor's taxation, the expenses of the discussion may be given to the objector. After the Court has given decree for the expenses on the Auditor's report, the action is concluded. A motion by counsel is necessary for approval of the Auditor's report, and the losing party will be liable in the fee unless he tenders the expenses,

with dues of extract, in which case it is unnecessary to have the report approved of (*Scott*, 1860, 22 D. 922).

EXTRACT AND UNEXTRACTED PROCESSES.

In order to put the decree in force by diligence, it is necessary to obtain an extract or statement of its substance from the office of the Extractor. This may be done on the eighth day after decree (Memorandum by Extractor printed in *Parliament House Book*), but is sometimes delayed by the pressure of business in the Extractor's office. The decree, signed by the judge, might with advantage be made a sufficient warrant for diligence, and the cumbrous and dilatory procedure of Extract abolished. The extract of final decree terminates the process, which for all purposes except correction of clerical errors is beyond the power of the Court (*Marquis of Lorne*, 1796, Hume's *Decisions*, 14; *Buchanan*, 5 Feb. 1824, F. C.; *Officers of State*, 1845, 7 D. 884).

If extract is not taken within a year from the date of the final decree, the clerk of process remits the whole process to the Lord Clerk Register under the provisions of A. S. 22 January 1876. All persons having interest may inspect such a process on payment of certain fees (s. 5), but the process cannot be borrowed; and if required for any purpose, the Court must be moved to order its retransmission to the office of the Clerk of Court to which the process belongs (s. 6).

[Stair, *Inst.* iv.; *Juridical Styles*, 3rd ed., iii.; Scott & Brand, edition of 31 & 32 Vict. c. 100; Court of Session Act, 1868; Coldstream, *Court of Session Procedure*; Mackay, *Manual of Practice*, 182, 228 ("Procedure in Ordinary Action"), 333–6 ("Proof before Lord Ordinary"), and 632, etc. ("Expenses in Ordinary Action").]

Actions in Sheriff Court, Ordinary Procedure in.—It is intended here to indicate the course of an ordinary action in the Sheriff Court, as distinguished from an action in the Debts Recovery or Small Debt Courts, and from those actions into the procedure of which specialities enter, and to give an account, though not in detail, of such steps only as are normal, and not occasional. The various stages of procedure in an ordinary action—whether normal, *e.g.* PETITION, CITATION, APPEARANCE, DEFENCES; or occasional, *e.g.* SISTING, ABANDONMENT, AMENDMENT OF RECORD—are treated of in detail under their own titles; while an account of the procedure in such actions as are special, in so far as it differs from the procedure in those that are ordinary, is given under the titles of these actions, *e.g.* DECLARATOR; ACCOUNTING; CONJUGAL RIGHTS ACT, PROCEEDINGS UNDER; ENTAILED ESTATES, APPLICATIONS AS TO, etc. Further, it is not intended here to enter on the questions as to who may raise an action in the Sheriff Court, whom it may be directed against, or what may be its subject-matter—for information on these points, see JURISDICTION, TITLE TO SUE, etc. Nor is it proposed to follow the course of an action on appeal, either from the Sheriff-Substitute to the Sheriff, or from the Sheriff Court to the Court of Session, which matter is treated of under APPEAL.

The type of an ordinary action in the Sheriff Court is that form which must be used to enforce payment of a sum of money exceeding £50, and it is of such an action that it is proposed to give, in outline, the normal steps of procedure. All forms of action differing, either incidentally or in whole, from this, are distinguished as special, and are not treated of here.

An action commences by the *petition*, which, after setting forth the

Sheriff Court in which the action is brought, names and designates the persons who are in the position of pursuer and defender in the action, mentioning the special character, if any,—as trustee, or inspector, or otherwise,—in which any party sues or is sued, and prays the Court, referring to the annexed condescendence and note of pleas-in-law, to give decree for the sum sued for (39 & 40 Vict. c. 70, Sch. A), which must be stated definitely; whence it follows that if interest and expenses, or either, are sought, they must be prayed for (*ib.* Sch. A, note). Thereafter follows the condescendence, which, as in the case of actions in the Court of Session, must set forth articulately, succinctly, without argument, and without quotation from documents, except where indispensable, the facts which form the grounds of action (*ib.* s. 6). To the condescendence is appended the note of pleas-in-law, being the legal propositions which are applicable to the facts in the case (*Young*, 1860, 23 D. 36), and which, taken in conjunction with them, are relied on to maintain the Prayer of the Petition. See ACTIONS, ORDINARY PROCEDURE IN COURT OF SESSION.

Following the note of pleas-in-law is the warrant to cite the defender in the action. The warrant commences with the place and date of granting, and bears that the Sheriff grants warrant to cite the defender, and in what manner and on what *inducie* he is to be cited; that is to say, what time is to be allowed him in which to enter appearance. The normal *inducie* are seven days when the defender is in Scotland, and fourteen days when he is on an island or furth of Scotland (39 & 40 Vict. c. 70, s. 8), though it is in the power of the Sheriff to shorten the warning or *inducie*, as he sees fit, in any case which he considers requires special despatch (*ib.* s. 8 (2)). If the citation is edictal, the period is always fourteen days, except in the case of tutors or curators of a minor, where it is the same as for the principal defender (*ib.* s. 9; A. S. 1839, s. 22). Citation may be made either nonpostally, when the petition is served on the defender by a sheriff officer either personally or at his dwelling-house; or, as is now almost invariably the custom, it is made through the post by registered letter (45 & 46 Vict. c. 77, s. 3). There are few occasions in which edictal citation is possible in the Sheriff Court, but where necessary it is made in terms of 39 & 40 Vict. c. 70, s. 9. The warrant then ordains the defender to lodge notice of appearance within the *inducie* of citation, on pain of certification, as in a Court of Session action, and finishes by setting forth any interim order, such as arrestment on the dependence, that may have been granted. The petition must be authenticated by the signature of the pursuer, or of his agent, who must add his address; once is sufficient, and the proper place is after the note of pleas-in-law. The warrant is authenticated by the signature of the Sheriff in every case, or of the Sheriff Clerk, unless an order other than one for citation, edictal or otherwise, or a warrant to arrest on the dependence, is contained in it (39 & 40 Vict. c. 70, Sch. A, note). Unless by special order of the Sheriff, the original petition may not be borrowed; but where defences have been lodged, certified copies of the petition may be borrowed by any party to the action, and these are sufficient warrants for arresting on the dependence where such warrant has been granted (39 & 40 Vict. c. 70, s. 10). If no appearance is entered within the *inducie*, the pursuer may apply for decree in absence (see ABSENCE, DECREE IN); and there is at this stage, though rarely resorted to, a corresponding power to defenders who have entered appearance to compel dilatory or reluctant pursuers to proceed with their case, viz. PROTESTATION FOR NOT INSISTING (*q.v.*). If, however, the defender intends to defend the action, he *enters appearance* within the *inducie* by lodging notice

of his intention, signed by himself or by his agent, in terms of 39 & 40 Vict. c. 70, Sch. B, and thereafter lodging *defences* with the Sheriff Clerk on the first Court day after the expiry of the *inducia*, or at the latest at an adjourned diet not later than seven days after the expiration of the *inducia* (*ib.* s. 16). The time cannot be extended even by consent of parties (*ib.* s. 19), but on special cause shown the Sheriff may prorogate it once (16 & 17 Vict. c. 80, s. 6; *Nicol*, 1888, 26 S. L. R. 61).

The defences are in the form of articulate answers to the condescendence, and where necessary (that is, where merely answering the condescendence does not disclose the defender's whole case), a separate statement of the facts on which the defender founds in defence, and conclude with a note of the defender's pleas-in-law. Like the condescendence, the answers and the statement of facts must be made succinctly and without quotation from documents except where indispensable (39 & 40 Vict. c. 70, s. 16). Defences are either dilatory or peremptory; the former being objections to jurisdiction or competence, and having, if well founded, the effect of absolving the defender from the depending suit, at the same time leaving to the pursuer the right to bring a new action (Ersk. iv. 1. 67; *Waterston*, 1884, 11 R. 1036); the latter include pleas on the relevancy and answers on fact, which, being sustained, preclude the action being brought again (*Hill*, 1857, 19 D. 955). Dismissing an action as irrelevant does not, however, preclude bringing a relevant action to try the same cause (see *Sutherland*, 1890, 18 R. 252).

Defences having been lodged, an opportunity is given to either party, though not as a matter of right, but only on cause shown, to *revise* his pleadings (*ib.* s. 17). Formerly, unless for special reasons the Sheriff directed otherwise, these revisals were made on the original papers (16 & 17 Vict. c. 80, s. 4, now repealed), but now, as the practice of borrowing the original petition is as much as possible discouraged (39 & 40 Vict. c. 70, s. 10), they are properly made on separate papers. In practice, revisal is rarely ordered, unless on the motion of the pursuer, where the defender has lodged a separate statement of fact. The pursuer can see the defences when lodged, and, if he thinks it necessary, ask that the case be enrolled in order to move for a revisal, and till this motion has been considered the Sheriff Clerk should not transmit the process to the Sheriff (Dove Wilson's *Sheriff Court Practice*, 4th ed., p. 146). If, however, the process has been transmitted to the Sheriff, and no motion for revisal made, he may himself order the parties to revise their pleadings if he considers it necessary. Like other orders of the Sheriff, the period for revisal may be prorogated once on cause shown, but not of consent (see *supra*, time for lodging defences).

At revisal, the pursuer alters his original statement where necessary to meet the counter allegations of the defender, and there seems to be no good reason why anything should be disallowed that would be competent by way of amendment; that is to say, which is necessary to determine the real question in controversy, and which does not materially alter the case against the defender, nor subject to the adjudication of the Sheriff a larger or other sum or estate than that specified in the petition, except of consent. See AMENDMENT OF RECORD. The defender may make similar alterations, subject to payment of any expense caused by delay in stating them, and the pursuer's opportunity of answering these revised defences is at adjustment.

Defences having been lodged, if no motion for revisal is made, the process is transmitted to the Sheriff. If such a motion has been made,

then the process is transmitted at once on refusal, or, if the motion is granted, on the expiry of the time allowed for revisal, whether the revised pleadings have been then lodged or not. Similarly, if the Sheriff have himself ordered revisal, the process is retransmitted to him on the expiry of the allotted period. The Sheriff then directs the action to be put to the roll for the first Court day occurring not less than four days thereafter, requires the parties then to *adjust* their pleadings, and *closes the record* (39 & 40 Vict. c. 70, s. 18). The four days, being intended to give the parties sufficient time to consider the ultimate form of their pleadings, should run, not from the date of transmitting the process to the Sheriff, but from the date of his returning it to the Sheriff Clerk.

The Act of 1876 does not direct what is to be done at *adjustment*, and the section of the Act of 1853 (s. 4) which contained directions as to this has been repealed by the Statute Law Revision Act of 1892; but adjustment, properly looked at, is simply an opportunity of correcting and explaining statements already made, or answering statements not already answered. If it is necessary to add new statements, these, in strictness, should be allowed as, and on the conditions of, amendments. See AMENDMENT OF RECORD. Section 4 of the Act of 1853 having been repealed, the direction which it contained, to strike out irrelevant matter before closing, is no longer imposed on the Sheriff. The record is closed by the Sheriff writing "*Record closed*" on the interlocutor sheet, and appending his signature and the date. The record having been closed, if parties have not renounced further probation, and where it seems necessary to the Sheriff, he appoints a diet for *proof* on an early day; if further probation is renounced, or proof is obviously unnecessary, or the necessity of it is doubtful, as where there are preliminary pleas, he sends the case to the *Debate Roll* (39 & 40 Vict. c. 70, s. 23). Speaking generally, disputes as to law are heard in the Debate Roll, questions as to fact go to proof; and if the decision of preliminary pleas after debate does not dispose of the case, but leaves the parties at issue as to fact, the case then goes to proof. Where it is expedient to allow proof under reservation of preliminary pleas, as where part only of the case is relevant to go to proof, or where the relevancy of the whole is doubtful, "*proof before answer*" is allowed, which leaves it permissible to raise all questions of law or relevancy at the hearing after proof. If evidence is to be admitted, reserving the question of whether or not it is competent, this should be noted in the order for proof (*Macvean*, 1873, 11 M. 506). The evidence taken at the proof is recorded in writing, either in longhand written by the Sheriff himself, or, as is usually the case, in shorthand, when it must be dictated by the Sheriff to a sworn shorthand writer (16 & 17 Vict. c. 80, s. 10; *Merry & Cuninghame*, 1895, 22 R. 247; *Dawson & Campbell*, 1895, 32 S. L. R. 674). It is taken in narrative form, with question and answer where the Sheriff thinks it desirable. The proof is taken, as far as may be, continuously, and only adjourned on good cause shown (39 & 40 Vict. c. 70, s. 19; 16 & 17 Vict. c. 80, s. 10). Proof may also be taken by *judicial examination* or *judicial visitation, on commission*, or to lie *in retentis*, and a *remit* on a matter of fact may be made to a skilled person to report, or the decision of the matter may be referred from the Sheriff to *arbitration*. These matters are treated of elsewhere, as is also the important subject of the stages at which documents founded on by the parties in their pleadings must be produced. The proof being closed, the debate on the evidence follows immediately, unless the Sheriff, in his discretion, allows one adjournment, which must not exceed seven days (39 & 40 Vict. c. 70, s. 19).

On reaching the stage of debate, the action is in exactly the same position as an action sent straight to the Debate Roll after the closing of the record, and the same rules govern both cases. The pursuer, unless the *onus* of proof or of making out his defence is on the defender, opens the debate. The defender replies, and the pursuer is heard again only if the defender has introduced new matter, and then only in reply to it; these rules, if observed, should preclude the necessity of a fourth speech.

The action has now passed through the various stages which lead up to *judgment*. The debate over, the Sheriff proceeds to give judgment, either at once, or on consideration, with the least possible delay (39 & 40 Vict. c. 70, s. 23). In all judgments pronounced in cases of proof, there must be *findings in fact* as well as *in law* (A. S. 15 Feb. 1851; *Mackay*, 1894, 21 R. 894; *Glasgow Gas Light Co.* 1866, 4 M. 1041; *Melrose*, 1868, 6 M. 952); and where the findings of an interlocutor do not sufficiently disclose the grounds of judgment, these must be appended in the form of a *note* (16 & 17 Vict. c. 80, s. 13). The decerniture must dispose of all the conclusions of the action, without going beyond them, and must determine the matter of *expenses* in so far as not already settled (A. S. 1839, s. 62). The general rule as to expenses is that the loser pays. Any merely accidental or clerical error in the judgment may be corrected by the Sheriff at any time prior to appeal (39 & 40 Vict. c. 70, s. 34).

In order to make the decree effectual by *execution* against the unsuccessful party, the successful one must first obtain an official *extract* of the decree. This "may be issued at any time on the expiration of fourteen days from the date" of the judgment, "unless the same shall, if competent, have been sooner appealed against," and no extract shall be issued before the expiration of fourteen days unless the Sheriff pronouncing the judgment shall allow the extract to be sooner issued (39 & 40 Vict. c. 70, s. 32). A decree for expenses cannot be extracted till the expenses have been taxed by the Auditor of Court and decerned for; and the normal period for extracting a decree for expenses is the same as that for extracting any other judgment. As to the different kinds of, and mode of doing, execution of a decree, see DILIGENCE; DECREE.

The normal course of an ordinary action has now been traced, and it remains to be added that the remedies against delaying that course, by failure to attend a diet of a defended action, or to lodge a paper in due time, or to duly return a borrowed process, are dealt with under DECREE (BY DEFAULT), and CAPTION. In addition to the normal steps of procedure enumerated above, and which are also treated of more particularly under their proper titles, there are many other incidental or occasional proceedings in the course of an ordinary action, of which mention only can be made here, viz.:— ABANDONMENT OF ACTION; AMENDMENT OF RECORD; CONJOINING ACTIONS; SISTING ACTIONS; SISTING NEW PARTIES; MANDATARY; DILIGENCE TO RECOVER DOCUMENTS; WAKENING; POOR'S ROLL; REFERENCE TO OATH.

Actor; Alter.—These terms are used by the Clerks of Court, who in interlocutors designate the counsel for pursuer and defender respectively *Actor* and *Alter*—usually abbreviated thus: *Act.*, *Alt.*

Actor, or **Art and Part.**—Every person accused is, in the language of the law, charged as guilty, "actor, or art and part," that is to say, as a principal or an accessory, the guilt being the same, and it being

therefore unnecessary that it should be determined whether his guilt is of the one character or the other (Hume, i. 305, 306; Alison, i. 218; Macdonald, 3; *Jamieson*, 1 Br. 466). This rule is illustrated by the cases of forgery, where the fabricator is art and part of the uttering (Hume, i. 155; Alison, i. 395, 396); and bigamy, where an individual who marries a married person, and the clergyman and witnesses, may all be guilty, art and part (Hume, i. 462; Alison, i. 539; Macdonald, 3; Bell, *Notes*, 113; *Auchincloss*, 1 Irv. 73).

These rules do not apply in treason, where all are principals (Hume, i. 533; Alison, i. 616; Macdonald, 3); and in concealment of pregnancy, where there can be no accession (Hume, i. 299; Alison, i. 158; Macdonald, 3, 150).

Actor sequitur forum rei—"The pursuer follows the forum of the defender," a maxim of the Roman law, which, says Phillimore, iv. 724, lies at the root of all international, and of most domestic jurisprudence on the subject of jurisdiction over foreigners. The oldest form of the maxim is probably that found in the Vatican Fragments, No. 325 (Huschké, *Jurispr. Anti. Just.* 769): *Actor rei forum sequi debet.* It seems from the earliest period to have been an established rule of civil procedure, among the Romans, that the pursuer should raise his action before the Court of the defender's domicile (Cod. iii. 13. 2),—the corresponding rule, in criminal matters, being expressed in the maxim, *In criminali negotio rei forum accusator sequatur* (Cod. iii. 13. 5). In Scotland the maxim has been adopted, and is followed, without exception, in personal actions. "The reason is," says Kames (*Law Tracts*, i. 352), "that the plaintiff must apply to the judge who hath authority over his party, and can oblige him to do his duty. This must be the judge of that territory within which the party dwells and has his ordinary residence." "Accordingly," says Erskine (*Inst.* i. 2. 16), "it imports nothing where the pursuer hath his domicile, for he must follow that of the defender, since no defender is obliged to appear before a Court to which the law hath not subjected him." Various exceptions were later introduced in the Roman law, and are also recognised in our own law in real actions and others (see JURISDICTION).

Actus.—Actus was one of the rural servitudes recognised in Roman law. It was the right of driving either a beast or a carriage through another man's land (*Inst.* ii. 3, pr.), heavy traffic being excluded (*Dig.* viii. 3. 7, pr.). The right was thus intermediate between *via*, which entitled one to the use of a roadway for heavy traffic, and *iter*, which gave one the right of walking. As a general rule, it included *iter*, the lesser right, and was itself included in *via*, the greater right (*Inst.* ii. 3, pr.); but this might be prevented by a special agreement between the parties (*Dig.* viii. 5. 4. 1). The servitudes in Scots law analogous to *actus* are DROVE ROADS (*q.v.*), HORSE ROADS (*q.v.*), and LOANINGS (*q.v.*) (Stair, ii. 7. 10; Ersk. *Inst.* ii. 9. 12; Bell, *Princ.* s. 1010; *Reid*, 1891, 18 R. 744). In Scotland, following the Roman law, the general rule as regards prescriptive servitude roads is that the greater right implies the lesser right (*Swan*, 1834, 12 S. 316). With regard to the significance, in modern law, of the Roman distinctions among rights of way, see *Galbreath*, 1845, 4 Bell's *App.* 374, at 390. See also *Malcolm*, 1886, 13 R. 512; *Veitch*, 1896, 3 S. L. T. No. 411.

Ademption.—See LEGACY.

Adherence.—It is the primary duty of married persons to live together, or, as it is expressed, to adhere to each other until the dissolution of the marriage (Bell, *Prin.* s. 1538; Fraser, ii. 867; *Mackenzie*, 1893, 20 R. 636, 22 R. (H. L.) 32). The husband, as the head of the house, has the right to determine where the home shall be, and the wife is bound to accompany him to any place he may choose (Stair, i. 4. 8; Ersk. i. 6. 19; Bell, *Prin.* s. 1538; Fraser, ii. 867; *Ringer*, 1840, 2 D. 307; *Molony*, 1824, 2 Add. 249). But the duty of mutual adherence is not specifically enforced. Where the cruelty of one spouse has made the continued cohabitation dangerous to the safety of the other, the remedy is a judicial SEPARATION (*q.v.*). Where the non-adherence has been obstinately persisted in for four years, the remedy is DIVORCE (FOR DESERTION, *q.v.*); Fraser, ii. 875); and so, where a wife who had got a decree for aliment arrested funds of the husband until he should adhere, the Court recalled the arrestment as incompetent (*Macgregor*, 1836, 14 S. 707). An action of adherence was by the Act 1573, c. 55, made an indispensable preliminary to an action of divorce for desertion. But this necessity was removed by the Conjugal Rights Act, 1861 (24 & 25 Vict. c. 86), s. 11. This change is one of procedure merely. Non-adherence must still be proved, but this can be in the suit for divorce (*Watson*, 1890, 17 R. 736; L. Watson in *Mackenzie, ut supra*, 22 R. (H. L.), at 41). An action of adherence appears to be still competent, but, except where aliment is also concluded for, is unknown in practice. (See *Mackenzie*, 1893, 20 R., per L. Young, at 664; 1895, 22 R. (H. L.) 32; and see DESERTION.)

Is it Non-adherence to refuse Sexual Intercourse? This question is answered in the affirmative by Fraser (ii. 1209), founding upon the old case of *Graham* (27 Feb. 1567, MSS. Records Com. Court, vol. ii.). It is submitted, however, that the Court would not find such an averment relevant. It does not seem to be covered by the words "divertis fra utheris companie," in the Act 1573, c. 55. It is thought that the statement of Sir J. P. Wilde—"there is no doubt, after the case of *Orme* (2 Add. 382), that although the Court enforces conjugal cohabitation (which itself is no longer specifically enforced in England), it does not pretend to enforce marital intercourse"—correctly expresses the law (*Rowe*, 1865, 4 S. & T. at 163). See Mackenzie, *Obs. on Act* 1573, c. 55 (187 of ed. of 1686); Elchies, *Annot.* 6; Bankt. i. 5. 132; Stair, i. (4. 6. 4).

DEFENCES TO ACTION OF ADHERENCE.—It is a good defence that the pursuer has been guilty of cruelty or of adultery, unless the offence has been condoned (*Lang*, 1851, 13 D. 408; *A. B.*, 1853, 16 D. 111; *Mackenzie*, 1895, 22 R. (H. L.) 32; Fraser, i. 872); and a wife who has got a protection order under the Conjugal Rights Act, 1861, s. 3, is not bound to adhere unless the order is recalled. It would be a defence to plead that the marriage was null (*Ricketts*, 1866, 35 L. J. Mat. 92). It is not a defence that the pursuer is insane (*Hayward*, 1858, 1 S. & T. 81; Fraser, ii. 873; but see *Radford*, 1869, 20 L. T. (N. S.) 279). It is not a defence that the pursuer has consented to a deed of voluntary SEPARATION (*q.v.*), for such a deed is revocable; and if the deed contain *in gremio* an admission of cruelty or adultery, the offender may still raise an action of adherence, and the defender must prove the cruelty or adultery if the defence is to be successful (*A. B.*, 1853, 15 D. 372; *A. B.*, 1853, 16 D. 111; *Lawson*, 1797, Mor. 6157; *Martin*, 1895, 3 S. L. T. No. 226 (L. Kincairney); Fraser, ii. 872, 915). Nor is it a defence in the mouth of the husband

that, although he will not live with his wife, he has provided her with a suitable residence and with aliment (*Colquhoun*, 1804, Mor. App. *v.* H. & W. No. 5: *Webster*, not reported, cited by Fraser, i. 872. See a Sheriff Court case, *Hislop*, Guthrie, *Select S. C. Cases*, ii. 205. See *Millar*, 3 S. L. T. No. 461).

Is it a defence to the husband that the wife was pregnant by another at the date of the marriage, and had concealed this from the husband? Fraser (ii. 875) says that in such circumstances a husband would not be ordained to adhere. He refers to *Perrin* (1 Add. 4), where there is a *dictum* to that effect by Sir John Nicholl. But in a suit by a wife for restitution of conjugal rights, where the husband pleaded that she was pregnant when he married her, that he had been induced to marry her by false representations that he had seduced her, Lord Penzance struck out the plea (*Green*, 1869, 21 L. T. (N. S.) 401). And in a more recent suit by a wife for restitution of conjugal rights, the husband desired to prove that he was not the father of a child conceived by her before marriage; but this evidence was rejected by Butt, J., as irrelevant (*Mason*, 1889, 61 L. T. R. 304). (See also *Kennedy*, 1890, 62 L. T. 705; *Foss*, cited by Bishop, s. 498.) In an American case, concealed pregnancy at marriage was held a ground for setting aside the marriage as proceeding upon essential error (*Reynolds*, 3 Allen, 605; see Bishop, s. 485 *et seq.*). See MARRIAGE. If any cause, except cruelty or adultery, can justify non-adherence, a stronger could hardly be figured than the discovery that the wife had concealed the fact of her pregnancy by another at the date of the marriage.

Is any defence good which would not be a ground for a judicial separation? There is a great deal to be said on principle for the argument that, in fixing the grounds upon which judicial separation may be decreed, the Court has impliedly affirmed that where neither cruelty in the sense required for separation, nor adultery, can be proved, the parties cannot be relieved from their primary duty of adherence. And for this proposition there is a considerable—and it is thought preponderating—body of authority (*A. B.*, 1853, 16 D. 111 (interlocutor); L. P. Inglis in *Chalmers*, 1868, 6 M. at 550; Sir J. Nicholl in *Barlee*, 1822, 1 Add. 301; Sir C. Cresswell in *Burroughs*, 1861, 2 S. & T. 303; L. Penzance in *Yeatman*, L. R. 1 P. & D. 491; see also *Rippingall*, 1876, 24 Weekly Reporter, 967; *Manning*, 1872, 6 Irish Rep. Eq. 426; *Holmes*, 2 Lee, 116; *D'Aquilar*, 1 Hagg. Ecc. R., at p. 784). In the case of *Mackenzie* (1893, 20 R. 636, 22 R. (H. L.) 33), the point was much discussed, but it was found unnecessary to decide it. L. Rutherfurd Clark said: "I know of no defence to an action of adherence save adultery and cruelty, though I think that the latter may be moral as well as physical" (20 R., at 670). L. Trayner expressed a contrary opinion, at p. 674. On appeal, the point was expressly reserved by L. C. Herschell, 22 R. (H. L.), at 34, and by L. Watson, at 41.

In an English case subsequent to *Mackenzie*, Lopes and Lindley L. JJ. express the view that "the ecclesiastical law of England recognised no middle state between that of *consortium vitæ* and *divortium a mensa et thoro*" (*Russell* [1895], P. 315, at 330). The Court of Appeal held that this rule had been altered by s. 5 of the Matrimonial Causes Act, 1884. As this Act does not apply to Scotland, and as the authorities referred to in support of the opposite contention are mainly English, this *dictum* of Lopes and Lindley L. JJ. is entitled to great weight. For the contention that less misconduct than would ground a decree of judicial separation may be a sufficient defence to an action of adherence, the following authorities may be referred to:—*Mackenzie, ut supra*, per L. Trayner; opinions reserved by L. C.

Herschell, and L. Watson; L. Fraser in *Stevens*, 1882, 9 R. 730; *Moore*, Eng. Law Mag. vol. 50, p. 279. See *Jolly*, 3 W. & S. at 189; *Forster*, 1 Hagg. C. R. 153; *Astley*, 1 Hagg. E. R. 721; *Bramwell*, 3 Hagg. E. R. 619; *Perrin*, 1822, 1 Add. 1. (But with this contrast *Barlee*, 1822, 1 Add. 301, at 305: *Green*, 1869, 21 L. T. (N. S.) 401; *Mason*, 1889, 61 L. T. Rev. 304; and see *Kennedy*, 1890, 52 L. T. 705.) *Connelly*, 2 Rob. E. R.; rev. 1851, 7 Moore, P. C. C. 438; Fraser, ii. 873. See an article in Jurid. Rev. v. 143, on "The *Mackenzie* Case."

Jurisdiction in Actions of Adherence.—An action of adherence is competent only in the Court of Session (13 & 14 Vict. c. 36, s. 16; cp. 11 Geo. IV. & 1 Will. IV. c. 69, s. 33 and s. 36). It is not yet conclusively settled whether the parties must have an actual domicile in Scotland before the Court has jurisdiction. In a recent case, L. Watson thought that such a domicile, although necessary to give jurisdiction for divorce, was not so for actions of separation and adherence (*Le Mesurier* [1895], A. C., at 527 and 531); so also Fraser (ii. 1294). There are conflicting *dicta* in England. See per Brett L. J. in *Niboyet*, 1878, 4 P. D., at p. 19; per Cotton L. J., *ib.*, at p. 21; per James L. J., *ib.*, at p. 9; *Manning*, 1871, L. R. 2 P. & D. 223; *Firebrace*, 1878, 4 P. D. 63; Westlake, *Priv. Int. Law*, 81; and see Bishop, *Marriage and Divorce*, ii. 69; Walton, *H. & W.* 446. See Jurisdiction.

[See Stair, i. 4. 8; Ersk. i. 6. 19, i. 6. 44; Fraser, ii. 867: Bishop, *Marriage and Divorce*, ii. ss. 1661, 1751; Walton, *H. & W.* 94, 446.]

Adherence to the King's (Queen's) Enemies.—By the Act 7 Anne, c. 21, passed shortly after the Union, it was provided that the law of treason of Scotland should be assimilated to that of England. The Act 25 Edw. III. c. 2, is the basis of the treason law of England. By the fourth article of that Statute, it is declared to be high treason "if a man be adherent to the king's enemies within the realm, giving to them aid or comfort within the realm or elsewhere." Thus, if a British subject hands over to the enemy arms, fortresses, or ships of war, or communicates valuable intelligence to the enemy's forces, or marches with the enemy's forces, or takes service in an enemy's ship of war, he is "adherent to the king's enemies." It is a jury question who shall be construed an "enemy." Acts of adherence to the enemies of the sovereign's allies constitute an offence under the Statute.—[Hume, i. 527; Alison, i. 613; Macdonald, 230: Anderson, *Crim. Law*, 32.] See Treason.

Adjournal.—See Act of Adjournal.

Adjournment.—All adjournments of criminal trials must be to a specified day (*Fraser*, 1 Irv. 1). Adjournment is a matter which is in the discretion of the Court (*Robertson*, 1 Coup. 348; *Anderson*, 1 Coup. 4), except in cases where an adjournment is required by Statute. Complication of the case, or a long list of witnesses, are not grounds for granting delay (*Rodger*, 1 Coup. 76). Adjournment cannot be given because a person named in the indictment or in the list of witnesses cannot be found, unless four days' notice has been given to the prosecutor, and still sufficient information has not been supplied (Crim. Proc. Act, 1887, s. 53). Absence

of a material witness (*Niven*, 3 Irv. 204; *Thomson*, 2 Coup. 103), or discovery of important evidence, or opportunity desired to inspect a production (Hume, ii. 388; *Dempster*, 4 Irv. 143), are grounds for adjournment: but delay will not be given for absence of a witness, if no effort has been made to secure his attendance (*Stewart*, 1 Swin. 540: see also *Hendry*, 2 White, 380). That a witness refused to be precognosed is not a cause for delay (*Fletcher*, Ark. 232).

A trial may be adjourned from day to day, or the Court may adjourn over a day or days (Crim. Proc. Act, 1887, s. 55).

Refusal of a reasonable adjournment may vitiate a summary conviction (*Orr*, 3 Irv. 183: *M'Mahon*, 2 Irv. 383: *O'Brien*, 2 Irv. 603: *Ferguson*, 5 Coup. 471: *Crawford*, 2 Irv. 511: *Graham*, 2 Irv. 558; *Gardiner*, 2 White, 474). This is specially true in the case of a child (*Meekison*, J. Shaw, 159; *Gray*, 3 Irv. 29: *Jameson*, 4 Irv. 246). But in ordinary cases an adjournment must be asked for (*MacKean*, J. Shaw, 132: *Bennet*, 3 Irv. 541: *Maclean*, 4 Irv. 351: *Lone*, 5 Irv. 423: *Wright*, 2 Coup. 504). If an adjournment is asked for, the request must be recorded if it is to be founded on (*Johnston*, 1 Coup. 41).

Adjournments must be recorded (*M'Garth*, 1 Coup. 260). But this may not apply where, in a summary case, the proceedings are stopped for a short time, the accused acquiescing (*M'Intyre*, 3 Coup. 298).

Where amendment of the libel is made at the trial, the Court may grant an adjournment, if this is asked for in the interest of the accused (Crim. Proc. Act, 1887, s. 70).

See CRIMINAL PROSECUTION.

Adjournment: Court of Session.—1. *OF TRIAL.*—In proofs before the Lord Ordinary no adjournment is allowed, "except on special cause stated in an interlocutor" (31 & 32 Vict. c. 100, s. 32). One counsel on each side is heard at the close of the proof. This rule however, is not absolute: and if the case is complex, or the proof is of such a nature that it would be difficult for the Lord Ordinary or for counsel to digest it on the spot, it may be for the interests of parties, and conducive to the ends of justice, that an adjournment should take place (*Birrell*, 1868, 6 M. 421).

The Court has power to adjourn a jury trial, but this power is only exercised in cases of necessity. It will not do so in order to correct the blunders of an agent, or to obtain additional evidence which might have been previously procured (*Clark*, 1 Murray, 161, 173–4). Illness of a juror, the judge, or counsel, would be good grounds for adjournment.

2. *OF COURT.*—When a Sheriff adjourns a case from his ordinary to his circuit Court, it is recommended that, where the adjournment is caused by the fault of one of the parties, or is granted to suit his convenience, the Court should impose an award of the expenses of the other party for that day, to be paid before the case goes on. The Court (except the Lord Ordinary on the Bills) does not sit on the term days. It has power to adjourn over any day observed as a general holiday. When the Court adjourns for a special holiday, papers due on that day may be lodged next sederunt day.

[Mackay, *Practice*, ii. 55; *Manual*, 21, 55, 334, 352; Coldstream, *Procedure*, 85.]

Adjournment: Sheriff Court.—It is no longer competent

to adjourn, prorogate, or continue of consent of parties the time for complying with any statutory enactment or order of the Sheriff, whether with reference to the making up and closing of record, appointing a diet of proof, diet of debate, or otherwise (39 & 40 Vict. c. 70, s. 19, Sheriff Courts (Scotland) Act, 1876).

With regard to the periods for lodging papers, transmitting any process to the Sheriff, or closing the record, it was competent, prior to 1876, to prorogate these by written consent of parties: and without consent they might be prorogated once on cause shown. These provisions were contained in sec. 6 of the Act of 1853 (16 & 17 Vict. c. 80); but that part of the section which allowed prorogations of consent has been repealed impliedly by sec. 19 of the Act of 1876, and expressly by the Statute Law Revision Act of 1892. The rest of the section, however, stands: and it is therefore competent for the Sheriff to prorogate the periods for lodging papers and making up and closing the record, but only once, and that on cause shown (39 & 40 Vict. c. 70, s. 19; 16 & 17 Vict. c. 80, s. 6; *Bainbridge*, 1879, 6 R. 541; *Nicol*, 1888, 26 S. L. R. 61).

The Act of 1876 makes no difference as to the adjourning of proofs. By sec. 10 of the Act of 1853, proofs may be adjourned, but only on cause shown; and adjournments should be as short as possible, for the section goes on to say that the proof shall be taken, as far as may be, continuously, and with as little interval as the circumstances or the justice of the case will admit of (16 & 17 Vict. c. 80, s. 10; *Meiklejohn*, 1870, 8 M. 890).

The debate or hearing after a proof should take place immediately, but may, in the discretion of the Sheriff, be once adjourned, for not more than seven days (39 & 40 Vict. c. 70, s. 23). The debate on the closed record, where there is no proof, may be adjourned once, on cause shown (*ib.* s. 19).

Adjudication *contra hæreditatem jacentem.*—In the case of ADJUDICATION FOR DEBT (*q.v.*) the creditor can adjudge the debtor's estate, after the debtor's death, either by proceedings against the heir, or, if the heir renounces the succession, against the *hæreditas jacens* of the debtor. The Act 1540, c. 24, provides that an heir of full age who remained unentered for year and day after his predecessor's death, might be charged by a creditor in a liquid debt to enter within forty days. If he failed to do so, the lands might be apprised, the apprising to be as effectual as if the heir were entered. By Statute 1621, c. 27, the former Act was ratified, with the addition that the Act was extended to the heir's own debts as well as to those of his predecessor, so that the creditor might charge an apparent heir to enter for a debt due by him just as he might for one due by his predecessor. The Act 1672, c. 45, which abolished apprisings, and substituted adjudications in the Court of Session in their room, was held by the Court not to include adjudications *contra hæreditatem jacentem*, which adjudications have accordingly always been competent before the Sheriff, as well as before the Court of Session. It is believed, however, that in practice they have been little used in the Sheriff Court (see s. 8 of the Sheriff Courts Act, 1877 (40 & 41 Vict. c. 50)).

There is this difference between such adjudications when led in the Court of Session and in the Sheriff Court respectively, that in the former case, by Regulation of 1696, art. 3, abbreviates, which had previously not been required, were introduced, while in the latter they have never been introduced by Statute. It seems, however, to have been the practice, when

such actions were led in the Sheriff Court, to issue abbreviates signed by the Sheriff, and to record them in the Register of Adjudications. Under the former law, after the *general charge*, and after the special or general special charge, as the case might be, decree of adjudication was pronounced against the heir and against the estate of the ancestor. But if the heir appeared and renounced the succession, the decree pronounced against the heir was *cognitionis causa tantum*, and the decree of adjudication was against the *hæreditas jacens* of the ancestor. The combined actions of constitution and adjudication, which are now competent, contain an alternative conclusion, in the event of the heir renouncing, for a decree *cognitionis causa tantum* and adjudication of the *hæreditas jacens*.

Notwithstanding opinions to the contrary, it is thought that the Conveyancing Act of 1874, ss. 9 and 12, does not alter the law as to adjudications *contra hæreditatem jacentem*. It is quite true that a personal right vests in the heir by mere survivance of the ancestor, but s. 12 has only the effect of limiting the heir's liability to the value of the estate to which he succeeds: but to that extent it is the heir who is liable. The liability for the ancestor's debts being thus fixed upon the heir, the 12th section goes on to provide that, if the "heir shall renounce the succession, the creditors of the ancestor shall have the same rights against the estate as upon a renunciation according to the law before the commencement of" the Act. The Act accordingly seems to recognise a renunciation by the heir after the Act, as before it, and provides that the consequences of the renunciation shall be the same after as before the Act.

It is to be observed that the *legal* in these adjudications is only seven years.

Adjudication for Debt.—Adjudication is a diligence whereby a creditor attaches the lands or other heritable property of his debtor, in satisfaction of, or security for, his debt.

History.—As a man's whole estate, heritable as well as moveable, is subject to the payment of his debts, it is, of course, reasonable that his creditors should have right to attach his heritable estate for payment of his debts. Accordingly, all civilised nations seem to have made adjudication, or some procedure having the like effect, a part of their system of law. Under the Roman law, the creditor might sell the debtor's moveable estate, and if he failed to recover thereby the amount of his debt, might then have recourse to his debtor's immoveable estate. Our ancient Scottish law was to the same effect. By the Act, Alex. II. c. 24, it was provided that lands should not be seized in satisfaction of debt, so long as the debtor's moveables were sufficient for payment; and if the cautioners were obliged to pay the debt, a proportional part of the debtor's lands were to be given to them. By the Act, 2 Rob. I. c. 24, it was provided that moveables should first be distrained for debt. Failing moveables, the Sheriff was to warn the debtor to sell the land within fifteen days, on the expiry of which the Sheriff was to sell so much of the land as would pay the debt, interest, and expenses. If the lands were held of the king, the purchaser was to be infeft by the Sheriff by royal charter. If held of a subject, the superior was to have right to purchase the land; but if he did not purchase, he was obliged on the Sheriff's precept to infeft the purchaser. The rights thus early conferred upon the creditor were rights, not of security, but of sale; and in like manner apprisings, which were the next stage of development, were at first proper sales of the debtor's estate,

without any right of redemption, differing in this important respect from adjudications, which in turn succeeded and superseded apprisings, and which, until the right of redemption is foreclosed, are mere securities for debt.

By a Statute of James III. (1469, c. 36), it was provided that, failing moveables and rent, the king's letters might be obtained, under which a debtor's land might be sold by the Sheriff to the amount of his debts, and the creditor paid out of the proceeds. The debtor had right to redeem the land within seven years, on payment of the price and the expenses of the purchaser's entry. If within six months no purchaser could be found, a portion of the land equal to the debt was to be apprised by thirteen men chosen by the Sheriff, and the portion apprised by them was made over to the creditor. The superior was bound to receive the creditor on payment of a year's rent; but he was entitled, if he chose, instead of receiving the creditor, to take the land and become liable himself for the debt. It may be observed, in passing, that this Statute, enacted for the benefit of creditors, had incidentally a most interesting and important effect upon the strictness of the feudal law, by relaxing the rights of superiors, and compelling them to receive vassals against their will, or else to adopt the option given to them of becoming debtors to their vassal's creditor.

As the lands of the debtor might be in different counties, the diligence required to be executed by the Sheriffs of the different counties; and to prevent the expense thereby occasioned, the diligence was intrusted to messengers, who were constituted sheriffs in that part. The messenger, in virtue of the letters of apprising, denounced the lands to be apprised, that is to say, made publication both on the ground of the lands and at the market crosses of the head boroughs of the several jurisdictions in which they lay, that the lands themselves were to be apprised. Fifteen free days required to intervene between the denunciation and the actual apprising of the lands. The procedure, as described by Erskine, at the actual apprising was that the creditor exhibited his claim of debt to the messenger, who remitted the examination of it to a jury or inquest. After the claim was sustained by the inquest, an offer of the apprised lands was made to the debtor upon payment, and on his failure to appear or to make payment, the messenger interposed his authority to the verdict of the inquest, and by his decree adjudged such a proportion of the debtor's lands to belong to the appriser as was taxed by the jury to amount to the principal sum, penalty, composition to the superior, and sheriff's fee: but no part of the debtor's lands was set off to the appriser in name of interest before the Reformation, because the exacting of interest was prohibited by the Canon law.

The messenger at first held his court in the head borough of the shire where the lands lay. This had the advantage of securing for the debtor a jury who knew, or might be presumed to know, the value of the lands, and whose verdict would probably apprise an amount of land fairly proportionate to the debt. After a time, however, the messenger was allowed to hold the inquest in Edinburgh, where persons sat upon the inquest who were strangers to the value of the lands, with the result that valuable estates were sometimes carried off from the debtors for inconsiderable sums, whereby great injustice resulted, for it must be kept in view that an apprising was then a true sale under reversion, and not, as an adjudication is now, a mere *pignus prætorium*. The appriser took over the property as in satisfaction of his debt. He was entitled at once to enter into possession and to draw the rents. He was not bound to account for the rents, but

might retain them, however large they might be, in proportion to the debt; and the principal sum remained due, and had to be paid by the debtor before he could redeem the lands. The diligence according to ancient law might thus be, and probably often was, most unjust to the debtor. It is not strange, therefore, that the Legislature in the seventeenth century intervened to prevent this injustice. The injustice, however, was not wholly towards the debtor, for if the creditor-appriser did not exercise his right of possessing the land and gathering the rents, the debtor might redeem, on payment of the bare principal sum, with the expense of diligence.

A great step in advance was made by the Statute 1621, c. 6. By this Act the debtor could only redeem upon payment both of the principal sum and interest. He required to do so even although the appriser had not possessed the lands. Further, where interest, the taking of which since the Reformation had been lawful, was due upon the debt, the principal sum and interest were accumulated by the decree into one sum, which carried interest until the lands were redeemed. Further, it was enacted that apprisers should have right to no more of the rents than corresponded to ten per cent. interest on the debt. If they intromitted with the whole rents, the surplus was to be devoted to payment of the principal, and when the amount of the intromissions exceeded the principal debt, with interest at ten per cent. and the expenses of the apprising and entry, the apprising was to cease and the lands to return to the debtor. If, however, the rents did not amount to the interest, all the interest unpaid was a charge upon the reversion, and as the debtor was only entitled to redeem upon payment of the whole debt,—principal and interest,—it followed that, if the smallest part of either principal or interest remained due at the expiry of the *legal*, the whole subjects apprised might be carried irredeemably from the debtor.

It is obvious that this Statute altered the legal character of the apprising, for if the apprising could be extinguished by intromission with the rents, it was no longer an absolute right of property in the person of the appriser, but a mere *pignus prætorium* or judicial security for payment of debt. The appriser became, as it were, a steward for the rents of the apprised estate after the extinction of his debt, and was bound to account therefor to the debtor.

Another important step in advance was taken by the Act 1661, c. 62. The Court of Session was authorised, on the suit of the debtor, to restrict the appriser's possession to such part of the lands as answered to the interest of the debt, on the debtor giving possession, or ratifying it if already taken. This Statute further provided for the *pari passu* rankings of apprisings. All apprisings led before the first effectual apprising at any time, and all led within year and day after it, were to rank *pari passu*, the posterior appriser always satisfying the first effectual appriser of his whole expenses.

The Act 1672, c. 19, directed that adjudications should proceed against debtors by way of action before the Court of Session, instead of by the old form of apprising by messengers. Further, it provided for *Special* adjudications, and enacted that such part only of the debtor's real estate was to be adjudged as should correspond to the principal debt and interest; with a fifth part more, because the creditor had to take land instead of money, besides the composition payable to the superior and the expenses of the infeftment. The debtor had to deliver to the creditor a valid right of the lands, renounce possession in favour of the adjudger, and ratify the decree of adjudication. The *legal* was five years, and the rent of the lands

adjudged was deemed to be in full of the interest on the debt. If, however, the debtor failed to produce sufficient title and to implement the decree of adjudication by giving quiet possession, the creditor might adjudge all right belonging to the debtor as he might have done by way of apprising under the Act 1661, c. 62. The Legislature thus introduced by this Statute *general* adjudications, in which the *legal* was ten years, the debtor's whole right was adjudged, and the creditor was not entitled to the additional one-fifth allowed in the special adjudication. Until the Lands Transference Act of 1847 (10 & 11 Vict. c. 48), the general adjudication could only be libelled and concluded for as alternative to a special adjudication, but the necessity of so libelling was obviated by that Act, the provisions of which were re-enacted by the Titles to Land Consolidation Act, 1868, s. 59. A summons may now conclude for general adjudication alone. Special adjudications are obsolete.

The true nature of the diligence of adjudication was thus defined, and the law of adjudication, with certain modifications, was established, so that subsequent legislation has altered it only in details. The simplification of the Scottish system of conveyancing, and the development of sequestration in bankruptcy, have in some degree detracted from its usefulness as a diligence. The diligence is, however, still one of very great importance.

Grounds of Adjudication.—Adjudication proceeds only upon a liquid document of debt or upon debt constituted by decree. The reason is that the precise sum may be known on the payment of which the debtor may redeem. The debt must be precisely liquidated. Thus a decree of adjudication was held inept where the debtor was cited on the summons of adjudication before the decree of constitution had been extracted (*Mackay*, 11th Dec. 1800, F. C.). It is not enough that the rule or principle be fixed by which the debt may be reckoned (Bell, *Com.* i. 739). So an adjudication led on an heritable bond against the heir of the granter of the bond was restricted to a security, because the adjudger had omitted to obtain a decree of constitution against the heir before leading the adjudication. The debt must not be prescribed or contingent. It must be a subsisting debt at the date of the adjudication. The term of payment must have come, but although it may not have come, the adjudication on equitable grounds may be allowed to proceed (1) when the debtor is *vergens ad inopiam*, or (2) if the creditor runs the hazard of losing his debt by other creditors adjudging year and day before him (see Adjudication in Security). A bill of exchange is *per se* a sufficient ground for adjudication. It need not be protested or registered (*Ferguson* 20 Feb. 1816, F. C.). If granted by a married woman, it will not sustain an adjudication (*Scott*, 1818, Hume, 221). But an open account, though attested by the debtor, or a bare acknowledgment for borrowed money or other document which may warrant decree in a separate action for payment of the amount, is not a sufficient ground (Parker 12). If the document of debt bear a clause of interest, or if interest be due *ex lege*, adjudication may proceed for arrears of interest without constitution. Every objection to the debt itself (*e.g.* want of authenticity of a voucher) is available against an adjudication (Bell, *Com.* i. 739). It is no objection that the debt is compensated by another debt due by the adjudger, unless the debtor pleads, and can instantly verify compensation. The debt must not only be due, but must at the time of adjudging be vested in the adjudger. But it may suffice, if his right come to him by succession, that his title be completed after the adjudication. The same indulgence, however, is not accorded to one who acquires right to the debt by assignation (Bell, *Com.* i. 742).

Constitution.—A decree of constitution is necessary where the debt is not liquid; where there is no written document of debt of the nature indicated above; where the document is ambiguous or dependent on a condition; or where, though existing, it is not produced, or where it has been lost. A decree of registration will be a sufficient constitution, but should be accompanied by the bill or other document of debt. Where the creditor is uncertain of the amount of his claim,—*e.g.*, where it depends on a settlement of accounts not yet balanced,—he should either (1) adjudge articulately for such sum as is certainly due, with a random conclusion for the uncertain sum, which will be available if it can be justified to the full amount, or (2) adjudge in security and obtain decree, reserving objections *contra executionem*. When the decree of constitution has been passed reserving objections, the adjudger must in competition support his action of constitution as libelled.

The action of constitution is a separate action from the action of adjudication. In the adjudication the Court cannot try the authenticity of the debt nor admit it to proof. But the action for constitution may be combined with the action of adjudication in one summons if against an unentered heir (32 & 33 Vict. c. 116, s. 60). Whether the two actions can be combined except in the case of an unentered heir, is at least doubtful.

A debt does not require constitution if made real by heritable bond or real burden. In such a case, however, if the adjudication is to proceed upon the *debitum fundi*, and not upon the personal obligation, if any, decree must first be obtained in an action of poinding of the ground. The adjudication will then proceed upon the debt and decree of poinding of the ground. The object of poinding the ground is to make the arrears of interest, which are moveable, real, and to accumulate interest, and make the accumulated interest and principal bear interest and become a real burden (Mackay, *Manual*, 518; *Juridical Styles*, 3rd ed., iii. 124). See Adjudication on *debitum fundi*.

Subjects of Adjudication.—(*a*) *Subjects Adjudgeable.*—The following subjects are adjudgeable:—Heritage and heritable rights; personal rights in lands; a faculty or power, *e.g.* to reduce a deed, but not where an element of discretion enters into its exercise; entailed estates during the debtor's lifetime, the proper course being to adjudge the lands themselves and not merely the debtor's liferent interest therein; liferents; reversions; leases where judicial assignees are not excluded; dues of harbours, fairs, and ferries; mines; fishings; the common good of a burgh; heritable securities (see sec. 129 of the Titles to Land Act, 1868, and sec. 65 of the Conveyancing Act, 1874; when the original creditor is dead, the executors or personal representatives, as well as the heir-at-law of the deceased, should be called); heritable bonds even before the term of payment, and though infeftment has not been taken; personal bonds secluding executors; a personal debt when an heritable subject such as a lease has been assigned in security; a husband's interest *jure mariti* in the rents of his wife's lands when the marriage was contracted prior to 18th July 1881; stock of the Royal Bank and of the Bank of Scotland; stock of chartered companies when arrestment is declared to be excluded, but not the shares of a company declared moveable by Act of Parliament (*Sinclair*, 1860, 22 D. 600). In that case it was contended for the pursuer that adjudication was competent because stock of the Royal Bank of Scotland had in a previous case been found to be adjudgeable. But the answer was that arrestment had been excluded in the case of Royal Bank stock, whereas bank stock at common law was arrestable, and, being arrestable, adjudication was not the appropriate diligence. A beneficiary's interest under a trust when that interest is heritable, as *e.g.* a

share of heritage as to which no direction to sell has been given, may be adjudged; a creditor of a principal beneficiary under a lapsed trust may adjudge his interest under the trust (*Gavin*, 1826, 4 S. 637); a creditor in an obligation granted by the trustees (*E. of Breadalbane*, 1824, 2 S. 529) can adjudge the heritage held in trust though held subject to a direction to sell; any reversionary interest in the truster may be adjudged if heritable, and adjudication is the proper diligence for attaching the truster's radical right in a conveyance of lands *inter vivos* to trustees (*Campbell*, 1801, Mor. App. Adjudication, No. 11); and also the donee's right under a power of appointment.

(*b*) *Subjects not Adjudgeable.*—Offices of trust and titles of honour, unless such as passed either by voluntary conveyance or were so annexed to land that they were made descendible to the same heirs; moveables and moveable rights; a bond of annuity over a heritable estate declared to be alimentary; arrears of rent or interest (*Broughton*, 10 S. 418); a *spes successionis*; the right of a substitute heir of entail to pursue a declarator of irritancy against the heir in possession; the gaol, town house, and its bell: the petty customs of a royal burgh (*Phin*, 1827, 5 S. 644); rights conferred for the discharge of a public purpose: lands taken by a railway and used for the purposes of their undertaking, or at least not proved to be superfluous (*Glover's Trs.*, 1869, 7 M. 338), are not adjudgeable.

Against whom Adjudication may proceed.—"The estate of the debtor is in all situations liable to the diligence of his creditors, both during his life and after his death, unless it be held by him under such restraints as deprive his creditors of their remedy against it" (Bell, *Com.* i. 711).

(1) If the debtor be in life, he is of course the defender to the action of adjudication.

(2) If he be dead and leave no heirs, the action is against the Crown as *ultima hæres*, and the Lord Advocate for the time being is called as defender (20 & 21 Vict. c. 44, s. 1; *Reid*, Mor. 1355). In this case a decree of constitution must be obtained before a summons of adjudication is raised.

(3) If the debtor be dead and have left an heir-at-law, such heir must be called as defender.

Procedure.—The present procedure in such a case is simple, but for a proper understanding of it, the former procedure, which was extremely cumbrous, must be briefly considered.

A. *Former Procedure.*—The problem was how to adjudge the estate of the ancestor, for his, the ancestor's, debt. There was no difficulty in solving this problem if the heir chose to enter to the ancestor's estate. In such a case the creditor constituted his debt, and then proceeded to adjudge the estate as if the heir himself had been debtor and proprietor. But if the heir did not choose to enter, either tacitly by assuming the general succession and behaving as heir, or expressly by making up his title, the creditor was obliged to give him two charges, namely, (1) *A general charge* to fix on him the representation generally, or to compel him to renounce the succession. If he renounced, decree was obtained not against him, but *cognitionis causa tantum*, whereby relief could be operated against the *hæreditas jacens* of the ancestor. *The general charge* was followed by an action of constitution raised against the heir, decree in which action, if not *cognitionis causa tantum*, made the debt his which was formerly his ancestor's. The debt being thus fixed against the heir, the next step was to give him (2) *A special charge* to enter on the specific lands sought to be adjudged. If he disobeyed this charge, the creditor

proceeded to adjudge the lands as if they were the heir's, and a summons of adjudication was raised calling upon the heir, and all others having interest, to hear and see the lands adjudged to belong to the creditor in payment of his debt. Instead of a special charge, the adjudger gave (3) *A general special charge*, which was the same in theory and effect as the special charge, but was appropriate when the subjects to be adjudged had not been perfected by sasine in the person of the ancestor, or when they were of such a nature as not to require sasine.

B. *Present Procedure.*—Letters of general charge or special charge or general special charge have not been competent since the Lands Transference Act of 1847 (10 & 11 Vict. c. 48, s. 16; 10 & 11 Vict. c. 49, s. 8). The provisions of these Statutes were re-enacted by the Titles to Land Consolidation Act, 1868 (31 & 32 Vict. c. 101, s. 60). The present procedure is by two actions, one of constitution and the other of adjudication, both of which may be combined in one summons. The citation on and execution of each summons and on the combined summons is equivalent to the former charges. The actions or the combined action may be raised on the expiry of six months after the date of the defender becoming apparent heir. As above stated, however, the combined action seems only to be competent against apparent heirs.

When the heir was the debtor, if he had not entered as such, by the former procedure no general charge was required, but only a special charge, on the expiry of which the creditor might proceed to adjudge in ordinary form. Since the Conveyancing Act of 1874, a personal right to land vests in the heir by his survivance of the ancestor, and it is now unnecessary either in theory or in fact to do anything to fix the representation upon the heir, or to make the lands available for his own debts, but, notwithstanding this, summonses of constitution and adjudication are brought in the same form as before the 1874 Act.

It must be kept in view that the heir is no longer liable for his ancestor's debts beyond the value of the estate to which he succeeds; that if an heir shall renounce the succession, the creditors shall have the same rights against the estate as upon a renunciation according to the law before the commencement of the Conveyancing Act of 1874; and that, when an heir has before renunciation intromitted with the ancestor's estate, he is liable for the ancestor's debts to the extent of such intromission but no further (37 & 38 Vict. c. 94, s. 12). Moreover, the ancestor's debts are preferable to the debts of the heir, provided the creditors of the ancestor complete their diligence within three years of the ancestor's death (1661, c. 24).

In what Court Adjudications are competent.—Adjudications *contra hæreditatem jacentem* (*q.v.*) are probably competent in the Sheriff Court, but by the Act 1672, c. 19, which substituted adjudications for apprisings, the Court of Session is declared to be the only Court competent to adjudications, exclusive of all inferior judges (Ersk. ii. 12. 53; Bell, *Com.* i. 714); and the Sheriff Court Act of 1877 (40 & 41 Vict. c. 50, s. 8), extending the jurisdiction of Sheriffs to all actions relating to a question of heritable right or title where the value of the subject in dispute does not exceed the sum of £50 by the year or £1000 value, expressly excludes "actions of adjudication save in so far as now competent." The whole tenor of recent legislation points to adjudications as suitable for the supreme Court alone, *e.g.* the 159th section of the Titles to Land Consolidation Act, 1868, as to the important matter of litigiosity by registration of a notice of summons, plainly contemplates a summons in the Court of Session.

Summons.—The procedure in an action of adjudication is in most respects the same as in an ordinary action; but the first motion is, as after explained, one for intimation. The form of summons is regulated by the Court of Session Act, 1850 (13 & 14 Vict. c. 36), and relative Act of Sederunt of 31st October 1850. Forms are given adapted to special circumstances in *Juridical Styles*, 3rd ed., iii. 114 *et seq.* There is no conclusion for expenses, adjudication being a diligence, but if the defender cause unnecessary opposition he may be found liable in expenses, decree for which will be separate from the decree of adjudication. The pursuer of the action will be the party in right of the debt, and he ought to complete his title to the debt, if he be not the original creditor, before raising the summons. If proceedings be taken by an assignee before the date of the assignation, they will be invalid, and the subsequent concurrence of the cedent will not validate them. But where the right of the adjudger comes to him by succession, the Court will sustain the proceedings (Bell, *Com.* i. 742). So, when the debt is heritably secured, a title must be completed to it before raising action. An executor-dative may raise an adjudication, but he must obtain confirmation before extract (*Black*, 1823, 2 S. 110). It is quite competent for an assignee of several creditors to raise an adjudication for the common behoof, and each creditor can obtain an extract of the decree in so far as concerns his own debt. Two or more debtors who are conjunctly and severally bound for a debt, may be made defenders in the same summons of adjudication.

It has been seen that the citation on the summonses of constitution and adjudication are equivalent to the charges of the old law. This being so, it is probably now incompetent to accept service, to hold the summons as executed, or to dispense with the *inducie*. The Court, however, may, in order to preserve the rights of creditors to rank *pari passu* with the first adjudger, and to enable him to obtain decree within year and day of the first effectual adjudication, dispense with the *inducie*, and allow the summons to be printed in the calling lists, or limit the term for the defender's seeing the summons, or grant warrant for enrolling the cause before the Lord Ordinary, and remit to the Lord Ordinary with power to pronounce decree, reserving all objections *contra executionem*, and dispense with the reading in the Minute Book, and grant warrant for immediate extract *ad interim* (*M'Kidd*, 1890, 17 R. 547). A creditor seeking these indulgences must apply by petition to the Inner House. The same indulgences are accorded to pursuers of actions of constitution where there is a race of diligence. Thus decree of constitution was granted (reserving all objections) without making up a record, so as to enable a party to raise an adjudication, and to rank *pari passu* with other adjudgers (*Bontine*, 1829, 8 S. 87). In the same case it was decided that the Court might decern in an action of constitution in terms of the libel before closing the record, "to the effect of adjudication and reserving all objections *contra executionem*." The Court has dispensed with the *inducie* of a summons of wakening of an adjudication, in order to secure to the pursuer a *pari passu* preference with other adjudging creditors (*Erskine*, 1822, 1 S. 355), and has dispensed with the *inducie* of a summons of adjudication, and allowed it to be enrolled in the calling lists of the Outer House. The term for seeing it was limited to eight days (*Scott*, 1832, 10 S. 253) and the procedure in other respects shortened (*Gregg*, 1839, 1 D. 544).

Litigiosity.—By s. 159 of the Titles to Land Consolidation Act, 1868, there is no litigiosity except from and after the registration in the General Register of Inhibitions of a notice in the form of Schedule RR to the Act.

The effect of registration of such a notice is to secure the pursuer and any other adjudger, within year and day of the first decree, against any act of the debtor, whether a conveyance, a heritable security, or even a lease.

The summons is served and called in the usual way. Thereafter, in the case of a first adjudication, the pursuer must enrol the cause in the Lord Ordinary's Motion Roll, and crave an order for intimation, whereupon the Lord Ordinary will, as matter of course, pronounce an interlocutor in these terms: "The Lord Ordinary, in respect it is stated that this is the first process of adjudication brought against the defender of the subjects libelled, appoints intimation to be made in the Minute Book and on the walls of the Parliament House, to all the other creditors of the defender, for the purpose and in the form prescribed by the Acts of Parliament passed thereanent."

This intimation requires to be made in all actions of adjudication, whether defended or not, under pain of nullity of the decree (19 & 20 Vict. c. 91, s. 5; 54 Geo. III. c. 137, s. 9). But, while intimation must be given in the case of the first effectual adjudication, there need be no intimation of succeeding adjudications ranking *pari passu* with it; or at least the want of it does not make them inept (*Mackenzie's Crs.*, 3 Pat. App. 409).

The period of intimation is twenty sederunt days. On the expiry of these days, and upon certificate that the intimation required by the foregoing interlocutor has been made, and that the *inducia* have expired, decree of adjudication may be obtained in the Undefended Roll, if the action be undefended. Although, in consequence of the intimation not having been given, the decree is ineffectual, yet the adjudication may rank *pari passu* with a subsequent adjudication duly intimated and made first effectual, or the summons may be conjoined with any subsequent summons duly intimated. The purpose of intimation being ordered in this way is, as the Statute ordaining it shows, "that any other creditors of the common debtor who at the next calling of the cause can show that, although they have not executed their summonses of adjudication, they are in other respects, by the nature of the grounds and steps taken by them, in condition to proceed in adjudging their debtor's estate, may produce the instructions of their debts, with summonses of adjudication libelled and signetted, for the purpose of their being conjoined in the decree of adjudication." If the first adjudication be defended, a second adjudger who wishes to be conjoined must await decree: he cannot demand decree in his own action while the other is pending (*Forman*, 1832, 10 S. 365). It is only with the first effectual adjudication, however, that there is room for conjunction, and any decree taken on a summons conjoined with a subsequent adjudication is bad.

Creditors who adjudge within year and day after the decree in the first effectual adjudication or at any time before it, may be ranked *pari passu* with the first effectual adjudication and those conjoined with it. Hence arises the expediency of posterior adjudgers obtaining the indulgences from the Court above referred to, so as timeously to lead their adjudications.

The necessity for obtaining the order of intimation above mentioned only obtains in adjudications for payment or in security, and not in actions of adjudication in implement, or in proceedings upon *debita fundi*. In the former case, the debtor is being compelled to implement a specific obligation with which other creditors have no concern, and in the latter case the adjudging creditor is merely making good his preference over ordinary creditors. The Court cannot dispense with this intimation in the case of a first adjudication, or pronounce decree during the currency of the twenty

days even on a statement of urgent circumstances (*Badenoch*, 1838, 16 S. 903). It may often be important to determine which is the first effectual adjudication. The summons first called is the first effectual, although decree is not obtained in it till after decree has been pronounced (in consequence of the *inducia* having been dispensed with) in an adjudication called posterior to it (*Allisons*, Mor. App. Adjud. No. 14). The subjects to be adjudged are set forth at length or by reference in the principal summons, and the description ought, of course, to be as correct as possible, but as creditors may not be supposed to know their debtor's property accurately, considerable latitude is allowed. Thus an adjudication of lands was found to carry the mines, and an adjudication of a tack of the lands of D and others, without mention of other particulars, has been sustained.

Defences to Adjudications.—The defender may, of course, appear and state objections to the ground of debt or the regularity of the action. But as adjudication is a diligence, the Court will not readily interfere with the course of an adjudication, but will rather grant decree of adjudication, reserving all objections *contra executionem*. Thus it will not prevent decree that the ground of debt is under suspension or reduction, nor that a multiplepoinding has been raised to ascertain who is best entitled to the debt. But a pursuer was held barred *personali exceptione* from adjudging on an heritable bond, although there had been a short delay in paying the interest, the fact being that on previous occasions he had made no objections to a similar delay (*Paterson*, 1828, 6 S. 1062). The defence most commonly urged is *pluris petitio*, that the adjudication has been led for more than is due. In apprisings this objection was fatal, but in adjudications the Court does not deal so strictly as to set aside an adjudication *in toto* on this ground, unless the *pluris petitio* be very great, or have arisen from gross negligence or fraud. The effect will in general only be to restrict the adjudication to one in security for the true debt, in which case the legal will not expire. It has further been held that a *pluris petitio* in the conclusion of the summons will be allowed no effect if decree be taken only for the sum truly due (*Marwell*, 1743, Mor. 110). Great care to secure accuracy as to the description of the grounds of debt, dates, and other particulars, must be observed, as the debtor, although he may not defend the action of adjudication, may impugn the decree on these grounds subsequently, as, *e.g.*, when the adjudger proceeds to make use of his decree by an action of maills and duties. Thus the writ on which, according to the old practice, a summons of adjudication proceeded bore that an assignation was dated 5th instead of 25th September. The error was repeated in the summons, but was attempted to be rectified after signeting. The decree of adjudication was held to be totally null and incapable of being sustained even as a security. But in the same case it was held that an inadequate stamp on a deed which formed the foundation of the decree of adjudication, was not a sufficient ground for a reduction of the decree *in toto* (*Wilkie*, 1850, 12 D. 818).

It is competent to restrict the summons to particular debts, or to particular portions of the lands. A decree of adjudication on summons and defences reserving all objections *contra executionem* for the purpose of giving the adjudger a *pari passu* ranking with other adjudgers, is merely interim, and accordingly, after the decree had been extracted, warrant was granted to retransmit the process to the clerk, so that the action might proceed in common form. Such a decree is only granted by the Court in exercise of its equitable jurisdiction, and is in no sense a decree on the merits, and it would be inequitable to the defender to hold it as final, and compel him to raise a suspension (*Freen*, 1833, 11 S. 711). When the creditor

adjudged on a bill, under deduction of the amount which he admitted to be due to the defender, while the defender alleged that the deduction should have been larger, decree was granted under reservation of all objections *contra executionem*. If the summons had been raised exclusively on the bill, without any admission of a *contra* account, the Court would not have allowed a question of accounting, but would have decerned as craved (*Watt*, 1841, 3 D. 1149).

After decree has been obtained, a state of accumulation in general requires to be prepared for transmission to the extractor along with the process. This state brings out the principal sum in the decree, interest thereon from the date of decree of adjudication, expenses of process, if any, and dues of extract, and brings out the total accumulated sum for insertion in the extract decree. The accumulation must not be brought down to a later date than that of the decree, and there should be deducted in the state any sum received to account of the debt before extract, as well as any sum expected from the use of other diligence, as arrestments or poinding. The creditor on a bond in which there were several joint-obligants, received a partial payment from the bankrupt estate of one of them, and then adjudged for the whole debt the estate of another of the obligants. The adjudication was restricted to a security for the balance, because he ought to have adjudged only for the balance (*Crs. of Campbell*, 17 June 1801, F. C.). If the amount expected is not certainly known, an estimate must be made of it, which should be so stated as to avoid *pluris petitio*. The creditor is not bound to take notice of any sum by way of compensation, for compensation does not operate *ipso jure*, and it is for the debtor to state the plea on his own behalf. When there are several separate grounds of debt, it is common, in order to avoid the danger of a *pluris petitio*, to accumulate each debt separately, so that a *pluris petitio* as to one may not affect the others. This is called Articulate Adjudication. But there may be an articulate adjudication where there is only one ground of debt, as when principal, interest, and penalty are separately stated, in which case an error will only affect the sum as to which it is made. It is competent and usual to conclude for interest on the accumulated sum.

In considering the possible defences to an action of adjudication, it must be kept in view that, although adjudication is in form an action, it is strictly and properly a diligence, and the Court cannot try the amount of the debt, or admit it to proof. That must be done in the action of constitution. The debtor, as we have seen, will not be entitled to plead compensation or retention, unless he can instantly verify the same, but if he can, he may resist the motion for intimation in the first effectual adjudication, which will not be allowed to proceed even to the effect of intimation being appointed (*Exrs. of D. of Queensberry*, 11 July 1817, F. C.). "Intimation cannot be stopped unless the defender can show *instanter* that there are no grounds for adjudging, as if he produce a discharge of the debt. It is perfectly settled that the existence of a trust-deed is no objection to a non-acceding creditor adjudging" (per L. Glenlee in *Harrower's Trs.*, 1827, 5 S. 347). But the order for intimation, if made, does not preclude the debtor from insisting in all his defences, even though preliminary. Intimation of a first adjudication, proceeding upon a bill *ex facie* prescribed, was in one case ordered, notwithstanding the defender's objection that the bill was prescribed (*Morrison*, 1836, 14 S. 1126). If the pursuer has taken decree for a random sum in the action of constitution, the adjudication will not be good unless in the ranking the debt can be supported. It is, of course, a good defence that the lands sought to be adjudged are not the property of the debtor, but if the debtor have the

radical right to the lands, as when he has divested himself of the lands in favour of a trustee for creditors, the adjudication will be good (*Harrower's Trs.*, 1827, 5 S. 347). With regard to the objection of *pluris petitio*, Bell (*Com.* i. 745) holds that the doctrine as settled is this, "that in cases of material *pluris petitio*, or culpable neglect, the adjudication is annulled, but where it is slighter, the only effect is to reduce the adjudication to a security for principal and interest without expenses or penalties." The *pluris petitio* is judged of by the accumulated sum as it appears in the decree of adjudication. Material omissions in the extract have been held to annul an adjudication.

Competition amongst Adjudgers.—In competitions between adjudgers on the one hand, and purchasers from the debtor-proprietor on the other hand, preference is given in accordance with the priority of sasine. But it is otherwise in competitions between adjudgers themselves. In such competitions the law has always favoured as far as possible equality of ranking, and the Act 1661, c. 62, thus expresses the spirit of the law: "And because oftentimes creditors, in regard they live at distance or upon other occasions are prejudged and prevened by the more timeous diligence of other creditors, so that before they can know the condition of the common debitor, his estate is comprised and the posterior comprisers have only right to the legal reversion, which may and doth often prove ineffectual to them, not being able to satisfy and redeem the prior comprisings. . . . therefore it is statute and ordained that all comprisings. . . before the first effectual comprising and after, but within year and day of the same, shall come in *pari passu* together, as if one comprising had been deduced and obtained for the whole respective sums contained in the foresaids comprisings, and it is declared that such comprisings as are preferable to all others in respect of the first real right and infeftment following thereupon or the first exact diligence for obtaining the same, are and shall be holden the first effectual comprising, though there be others in date before and anterior to the same."

This Statute has been interpreted to mean that what is known as "the first effectual adjudication" may not be the only effectual adjudication, but that all adjudications anterior to the first effectual adjudication, however long anterior, and all posterior adjudications within year and day of the first effectual adjudication, shall rank *pari passu*. To quote the words of Bell (*Com.* i. 721), "the first effectual adjudication once constituted is the criterion of the *pari passu* preference. It becomes from that moment not merely a private diligence, belonging exclusively to the individual who uses it, but a general diligence in which every creditor who afterwards adjudges has an interest. In this view, it is not entirely at the disposal of the individual. Its quality of 'effectual' remains to complete the other adjudications, although the debt on which it proceeds may have been paid off and the adjudication of course extinguished as an individual diligence." But when a summons, after having been executed and intimated in terms of the Statute, had been abandoned, the pursuer having accepted payment of his debt, a subsequent summons, which had been duly intimated, was held to be the first effectual adjudication with which others could be conjoined (*M'Lean's Crs.*, 5 Mar. 1802, F. C.).

Under the old law, it was often a matter of extreme delicacy and difficulty to decide which was the first effectual adjudication. Sasine certainly was not required, the matter being one between adjudgers. The Statute above quoted provided that it should be sufficient that the creditor had used "the first exact diligence" for obtaining an infeftment. In the

simple case a charge to the superior was sufficient, but there were cases where a charge was unnecessary, as when the debtor's right was personal, or when the titles of the superior were incomplete, or where the creditor adjudging was himself the superior; and accordingly the Legislature intervened to provide a method for completing the diligence more within the reach of the creditor. The Statute 33 Geo. III. c. 74, continued by 54 Geo. III. c. 137, and subsequent Statutes, provided that "the presenting of a signature in Exchequer when the holding is of the Crown, or the executing of a general charge of horning against superiors at the market cross of Edinburgh, and pier and shore of Leith when the holding is of a subject, and recording an abstract of the said signature or the said charge in the Register of Abbreviates of Adjudications, shall be held in all time coming as the proper diligence for the purpose aforesaid."

The difficulties which have just been mentioned, and the remedial Statute, are of little more than historical interest, seeing that the modern conveyancing Statutes provide effectual means for the completion of a feudal title by merely recording the extract of the decree, with warrant of registration thereon, in the appropriate Register of Sasines.

The year and day begins to run from the date of the decree of adjudication. Where one adjudication was dated 30th July 1679, and another 31st July 1680, it was held that the year was not to be counted by the number of days, but by the return of the day of the same denomination of the next year, and that accordingly the two adjudications were to rank *pari passu*. An adjudger is entitled to the benefit of the *pari passu* preference, although his diligence has not entered the record. Reference has already been made to the necessity of intimation in the case of a first adjudication, and that such intimation is ordered by the Lord Ordinary upon the expiry of the *inducie* of citation. The purpose of such intimation is of course that other creditors may have warning, and may take steps to protect themselves; but the result is, or may be, that the creditors take separate proceedings, to the great embarrassment of the debtor. The debtor may accordingly have an interest to prevent the order for intimation being pronounced; but he will not succeed in preventing it, unless by instantly verifying a good counter-claim, or showing that he has obtained a discharge of the debt, and that there are no grounds for adjudging. If investigation and discussion are necessary, intimation will be ordered. If intimation be ordered, and other creditors appear, it is of course desirable to diminish as far as possible the expense of separate appearances and separate adjudications. With this view, any creditor who produces a signeted summons of adjudication may have his action conjoined with the first adjudication (19 & 20 Vict. c. 91, s. 5). The first adjudication is the adjudication which is first called, not of necessity the one in which decree of adjudication has first been obtained. If there should be a fatal defect in the first adjudication, the defect will not prejudice creditors whose actions have been conjoined with it. The death of the debtor does not alter the law as to *pari passu* preferences: so that if, after the first effectual adjudication, the debtor die, any subsequent adjudication within year and day of the first will be entitled to rank *pari passu* with it. As, however, six months must now elapse from the date of death before the actions of constitution and adjudication can be raised, and as the heir may not renounce the succession, posterior adjudgers may not be able to adjudge within the year and day, and may thus lose the benefit of a *pari passu* ranking. To prevent this, the Court may allow these adjudications to proceed as if the heir had renounced. Adjudications led beyond year and day from the date of the first effectual decree, are preferred according to priority.

While, under the Conveyancing Act of 1874, a personal right to lands vests in the heir by mere survivance, yet the right which he takes is subject to the debts of his ancestor, and as the creditors of the heir have no better right than the heir himself has, they cannot compete with the creditors of the ancestor. The matter has been made the subject of legislation in Scotland by the Statute 1661, c. 24, which proceeds upon the preamble "that it is just that every man's own estate should be first liable to his own debt before the debts contracted by the appearand heirs," and declares "that the creditors of the defunct shall be preferred to the creditors of the appearand heir and the real estate belonging to the defunct within the space of three years after the defunct's death." The Statute thus requires that the ancestor's creditors shall have a preference only if they proceed within the three years following the ancestor's death. The Statute further applies to heritable subjects indiscriminately, whether they be such *destinatione* or *suæ naturæ*. The Act applies in the case of an heir who succeeds by settlement, but not if he has been infeft during his ancestor's life. The Act, in requiring that the defunct's creditors shall do diligence, has been interpreted to mean complete diligence, that is to say, the adjudication must be followed by infeftment within three years. According to Bell, inhibition would perhaps be held complete diligence. It is thought also that the Court might allow indulgence to the creditors by dispensing with the discussion of their debt in the action of constitution, reserving all objections *contra executionem*, and similar equitable indulgences, such as those accorded as above mentioned to creditors claiming a *pari passu* preference with the first adjudication. If the first effectual adjudication against the ancestor's estate be completed within the three years, the adjudger will have a preference over other creditors of the ancestor who adjudge beyond the three years, although within year and day of the first adjudication. Such tardy adjudgers must rank along with the creditors of both ancestor and heir, with whom they may be entitled to a *pari passu* preference. It would appear that the first effectual adjudication may be led by a creditor of the heir even within the three years, and that a creditor of the ancestor, likewise adjudging within the three years and within year and day of the first adjudication, may take the benefit of it. In the case of a judicial sale, when such sale has been commenced at the instance of the apparent heir, or of a creditor of the ancestor, or of a creditor of the heir, the preference is preserved to the creditors of the ancestor who enter their claims in the ranking and sale within the three years. A second provision in the Act above mentioned (1661, c. 24) prevents an apparent heir from granting any right or disposition to the prejudice of his ancestor's creditors within a full year after his ancestor's death. This provision strikes at all conveyances or securities, such as sales for a full price or bonds for money lent.

Creditors of the ancestor may plead the Statute against the deed of the heir, although they have done no diligence and the challenge is not made till after the expiry of the three years. But this does not hold when there is a competition between the creditors of the ancestor and those of the heir. There is nothing to hinder a conveyance by the heir in favour of all the creditors of the ancestor. The heir, however, cannot convey to his own creditors, so as to defeat the diligence of the ancestor's creditors, within three years of the death of the ancestor.

Completion of Titles.—The decree of adjudication supplies, in law, the want of a voluntary conveyance by the debtor. Where the property,

though of an heritable nature, does not require sasine to its transmission, it is fully vested in the adjudger (subject to the debtor's right of redemption) by the decree of adjudication alone. Where the property is feudal, and sasine is required, the right of the adjudger was completed formerly by sasine on a charter of adjudication from the superior.

Prior to the passing of the Lands Transference Act of 1847, the creditor who had adjudged his debtor's land completed his title by obtaining a charter from the superior. In virtue of the decree, the creditor was entitled to obtain such a charter, and, if necessary, to charge the superior to grant him an entry. The charter closely resembled the charter of resignation, the only material difference being in the *quæquidem* clause, which bore in the charter of adjudication that the lands had been adjudged by the Court from the former owner, and decerned to belong to the creditor. With the charter of adjudication might be combined one of confirmation, if the debtor's title required it. The charter contained a precept of sasine, in virtue of which the adjudger completed his title in the ordinary way by instrument of sasine.

By the Lands Transference Act of 1847, important changes were made in the method of completing the title. Formerly the title could only be completed through the superior, but by the Act of 1847 the decree of adjudication contained warrant for infefting the adjudger, to be holden *a me vel de me*. In virtue of the decree the creditor could take infeftment, the result of which was that he held of the party adjudged from, until confirmation by the superior, in the same manner as if the party adjudged from had granted him a disposition with an obligation to infeft *a me vel de me*, and a precept of sasine, and he had been infeft on such precept.

The next change was by the Titles Acts of 1858 and 1860, which, without affecting the right of the superior, enabled the adjudger to complete a real right to the subjects by recording the decree of adjudication, with warrant of registration thereon, in the appropriate Register of Sasines. The decree required no precept of sasine. It was made equivalent to a voluntary disposition by the person adjudged from, to the adjudger. If the person adjudged from had only a personal right, the decree transferred such right as he had, enabling the adjudger to complete his title by virtue of the procuratory of resignation, or precept of sasine, which were held as transferred to him by the decree.

By the Titles to Land Consolidation Act of 1868, s. 62, and the Titles to Land Consolidation Amendment Act, 1869, s. 4, the provisions of the Titles to Land Acts of 1858 and 1860 were re-enacted, but those sections were repealed by the Conveyancing Act of 1874, s. 62, which declared that the words therein set forth should be deemed and taken to be the 62nd sec. of the said Act of 1868. This section declares that a decree of adjudication shall in all cases, except where the subjects contained in the decree of adjudication are heritable securities, be held equivalent to, and shall have the legal operation and effect of, a conveyance in ordinary form of the lands therein contained, granted in favour of the adjudger of the lands; in virtue of which conveyance the adjudger may now complete a feudal title, either by recording the decree or expeding a notarial instrument upon it. When the person adjudged from has merely a personal right, a title can be completed by using the decree as the connecting link, and expeding and recording a notarial instrument.

If the person who wishes to complete his title be not the original adjudger, he will complete his title as if he had acquired right to an ordinary conveyance, the decree being equivalent thereto.

Where the subjects adjudged are heritable securities, the completion of title was regulated by the 129th sec. of the 1868 Act; but that section was repealed by s. 65 of the 1874 Act, and the adjudger may now complete his title by recording either the abbreviate of adjudication or an extract of the decree in the appropriate Register of Sasines, in either of which cases he is in the same position as if an assignation of the heritable securities had been granted in his favour by the person whose estate is adjudged, and as if such assignation had been duly recorded in the appropriate Register of Sasines at the date of so recording such abbreviate or such extract decree. This enactment seems to apply whether the person adjudged from was infeft or not; but if he was not infeft, there can be no objection to treating the decree as an assignation of an unrecorded conveyance, and completing the title by notarial instrument under s. 23 of the 1868 Act.

With regard to long leases, s. 10 of the Registration of Leases (Scotland) Act, 1857 (20 & 21 Vict. c. 26), provides that the recording of the abbreviate of adjudication in the register in which the lease is recorded shall complete the right of the adjudger to such lease.

Redemption and Expiry of the Legal.—The right acquired by the adjudger is not an absolute right of property. It is a mere judicial security or *pignus prætorium*, and not a sale under reversion, and the debtor has the right of redemption (*Grindlay*, 1833, 11 S. 896; *Cochrane*, 1849, 11 D. 908: affd. 7 Bell's *App.* 65). It has not the effect of an absolute conveyance, "so as to give the adjudging creditor of the superior a right to enter vassals." If the debt be extinguished by payment or by intromission with the rents, the debtor is entitled to have his estate back. His right of redemption may be foreclosed by the creditor taking the proper steps after ten years. This period of ten years during which the debtor may redeem is called *the Legal*, which is an elliptical expression for "the legal term of redemption." Upon the expiry of the legal, the adjudging creditor has it in his power to foreclose the debtor from exercising the right of redemption. This the creditor does by raising and obtaining decree in an action called a declarator of expiry of the legal, in which the adjudging creditor calls on the debtor to exercise his right of redemption, otherwise to have it judicially declared that his right is foreclosed. After the action is raised, the debtor may require the adjudger to account for his intromissions with the rents, so that the sum may be ascertained on payment of which he may redeem the lands. Even after the legal has expired, the right is redeemable until decree that it has expired is pronounced (*Govan*, 1758, 2 Pat. App. 27). After decree, however, the right of redemption is absolutely at an end. It must be kept in view that decree, if obtained in absence, may be set aside on proof that the debt was really paid or extinguished within the legal, and also if there be any material objection in the original diligence of adjudication, or any irregularity in the action or decree, or in the action of declarator of expiry of the legal. If the adjudger, after decree, finds that his debt has not been extinguished, his right of action still subsists for the balance due (Shand, 717): and, on the other hand, when the adjudication has been restricted to a security, the adjudger must account for his intromissions as well after as within the legal (*Walker*, 1720, Mor. 302). A decree of expiry of the legal may be opened up, as where the debtor was at the time abroad, and during part of the legal a minor (*Aitken*, Jan. 1809, Bell, *Com.* i. 706, n. 3); or it may be reduced, but the right to reduce will be barred by the negative prescription (*Paul*, 8 Feb. 1814, F. C.). The debtor has right to redeem at any time before decree of declarator of expiry of the legal: but this rule is subject to another, which is equally well settled, that an

adjudication followed by charter and sasine, or the modern equivalent thereof, and by forty years' possession after the expiry of the legal, is not redeemable (*Spence*, 21 Jan. 1807, Bell, *Com.* i. 707, n. 3). But the mere expiry of the legal does not vest the estate in the creditor *ipso jure*, even when there has been possession for forty years. Either decree of declarator of expiry of the legal must be obtained, or there must be possession for forty years upon charter and sasine or its modern equivalent. As an adjudication without declarator of expiry of the legal is not an *ex facie* valid irredeemable title, sec. 34 of the Conveyancing Act of 1874 does not apply to the case, and therefore the full period of forty years' prescription is required. Once acquired, the absolute right operates *retro*, so that an entail became effectual which was executed by the adjudger before declarator of expiry of the legal (Bell, *Prin.* s. 831). Minorities must be deducted (*Aitken, ut supra*). A decree of adjudication not followed by possession is liable to the negative prescription, but sasine upon the decree interrupts the prescription (*King*, 1828, 6 S. 643). Bell (*Com.* i. 706) thus states his view of the result of the case of *Gold* (Mor. 10789):—"(1) That within the forty years it was competent to prove payment or satisfaction of the debt within the legal; (2) that the expiration of forty years after sasine saved the creditor-adjudger from any challenge on the ground of objection to the sasine; and (3) that it would require the expiration of forty years from the end of the legal term to secure the creditor-adjudger from all challenge."

Extinction.—It is laid down by Erskine (ii. 12. 37) that adjudications may be extinguished *ipso facto*, without the necessity of any decree of declarator, by the creditor's intromissions during the currency of the legal with the rents of the lands adjudged, or by payments in full made by the debtor, or by others on his account, and it is unnecessary on redemption that the debtor should be again infeft; the reason being thus stated by Erskine, that an adjudication is the sale of lands to a creditor redeemable by the debtor upon payment. And as all redemptions operate *retro*, so as to avoid the sale as if it had never existed, the debtor's seisin must revive and recover all the force that it had originally before the apprising was led. But even if this be so, it is competent for the debtor, if he believes the creditor-adjudger has been paid by his intromissions, or if he wishes to pay any balance to the creditor, to raise an action of declarator of extinction and payment, or of reduction and extinction. In this action the defender must offer to pay the balance, if any, due to the creditor, including the principal sum and interest, and the whole expense of diligence incurred by the creditor in recovering the debt, together with the salary to the factor, if one has been employed for collecting the rents (Ersk. ii. 12. 38). The heir of the person last infeft is entitled to redeem. In estimating the sum required for redemption, the Act 19 & 20 Vict. c. 91, s. 5, must be kept in view, which provides that "in all cases where penalties for non-payment over and above performance are contained in bonds or other obligations for sums of money, and are made the subject of adjudication, or of demand in any other shape, it shall be in the power of the Court to modify and restrict such penalties so as not to exceed the real and necessary expenses of making the debt effectual."

As the debtor has an interest to have an adjudication of his lands extinguished, so a postponed adjudger may have an interest to extinguish an adjudication prior to his own. In such a case, however, the adjudication is not strictly extinguished. The right to it is only transmitted from one creditor to another. In order to the proper extinction of the adjudication, payment must be made by the debtor, or by others on his account, either to

the original adjudger or to his assignee (Ersk. ii. 12. 37). In any challenge of an adjudication, the warrants, by which are meant general and special charges and other preliminary steps of proceeding, cannot be called for after twenty years, but the grounds of debt, such as bonds, bills, contracts, assignations and decrees of constitution, must be produced at any time within the years of prescription: the reason for this being stated to be, that although they are the warrants, they are not the grounds of the decree, and that they are not parts of the title of the pursuers, but evidence of the passive title against the defenders (*Irvine*, Mor. App. Tailzie, No. 1, affd. H. L. 2 Pat. App. 419).

Erskine points out the insecurity of the right of a singular successor who purchases an adjudication, for the adjudication may have been extinguished by the adjudger's renunciation or discharge, which need not be registered, or by his intromission with the debtor's effects, which cannot be registered; or the sasine which has proceeded on the adjudication purchased may possibly be a common right to support other adjudications led within year and day. The debtor may prevent the legal from expiring, and preserve his right of redemption, if during the legal he intimates his desire to pay the debt and consigns the sums due. So an action of count and reckoning and declarator of extinction, brought within the legal by the debtor, keeps open the right of redemption (*Kincaid*, Mor. 289).

Ajudication in Implement.—Adjudication in implement is defined by Bell to be "a form of legal diligence by which the want of a complete voluntary title to land or other heritage is judicially supplied to those who hold a disposition or other conveyance without a precept or procuratory, or who hold an obligation entitling them to demand a full conveyance of any particular subject." So when a party has obliged himself to convey lands by missives of sale, and refuses to convey voluntarily in implement of his obligation, an action of adjudication in implement may be raised against him, the decree in which adjudges the lands from the obligor, and declares them to belong to the obligee. So lands could be adjudged by the disponee of one who had granted a disposition without procuratory of resignation or precept of sasine. So when a party obliged himself to grant heritable security for a loan, lands agreed to be given in security could be adjudged in security (*Macgregor*, 1843, 5 D. 888); or when an heir of entail incurred an irritancy, the next heir to whom the estate was forfeited might have the lands adjudged, subject to the conditions of the entail. The action may be directed against the obligor if in life, or if he be dead, against his heir, or if he have no heir, against the Crown as *ultimus hæres*. The procedure against the heir to implement his ancestor's obligation is the same as in ADJUDICATIONS FOR DEBT (*q.v.*). Before the Lands Transference Act of 1847, it was by letters of general charge, action of constitution, letters of special or of general special charge, followed by action of adjudication. Since 1847, and now under the Titles to Land Consolidation Act, 1868, the proceeding is by actions of constitution and adjudication, or by combined actions of constitution and adjudication. There is no room in actions of adjudication in implement for *pari passu* ranking under the Act 1661, c. 62, because it is not an action for payment of debt, and therefore no intimation for twenty days is required, as in other adjudications; nor is there any room for legal reversion (unless, indeed, such be the nature of the obligation to be implemented (*Watson*, 1868, 6 M. 258)), because the purpose of the action is to carry the subjects to the obligee as

irredeemably as they would have been if the obligation had been implemented by a voluntary deed. The effect of the decree is prescribed by s. 62 of the Titles to Land Act of 1868, and s. 4 of the Amendment Act of 1869, as amended by the 62nd section of the Conveyancing Act of 1874, which Statutes also regulate the methods of completing the adjudger's title,—the effect of the decree and the methods of completing title being the same as in ADJUDICATIONS FOR DEBT (*q.v.*).

If there be more than one adjudication in implement at the instance of different parties, the first completed by registration in the Register of Sasines will be preferred, even though the decree on which it proceeded be subsequent in date to the other decrees. If two competing adjudgers crave decree in implement at the same date, Bell (*Com.* i. 749–50) is of opinion that the equity which introduced the process of adjudication in implement demands that they "should be conjoined in one complex adjudication, and the subject either sold or divided for their benefit. Truly they are nothing more than creditors, for while no real right or *jus in re* has been constituted, the *jus ad rem* that each enjoys, resolving into a mere action, makes them proper personal creditors." But see *Wright* (1821, 1 S. 95).

In a competition between an adjudger in implement and an ordinary adjudger for debt, if the ordinary adjudger completes his security by sasine, he will be preferred, and all others who complete their adjudications within year and day of him. "The subject is already attached preferably for the benefit of all who come within year and day, and the adjudger in implement may still adjudge as a common creditor for damages" (Bell, *Com.* i. 750). It is at least doubtful whether adjudications in implement are competent in the Sheriff Court (Shand, *Pract.* ii. 724).

Adjudication in Security. — Adjudication in security may sometimes be used on debts, the terms of payment of which have not yet come (Ersk. ii. 12. 42). And when the debt, though proved by written voucher or decree, is future or contingent, the creditor may sometimes adjudge in security (*Crs. of Wallace*, 1781, Mor. 62). All actions of adjudication may, if the creditor desires, be restricted to a security; and where the debt is a random sum, as when the creditor has obtained in the action of constitution decree reserving all objections *contra executionem* (see ADJUDICATION FOR DEBT), the creditor ought to take decree for satisfaction and payment of what he considers is certain, and a decree in security for what he considers the uncertain portion of the debt, so as to avoid *pluris petitio* (*Crs. of Macneil*, 1794, Mor. 122). When the debtor is *vergens ad inopiam*, the creditor may adjudge in security of his debt, although the term of payment is not yet come; and a cautioner threatened with distress may adjudge in security for what he may ultimately be called upon to pay, provided the creditor has not also been adjudged and ranked for the same sum.

This adjudication, when it is the first, requires to be intimated like other adjudications. There is no legal term of redemption; the debtor may redeem at any time. In other respects adjudication in security is obtained and completed in the same way as an ordinary adjudication for debt, but the grounds for craving the Court to adjudge in security should be specifically stated (*D. Queensberry's Exrs.*, 11 July 1817, F. C.).

Adjudication of Bankruptcy is the order of Court whereby a debtor is, according to English law, adjudged bankrupt. The leading Act regulating the proceedings is the Bankruptcy Act of 1883 (46 & 47 Vict. c. 52). The order is pronounced on the petition either of the debtor himself, alleging his inability to pay his debts, or on the petition of a creditor, founding on an act of bankruptcy committed by the debtor within three months previously. See ACT OF BANKRUPTCY. The debt which founds a creditor's petition must amount to £50, but it is sufficient if several creditors join whose debts amount in the aggregate to this sum. It must be a liquidated sum (*i.e.* liquid or certain in amount). Securities must be valued and deducted. The debt must have been incurred prior to the act of bankruptcy founded on, and must exist down to the date of the hearing and of the receiving order. No bankruptcy petition may be filed against any debtor who is not domiciled in England, or who, within a year of the date of the presentation of the petition, has not ordinarily resided or had a dwelling-house or place of business in England (46 & 47 Vict. c. 52, s. 6 (1)). Before the debtor is adjudged bankrupt, a receiving order is made for the protection of the estate (*ib.* s. 5). In the case of a petition by the debtor, it must be made forthwith (*ib.* s. 8); and in the case of a creditor's petition it is ordinarily made at the hearing of the petition (*ib.* s. 7). The receiving order does not divest the debtor, nor take away his title to sue, but he is accountable to the receiver for all property recovered by him. If, at the hearing of a petition, the Court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that, for other sufficient cause, no order ought to be made, the petition may be dismissed (*ib.* s. 7). Where a receiving order is made against a debtor, then, if the creditors at their first meeting resolve by a majority in value that he should be adjudged bankrupt, or pass no resolution, or if they do not meet, or if a composition or scheme is not accepted or approved in pursuance of the Act within the prescribed period, the Court adjudges the debtor bankrupt. The creditors may appoint the trustee by ordinary resolution, or leave the appointment to the committee of inspection. The official receiver acts under the receiving order until the trustee is appointed.

The general effect of an adjudication upon the debtor's property is similar to that of sequestration. It draws back to the commencement of the bankruptcy (*i.e.* the first act of bankruptcy within three months prior to the presentation of the petition), and vests the trustee as from that date with the bankrupt's whole property, real and personal. The Bankruptcy Act, 1883, defines the property which so vests (s. 44) as including—

"(1) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge.

"(2) The capacity to exercise and take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of the bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice.

"(3) All goods being at the commencement of the bankruptcy in the possession or disposition of the bankrupt in his trade or business by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the

bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section."

The same section provides that the property vesting in the trustee shall not include—

"(*a*) Property held by the bankrupt on trust for any other person.

"(*b*) The tools (if any) of his trade and the necessary wearing apparel and bedding of himself, his wife and children, to a value, inclusive of tools and apparel and bedding, not exceeding £20 in the whole."

An adjudication of bankruptcy in England or Ireland constitutes the debtor notour bankrupt in Scotland (19 & 20 Vict. c. 79, s. 7). A receiving order does not have this effect.

[Robson on *Bankruptcy*, 197 *et seq.*; Williams, *Bankruptcy Practice*, 28, 66, 162, 233; Goudy on *Bankruptcy*, 71–2.]

Adjudication on *debita fundi*.—Adjudications are competent upon *debita fundi* such as heritable bonds, duties due to superiors, debts constituted real burdens upon land, whether by constitution or by reservation. If there be a valid personal obligation as well as a heritable bond, the adjudication may proceed upon such obligation. The advantage of proceeding upon the personal obligation is that the adjudication will embrace all the lands of the debtor, whereas if it proceeds upon the *debitum fundi* alone, it will be confined to the security subjects. The disadvantage of proceeding upon the personal obligation, however, is that the adjudication will have no preference over other adjudications proceeding upon ordinary unsecured debts. Adjudications upon *debita fundi* were expressly excepted from the *pari passu* ranking of apprisings under the Act 1661, c. 62. But they are entitled to the natural preference which they have as real debts. Thus, in a competition amongst adjudgers, they are preferable to adjudications upon personal debts, and they are preferable *inter se* according to the priority of infeftment. But while this is so, the creditor in them has no preference for arrears of interest before the adjudication. He will naturally, as other adjudgers do, accumulate interest with the debt, so that the two may bear interest in the adjudication, but he will have no preference over other adjudgers for the interest of the accumulated sum, which interest is not a real but a personal debt, being interest upon interest. He can, however, secure a preference for arrears of interest by converting these arrears into a real debt. This he can do by obtaining decree in an action of poinding of the ground. Having obtained this decree, he can raise an action of adjudication, proceeding upon the debt as the ground, and the decree as the warrant. The decree on the adjudication will then give him a preference for the accumulated sum, which has thus been converted into a real debt.

Adjudication on a Trust Bond.—This was an expedient devised by Sir Thomas Hope to enable an heir to establish his title to his ancestor's estate without incurring either liability for his ancestor's debts, or becoming liable to implement a particular obligation of his ancestor's. It may have been useful at a time when an heir who did not renounce the succession, incurred liability for the full amount, whatever it might be, of his ancestor's debts. But it is now unnecessary and obsolete. The procedure was that the heir granted a bond in favour of a friend whom

he could trust for the full amount, or even more than the full amount, of the estate. The understanding between him and the grantee of the bond was that the grantee should adjudge the estate in virtue of the bond, and should then either challenge competing claims for the benefit of the heir, or should assign the adjudication to the heir, who would then himself be in a position to challenge these claims. By this expedient he established his rights as heir without incurring the liabilities of an heir (see Menzies, *Conveyancing*, 807). The heir completes his title upon the adjudication, but if, instead of doing so, he completes his title as heir, he is held to have abandoned his adjudication, which thereby becomes ineffectual as a step to a title (*Bellenden*, 1823, 2 S. 329).

Adjudication on a Trust Disposition.—It was attempted to secure the advantage of adjudication upon trust bond by granting, instead of a bond, a trust disposition, with the understanding that the disponee should lead an adjudication in implement upon the disposition. This device was, however, discountenanced by the Court in *Dunlop* (4 July 1820, F. C.; affd. 2 Sh.'s App. 115). See ADJUDICATION ON TRUST BOND.

Adjudication, Declaratory.—This was a form of action of considerable utility in the law, and expressly recommended by the Court (*Dalzell*, 1756, Mor. 16204). It was useful in a variety of cases, as where property, though feudally vested in one, really belonged to another, who desired his right to be declared, and the estate to be adjudged to him as his own property; or where an estate was vested in trustees who had completed a title and had all died, and the beneficiary desired to have his rights declared and the estate adjudged to him; or where a judicial factor appointed upon the estate of a deceased person required to complete a title to that estate. The legislation of the last thirty years, in conveyancing and trusts, has introduced simpler modes of completing titles, and superseded, in many cases, declaratory adjudications. Thus by the Titles to Land Act, 1858, s. 21, a factor, instead of leading a declaratory adjudication, might petition the Court for warrant to complete a title to specified lands, and the warrant granted had the legal effect of a disposition in favour of the factor from the person whose estate was under management—at all events when that person's title was complete (see Titles to Land Act, 1860, s. 38; Titles to Land Consolidation Act, 1868, s. 24; the Amendment Act of 1869, s. 3; and the Conveyancing Act of 1874, s. 44); and beneficiaries under a lapsed trust, when entitled to any heritable property, may, under sec. 14 of the Trusts (Scotland) Act, 1867, apply by petition for authority to complete title.

Adjunctio.—The term *adjunctio* is applied by commentators to cases of accession in which one moveable subject accedes to another moveable subject, as embroidery to a garment (*Inst.* ii. 1. 26). In Scotland the expression is sometimes used to denote generally industrial accession. See ACCESSIO.

Adjustment.—Adjustment is a term used to indicate the method of settling maritime claims, and, in particular, general average and claims

under policies of marine insurance. In simple cases of insurance claims, an endorsement of the sum payable is written on the policy, and initialed by the underwriters. But in general, statements are made up by average adjusters, and then the claims are examined and passed by those concerned—most frequently underwriters. So long as the underwriter has not paid, he is not debarred from challenging the adjustment; but once he has passed the statement, there is an *onus* on him to show that it is wrong (*Herbert*, 1 Camp. 136; *Shepherd*, 1 Camp. 275). These authorities are English, and the judgments to some extent seem based on the English doctrine of want of consideration, but it is thought the rule in Scotland is the same.

The practice of average adjusters does not in general constitute a binding usage of trade, for adjusters do not profess to act in such cases on mercantile usage, but to give effect to what they believe to be the law (*Attwood*, 5 Q. B. D. 286). At the same time, courts of law give weight to any well-established practice of adjusters, as likely to be convenient, and only to be disregarded if clearly against principle (*per* Lord Blackburn, *Svensden*, 10 App. Cases, 416). If the parties by the policy have agreed to be bound by the practice, it will be given effect to, whether in accordance with law or not (*Stewart*, L. R. 8 Q. B. 362).

The principles on which adjustments are made will now be shortly stated. This has been done largely in terms of the Bill to codify the law of marine insurance presented to the House of Lords in 1895 by Lord Chancellor Herschell, after careful revision by a committee of experts. Where the law, as declared by the Bill, is clear and simple, no further authority has been stated.

Standard of Adjustment.—The insurer, or each insurer if there be more than one, is liable for such proportion of the loss as the amount of his subscription bears to the value fixed by the policy, in the case of a valued policy, or to the insurable value, in the case of an unvalued policy.

The liability of the insurer for expenses properly incurred pursuant to the suing and labouring clause must be determined on the same principle.

Insurable Value.—Subject to any express provision or valuation in the policy, the insurable value of the subject-matters insured must be ascertained as follows:—

(1) In insurance on ship, the insurable value is the value, *at the commencement of the risk*, of the ship, including her outfit, provisions and stores, money advanced for seamen's wages, and other disbursements (if any) incurred to make the ship fit for the voyage or period of time covered by the policy, *plus* the charges of insurance upon the whole.

The term ship in the case of a steamship includes the machinery, boilers, coals, and engine stores; and in the case of a ship engaged in a regular trade, the permanent fittings requisite for the trade.

(2) In insurance on freight, whether paid in advance or otherwise, the insurable value is the gross amount of the freight at the risk of the assured, *plus* the charges of insurance.

(3) In insurance on goods or merchandise, the insurable value is the *prime* cost of the property insured, *plus* the expenses of shipping and the charges of insurance upon the whole.

(4) In insurance on any other subject-matter or interest, the insurable value is the amount at the risk of the assured when the policy attaches, *plus* the charges of insurance.

Total Loss.—Where there is a total loss of the subject-matter insured:—

(1) If the policy be a valued policy, the measure of indemnity (basis of adjustment) is the sum fixed by the policy.

(2) If the policy be an unvalued policy, the measure of indemnity (subject to the limit of the sum insured and any express provision in the policy) is the insurable value of the subject-matter insured.

Particular Average Loss.—Ship.—Where a ship is damaged, but is not totally lost, the measure of indemnity, subject to any express provision in the policy, is as follows:—

(1) Where the ship has been repaired, the assured is entitled to the reasonable cost of the repairs, less customary deductions, but not exceeding the sum insured in respect of any one casualty, provided the repairs have been executed *bonâ fide* and with reasonable discretion. The best-known deduction is the allowance to underwriters of one-third off the cost of repairs to represent the substitution of new materials for old. The deduction is not given in cases when a ship is injured on her first voyage, and is generally excluded in the case of iron ships.

(2) Where a ship has been only partially repaired, the assured is entitled to the reasonable cost of such repairs, computed as above, and also to be indemnified for the reasonable depreciation arising from the unrepaired damage, provided that the aggregate amount shall not exceed the cost of repairing the whole damage, computed as above.

(3) Where the ship has not been repaired, the assured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage, computed as above.

(4) Where the ship has not been repaired, and is sold in her damaged state during the risk, the assured is entitled to the reasonable cost of repairing such damage, computed as above, but not exceeding in the ordinary case the actual depreciation in the value of the ship as ascertained by the sale. (*Pitman*, 9 Q. B. D. 192.)

By way of example: A ship is insured by A. for £1000, under a policy in which the ship is valued at £5000. She is damaged by perils insured against, which cost, taking into account customary deductions, £1000.—A. pays one-fifth of the sum insured, or £200. If there is no valuation in the policy, and the insurable value of the ship is £6000, A. will pay one-sixth of the sum insured.

Freight.—Where there is a partial loss of freight, the measure of indemnity (subject to the limit of the sum insured, and any express provision in the policy) is such proportion of the sum fixed by the policy, in the case of a valued policy, or of the insurable value, in the case of an unvalued policy, as the proportion of freight lost by the assured bears to the whole freight at the risk of the assured under the policy.

E.g. The freight being valued at £1000; one-fourth is lost—the insurer pays £250, whether the freight at risk is more or less than the valuation.

Goods.—Where there is a partial loss of goods, merchandise, or other moveables, the measure of indemnity, subject to the limits of the sum insured, and any express provision in the policy, is as follows:—

(1) Where part of the goods, merchandise, or other moveables insured by a valued policy is totally lost, the measure of indemnity is such proportion of the sum fixed by the policy as the value of

the part lost bears to the insurable value of the whole, ascertained as in the case of an unvalued policy.

(2) Where part of the goods, merchandise, or other moveables insured by an unvalued policy is totally lost, the measure of indemnity is the insurable value of the part lost, ascertained as in the case of total loss.

(3) Where the whole or any part of the goods or merchandise insured has been delivered damaged at its destination, the measure of indemnity is the ratio of loss, ascertained by comparing *the gross sound value with the gross proceeds if sold, or the gross damaged value if not sold*, reduced to the same cash basis, at the time and place of arrival, applied to the sum fixed by the policy, in the case of a valued policy, or to the insurable value, in the case of an unvalued policy.

(4) "Gross value" means the price which a wholesale buyer would give, with freight, landing charges, and duty paid beforehand; provided that in the case of goods or merchandise customarily sold in bond, the bonded price is deemed to be the gross value. "Gross proceeds" mean the actual price obtained at a sale where all charges on sale are paid by the sellers.

(5) Where any sale or other charges on damaged goods or merchandise are paid or payable by the buyers, such charges must be added to the gross proceeds before establishing the ratio of damage, as above provided; and in the event of a claim being established, such charges are subsequently recoverable from the insurer as "extra charges."

E.g. Goods are insured for £5000 under a policy in which they are valued at £5000. They arrive damaged by perils insured against, and their gross value is only £3000; whereas, had they arrived in sound condition, their value would have been £6000. The insurers pay £2500, being 50 per cent. of the valuation. On the other hand, had the goods been valued at £7000 in the policy, and insured therefor, the underwriters would have had to pay £3500, or 50 per cent., again, of the high valuation. In an open policy, the insurable value takes the place of the valuation as the standard. (*Lewis*, 2 Burr. 1167; *Johnson*, 2 East, 581; *Usher*, 12 East, 639; *Forbes*, 13 East, 32; Francis, 1 Com. Cas. 217.)

The principles regulating cumulative losses, losses under special clauses, *e.g.* the running-down clause, and losses to which the usual memorandum applies, will be discussed when treating of the Law of Marine Insurance generally.

General Average.—In this case the adjustment is concerned, in general, with two different questions—(1) the amount of contribution payable *inter se* by the ship, freight, and goods in whose interest the general average expenditure or sacrifice has been incurred; and (2) the sum recoverable from the insurers of these interests.

Adjusters have frequently difficult and important work to do in making up general average statements, determining the amount of contribution payable by the different interests; but this part of the subject will be more conveniently treated when the subject of general average is dealt with generally under the title Average. A deduction of new for old is made on similar lines to the deduction made in questions of particular average with underwriters.

In a question with underwriters, the following propositions define the principles on which the adjustment proceeds:—

Subject to any express provision in the policy: where the assured has suffered a general average loss, he may recover from the insurer in respect of the proportion of the loss which falls upon him; and when the loss is caused by a peril insured against, *e.g.* jettison, he may recover from the insurer in respect of the whole loss, without having enforced or giving credit for his right of contribution from the other parties liable to contribute, reserving the insurer's right of subrogation.

Subject to any express provision in the policy: where the assured has paid, or is liable to pay, a general average contribution, he may recover therefor from the insurer; but, in the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connection with the avoidance of, a peril insured against. It is obvious that the contributory value may be quite different from the insured value. In that case the adjustment is made by looking at the contributory value of the subject insured and the valuation in the case of a valued policy, or the insurable interest in an open policy, and charging the underwriter with the average contribution, not exceeding the amount he would have been liable for, assuming the contributory value had been the same sum as the valuation, or as the amount of the insurable interest, as the case may be.

E.g. The contributory value of the ship is £6000; the general average contribution on this value is £1000; the ship is valued and insured for £5000; the insurers pay five-sixths of the £1000.

It was held by Lord Shand (*Robinows*, 1876, 3 R. 1134), that where the policy provided that general average was to be payable in accordance with foreign statement, this meant that underwriters were liable for the proportion of the contribution which their subscription bore to the value in the policy, whatever the contributory value of the ship. The judgment was affirmed, but on different grounds, and in practice the ordinary rule is applied.—[See Tudor, *Leading Cases in Mercantile and Maritime Law*; Arnould on *Marine Insurance*; Phillips on *Marine Insurance*; M'Arthur on *The Contract of Marine Insurance*; The Marine Insurance Bill, 1895, specially clauses 15, 66, 67, 68, 69, 70, 71.]

See Average, Marine Insurance.

Adjustment of Record.—See Record.

Ad medium filum.—Where the march between two properties is a non-navigable river, a road, or a ditch, each owner is presumed to possess the *solum* of his estate *ad medium filum*, *i.e.* up to an imaginary line or thread drawn through the centre of the river, road, or ditch (*Wishart*, 1853, 1 Macq. 389). The extent of either property does not affect this presumption. But the proprietary right, in any case, is restricted. Thus, if a road or street be the march, the use of the surface is public, and the proprietor's right usually takes the shape of a claim to the underground minerals. On the other hand, if a running stream separates two estates, the use to which the coterminous proprietors may put the *solum* is qualified,—mainly owing to the fact that they have a common interest in the water of the stream, with the natural flow of which they are not entitled to interfere by erecting an *opus manufactum* in the *alveus* (*Bicket*, 1866, 4 M. (H. L.) 44). A boundary "by" a road is different from a boundary "by" a stream: as, in the

former case, every part of the road is excluded; in the latter, the property in the *alveus* up to the *medium filum* is carried.—[*M'Intyre's Trs.*,1867,5 M. 780; Rankine, *Landownership*, 102, 105–6, 279, 291; M. Bell, *Lect.* 602; Bell, *Prin.* s. 1120; *Gibson*, 1869, 7 M. 394.] See Boundaries; Fishing.

Adminicles, in a proving of the tenor, signify any writings from which the existence or terms of the missing writ can be ascertained. The pursuer must specify those upon which he founds (*Jenkinson*, 1850, 12 D. 854). Their character varies with the nature of the writ. Thus, in the case of a formal deed, they may be expected to be more ample than in the case of an informal personal contract (*Winton & Co.*, 1862, 24 D. 1094); or of documents, such as are kept in public registers (*Richmond*, 1869, 7 M. 956; cp. *Lauderdale*, 1770, 2 Pat. App. 234). Accordingly, it is matter for observation that the draft of a formal deed cannot be traced (*Rannie*, 1891, 18 R. 903). Parole evidence is unnecessary in corroboration if the adminicles are probative, and narrate or presuppose the missing writ, and are under the hand of the granter or his heirs or assignees. And even where they were not so subscribed, they have been held sufficient, without supplementary proof, where the circumstances were special (cp. *Lesmore*, 1682, Mor. 15802; *Inglis*, 1712, Mor. 15819; *Gordon*, 1749, 5 B. Sup. 776; *Fleming*, 1835, 13 S. 1002; and *Walker*, 1852, 14 D. 362; with *Graham*, 1847, 10 D. 45, and *M'Leod*, 1865, 3 M. 840). When they consist of improbative writings, or drafts of the missing deed, or scrolls of writings which refer to it as a finished deed, they must be supplemented by parole evidence, which should include, if possible, the oaths of the instrumentary witnesses (Stair, iv. 32. 8. 9; Ersk. iv. 1. 55. 56). Adminicles will be sustained more easily when he who has the adverse interest admits that he granted the deed (*Ronald*, 1852, 14 D. 357). Such an admission is especially important in the case of holograph instruments, as it is a delicate matter to prove their tenor (*Trotter*, 1707, Mor. 15811; *Robertson*, 1833, 11 S. 775; cp. *Fraser*, 1784, Mor. 15830). In the case of a valuation of teinds, the report of the teind clerk has been held equivalent to a proof (*Athole*, 1880, 7 R. 1195). Written adminicles have been dispensed with where, looking to the nature of the missing writ, they are not to be expected (Ersk. iv. 1. 55; *Winton*, *ut supra*); or where such a special *casus amissionis* is proved, as the wilful destruction of the deed by a person prejudiced by it (*Leckie*, 1884, 11 R. 1088; *Rannie*, *ut supra*). The witnesses must prove that the import of the deed was substantially as libelled (*Rintoul*, 1833, 6 W. & S. 394), that it was legally executed (see *Rannie*, *ut supra*), and that it did not bear traces of vitiation or forgery. The testing clause and the due stamping of the deed need not be specially libelled and proved. Written adminicles are not excluded by the Act 1579, c. 94, in proving the tenor of letters of horning, and their executions.—[Stair iv. 32. 6–10; More, *Notes*, 386; Ersk. iv. 1. 55–58; Tait, *Evidence*, 208 *et seq.*; Bell, *Prin.* s. 883; Mackay, *Practice*, ii. 321; Dickson on *Evidence*, ss. 1329, 1337, 1346–51.] See Casus Amissionis; Proving of the Tenor.

Administration, Husband's Right of.—This term denotes the right which the husband enjoys, as head of the family, to control the management of the wife's estate. In virtue of this right, unless renounced or excluded by deed or by Statute, his consent is required to validate her deeds: *e.g.* a receipt by her without his consent would not be valid,

nor a sale of her heritage (*Dickson*, 1871, 10 M. 41), nor a transfer of her moveables. Erskine says: "It also proceeds from the curatorial power of the husband, that all deeds done or granted by a wife without his consent are in themselves null, though they should relate to her own property, and make no encroachment on any right competent to the husband" (Ersk. i. 6. 22, see 27; Fraser, i. 797). By the older writers the expression *jus mariti* is often used to include both the husband's right of property at common law in the wife's moveable estate, and also his curatorial power (Stair, i. 4. 9; Ersk. i. 6. 13; Bell, *Prin.* s. 1563). But the two rights are distinct, and were discriminated at an early period, as Fraser points out (*H. & W.* i. 796, 676; M'Ken. i. 6, 16; *Murray*, 1745, Mor. 5843 (Kilkerran's report); *Collington*, 1667, Mor. 5828; *Annand*, Mor. 5844, 2 Pat. 369 (1774); *Bryce's Tr.*, 1878, 5 R. 722).

The Administration must be for her Benefit, or it is competent to appoint another Curator.—When the wife's fortune fell under the *jus mariti* the husband was the uncontrolled master of it, and was under no obligation to account to her for his actings. He was, in fact, just as free to deal with it as with any part of his estate (*Fraser*, 1872, 10 M., at 847; Stair, i. 4. 9; Ersk. i. 6. 13; Fraser, i. 649). It is otherwise when, as by the present law, the wife remains the owner, subject only to the husband's control as to the management of the capital. Here the husband's curatory is reserved by the law, as a protection to her against being led by feminine impulsiveness, or inexperience of affairs, into imprudent ventures. The husband is bound, therefore, to exercise his administration in her interest. In *Bryce's Tr.*, Lord Gifford, in delivering the opinion of the Court, said: "A husband's *jus mariti* and a husband's right of administration or curatorial power are different things, and the exclusion of the one does not necessarily imply the exclusion of the other. It is always a question of intention. The husband's *jus mariti* virtually makes him proprietor of his wife's moveables; but his curatorial power is quite different, and must be exercised solely for her behoof, and to save her from being hurt by her own acts" (5 R. at 728). And it would appear, though there is no decision upon the point, that where strong cause was shown, a husband might be compelled to find caution to administer his wife's estate for her behoof, or might even be removed from office, the wife being authorised to act by herself, or another curator being named (*Bryce's Tr., at supra*; Fraser, i. 798). There is now, however, less likelihood than formerly for such a strong measure being necessary, as a wife, married since the Married Women's Property Act, 1881 (except in the few cases to which the Act does not apply), does not need her husband's consent in disposing of her income. It would only be in a case where the husband, from improper motives, obstinately declined to concur in the granting of a deed, the signing of a transfer of shares, or some other act of administration of capital, that the interposition of the Court might now be necessary. It has been repeatedly held that, where the subject of an action which a married woman desires to raise is something which, if recovered, would be her separate estate, although the right of administration might not be excluded from it, her husband cannot prevent the action by arbitrarily refusing his consent. If necessary, the Court will dispense with it, and appoint a *curator ad litem* (*Blair*, 1829, 8 S. 264; *Hacket*, 1673, Mor. 6039; *Graham*, 1831, 9 S. 543; Stair, i. 4. 15; Ersk. i. 6. 21; Fraser, i. 569; Mackay, *Manual*, 147).

It was at one time thought that the husband's right of administration was so inherent in the nature of the family, that it would be *contra bonos*

mores to allow him to renounce it (*Dickson*, 1705, Mor. 10395; *Murray, Collington, ut supra*; *Dick*, 1709, Mor. 5999; Stair, i. 4. 9; Fraser, i. 798). But the husband's rights as *caput et princeps familiæ*, under which he may fix the common home where he chooses, and has a limited authority over his wife and children, is now distinguished from his right of administration in the limited sense of controlling her management of her own estate. His general right to be the head of the family he cannot renounce (Bell, *Prin.* s. 1562; Fraser, i. 799; *Colquhoun*, 1804, Mor. App. *Husband & Wife*, No. 5; *Collington, ut supra*). But he may renounce his particular right of management of his wife's fortune (*Biggart*, 1879, 6 R. 470; *Annand, ut supra*; Ersk. i. 6. 14; Fraser, i. 799).

How the Right of Administration is excluded.—The husband may renounce the right by antenuptial marriage contract (Ersk. i. 6. 14; Bell, *Prin.* s. 1563; Fraser, i. 799; *Bruce's Trs.*, 1894, 21 R. 593). Before the Married Women's Property Act of 1881 (*q.v.*), where it was intended that the lady should remain the mistress of her own fortune, the invariable practice was for the husband to renounce both his Jus Mariti, (*q.v.*) and his right of administration. That Statute abolishes the *jus mariti* in the estate of a wife married after the Act, or, if married before the Act, in her estate acquired thereafter, unless the husband had made a reasonable provision by irrevocable deed. It removes the right of administration from the income of the wife's moveable estate, and the rents of her heritage. But as to the capital of her estate, that right is left intact. It is essential, therefore, where it is desired to give the wife the uncontrolled right of disposal of her estate, that the husband should still renounce his right of administration. It may be renounced by him by a post-nuptial marriage contract or other deed. And as the renunciation of this right, unlike that of the *jus mariti*, where this still exists, does not infer any pecuniary loss to the husband, it does not seem that a renunciation of it could be revoked by him or by his creditors as a donation (see *Shearer*, 1842, 5 D. 132; *M'Phersons*, 1750, Mor. 6113; Fraser, i. 793, and ii. 948). Moreover, as the right arises from the position of the husband in the family, it is personal to him, and cannot be attached by his creditors (Fraser, i. 800; see *Crawcour*, 1844, 6 D. 589, per L. Cuninghame; Ersk. i. 6. 22). It may be excluded by the giver of a fund to the wife, for a donor may attach any lawful condition to his bounty (Ersk. i. 6. 14; Fraser, i. 783; *Annand, ut supra; M'Donald*, 1855, 17 D. 998; *M'Dougall*, 1879, 6 R. 1089). And effect will be given to a clause declaring that, upon a certain event happening, *e.g.* the husband becoming insolvent, the right of administration is to be excluded (*Annand, ut supra*; Fraser, i. 799).

Exclusion or Renunciation may be implied.—The express exclusion of the *jus mariti* does not necessarily imply the exclusion of the right of administration (*Bryce's Tr.*, 1878, 5 R. 722). But there is no magic in the words "right of administration," and the husband's power may be excluded by any words which clearly import that intention. And so a renunciation by the husband of his *jus mariti*, and all other right and title to the rents of subjects belonging to his wife, with a declaration that her own receipts should be effectual discharges, was held to imply the exclusion of the right of administration (*Keygie*, 25 May 1815, F. C.); as was also a clause in a deed which excluded the *jus mariti*, and provided that the husband should have no concern with certain annuities, but that the wife's receipts should be sufficient therefor (*Gowan*, 1822, 1 S. 418; *Bruce's Trs.*, 1894, 21 R. 593, and authorities there cited; *Irvine*, 1883, 10 R. 731; *M'Dougall, ut supra*, cases referred to by L. Deas; *Commercial Bank*, 1842, 14 Sc. Jur. 528;

Fraser, i. 799 and 783). Renunciation of the *jus mariti* might be inferred from facts and circumstances, as when the husband plainly showed by a course of conduct that he did not lay claim to property to which he was entitled *ex jure mariti* (*Smith*, 1884, 12 R. 186; *Wright's Exrs.*, 1880, 7 R. 527; *Davidson*, 1867, 5 M. 710). It would seem that, as to a particular transaction, or the conduct of a particular piece of business, the husband's consent may be inferred from his lying by, in the knowledge that his wife was engaging in it, and not warning the other party that she was acting without his consent. J. Voet (23. 2. 42 *in finem*) says that where a husband —*præsens atque sciens uxorem contrahere*—keeps silence, his consent is presumed (and see *Hill*, 1879, 7 R. at 76; *Wright's Exrs.*, 1880, 7 R. 527; *Dickson*, 1871, 10 M. 41). But where the transaction is one for which writing is essential, it is as necessary that his consent should be in writing as that of the wife herself (*Dickson, ut supra*). And such tacit consent, if sufficient as to a particular transaction, could not amount to a general waiver by him of his right of administration.

Without a renunciation of the right of administration, either express or necessarily implied from the terms of a writing, a third person, except in the cases following, would hardly be in safety in dealing with a married woman; and in a question with her it would seem sufficient for the husband to say that he had not interfered before, because he had approved of her actings, but had not waived his right to take action when her management met with his disapproval. See *Wright's Exrs., ut supra*; *Henderson*, 1889, 17 R. 18. As to a wife's contractual capacity, see MARRIED WOMAN; CAPACITY.

RIGHT OF ADMINISTRATION MAY BE IN CERTAIN CASES DISPENSED WITH BY THE COURT.—By s. 5 of the Married Women's Property (Scotland) Act, 1881, "where a wife is deserted by her husband, or is living apart from him with his consent, a judge of the Court of Session or Sheriff Court, on petition addressed to the Court, may dispense with the husband's consent to any deed relating to her estate" (see *Niven, Petr.*, 1883, 20 S. L. R. 587; *Gibson*, 1893, 1 S. L. T., No. 336). See *supra* for the Court's power at common law where the husband refuses to consent, or abuses his curatorial powers; and cp. *Bryce's Tr.* (1878, 5 R. 722).

IN CERTAIN CASES THE RIGHT OF ADMINISTRATION IS EXCLUDED BY STATUTE.—*a.* By the Conjugal Rights Act, 1861, when the wife has obtained a protection order, property which she has acquired or may acquire after desertion, and property which she has succeeded to or may succeed to or acquire right to after such desertion, is vested in her, exclusive of her husband's *jus mariti* and right of administration. The protection does not extend to property of which the husband or his assignee had acquired full and lawful possession before the petition, or against which, before that date, a creditor of his had done complete diligence (s. 4). By the same Act the *jus mariti* and right of administration are excluded from property which a wife may acquire, or which may come to or devolve upon her after a decree of judicial separation. In neither case does return to cohabitation restore the husband's rights as to estate which was hers when the cohabitation is resumed (s. 3 and s. 6).

b. By the Married Women's Property Act, 1877, the *jus mariti* and right of administration are excluded after 1st January 1878 from the wages and earnings of a married woman, including money acquired by her through the exercise of any literary, artistic, or scientific skill.

c. By the Married Women's Property Act, 1881 (*q.v.*), the rents and produce of heritable property *in Scotland* belonging to the wife are no

longer subject to the *jus mariti* and right of administration of the husband (s. 2). See *infra* as to cases to which the Act does not apply. As to a wife's moveable estate, the *jus mariti* is abolished, but not the right of administration, except that the income shall be payable to the wife on her individual receipt or to her order; but the wife is not entitled to assign the prospective income of her moveable estate, or, unless with the husband's consent, to dispose of such estate. The Act applies to all marriages contracted on or after 18th July 1881, when the husband at the time of the marriage was domiciled in Scotland. In the case of marriages prior to its date the Act does not apply at all, when the husband, before the Act, has by irrevocable deed made a reasonable provision for his wife in the event of her surviving him (s. 3); and when no such provision has been made, it applies only to the wife's estate to which she acquired right after its passing (*ib.*). The husband's right of administration is not excluded from heritage the fee of which vested in a wife married prior to the Act, though the income did not become payable to her till thereafter (*Horsbrugh*, 1889, 16 R. 507).

Right of Administration of Foreign Husband, or Husband who acquires Scottish Domicile after Marriage.—It may happen that a foreign wife, resident but not domiciled in Scotland, deals with her estate in a manner in which she is entitled to act by the law of her own country, but which exceeds the powers of a Scottish wife. An English wife, for example, can dispose of the capital of her moveable estate as if she were a *femme sole* (Married Women's Property Act, 1882, s. 1 (1)). A Scottish wife, without a marriage contract cannot deal with her capital except with her husband's consent. Is the English wife's power restricted by her temporary residence in Scotland? It is submitted that a wife's power of managing her funds independently of her husband is part of her capacity: and that the sound principle is to refer any question as to capacity to the *lex domicilii*. In this case, for the reasons given *infra*, it may be thought, however, that the *lex domicilii* is and remains the law of the domicile at the marriage. There is no direct authority upon the point, and the opinions of writers are extremely conflicting (see *Cooper*, 1888, 15 R. (H. L.), 21; *Sottomayor*, 1877, 3 P. D. 1; Fraser, *Parent & Child*, 570, 583; *Husband & Wife*, ii. 1317; Westlake, 43; Dicey on *Domicile*, 177; Story, *Conflict of Laws*, s. 100; Gillespie, *Bar*, 310; Burge, *Commentaries*, i. 113; Guthrie, *Savigny*, 152; Walton, *Husband & Wife*, 365, 368, 403 *et seq.*; but see Voet, 23. 2. 61). The question is more difficult when there is a change of domicile, as when the English wife, possessed of property of which she has complete power of disposal, becomes domiciled in Scotland. The opinion now entertained by the great majority of writers on private international law is, that the rights of spouses in their respective estates are fixed at the date of the *marriage*. An express marriage contract would not lose its effect by a change of domicile; and it is thought there was an implied contract that the law of the original domicile should govern.

To take the former illustration: English spouses acquire a domicile in Scotland. The wife possesses separate estate. The Married Women's Property (Scotland) Act, 1881, does not apply, for the husband had not *at the time of the marriage* his domicile in Scotland (s. 1 (1)). When his domicile becomes Scottish, does the wife's estate cease to be her separate property, and become his *ex jure mariti* by the common law of Scotland? It is thought this would not be the result, at any rate, as regards property which was the wife's before the new domicile was acquired. As to *acquirenda* thereafter, there is more doubt. See Jus Mariti; Domicile; Capacity

(Fraser, ii. 1325; Walton, 408 *seq.*, and authorities there cited, to which add Voet, 23. 2. 87; Rattigan, *Priv. Int. Law*, 63; but see Murray, *Property of Married Persons*, 69). If this be the view ultimately adopted by the Courts, it seems likely that the same rule will be applied to the husband's right of administration of his wife's separate estate. The unrestricted power of disposal of her estate was part of the wife's right in it at the marriage; and it would be an odd result to hold that her estate remained her separate property, but that the necessity for her husband's concurrence in disposing of it had been superinduced by the change of domicile (see *Duncan*, 1854, 18 Beavan, 128, especially at 141; affd. 7 De G. M. & G. 78; *Guépratte*, 1851, 4 De G. & S. 217; *Peillon*, 1858, 25 Beavan, 218).

In spite of the weighty opinions in support of this doctrine of implied contract at marriage, that the rights of spouses shall be fixed by the law of the domicile at that time, it cannot be denied that there are important considerations on the other side. The general tendency is to allow the law of the actual domicile to decide all questions of personal status and rights in personal property. And it would seem quite as natural to hold that there was a tacit contract that the law of the domicile at marriage was to determine upon what grounds, if any, it might be dissolved. It may appear inequitable that a husband should be able to acquire increased rights in his wife's estate by changing his domicile and hers against her will. But with equal or greater force it might be urged that he was not entitled to change her domicile to a country where he could obtain a divorce upon a ground not sufficient by the law of the domicile at marriage—by which, indeed, the marriage might have been indissoluble. That he has this power is now settled, and it is by no means impossible that the same rule will be applied in questions of property (see *Carswell*, 1881, 8 R. 901; *Harvey*, 1880, 6 P. D. 35, 8 App. Ca. 43; *Humphrey*, 1895, 34 S. L. R. 99; and cp. *Le Mesurier* [1895], App. Ca. 517).

Effect of Exclusion of both Jus Mariti *and Right of Administration.*—Where the husband's rights are entirely excluded, the wife may deal with her separate estate as if unmarried, and may render her estate liable for the fulfilment of all obligations connected with its enjoyment or administration (*Biggart*, 1879, 6 R. 470: *Burnett*, 1888, 25 S. L. R. 356; *Henderson*, 1895, 22 R. 895; Fraser, i. 813). Thus she may invest it in the shares of a company, and is liable to the extent of her separate estate upon the liquidation of the company (*Biggart, ut supra*; *M'Dougall*, 1879, 6 R. 1089).

Title to Sue.—As to estate in this position, a married woman has a title to sue without her husband's concurrence (*Graham's Trs.*, 1831, 9 S. 543; *Hay Primrose*, 1850, 12 D. 916; Fraser, i. 572). And it is thought it is unnecessary to appoint a *curator ad litem* (Fraser, *l.c.*; Mackay, *Manual*, 144; *Smith*, 1894, 2 S. L. T. No. 371).

But the possession of separate estate does not remove her incapacity, as a married woman, to contract a personal obligation, as distinct from an obligation which binds her estate but not herself. Except when she has a protection order, or is judicially separated, and in certain other special cases, a married woman cannot bind herself personally. See Married Woman. Her possession of separate estate does not enable her to grant a bill of exchange as cautioner for a debt (*M'Lean*, 1887, 14 R. 448), or a cash-credit bond (*Jackson*, 1892, 19 R. 528). And a discharge of legitim signed without her husband's consent is not binding (*Miller*, 1886, 13 R. 764). But when the right of administration is excluded she may invest or spend her move-

able estate in all respects as an unmarried woman (*Biggart, Henderson, ut supra*). As to her heritage when this right is excluded, she may dispose of it, or grant leases or feus, or burden it, and, in short, deal with it in all respects as if she were a man or an unmarried woman (*Annand*, 1775, 2 Pat. 369; *Keggie*, 25 May 1815, F. C.; *Gowan*, 1822, 1 S. 418; *Gordon*, 1832, 11 S. 36; *Standard Property Investment Co.*, 1877, 4 R. 695, per L. Gifford; More, *Notes to Stair*, xvii.; Fraser, i. 814; Rankine, *Leases*, 25).

Where the Jus Mariti *is excluded, but not the Right of Administration.*—This was formerly a somewhat unusual case, the rule being either to exclude the husband's rights altogether or not at all. The effect of the Married Women's Property Act, 1881, is to make it, where there is no marriage contract, the normal position of a wife's moveable capital or of her heritage.

With her estate in this position a married woman cannot deal without her husband's consent. It is not his, but he has the right of directing how it shall be administered. But he must do so for her behoof, and not for his personal advantage as opposed to hers (*Bryce's Tr.*, 1878, 5 R. 722). Transfers of her shares and similar documents must be signed by both spouses. She cannot sue or defend without his concurrence (*Borthwick*, 1827, 5 S. 242; *Wight*, 1827, 5 S. 549; Mackay, *Manual*, 144). But if he unreasonably refuse his consent, the Court will appoint a *curator ad litem* (*Finlay*, 1748, Mor. 6051; *Cullen*, 1830, 9 S. 31; *Blair*, 1829, 8 S. 264; Mackay, *Manual*, 147). Where the action relates to income of heritage in Scotland, she may sue alone, as the right of administration is there excluded.

Heritable Estate.—It is only from the rents and produce of heritable property in Scotland belonging to the wife that the husband's rights are excluded. As to rents of her heritage not in Scotland, they would seem, when he was domiciled in Scotland before the marriage, to fall under the *jus mariti*. If he was not domiciled in Scotland, this might be held otherwise, on the doctrine of tacit consent that the *lex domicilii* at the date of marriage should govern the rights of spouses during its subsistence (see *supra*).

It would seem that she could grant a valid receipt to tenants for rents, but otherwise the Act gives her no power, and she had none at common law, to sell or burden, or otherwise deal with her heritage (*Boyle*, 1822, 1 S. 372; *Bullions*, 1793, Mor. 6149).

She is not expressly prohibited from assigning her rents in advance, as she is in the case of the prospective income of her moveables. But it would appear that she cannot, without her husband's consent, grant a lease or perform any other act of administration (Ersk. i. 6. 27; Fraser, i. 804; Rankine, *Leases*, 23).

[Stair, i. 4, 9, and More's *Notes*, xvi.; Bankt. i. 124, 65; Ersk. i. 6. 13–27; Elchies, *Annotations*, 9; Bell, *Prin.* ss. 1562, 1563; Fraser, *H. & W.* i. 796; Walton, *H. & W.* 165, 308, 408.]

See Jus Mariti; Married Woman; Married Women's Property Act.

Administration, Letters of.—In England, when a person possessed of personal property dies intestate, or without having appointed executors, the Court (Probate, Divorce, and Admiralty Division) will grant letters of administration to a person who is called an administrator, and who is thereby authorised to administer the personal estate of the deceased. In the case of intestacy, the office of administrator will be granted to the widow or one of the next of kin of the deceased, or, failing these, to a

creditor or other person interested. Where the deceased has left a will, but has not appointed executors, or where the executors appointed have failed through declinature or otherwise, the office will be granted to the person chiefly interested under the will, or to the residuary legatee. In this case, he is granted *Letters of Administration cum testamento annexo.* The administrator, who draws his authority from the Court, is bound to give security for the due administration of the estate, by entering into a bond with sureties, called the administration-bond.

By the Confirmation and Probate Act of 1858 (21 & 22 Vict. c. 56, s. 14) it is provided that, where a person dies domiciled in England or Ireland, and leaves, besides personal property situated in that country, personal property situated in Scotland, his executors may produce the probate or letters of administration obtained in England or Ireland, with a note written thereon, signed by the proper officer, stating that the deceased died domiciled in England or Ireland, in the Commissary Court in Edinburgh, and these, having been certified by the Commissary Clerk, "shall be of the like force and effect, and shall have the same operation in Scotland, as if a confirmation had been granted by the said Court." Similarly, where a domiciled Scotsman has left part of his personal property situated in England or Ireland, his executor may produce his Scottish confirmation in the English or Irish Court, and get it sealed there, and it has then "the like force and effect" as if probate or letters of administration had been granted to him in the English or Irish Court (21 & 22 Vict. c. 56, ss. 12, 13; 39 & 40 Vict. c. 70, ss. 41, 42, 43). Calendars containing particulars of all probates and letters of administration issued in England and Ireland, are made up in these countries, and copies are sent to the office of the Commissary Clerk in Edinburgh, where they may be consulted upon payment of a fee of one shilling (20 & 21 Vict. c. 77, s. 68). See CONFIRMATION OF EXECUTORS.

Administrator-in-law.—See ADMINISTRATION (HUSBAND'S RIGHT OF); CURATOR; TUTOR; PARENT AND CHILD.

Admiral, The Lord High.—The Lord High Admiral of Scotland was one of the officers of State, and anciently had very extensive civil and criminal jurisdiction. From an early date, however, his legal functions came to be exercised by a Judge-Admiral, who presided in the High Court of Admiralty; and by inferior Admirals, styled Admirals-Depute, who exercised local jurisdiction, and whose judgments were subject to review by the Judge-Admiral. There was orignally no law regulating the qualifications of the Judge-Admiral; but by 26 Geo. III. c. 47, it was enacted that he should possess the qualifications required from persons holding the office of Sheriff-Depute. Prior to this, in order to regulate the Admirals' jurisdiction, the Act 1681, c. 16, was passed. It declared "the High Court of Admiralty to be a Soveraigne Judicature in itself, and of its own nature to import summar execution" . . . "That the said High Admiral, as he is His Majesty's Leivetenant and Justice-General upon the seas and in all Ports Harbours or Creiks of the same and upon fresh waters or navigable rivers below the first bridges or within the flood-marks so far as the same does or can at any time extend; so the said High Admiral hath the sole privilege and jurisdiction in all maritim and sea faring causes foreign and domestic whether civil or criminal whatsoever within this realm

and over all persons as they are concerned in the same and prohibits and discharges all other judges to meddle with the decision of any of the said causes in the first instance except the Great Admiral and his Deputes allenarly." It may be noted that, besides privative jurisdiction in maritime cases, the Judge-Admiral (but not the inferior Admirals) had by long usage concurrent jurisdiction in mercantile cases with the Court of Session and Sheriff Court (see ADMIRALTY COURT). Further, the Statute declared that it was the privilege of the Admiral to cause parties to find caution not only for compearance, but also for performance (that is, caution *de judicio sisti et judicatum solvi*); and that the High Court of Admiralty is a supreme Court, and the decrees of inferior Admiralty Courts, and also its own decrees, are subject to review and reduction by it: while all review by the Court of Session by way of advocation is prohibited; and parties dissatisfied with the judgment of the Judge-Admiral must bring a suspension or reduction in the Court of Session. Commercial treaties with foreign nations were recorded in the Admiralty Court. Embargoes on cargoes in port were laid on by authority from the Lord High Admiral, who also granted letters of marque and reprisal, and the Admiralty Court exercised the jurisdiction in prize cases.

At the Union the jurisdiction of the Admiralty Court was preserved and its privileges confirmed. The right of review competent to the Court of Session was also declared to remain as before (5 Anne, c. 7, s. 19). In 1825 its jurisdiction in prize cases was taken from it (6 Geo. IV. c. 120, s. 57); and it, along with the office of Judge-Admiral, were abolished in 1830 by 1 Will. IV. c. 69, s. 21, which transferred the privative or exclusive jurisdiction hitherto exercised by it in civil cases to the Court of Session and Sheriff Courts; while long before this date the Court of Justiciary had exercised concurrent jurisdiction in criminal cases. Since then the office of Lord High Admiral has fallen into desuetude.

Admiralty, Scottish High Court of.—The High Court of Admiralty was instituted for the trial of admiralty or maritime cases. It originally possessed privative or exclusive jurisdiction "in all maritime and seafaring causes, foreign and domestic, whether civil or criminal, whatsoever within this realm, and over all persons as they are concerned in the same" (Scots Acts, 1681, c. 16). Its criminal jurisdiction, however, came in time to be cumulative or concurrent with that of the Court of Justiciary, and thus presents no specialities, except perhaps the following point, namely: that when the Admiralty Court was abolished in 1830, and the criminal jurisdiction which it had formerly shared with the Court of Justiciary was conferred on the Sheriff, it was provided that no Sheriff should try any criminal case which it would not have been competent for that judge to try if the crime had been committed on land (1 Will. IV. c. 69, s. 23). It was the Scottish Prize Court, and continued to act as such until its jurisdiction in prize cases was taken from it in 1826 by 6 Geo. IV. c. 120, s. 57. The Admiralty Court itself, together with the office of Judge-Admiral, was abolished in 1830, but until then its privative or exclusive jurisdiction extended to all maritime and seafaring causes (*Clark*, 1783, Mor. 7532). These will be stated later. While by long usage the High Court of Admiralty—but not the inferior Admirals—had cumulative or concurrent jurisdiction with the Court of Session in all mercantile causes (*Anderson*, 1706, Mor. 1460; *Haig Daes & Co.* 1768, Mor. 7517), by sec. 21 of 1 Will. IV. c. 69, which abolished the Admiralty Court, it is enacted that

after the passing of the Act the Court of Session shall "exercise original jurisdiction in all maritime civil causes and proceedings of the same nature and extent in all respects as that held and exercised in regard to such causes by the High Court of Admiralty before the passing of the Act." Similar jurisdiction was by ss. 21 and 22 conferred on the Sheriff Courts, which was declared to be exclusive in cases not exceeding the value of £25, and concurrent with that of the Court of Session in cases above that value. These Courts, therefore, by Statute exercise the jurisdiction in admiralty or maritime causes formerly exercised by the Admiralty Court: and also any admiralty jurisdiction conferred on them by special legislation, such as the admiralty jurisdiction conferred on the Court of Session by the Foreign Enlistment Act, 1870. Their relation to admiralty cases is the same as that occupied by the High Court of Judicature in England in relation to such cases. By the Judicature Act in 1873, the separate Courts of Common Law, Equity, Admiralty, etc., were united: and one Court—the Supreme Court of Judicature—was created, on which was conferred all the jurisdiction previously exercised by the different Courts,—the only difference between the countries being that in England the Court is divided into divisions, and admiralty cases continue to be disposed of in the Admiralty Division of it, and there decided by the judges of that division in the first instance; while in Scotland the Court of Session and Sheriff Court are not so divided; and all cases are decided by the same judge or judges, or Sheriff, no matter what their nature may be, whether maritime or not. And it may here be added that the same forms of process are used in admiralty as in other cases.

Maritime and seafaring causes, according to Erskine (i. 3. 33), comprehend "questions of charter-parties, freights, salvages, wrecks, bottomries, policies of insurance, and in general all contracts concerning the lading or unlading of ships, or any other matter to be performed within the verge of the Admiral's jurisdiction; and all actions for the delivery of goods sent on shipboard, or for recovering their value, or where the subject of the suit consists of goods transported by sea from one port to another." Again, in 1 Bell's *Com.* 546 (7th ed.), maritime and seafaring causes are defined to be those "relative to charter-parties, freights, salvages, wrecks, collision of ships, bottomry, and policies of sea insurance, without any regard to the place of contract as executed at sea or on land." These are the only authoritative definitions, in the institutional writers, of admiralty cases. No doubt the distinction between maritime and other cases would by this time have become more definite if the Admiralty Court had continued to exist as a separate Court. As it is, the matter is of slight importance, for all causes, whether maritime or not, are decided in the same Courts. In fact, almost no distinction is now observed in practice between admiralty and other cases. In case of doubt it is perhaps as well to consider the case as not maritime (see Smith, *Maritime Practice*), for if it turn out to be maritime, the Court must apply the principles of maritime law. These are the rules common to all commercial nations having shipping interests, and form part of the general body of international law (Bell, *Com.* i. 546 *et seq.*). Of course, in addition, individual nations may, and generally have, municipal laws binding on their own subjects and on foreigners within their jurisdiction. In this country the most important of these is the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60). For further information, reference must be made to the special articles on the subjects included in Erskine's and Bell's definitions quoted above:—*e.g.* Charter-Party; Bottomry, etc.

Though admiralty cases are conducted in the same manner as other cases, they have still some small peculiarities or privileges reserved to them by Statute, which may be mentioned:—

(1) Maritime summonses need not be signeted. It is sufficient if they are signed by a Clerk of Session (13 & 14 Vict. c. 36, s. 15). In practice, however, they are almost invariably signeted.

(2) Until 1889, maritime cases, in common with consistorial cases, were exempt from the payment of fee fund dues.

(3) All applications of a summary nature in connection with them may, where necessary, be made to the Lord Ordinary on the Bills (1 Will. IV. c. 69, s. 21).

(4) In maritime cases there is, strictly speaking, no *inducie*, though generally a short *inducie* is given. They can, therefore, it is thought, if necessary, obtain the advantage of the shorter *inducie*, the effect of which is reserved in the Court of Session Act, 1868, s. 14 (Smith, *Mercantile Practice*, 13).

(5) Procedure is summary, but it is doubtful if this rule is well observed in practice.

(6) In maritime cases, the Admiralty Court had the right of ordaining the defender to find caution *de judicio sisti et judicatum solvi* before being heard in his defence: and invariable practice gave a pursuer an absolute right to demand it. The Court of Session, therefore, as coming in its place, must, except in the case of foreign ships in certain circumstances, ordain a defender, if his ship has been arrested, and he cannot consign the sum sued for, to find caution of both kinds, though it may accept juratory caution (*Gray*, 10 D. 154, 721). As regards foreign ships, it is provided in the Merchant Shipping Act, 1896, s. 688, that when any injury has, in any part of the world, been caused to any property belonging to Her Majesty or any of her subjects by any foreign ship, that ship may at any time thereafter be arrested if found within the jurisdiction of the Courts of the United Kingdom. In Scotland the Courts exercising this jurisdiction are the Court of Session, and the Sheriff Court "of the county within whose jurisdiction the ship may be." It is to be exercised if the Court consider that the injury was probably caused by the ship in question. And if arrested, the ship is not to be freed until her owner has made satisfaction in respect of the injury, or given security to be approved by the Court that he will abide the event of the action, and pay all costs and damages that may be awarded.

(7) The Act 1 Will. IV. c. 69, s. 23, conferred on the Court of Session and Sheriff Court the admiralty jurisdiction regarding the using of arrestments. As regards the Court of Session, there is nothing peculiar in the way arrestments are used in maritime cases. In practice, ships and goods on board ship are arrested on the ordinary warrant to arrest contained in a summons; and it has been decided that there is no necessity of applying to the Lord Ordinary on the Bills for a special warrant to arrest maritime subjects (*Clark*, 15 D. 750), the contrary rule, mentioned in Bell, *Com.* ii. 63, 64, being no longer in force (Stair, ii. 2. 5, iv. 1. 37, 58; Ersk. i. 3. 33; Bell, *Com.* i. 546 (7th ed.); Bankt. iv. 12; Balfour, *Practicks*; Kames, *Law Tracts*; Boyd, *Admiralty Proceedings*; Smith, *Maritime Practice*).

Admiralty Jurisdiction in the Sheriff Court.—As already mentioned, admiralty jurisdiction was conferred on Sheriff Courts by 1 Will. IV. c. 69, ss. 21 and 22,—privative jurisdiction when the sum sued for did not exceed £25, and concurrent with the Court of Session when it exceeded that sum; and sec. 21 of the Sheriff

Courts Act, 1838, was enacted to confirm it. By it the powers and jurisdiction formerly competent to the High Court of Admiralty were in the manner above mentioned conferred on the Sheriff Court, "provided the defender shall upon any legal ground of jurisdiction be amenable to the jurisdiction of the Sheriff before whom such cause may be raised." These statutes have been held to confer the power of founding jurisdiction against foreigners by arrestment *jurisdictionis fundandæ causa* (*Bruhn*, 1863, 2 M. 335; Dove Wilson, *Sheriff Court Practice*, 449). In addition to this mode of suing a foreigner in the Sheriff Court, he may also be sued there (1) if the action would have been competent in a Sheriff Court against a Scotsman subject to the Sheriff's jurisdiction, and (2) if a ship belonging to such foreigner, or of which he is part owner or master, shall have been arrested within the sheriffdom (Sheriff Courts Act, 1877, s. 8 (4)). These are the only cases in which, in addition to the power of arresting foreign ships under the Merchant Shipping Act, 1894, mentioned above, in which Sheriffs have jurisdiction over foreigners, and they are both derived from their admiralty jurisdiction. Again, in the exercise of such jurisdiction each Sheriff has jurisdiction over any river, firth, or estuary which may separate his sheriffdom from the adjoining one, provided that a defender if he reside in one of the adjoining counties must be sued in it (s. 24). In all other respects maritime cases are conducted in the same manner as other cases (A. S. 10 July 1839, s. 161); in particular, it is not necessary that a defender in a maritime case should find caution *judicatum solvi*, unless required to do so on special grounds (1 & 2 Vict. c. 119, s. 22).

Admissions and Confessions.—The general rule that an admission is receivable only when adverse to the interest of the party making it (Best, s. 519; *Scott*, 1892, 3 White, 241) is inapplicable where the statement forms part of the *res gestæ*, or is made in an opponent's presence without contradiction; and sometimes when the question is not of its truth, but whether it was made (see Best Evidence). As to the question, When may a party found on entries in his business books in support of his plea? see Books.

(*a*) A *judicial admission*, in civil cases, is, in general, conclusive against the party making it, *e.g.* in a closed record (*Scott. Marine Insur. Co.*, 1853, 1 Macq. 334, 340; cp. *Bathgate*, 1840, 2 D. 811, and Dickson, s. 280): or in a joint minute in lieu of proof (*Royal Bank*, 1830, 8 S. 424; cp. *Nisbet*, 1864, 2 M. 863; and see A. S. 16 Feb. 1841, s. 22, as to admissions in jury trials). Sometimes it is difficult to say whether a judicial statement amounts to a judicial admission (*Cairns*, 1850, 12 D. 919, 1286). Such admission is conclusive upon facts provable only by writ or oath, whenever what is admitted on record would, if admitted on oath, suffice for the pursuer's case (*Darnley*, 1845, 7 D. 595). So too a fact relevantly averred, and neither admitted nor denied by the party within whose knowledge it is, is held admitted (A. S. 1 Feb. 1715, ss. 6, 7: A. S. 11 July 1828, s. 105; A. S. 10 July 1839, s. 55), unless provable only by writ or oath (*Darnley, ut supra*). A reference to a document for its terms is not an admission of its existence (*Pringle*, 1867, 5 M. (H. L.) 55). Judicial admissions do not obviate the necessity of a proof in consistorial actions (1 Will. IV. c. 69, s. 36; 24 & 25 Vict. c. 86, s. 11; *Muirhead*, 1846, 8 D. 786; *M'Farlane*, 1847, 9 D. 500); and a party is not bound by an admission on record that he entered verbally into a contract, to the constitution of which

writing is necessary, unless barred *rei interventu* (Dickson, ss. 278, 603. Where an official writing is the only competent evidence, a judicial admission cannot supply its place (*Campbells*, 1799, M. 11120). Decisions vary as to whether it can be read as proving the contents of a bond (*Clark*, 1816, 1 Mur. 163; *Pearson*, 1835, 13 S. 1138. See Dickson, s. 603 (d); Taylor, s. 410 *et seq.*). A sentence or decree proceeding on an admission or confession, unless signed by a party or his agent, is null, except where practice sanctions an oral consent by counsel (Dickson, ss. 1130, 1131: but cp. *Mackay*, 10 R. (J. C.) 10). A prisoner's verbal confession, on being asked to plead, is conclusive. As to the effect of an admission on record upon the competency of modifying a deed by parole, see PAROLE.

(*b*) Admissions in a record will not, unless specially authorised by the party, bind him in a different cause (*Marianski*, 1851, 1 Macq. 212; *Aitchison*, 1877, 4 R. 899, 921), save where the actions have been conjoined (Dickson, s. 294; see also ss. 279 (e), 1719 *et seq.*). But a deliberate statement made in one cause, *e.g.* as a witness or haver, or under the Bankruptcy Act, is admissible against the party in another cause, even although the issue and the opponent be different. He is not, however, foreclosed from leading contrary evidence (*Hunter*, 1836, 15 S. 159; *Emslie*, 1862, 1 M. 209; Dickson, ss. 288, 292). It appears that, in a criminal trial, statements made by the accused as witness in a previous civil action relating to the same matter may be used against him (*Banaghan*, 1888, 1 White, 566). Decisions conflict as to the law in the converse case (Dickson, ss. 289, 290; *Little*, 1845, 8 D. 265; 1847, 9 D. 737, where it was held that parole proof of a declaration, whether itself admissible or not, is incompetent). A declaration emitted on a charge which did not go to trial is admissible in a subsequent trial on a different charge, where the same facts are involved (*Ross*, 1836, Bell, *Notes*, 240). In an old case his plea of guilty was held admissible against a party in subsequent civil proceedings regarding the same matter (*Grierson*, 1541, Mor. 14021).

(*c*) An extrajudicial admission, which is, or eventually turns out to be, against interest (*Promoter Life Ass. Co.*, 1830, 5 Mur. 136; *Cairns*, 1850, 12 D. 919, 1286; affd. 1854, 1 Macq. 212) may be proved, *e.g.*, when made in conversation (*Mack*, 1832, 10 S. 850), in correspondence (*Young & Co.*, 1824, 2 Sh. App. 25), in uttered or delivered documents (*Anderson*, 1848, 11 D. 118), or in a person's books (*Pickard & Curry*, 1892, 19 R. (H. L.) 56), whether he be a merchant or not, whether the books be business or private books (*Purveyance*, 1677, Mor. 12623; *Wardlaw*, 1662, Mor. 12620), and whether kept by himself or his bookkeeper (*Knox*, 1850, 12 D. 719; *Laidlaw*, 1886, 13 R. 724). But the weight to be attached to such entries will depend on the regularity and authenticity of the books in which they are posted, and on the nature of the evidence supplementing them (*Waddel*, 1790, 3 Pat. App. 188; *Nisbet's Trs.*, 1829, 7 S. 307; *Wink*, 1868, 6 M. 657; *Thomson*, 1873, 1 R. 65; *Drummond* (*Carse's Factor*), 1880, 7 R. 452). Sometimes admissions in an authorised statement, or in the narrative of a deed, are receivable (*Morrison*, 1860, 23 D. 232; *Hamilton's Exrs.*, 1853, 15 D. 594; cp. *Bulley*, L. R. 9 Ch. 739; Dickson, s. 299). An admission of liability by a parish is, in general, permanently binding; but can be founded on only by a parish party to it (*Beattie & Muir*, 1883, 11 R. 250). Extrajudicial admissions may be received in consistorial actions (Fraser, *H. & W.* ii. 1170; *Fullerton*, 1873, 11 M. 720). Admissions obtained by artifice (*Burgess*, 1817, 2 Hagg. C. R. 227: cp. *Robb*, 1824, 3 S. 301), or made when the party was under legal duress, or when he was interrupted in making his

statement (Dickson, ss. 308, 309; Taylor, s. 798), have been received in England. An admission made in an attempt to effect a compromise cannot be proved (*Fyfe*, 1835, 13 S. 809; *Williamson*, 1845, 7 D. 842). An extra-judicial admission is not full proof (see (*f*) *infra*).

(*d*) An admission must be taken as a whole. The party founding on it cannot cull out what is favourable to himself, *e.g.* he cannot found on one side of an account. When made under a qualification, whether intrinsic or extrinsic, it must be taken as it stands (*Campbell*, 1843, 14 D. 1086; *Picken*, 1872, 10 M. 987; *Gelstone*, 1875, 2 R. 982; Dickson, ss. 311, 313, 1228; cp. *British Linen Co.*, 1853, 15 D. 314). The qualification may, however, be disproved, even if intrinsic (*Anderson*, 1825, 3 S. 496; 1827, 5 S. 744, *Miller*, 1843, 5 D. 856; 1845, 7 D. 283: Tait, 294); and the Court may disregard it as improbable (Dickson, s. 312). As to qualified oaths, see OATH ON REFERENCE.

(*e*) An accused's written declaration is, if extant, the only competent evidence of what he said before the magistrate. When it has been lost or destroyed, secondary evidence is admissible, the prosecutor not being in fault. It may be impugned on the ground that it is not a true narrative, or that it was emitted by the accused when drunk or insane, or under promise or threat by a superior official. It is evidence only against the accused, and not against or for a *correus*. In no case is it conclusive against the accused (Dickson, ss. 316–18, 335–9). See DECLARATION.

(*f*) Extrajudical admissions in criminal cases, usually called confessions, whether oral or written, are admissible, except when made involuntarily (*Turner*, 1853, 1 Irv. 284), or under a promise or threat by even a minor official, *e.g.* a constable. (In *Robertsons*, 1853, 1 Irv. 219, this principle was applied in the case of an inspector of poor.) It is otherwise when the inducement proceeds from a private person, unless authorised by the prosecution (Dickson, ss. 345–6). When an accused, on being charged or apprehended, or out on bail, volunteers a statement to a constable, or makes a statement in answer to a constable's question, the statement is admissible, although made without warning, provided that the accused was not pressed or entrapped into making it (*Gracie*, 1884, 5 Coup. 379; *Smith*, 1888, 1 White, 600). Statements volunteered or made, after unambiguous warning, to a prison governor or warder are admissible (*Proudfoot*, 1882, 4 Coup. 590). Confessions made to fellow-prisoners or private persons, if unconnected with the prosecution (*Grant*, 1862, 4 Irv. 183; *Graham*, 1876, 3 Coup. 217), and conversations between fellow-prisoners, overheard or picked up by eavesdropping, are received (Dickson, ss. 347, 348, 350). Confessions to magistrates and prosecutors are, it is thought, inadmissible (Dickson, s. 349: Hume, ii. 335; *Hendry*, 1857, 2 Irv. 618; cp. *Cuthbert*, 1842, 1 Broun, 311). The conversations of a prisoner alleged to be insane, expressions used in sleep, and statements made when drunk, have been admitted. An extra-judicial confession is not full proof (Dickson, ss. 348, 351, 352). As to the admissibility of confessions to doctors, clergymen, etc., see CONFIDENTIALITY.

(*g*) In civil cases, an admission made by one person will bind another, when it relates to some matter in which they have a joint, as distinguished from a common, interest, or in which one is interested derivatively through another (Taylor, s. 750). Thus the admission of one partner as to the partnership estate is receivable against the others, while the admission of one defender or accused is not evidence against a co-defender or *correus*, unless concert or conspiracy be proved (*Campbell*, 1840, 2 D. 663: Dickson, s. 363). The admission of a cedent before assignation, of a bankrupt before sequestration, and of a principal before the constitution of the cautionary

obligation, will bind the assignee, the creditors, and the cautioner respectively; and the admission of a trustee may be proved against the trust estate (Dickson, ss. 356–8). A person is bound by admissions which he has authorised, *e.g.* the admissions on record of counsel, and the entries of a bookkeeper (*Kenney*, 1836, 14 S. 803); and by those of his agent, in so far as they form part of the *res gestæ* of transactions for which he is liable (see *Forbes*, 1873, 11 M. 454). Where the agent is a general agent the limitation does not apply (*Smith*, 1831, 9 S. 474; *Morrison*, 1885, 12 R. 1152). As to the effect of admissions by parents in questions of legitimacy and paternity, see AFFILIATION.

(*h*) An admission or confession may be implied from the conduct of a person, who, by acting or abstaining, leads another to believe that he means to acknowledge a fact to his prejudice, *e.g.* where he remains silent, when statements adverse to him are made in his presence (*Longworth*, 1862, 24 D. 696), and when contradiction is fairly to be expected (Dickson, ss. 367, 368, 370–2). As to statements made in the presence of a party's authorised agent, see cases in Dickson, s. 368 (a) and (c). Where his conduct amounts only to an indication of his belief that a fact is adverse, *e.g.* the suppression or fabrication of evidence, it is thought that it does not import an admission (Dickson, s. 367; but see Taylor, s. 116). To establish a plea of acquiescence, mere silence or delay in taking action does not suffice. Taciturnity, *mora*, or non-objection, is an element only in the proof (*Monereiff*, 1859, 21 D. 216; *C. B.* 1885, 12 R. (H. L.) 36; *Elphinstone*, 1886, 13 R. (H. L.) 98; *Colvin*, 1890, 18 R. 115; Dickson, ss. 620 *et seq.*; and cp. *Cook*, 1872, 10 M. 513; *Neilson's Trs.*, 1883, 11 R. 119; *Buckner*, 1887, 14 R. 1006). It is essential that the party said to acquiesce know, or ought to know, the facts (see *Spence*, 1888, 15 R. 376; *Dalmellington Iron Co.*, 1889, 16 R. 523), and that there be evidence either of positive acts by him signifying acquiescence, or *rei interventus*, following upon a belief induced by him that he has acquiesced. Thus "where great cost is incurred by operations carried on under the eye of one having a right to stop them, or where, under the eye and with the knowledge of him who has the adverse right, something is allowed to be done which manifestly cannot be undone, the law will presume an agreement or conventional permission as a fair ground of right" (Bell, *Prin.* s. 946; *Bargaddie Coal Co.*, 1859, 3 Macq. 467). As to character of necessary averments, see *Hunter*, 1854, 16 D. 441; *Cowan*, 1865, 4 M. 236; *Zetland*, 1882, 9 R. (H. L.) 40). In such cases his admission is conclusive; he cannot resist the plea of personal bar (*Cairncross*, 1860, 3 Macq. 827; *Freeman*, 2 Ex. 654; *M'Kenzie*, 1881, 8 R. (H. L.) 8; cp. *Watkins*, L. R. 10 Q. B. D. 178). Such admissions have received effect in questions as to the settlement of accounts (*Stewart*, 1893, 20 R. 260; Dickson, ss. 369, 370); the establishment of qualifications or enfranchisements of ownership (Rankine, *Landownership*, see Index, *s.v.* "Acquiescence"); the abandonment of claims under a lease (*Eliott's Trs.*, 1894, 21 R. 858; Rankine, *Leases*, see Index, *s.v.* "Acquiescence"); the modification or construction of a contract (*Kirkpatrick*, 1880, 8 R. 327; *Wight*, 1858, 20 D. 955); discharge of claim by an injured person (see *M'Donagh*, 1886, 13 R. 1000), or beneficiary (cp. *Spence*, 1888, 15 R. 376, with *Kintore*, 1886, 13 R. (H. L.) 93; *Inglis' Trs.*, 1887, 14 R. 740; affd. 1890, 17 R. (H. L.) 76); the acceptance of an offer; and the delivery of a deed (Dickson, ss. 559, 962). Acquiescence short of the prescriptive period does not operate to transfer an exclusive right of property (Rankine, *Landownership*, 3rd ed., 51, 350; *Fraser*, 1895, 22 R. 558; cp. *Tweeddale*, 1822, 1 S. 397).

As to admissions involved by pleading, see (*a*) *supra*. See also RECORD. As to admissions in actions of proving the tenor, see ADMINICLES. [See Stair, iv. 45. 5. 8; Ersk. iv. 2. 33; Tait, 291–5; Dickson on *Evidence*, ss. 276–384, 1229, 1230; Kirkpatrick, *Digest*, ss. 9, 40–54, 76, 93; Taylor, *Evidence*, ss. 723–907; Stephen, *Dig. Art.* 15 *et seq.*; Roscoe, *Nisi Prius Ev.*, see Index, *s.v.* "Admissions."]

Admonition.—If an offence is such as may be punished by an arbitrary sentence, the judge may consider that the accused is sufficiently punished by being admonished, or warned that, if he lapses again into crime, a severe penalty will be imposed. An admonition is the sentence eminently appropriate to the case of a juvenile criminal not yet hardened in crime, or to that of an offender of mature years whose previous character has been blameless, and who has been convicted for the first time. In addition to admonishing, the judge may deal with the case under the Probation of First Offenders Act, 1887 (50 & 51 Vict. c. 25, ss. 1, 2). By this Statute it is provided that where an offence is not punishable with more than two years' imprisonment, and where there is no previous conviction against the accused, the Court has the power, if the circumstances justify, of releasing the offender upon probation of good conduct, instead of sentencing him to punishment. When this is done, the Court directs that the offender enter into a recognisance, with or without sureties, and during such period as the Court may direct, to appear and receive judgment when called upon, and in the meantime to keep the peace and be of good behaviour. If the offender has failed to observe any of the conditions of his recognisance, he may be apprehended and sentenced. Power to exact caution for good behaviour is also conferred on magistrates of Burgh Courts by the General Police and Improvement (Scotland) Act, 1862 (25 & 26 Vict. c. 101, ss. 426, 427), and by the Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. c. 55, ss. 488, 489). By s. 483 of the latter Act, the power of dismissing a convicted person with an admonition is specially conferred on magistrates of Burgh Police Courts. See ARBITRARY PUNISHMENT: CRIMINAL PROSECUTION; FIRST OFFENDERS.

Ad omissa vel male appretiata—"As regards things which have been omitted or wrongly valued."—After an executor has been confirmed, it is competent for a creditor or other person interested in the deceased's estate, who is dissatisfied with the inventory, either because it omits part of the estate or because the value has been under-estimated to apply to have himself confirmed as executor to the deceased *ad omissa vel male appretiata*. The procedure is the same as in an application to be confirmed executor-dative (see CONFIRMATION OF EXECUTORS); but the application must be intimated to the executor who has already been confirmed. The form of prayer is: "To decern the petitioner executor-dative *ad omissa* [*vel male appretiata*] *qua* next of kin [or *qua* residuary legatee, or other title, as the case may be] to the deceased B., after designed." In general, where the executor confirmed has acted in good faith, the result of the application will be an eik to the original confirmation; but where there is room for any suspicion of bad faith, the applicant will be decerned executor *ad omissa vel male appretiata*, and the whole subjects contained in the supplementary inventory will be carried to him, excluding entirely the original executor (Ersk. iii. 9. 36, 37; *Robertson*, 1704, Mor. 3498; *Smith's Trs.*, 1862,

24 D. 1142). It is not necessary for persons interested in the estate of the deceased to confirm *ad omissa* in order to call the original executor to account for part of the estate alleged to have been intromitted with by him, but not given up in the inventory (*Smith*, 1880, 7 R. 1013).—[Currie on *The Confirmation of Executors.*] See CONFIRMATION OF EXECUTORS; EXECUTOR.

Adoption.—Adoption among the Romans meant the juristic act whereby the head of a family assumed as a child one who stood outside its membership. It was, like marriage and legitimation, a mode of acquiring *patria potestas*. The leading conditions were that (1) only male citizens capable of marriage could adopt: (2) the younger could not adopt the elder, for *adoptio naturam imitatur* (the final rule was that the adopter must be the senior by at least eighteen years); (3) adoption might be into any degree in the line of descent,—son, grandson, etc.,—and that whether the adopter had children of his own or not; (4) a public inquiry was always held as a preliminary, in order to ascertain whether the act was in the interest of the adoptive child, and whether the legal requirements were satisfied; (5) the adoption must not be temporary or conditional, although it was in the adopter's power to terminate the relationship by giving the adoptive child in adoption to another, or by emancipation.

Adoption was a generic name, including two species which differed in their forms and their effects: (1) adoption proper, where the person to be adopted was subject to the *potestas* of another (*alieni juris*), and (2) ADROGATION (*q.v.*), where the person was in an independent family position (*sui juris*).

Adoption in the strict sense involved the transference of the *filius* or *filia familias* from one family into another. In the early law this was effected by a complicated procedure described in Gaius (*Inst.* i. s. 134). By the later law it was sufficient for the natural and the adopting parents to appear before a competent magistrate along with the child, and make a declaration of their purpose, which was registered in the books of the Court. The effect was that the child passed out of the *potestas* to which he had previously been subject, and came under the *potestas* of the adoptive parent on the same footing as a natural child; accordingly, he lost his rights as an agnate in his old family, but acquired, instead, all the privileges of an agnate in his new family. These consequences were greatly modified by Justinian. The child given in adoption was no longer to quit his own family unless the adopter was a natural ascendant (*adoptio plena*). In that case the natural and artificial ties coincided, and the child passed into the family and the *potestas* of the adopter, with the same results as before. But when the adopting parent was a stranger or even a collateral relative (*adoptio minus plena*), he acquired no *potestas* over the child, and no right to his property; the child retained his rights in his natural family unimpaired, and acquired in addition a right of succession to the adoptive parent, if he died intestate.—(Code, viii. 48. 10; *Inst.* i. 11. 2, and iii. 1. 14.)

Adoption is a legal institution in Germany in a form resembling Justinian's *adoptio minus plena*, and it was introduced into France by the *Code Civil* (Arts. 343–60) in a limited class of cases; but it has no place either in Scots or English law.—[Stair, *Inst.* iii. 4. 34.]

Adoption of Deeds.—Adoption is that act by which a written instrument, otherwise null, is given the effect of a properly executed instru-

ment of the party who adopts it (*Gall*, 1855, 17 D. 1027). The typical case is where an improbative writing is referred to and adopted in a docquet attached to it, which is holograph of the party, *e.g.* "I adopt the above as holograph. (Signed) *A. B.*" (*M'Intyre*, 1 March 1821, F. C.). But the adoption is equally good if made in a separate probative writing which clearly identifies the deed in question (*Inglis*, 1831, 5 W. & S. 785). It is likewise competent in a probative deed to declare beforehand that subsequent writings, which are clearly indicated, shall have the effect of duly authenticated deeds, although themselves improbative (*Wilson's Trs.*, 1861, 24 D. 163. But see M'Laren on *Wills*, 3rd ed., 289, where the learned author expresses his dissent from this view). Where, for example, a testator in a properly executed deed made reference to a letter of the same date, signed but not holograph, and which constituted certain legacies, this adoption was held to give the letter the effect of a probative document, and to constitute valid legacies (*Inglis, ut supra*).

The adoption founded on must be distinct and unequivocal. Adoption of a forged bill will not be inferred from the mere failure of the person whose name is forged to repudiate the forgery, on receiving intimation of its existence apart from a demand for payment. The law on this point is fully discussed in the *British Linen Bank* case (1881, 8 R. (H. L.) 8). There the doctrine was recognised to the extent of setting up the null instrument *ab initio*. Lord Blackburn said: "I wish to guard against being supposed to say that, if a document with an unauthorised signature was uttered under such circumstances of intent to defraud that it amounted to the crime of forgery, it is in the power of the person whose name was forged to ratify it, so as to make a defence for the forger against a criminal charge. I do not think he could. But if the person whose name was, without authority, used, chooses to ratify the act, even though known to be a crime, he makes himself civilly responsible, just as if he had originally authorised it. It is quite immaterial whether the ratification was made to the person who seeks to avail himself of it or to another."

The question of adoption is one of fact, and must be proved (*Warden*, 1863, 1 M. 402). One cannot be said to "adopt" the slander of another by standing by and acquiescing in it (*Jack*, 1891, 19 R. 1); nor can a company adopt a contract made on its behalf before it came into existence (In re *Northumberland Avenue Hotel*, 1886, 33 Ch. Div. 16). See DEEDS.

Adpromissor.—Adpromissor, in Roman law, was a person who, in the interest of the principal debtor in a verbal contract, undertook the same liability as had already been undertaken by the principal debtor. The purpose of every *adpromissio* was to secure the performance of an obligation by a third party, and accordingly the undertaking of the adpromissor was strictly accessory (Gaius, iii. 116, 117). The terms *adpromissio* and *expromissio* are employed to mark an important distinction between two classes of obligation. In *adpromissio* the original debtor continues bound as well as the new debtor; in *expromissio* the original debtor is released, and the new debtor takes his place (*Dig.* xiii. 5. 28). An adpromissor is bound for and with the original debtor, and is, therefore, strictly a cautioner; an expromissor is bound for and in lieu of the original debtor, and is, therefore, a substitute for the original debtor.—[Stair, i. 17. 3; Ersk. *Inst.* iii. 3. 61, and iii. 4. 22; Bell, *Prin.* s. 245.]

Adrogation.—The act by which a person *sui juris* (*i.e.* a *pater familias*) gave himself in adoption was termed *adrogatio* in Roman law, because the proposal had to be submitted as a *rogatio* or bill to the people assembled in the *Comitia Curiata*, and affirmed by them, after investigation by the *pontifices* and evidence of consent by the parties, before it became effectual. The semblance, at least, of this legislative procedure was kept up until the time of the classical jurists, with the result that adrogation could only take place at Rome, and only in the case of males of full age. By the time of Diocletian a simpler form was introduced: a magistrate discharged the duty of inquiring into the expediency of the proposed step, and if his report was satisfactory an imperial rescript was issued authorising it. The conditions were extremely stringent when the person adrogated was below the age of puberty. See ADOPTION. The special consequences of adrogation were that the adrogator acquired *potestas* over the *adrogatus* himself, and also over his children, if any, and succeeded to his whole estate, without becoming responsible for his debts,—an anomaly which was corrected by the prætor. Justinian changed the law, as regards the property, by enacting that adrogation should not operate a universal succession, but should only entitle the adrogator to the usufruct of the adopted child's estate, the title of property remaining vested in the latter (*Inst.* iii. title 10).

Adscripti vel adscriptitii glebæ.—This term describes a status that is now of merely historical interest. *Adscriptitii* in the Roman law (Code, xi. 47) were *servi* attached to the soil, and transferred with it from one owner to another. It was not a status of absolute personal slavery, for an *adscriptitius* could not be required to work except on the land to which he was *adscriptus*, nor could he be alienated except as an appanage of that land. This agricultural serfdom, which was common in England, obtained little hold in Scotland, though it was not unknown. The Statute 1214, c. 1 (Alexander II.), authorises "bondmen" who live in steads and towns, to plough and sow in the ensuing year for their own profit. The *Regiam Majestatem* includes (ii. 9), among the methods of obtaining liberty, that of being gifted or sold along with the ground, and so becoming *adscriptitius*. It is said that the last claim of serfdom proved in a Scottish Court was in 1364. The status, however, long survived in the case of colliers and salters, these being regarded as "necessary" servants, *i.e.* servants "whom the law obliges to work" (Ersk. *Inst.* i. 7. 61). It seems clear that these workmen were at common law regarded as *adscripti* to the collieries or salt-pans in which they worked (see *Dundas*, 1754, Mor. 2355), and that the Statutes 1606, c. 10, and 1641, c. 124 (re-enacted 1661, c. 333), merely regulated the rights and duties attaching to a status already recognised by the law. These Acts gave masters a summary remedy for enforcing their common law rights to the services of such workmen, and regulated wages. The decisions relate entirely to colliers, but salters were in precisely the same legal position.

Erskine (*l.c.*) states that these workmen "are, by the law itself, without any paction, bound, merely by their entering upon work, in a colliery or salt manufactory, to the perpetual service thereof." But if this ever was the common law, its rigour was greatly modified by decision. In *Dundas* (1761, Mor. 2359), employment in a colliery for year and day was held to be requisite before the master could enforce a claim to the collier's services; and in *Clark* (1764, Mor. 2361) it was decided that no period of service will make a man a bondsman, if he has entered the work without any

paction of slavery. According to the latter case, however, the status attached to a child who took up work in a colliery to which his father was *adscriptus*. Probably the status might also arise through the exercise by coalmasters and owners of salt-pans of their powers to put vagabonds and beggars to work (1606, c. 10, and 1672, c. 41).

Colliers were bound (*adscripti*) strictly to the coal. Thus a lessee of the coal could not at the end of his lease carry off his colliers to another pit (*Spence*, 1764, Mor. 2360). Again, though they might seek work elsewhere while the colliery to which they were attached was not going, they could be reclaimed when the colliery was reopened (*Wallace*, 1708, Mor. 2349). Where the coal failed, they could not be transferred to another coalmaster (*Anderson*, 1743, Mor. 2351), but they might be employed at other collieries possessed by their master (*Clark*, 1769, Mor. 2362). That their civil disabilities were serious, is shown by their express exclusion from the benefits of the Act of 1701 for preventing wrongous imprisonment. But they were found capable of being admitted and voting as burgesses (*Burgesses of Rutherglen*, 1747, Mor. 2352).

This status of servitude was abolished by the Acts 15 Geo. III. c. 28, and 39 Geo. III. c. 56. The former Act (see the preamble) was passed (1775) to emancipate the colliers and salters, then in a state of servitude, gradually and upon reasonable conditions, and to prevent others from coming into such a state of servitude. The latter Act (1799) declared all colliers to be free.

It may be pointed out that the common law did not recognise such life service as legitimate in the case of other workmen. Thus, although it was held not *contra bonos mores* for a collier to bind himself for liferent service (*Laird of Caprington*, 1632, Mor. 9454), yet a contract by which the crews of fishing-boats bound themselves "to be as *adscriptitii* or *villani* astricted continually to their respective boats" for fifty-seven years, was held to be "too great a restraint on natural liberty" (*Allan & Mearns*, 1728, Mor. 9454).

Adstipulator.—Adstipulator, in Roman law, was a second stipulator, accessory to the principal stipulator, to whom the promiser, in a verbal contract, engaged to pay what he had already promised to pay to the principal stipulator. Such a second stipulation was usually employed where the primary stipulation was for payment after the principal stipulator's death. The chief function of the adstipulator was to enforce the promiser's obligation as the representative of the stipulator, and to hand over what he recovered to the stipulator's heirs. In the later Roman law, *adstipulatio* practically disappeared.—[Gaius, iii. 110–114.]

Adulteration.—See Food and Drugs Acts: Fertilisers and Feeding Stuffs Act.

Adultery is the voluntary sexual intercourse of one spouse with any person except the other spouse. If a married woman were ravished (see *Long* [1890], 15 P. D. 218), or had connection with a man in the belief that he was her husband, or believed upon probable grounds that her marriage had been dissolved, as, *e.g.*, when her husband had been reported drowned at sea, there would not be the *malus animus* which is essential to the

crime (Hume, *Crimes*, i. 457; Fraser, *H. & W.* ii. 1142). It is now rape if a man has intercourse with a married woman by personating her husband (Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 4). And in all such cases as those enumerated, where the woman did not consent, the civil consequences of adultery will not follow any more than the criminal (Fraser, *l.c.*: *Long, ut supra*. See for Canon law, Walter, *Kirchenrecht*, s. 330; Reichel, *Short Manuals of Canon Law*, Parts XII. and XIII. 369). So intercourse with an insane woman is not adultery by her (see *Long, ut supra*; *Mordaunt*, L. R. 2 (H. L.) Sc. 374). But it has been held in England that it is not a good defence that the defender is subject to delusions, if he is not so mentally deranged as not to know the nature of the act and its legal consequences (*Yarrow* [1892], P. 92; *Hanbury* [1892], P. 222).

A. *Criminal Consequences.*—See Adultery (as a Crime).

B. *Civil Consequences.*

Adultery is a ground of Divorce (*q.v.*), and of Separation (Judicial) (*q.v.*). The adultery of the pursuer may be pleaded as a defence to an action of Adherence (*q.v.*), or an action of divorce for Desertion (*q.v.*). A husband has a claim of damages against his wife's paramour, and that whether he divorce her or not. The action is not barred by his condonation of her offence (*Macdonald*, 1885, 12 R. 1327; Fraser, *H. & W.* ii. 1203; Walton, *H. & W.* 297). A decree of divorce for adultery operates as a revocation of prior donations by the innocent spouse. And some writers say it is sufficient for this purpose that the donor knew of the donee's adultery, or, at any rate, enough that he intended to raise a divorce, though he died before doing so (Stair, i. 4. 18; Craig, iii. 3. 3, and iii. 4. 15; Bankt. i. 5. 100). But this is doubted by later authorities (More, *Notes on Stair*, i. 4. 11, at xxxv.; Ersk. i. 6. 31; Fraser, *H. & W.* ii. 952). A spouse divorced for adultery cannot revoke donations made by him, and, according to one case, he cannot do so after commission of the adultery, though before decree in the divorce (*Murray*, 1575, Mor. 328, 2nd report).

Marriage with Paramour.—The Act 1592, c. 11, enacts that when any woman has been divorced for adultery, and completes unlawful and pretended marriage with the person with whom she committed adultery, or dwells with him at bed and board, it shall not be lawful for her to dispone her lands, heritages, tacks, rooms, or possessions, either to her pretended husband, or to the children of that marriage, or to any other person in prejudice of the heirs of the first lawful marriage, or, failing them, of her other heirs whatsoever. The Act applies only to the woman, and to her only, if she is the owner of heritage. It applies to onerous as well as to gratuitous deeds (Ersk. ii. 3. 16). The Act is referred to by Fraser (*H. & W.* i. 150) as still *in viridi observantia*, but it does not appear to have been illustrated by decision, and it is not impossible it might be found to be in desuetude.

The Act 1600, c. 29, declares all marriages null which are contracted by a divorced spouse with the persons "with quhome they are declarit be sentence of the ordinar judge to have committit the said cryme and fact of adultery." And the children are declared incapable of succeeding to their parents. The Statute is not in desuetude (*Beattie*, 1866, 5 M. 181; Fraser, *H. & W.* i. 144; Bell, *Prin.* s. 1526). The divorce must, it is said, be in Scotland (More, *Notes*, xvi; Riddell, *Peerage Law*, 391 and 410; Fraser, *ib.* i. 145). And the paramour must be named in the decree (Ersk. i. 6. 43; Fraser, *ib.* i. 144; see *Campbell*, 1866, 4 M. 867). For evidence of adultery, see Divorce.

[Hume, i. 455; Ersk. i. 6. 43, 44; Bell, *Prin.* ss. 1526, 2033; Fraser, *H. & W.* ii. 1142, i. 144 and 150, ii. 952, ii. 1203; Walton, *H. & W.* 41, 10, 141, 297.]

Adultery (as a crime).—Adultery, by the law of Scotland, consists in "the carnal connection of a married person with any other person than him or her to whom he or she is married" (Fraser, *H. & W.* ii. 1142). Formerly, adultery was a statutory crime by the law of Scotland. By Statute, and in practice, a distinction was made between *simple* adultery, which had none of the aggravations that characterised the other form of the offence; and *notour* adultery, which was adultery aggravated by the birth of a child as the result of the intercourse, or by open and shameless living together of the parties, or by disregard by them of the Church's admonition. Simple adultery was punishable by an arbitrary sentence. The punishment of notour adultery was declared by 1551, c. 20, to be escheat of moveables; but, by 1563, c. 74, it was made a capital crime. These Statutes have long been in desuetude, and criminal prosecutions for adultery are now unknown.—[1581, c. 105; 1701, c. 11; Hume, i. 453; Stair, i. 4. 7; Bankt. i. 132; Ersk. i. 6. 43; Chisholm, *Barclay's Digest*, *voce* "Adultery."]

Adventure.—See Joint Adventure.

Advertisement.—In judicial procedure this term is applied to a notice published in the *Gazette*, the daily or weekly newspapers, or by handbills or placards. The object of advertisement may be (1) to comply with the provisions of a Statute, as, for example, the Roads and Bridges Acts, the Bankruptcy Statutes, etc.; (2) to ascertain the whereabouts of parties interested in a suit, as in multiplepoindings, where the parties may be numerous, and their addresses not known to the real raiser; (3) to form one part of a bilateral contract. Thus it has been held that a contract arises the moment a person performs a condition mentioned in an advertisement (*Williams*, 1833, 4 B. & Ad. 621); that is, an advertisement may be a proposal which is accepted by performance of the conditions (Pollock on *Contracts*, p. 12). Examples of such are railway time-tables, announcements of auction by advertisement, offers for sale by tender, offers of reward (Chitty on *Contracts*, 12th ed., p. 667). Advertisements by public carriers partake of the nature of offers. Thus the contract for the conveyance of merchandise in a general ship is made by advertisement of the ship for freight on the one hand, and the bill of lading on the other hand. Such an advertisement entitles a merchant to bring his goods to the vessel, and to insist on their being received, unless the ship be already full (Bell, *Com.* i. 589).

In petitions, either in the Inner or Outer House, an order for advertisement is not uncommon, and, if desired, is asked for along with an order for intimation and service. In entail petitions, under the Entail Amendment Act, 1875, advertisement is necessary (38 & 39 Vict. c. 61 s. 12 (4).

[Mackay, *Manual*, 384, 532, 552, 564, 588; Coldstream, *Procedure* 367.] See Petition; Gazette. See also Carrier; Offer; Contract; Slander.

Advertisement Duty.—The duties payable on advertisements were repealed by 16 & 17 Vict. c. 63, s. 5.

Advertisements, Indecent. — Advertisements relating to diseases, etc., connected with sexual intercourse, may not be placed so as to be visible to any person on a public way or urinal, or delivered or offered to such a person (52 & 53 Vict. c. 18, s. 3).

Advertising Stations.—The Advertising Stations (Rating) Act, 1889 (52 & 53 Vict. c. 27), provides that where land is used for the exhibition of advertisements, and not otherwise occupied, the person who permits the land to be used, or, if he cannot be ascertained, the owner thereof, is rated according to the value of such use (s. 3). Where land or other hereditament, occupied for any other purpose, is also used for the exhibition of advertisements, its ratable value is estimated so as to include the increased value from such use (s. 4). Corporations or other authorities who have granted a licence for the erection of hoardings or scaffoldings, may include a condition prohibiting the exhibition of advertisements thereon (s. 5). As to the persons liable to be rated in regard to advertisement stations, see *Chappell* (L. R. 1892, 1 Q. B. D. 561), *Taylor & Others* (L. R. 1887, 19 Q. B. D. 288). The Act does not warrant the insertion in the Valuation Roll, as tenant and occupier, of the name of a person who paid a yearly rent for the exclusive use of advertising boards attached to a house not belonging to him (*Fry & Sons*, 1893, 20 R. 622). See RATING.

Ad vitam aut culpam.—When one is appointed for life to an office, the qualifying condition is implied *quamdiu se bene gesserit*, and hence such an appointment is described as *ad vitam aut culpam*. The servant's interests are protected by giving him tenure for life; the master's interests are protected by giving him power to dismiss the servant for misbehaviour.

"Either the appointment must expressly bear that the appointee is to hold his office for life, or the office must be of such a nature that a life appointment is necessarily implied. In this last case are embraced only offices of the nature of *munera publica*. Public officers are irremoveable, except for fault" (per L. P. Inglis in *Hastie*, 4 June 1889, 16 R. 715). At common law, it is held to be a principle of public policy that public officers should be protected in the independent exercise of their functions by the knowledge that they are irremoveable, except for misbehaviour. On this principle, it is believed, rests the life tenure of the judges of the Supreme Courts; of the beneficed ministers of the Church of Scotland; of sheriff clerks; of town clerks in royal burghs (*Thomson*, 1665, Mor. 13090; *Simpson*, 1824, 3 S. 150; *Farish*, 1836, 15 S. 107); of parochial schoolmasters before 1872 (*Duff*, 1799, Mor. 9576); and of many others. The life tenure of certain public officers is declared by Statute—*e.g.* sheriffs (28 George II. c. 7); sheriffs-substitute and procurators-fiscal (40 & 41 Vict. c. 50, which substitutes for "*culpa*," "inability or misbehaviour"). So inherent is this right in the nature of a public office, that in *Duff* (*ut supra*), an undertaking by a duly appointed parochial schoolmaster to remove at the pleasure of the heritors was found not to be binding; and in *Simpson* (*ut supra*), the appointment of town clerk in a royal burgh, expressly declared to be "during pleasure," was held to be an appointment *ad vitam aut culpam*. It was decided, however, that it was not *contra bonos mores* for the trustees of

an endowed school to appoint a teacher removeable at pleasure (*Bell*, 1838, 16 S. 1136; affd. 2 Rob. App. Ca. 286); and it was held legal for commissioners acting under the Burgh Police Act, 1862, s. 67, to define their clerk's term of office (*Hamilton*, 1871, 9 M. 826). The modern tendency is to restrict the application of the rule.

Other officials of many kinds have invoked the protection of the principle. Some succeeded to a substantial extent, inducing the Court to hold that they could not be removed arbitrarily or capriciously, but only for some reasonable cause, which, however, need not necessarily infer misbehaviour. Such were masters of grammar schools in royal burghs (*Magistrates of Montrose*, 1710, Mor. 13118; *Hastie*, 1769, Mor. 13132, 2 Pat. App. 277; *Mitchell*, 1883, 10 R. 982). The session clerk of Glasgow was allowed similar protection (*Harvie*, 1756, Mor. 13126); but it was subsequently decided that a session clerk, whose appointment was indefinite, holds office only during pleasure (*Anderson*, 1779, Mor. 13137). The following officials unsuccessfully contended that an indefinite appointment necessarily meant in their case one *ad vitam aut culpam*:—Extractors appointed by the Principal Clerks of Session (1741, Mor. 13125); teachers in private schools (*Mason*, 1836, 14 S. 343; *Gibson*, 1837, 16 S. 301, 1 Rob. App. Ca. 16; *Bell*, *ut supra*); the clerk to the magistrates of a burgh of barony (*Dykes*, 1840, 2 D. 1274); a collector of poor-rates (*Shaw*, 1862, 24 D. 609); an ordained foreign missionary of the Church of Scotland (*Hastie*, *ut supra*).

Cases dealing with an express appointment *ad vitam aut culpam* are those of *Taylor* (1767, Mor. 13128) and *Abercromby* (1802, Mor. 13154), in which it was held that employers are not entitled to appoint assistants to clerks holding expressly *ad vitam aut culpam*, even where there was no interference with the patrimonial rights of the latter. It may, however, be doubted how far these decisions would now be followed. In *Rose* (1853, 15 D. 908) the opinion was expressed that the appointment of a procurator-fiscal of the J. P. Court, expressly bearing to be *ad vitam aut culpam*, could be nothing more than an appointment during pleasure.

In considering whether there has been *culpa*, the employer is entitled to inquire into and form his own judgment on the matter. "The Court will interfere only where there is irregularity, precipitation, and oppression in the course of the proceedings, and manifest failure to make out any serious case on the merits" (per L. J. C. Hope in *A. B.*, 1844, 6 D. 1238). The *culpa* must be such as disqualifies for the proper discharge of the duties of the office; and so, in the case of a schoolmaster, grave moral delinquencies were held to justify dismissal, although his ability and diligence in teaching were unimpeached (*A. B.*, 1825, 4 S. 63; *A. B.*, *ut supra*). As to the proper remedy for one who alleges wrongous dismissal from an *ad vitam aut culpam* appointment, see *Goldie* (1868, 6 M. 541).

Advocate.—In Scotland the term advocate has come to be properly appropriated to one who is a member of the Faculty of Advocates. Members of a body of Solicitors in Aberdeen are styled advocates, but have none of the privileges peculiar to members of the Faculty of Advocates, and, like other solicitors, are legally qualified to plead in the inferior Courts only, and in the Bill Chamber of the Court of Session. See ADVOCATES IN ABERDEEN.

I. *History.*

Though the Faculty of Advocates was only founded in 1532 by the Act instituting the College of Justice, advocates or procurators who pleaded the causes of litigants existed long before that date. Litigants frequently were represented by their own personal friends or relatives, but professional pleaders were also commonly employed. Such procurators are referred to in many old Statutes, which show that the profession was well recognised. The Act 1424, c. 45, "anent complaintes to be decided before the Judge Ordinar," provides that, "gif there bee onie puir creature, for fault of cunning or dispenses, that cannot, nor may not follow his cause, the king, for the love of God, sall ordaine the judge, before whom the cause suld be determined, to pur-wey and get a leill and a wise advocate to follow sik puir creatures causes. . . ." The Act 1429, c. 125, provides that "advocates and forespeakers in temporal Courts before being heard in a cause, shall swear that they believe the cause to be good, and if the party be not present shall swear for him" the following oath:—

"Illud juretur, quod lis sibi justus videtur,
Et si quæretur verum non inficietur.
Nil promittetur, nec falsa probatio detur,
Ut lis tardetur, dilatio nulla petetur."

By the Act 1455, c. 47, dealing with "the maner of arrayments for the Parliament," it is provided, "all men that are forespeakers for the coist to have habits of greene" . . . "and quhilk of the forespeakers that wants it in that time of the said Parliament or several counseles, the said habits and afterwards speakis for meed, sall pay five pounds to the king." The powers and duties of advocates in these early times were in many respects similar to those which advocates have now (Balfour, *Practicks*, 297 *et seq.* Regiam Majestatem, iii. 15–19); and while many of their present powers and duties are defined by Statutes and Acts of Sederunt, a great many are the result of development from the ancient law and practice. Advocates were not allowed in criminal cases till 1587, when an Act was passed (c. 38) annulling previous prohibitory Acts (1487 c. 98), and legalising such employment. By the Act of 1532 the Faculty of Advocates was instituted. By s. 64 it is ordained "that there be ane number of advocates and procuratoures chosen, and to be chosen to the number of ten persones, that sall be called general procuratoures of the Councel" (then follow the names of eight persons); "and gif ony uthers cunning men will desire to be admitted to the office of advocation and procuration, they sall be received with advise of the said Lordes, for completing of the said number, and that thir procuratoures foresaidis procure for everie man for their wages bot gif they have reasonable excuse." Originally no special qualifications were required for admission to the Faculty. The Court admitted those whom they thought fit. This gave rise to abuses; and by Act of Sederunt, 12 Feb. 1619 (passed in consequence of a petition of the Faculty), an examination and thesis in Civil Law were prescribed. This became the ordinary mode of admission, but admission extraordinarily "by a Bill to the Lords," without undergoing examination, continued to exist as an alternative mode for many years. By various Acts of Sederunt, however, the terms of admission by the "extraordinary" mode became modified, and even such privileged intrants were compelled to undergo certain trials. By A. S. 25 June 1692, it was provided that the ordinary mode of trial would not be dispensed with unless the Court were informed of the person's fitness for the office, after which they remitted him to the Dean and Faculty for examination in Scots

Law, and it is added, "that importunity may not prevail," "no person is to have the benefit of this Act who is cousin-germane or of nearer degree to any of the Lords." The interference of the Court came in time to be a mere formality, and the two classes of intrants were distinguished mainly by the fact that one passed in Civil and the other in Scots Law (Spottiswoode, *Forms of Process*, 45; A. S. 28th Feb. 1750).

II. *Present Regulations as to Admission to Faculty.*

Intrants are now admitted in accordance with the following regulations, approved by the Faculty on 21st November 1894:—

A. *Private Examinations.*—The examinators shall be nine members of Faculty nominated by the Dean, three of whom go out of office annually. The examinations shall be partly written and partly oral, and the examinators may select assessors to assist them. The qualifications required of intrants are as follows:—(i.) *General Scholarship.*—1. Every intrant shall be deemed duly qualified in general scholarship if he produce evidence that he has obtained (1) the degree of Master of Arts in any of the Scottish Universities, or (2) the degree of Bachelor of Arts or Bachelor of Civil Law of the University of Oxford, or Bachelor of Laws of the University of Cambridge, or Bachelor of Arts of Trinity College, Dublin, or (3) the degree of Bachelor of Arts of the University of Durham, or (4) the degree of Bachelor of Arts or Bachelor of Laws of the University of London, or (5) the degree of Bachelor of Arts or Bachelor of Laws of the Royal University of Ireland, or (6) the degree of Bachelor of Arts or Bachelor of Laws of the Victoria University, Manchester; (7) such University degree as shall, in the opinion of the Dean and his Council, be evidence of the same amount of scholarship as that afforded by the degree of Master of Arts of a Scottish University. 2. In the event of the intrant not having graduated as above, he shall be examined in the following subjects, viz. (1) Latin, (2) Greek, or (in the intrant's option) one of the following languages, viz. French, German, Italian; (3) Mathematics, or Natural Philosophy, or Chemistry; (4) Metaphysics and Logic, or Moral Philosophy and Logic; (5) History of the United Kingdom. 3. The examinators shall publish (with concurrence of the Dean of Faculty) the names of the books on which the examination shall be held. 4. The intrant must pass in at least two of the subjects at one time.

(ii.) *Law.*—1. On the expiry of a year after the intrant has been found qualified in general scholarship, it shall be competent (if he has complied with the conditions of the two following regulations) to proceed with his examination in law. 2. With the view of securing to the intrant a period for undisturbed application to the study of the law before being admitted to practice, it shall not be competent to the examinators to proceed to examine him in law, unless during the year before such examination he shall not have engaged in any trade, business, or profession, either on his own account, or as assistant to, or in the employment of, another. 3. The intrant shall not be examined in law until he produce (1) evidence of attendance, such as is required for admission to examination for a law degree, in a class of Scots Law and a class of Conveyancing in a Scottish University; (2) evidence of the like attendance in a class of (*a*) Civil Law, (*b*) Philosophy of Law and International Law—Public or Private, (*c*) Constitutional Law and History, in a Scottish University, or such attendance in another university or school of law as may seem to the Dean and his Council to be equivalent thereto, (*d*) Medical Jurisprudence in a university, or in a school recognised as qualifying for university degrees.

4. On the production by the intrant to the examinators of evidence that he has attended the classes above specified (which he may attend in any order he thinks fit), he shall be examined on (1) the Civil Law, (2) the Philosophy of Law and International Law—Public or Private, (3) Constitutional Law and History, (4) Medical Jurisprudence, (5) Scots Law, Civil and Criminal, including Procedure, (6) Conveyancing. 5. If the intrant has obtained the degree of LL.B. from a Scottish University, after examination in all the subjects above prescribed for examination in law, he will be held qualified in general scholarship and law, without examination or other evidence thereof; provided always that during the year immediately before presenting his diploma to the examiners, he shall not have been engaged in any trade, business, or profession, as required by the preceding rule (ii) 2; and provided also, that he shall have duly presented his petition for admission to the Faculty, and appeared before the examinators prior to the commencement of such year. 6. If the intrant shall have obtained said degree of LL.B. after passing examinations in one or more of the said subjects, he shall be exempt from examination in these subjects. 7. The intrant must pass in at least two of the subjects at one time. 8. The examinators shall publish (with concurrence of the Dean of Faculty) the names of the books on which the examination shall be held. There shall be four periods for the examinations of intrants in each year, viz. (1) the last Friday in October, (2) the last Friday but one before the rising of the Court for the Christmas recess, (3) the last Friday but one before the rising of the Court in March, and (4) the last Friday but one before the rising of the Court in July, along with, in each case, the Monday and Tuesday immediately preceding. But the Dean and the examinators shall have power in special cases to fix a diet for examination at any other period. The written examinations shall be held on the Mondays and Tuesdays, and the oral on the Fridays above mentioned.

B. *Public Examination.*—The regulations as to the public examination are as follows:—1. *The Thesis.*—(1) On receiving the certificates of the private examinators, the Dean shall pronounce an order assigning a title of the Pandects to the intrant for the subject of his thesis, which he shall appoint him to lodge with the Clerk of Intrants on a particular day, naming a subsequent day for the diet of his public examination. (2) The Thesis shall be submitted by the clerk to the members of Faculty who have examined the intrant in Civil Law, and who, if satisfied, shall affix their *impugnetur*. 2. *Admission.*—If the Thesis on being impugned shall have been satisfactorily defended by the intrant, the question as to his admission shall be decided by the Faculty, voting by ballot. The intrant then takes the oath of allegiance before a Lord Ordinary.

Fees.—The fees payable by an intrant amount in all to £343, 1s., of which £264, 9s. is payable on presentation of the petition, and £78, 12s. before the examination in law. Of these sums, £50 is stamp duty, payable under 54 & 55 Vict. c. 39, and £55 for entry money to the Advocates' Widows' Fund, to which all members of the Faculty must contribute (11 Geo. IV. c. 41). The remainder goes to defray the expenses of the Faculty, including principally the expenses of the library. (The stamp duty is remitted if the intrant be an English barrister; if an Irish barrister, £10 is chargeable.) In addition to these fees, intrants have to pay an examination fee of £1, 11s. 6d. for each subject in which they are examined. An age-tax, amounting to £6, 12s., £8, 16s., or £11 (according to class of annuity selected in Widows' Fund), is imposed for each year of age above twenty-four at the date of admission.

There are at present 417 members of the Faculty. The Faculty exercises a supervision over its members, and may censure, or even strike off its rolls, any member guilty of professional or other misconduct.

III. Officials, etc.

The Faculty is a corporation (Ivory's ed. of *Ersk.* i. 214). The head of the Faculty is the Dean, who presides at the meetings, and signs its minutes and other acts. He takes precedence of all other members of the Bar, including the Lord Advocate, and is usually consulted upon any doubtful point of professional practice or etiquette. The Dean, the Vice-Dean, who officiates in the absence of the Dean, and the Treasurer, are elected annually at the anniversary meeting of the Faculty, held on the second Wednesday after the Christmas recess. By Act of Sederunt, 16th January 1819, the Faculty is ordained to appoint six of its number annually to be Advocates for the Poor. These are appointed at the anniversary meeting, and hold office for one year. The six members of the Faculty, of those willing to accept the office, who are next in seniority to the most junior of the retiring six, are appointed. Though at one time a salary of £10 was provided (A. S. 2 March 1534), counsel for the poor now give their services gratuitously, unless expenses in a cause are awarded to their client, in which case counsel's fees are chargeable against the opposite party (see Poor's Counsel). All Judges in the Court of Session, and Sheriffs-Depute of the various counties, and, generally, Sheriffs-Substitute, as well as the two principal Law Officers of the Crown, the Lord Advocate and Solicitor-General, are chosen from the Faculty (see Lord Advocate; Solicitor-General). Standing counsel for various Government departments are also appointed from the Faculty.

Library.—The library of the Faculty is the most valuable in Scotland, and is estimated to contain about 398,000 items, including many valuable manuscripts. Last year (1895), 37,684 items were added. It has a statutory right to demand at Stationers' Hall a copy of every book published (8 Anne, c. 19, and 5 & 6 Vict. c. 45, ss. 8, 9, 10). It is under the charge of the Keeper of the Library (elected annually), and six Curators, two of whom retire annually.

IV. Powers and Duties of an Advocate.

An advocate is entitled to plead in every Court in Scotland, civil, ecclesiastical, or criminal, superior and inferior (except when debarred by Statute, as by the Small Debt Acts); also before the House of Lords and the Judicial Committee of the Privy Council.

Mandate.—It is contrary to professional rules for an advocate to act except upon the instructions of a qualified law agent. A client instructs an agent, and the agent instructs counsel. An advocate does not require to produce any mandate. His gown is his mandate, *i.e.* he is presumed to have a mandate from his bare appearance in Court (Ersk. iii. 3. 33). If he appears and acts "*bonâ fide* for a party at the desire of a practising agent, he is not responsible for the consequences of the agent's acting without authority" (*Wallace*, 1821, 1 S. 40). A party for whom such unauthorised appearance is made, is bound by a decree against him, and is liable in expenses, but these he may recover from the agent; and he has always a remedy against those who have used his name without his authority (*Hamilton*, 25 Nov. 1813, F. C.; *Cowan*, 1836, 14 S. 634; *Thomson*, 1855, 17 D. 774). An advocate's mandate, once given, is presumed to continue, and it covers all acts of discretion in the conduct of a case. At one time a special mandate was necessary to authorise certain acts, such as compromising

(Balfour, *Practicks*, 298): but it is now settled that, "unless there be something very special in his instructions, a counsel is always entitled to give up a defence, or abandon a claim," and "may make an absolute surrender of his client's case" (L. P. Inglis in *Duncan*, 1874, 1 R. 329; see also *Royal Bank*, 1830, 8 S. 424: *Gilfillan*, 1833, 11 S. 545; *Gordon*, 1834, 12 S. 401; *Currie*, 1846, 9 D. 308; *Macintosh*, 1860, 22 D. 421). The law in England is the same (*Swinfen*, 1860, 5 H. & N. 890; *Strauss*, L. R. 1 Q. B. 179).

In the case of *Batchelor* (3 R. 914), Lord President Inglis lays down the law on this subject thus: "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 *bonâ 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 consideration of propriety and expediency, from doing so."

While counsel's mandate gives him complete authority over the suit, it does not give him power over matters that are collateral to it, and his implied authority to bind his client does not extend to matters not within the scope of the action (*Wauchope*, 1863, 2 M. 326). It has been doubted whether counsel has power, without special authority, to enter into a reference of the cause in which he is employed. Lord Justice-Clerk Hope, in *Stewart* (1843, 6 D. 151), expressed the opinion that "there is no doubt that counsel appointed to conduct a cause in Court cannot refer it, if such reference is beyond the mere ascertainment of accounts"; but an opinion *per contra* was expressed by Lord Campbell in the House of Lords in *Mackenzie* (2 Bell's *App.* 43). It is now thought that power to refer the whole cause is within counsel's mandate (Bell, *Prin.* s. 219.)

Liability for Incorrect Advice.—An advocate is not liable in damages for incorrect advice, nor is an agent who acts upon the advice of counsel in matters connected with the conduct of a suit (*Megget*, 1823, 2 S. 256; *Burness*, 1849, 11 D. 1258; but see *Dixon*, 1863, 2 M. 61, on question of conveyancing).

Fees.—An advocate's fees are presumed to have been paid, and are almost always sent when he is instructed; and if not, he cannot recover them by action (*Batchelor*, 1876, 3 R. 914). But a salary as standing counsel may be sued for (*Mackenzie*, Mor. 11421); and when no fee has been sent to counsel for a particular piece of business in a cause, it may be sent afterwards and made a charge against the opposite party, who has been found liable in expenses (*Sim*, 1889, 16 R. 583). Action is competent for recovery

of counsel's fees which have been received by an agent but not paid to counsel (*Cullen*, 1862, 24 D. 1132; *Keay*, 1837, 15 S. 748, 9 Sc. Jur. 353). An agreement by an advocate to take a proportion of the subject of the suit in place of a fee is illegal. By the Act 1594, c. 220, it is not lawful for an advocate to buy any lands or any debatable rights, heritable or moveable, which are or have been in dependence, and remain undecided.

Privilege.—Counsel (not only advocates, but agents, and parties pleading their own cases) are absolutely privileged in speaking in Court, in commenting on the evidence and conduct of parties, and in all other matters, if pertinent to the cause, and no action for defamation or verbal injury will lie against them. "Otherwise there would be no security that the judge had heard everything he ought to hear" (L. Deas in *Drew*, 1862, 24 D. 662; *Moodie*, Mor. 360; *Williamson*, 1890, 17 R. 905). While a counsel has an absolute privilege, the privilege of a litigant is qualified, and an action will lie against him if the pursuer undertake to show that the defamatory statements were not made honestly for the purpose of litigation, but from motives of personal malice (*Williamson, ut supra*). See Slander.

Confidentiality.—Communications between a party and his legal adviser regarding the subject of a suit, and anything learned by such legal adviser in the course of his employment, are secure from disclosure: but where knowledge has been obtained otherwise than as the result of employment by the client, it must be disclosed. Thus in *Wamphray's Crs.* (Mor. 347), in a proving of the tenor, defender's advocate was bound to depone whether he saw the writ, and what its tenor was, but not to divulge anything communicated to him which could not appear from the writ itself. In England it has been laid down that the privilege of confidentiality is not "qualified by any reference to proceedings pending or in contemplation" (*Cromack*, 2 Brod. & Bing. 6; *Greenough*, 1 My. & Kee. 98); but it is doubtful how far this applies to Scotland. Memorials and opinions of counsel are protected (Bell, *Prin.* s. 2254; *Thomson's Trs.*, 1823, 2 S. 233. The privilege of confidentiality is in the interests of the client, and if he waives it, as by putting his counsel or agent into the witness-box, the privilege is at an end (15 & 16 Vict. c. 27, s. 1; *Forteith*, 2 Mur. 467). A legal adviser is bound to produce all writings his client would have been bound to produce, and to answer questions regarding them which his client would have been bound to answer. In *Betson* (Mor. 342), an advocate, in an exhibition of writs, was bound to depone, as a witness, as to defender having the writs, although he was defender's counsel in the cause. Anything which forms part of the *res gestæ* of a crime or fraud is not protected (*M'Cowan*, 1852, 15 D. 229, 494; *Morrison*, 1860, 23 D. 232; *Humphreys*, Bell, *Notes*, 253; *M'Lean*, 2 Swin. 183; *Keith*, Mor. 354). In preparations for defence, when proceedings in respect of such fraud or crime have been instituted, the usual rule of privilege applies. (See Stair, iv. 43–9; Ersk. iv. 2. 25; Hume, 350; More, *Notes*, ccccxv.; Dickson on *Evidence*, s. 1663 *et seq.* See also Confidentiality.)

Where Counsel necessary, etc.—A party is always entitled to plead his own cause orally in any Court; but if he elects to plead himself, counsel will not be heard for him in addition (*Longworth*, 1867, L. R. 1 Sc. App. 218). The rule is different as to papers in the Court of Session, which, with few exceptions, must be signed by counsel. The signature of the party is not sufficient (A. of S. 19 Dec. 1710, 15 June 1738, 5 Mar. 1789, 11 July 1828, s. 112; *Hay*, 1823, 2 S. 101; *Sasson*, 9 S. 562; *Denny*, 1 M. 270; *Rennie*, 13 D. 36; *Jaffray*, 2 M. 355; *Rae*, 4 Sc. Jur. 488; 31 & 32 Vict. c. 100, ss. 20, 23, 29). Counsel being held responsible for the

pleadings, the Court requires that he shall satisfy himself that papers signed by him are proper to be laid before them (18 D. 33 (note); *Denny*, 1863, 1 M. 270). Exceptions to the rule are summonses (which must be signed by a W.S.), Bill Chamber proceedings, and minutes of admission, which are commonly signed by agents (31 & 32 Vict. c. 100, s. 13; *Scott*, 1848, 10 D. 732). Special cases should be signed by the counsel "by whom they have been adjusted, the paper being one which contains a joint statement binding on both parties" (L. P. Inglis in *Hope*, 1870, 8 M. 702), but, as a rule, one advocate may sign a paper for another.

Attendance in Court.—The Lord Advocate and Solicitor-General have conferred upon them patents as Queen's Counsel, but do not sit within the bar except while they hold office. Other advocates become senior counsel by ceasing to draw papers and prepare pleadings, after which they rarely act in Court without a junior. In no case is it necessary that more than one counsel should be employed in a case, but the practice in the Inner House is to instruct two, and it has been laid down that, "where one counsel only is retained, his absence will not be esteemed a good reason for delay" (L. P. M'Neill in *Forbes*, 1855, 18 D. 80). In the subsequent case of *Kirk Session of Wemyss*, 1855 (18 D. 273), where only one counsel was instructed, who did not appear to plead owing to his being engaged in the other Division, the case was sent to the bottom of the roll, the Lord President observing that the party being a public functionary, there was no excuse for the ordinary rule not being observed. It has also been laid down that "the fact of counsel being engaged in a proof will not be taken as an excuse for not appearing in the Division" (*Wilson*, 1876, 3 R. 527). Engagement in a jury trial or before a Lord Ordinary is in the same position. Attendance of counsel in the Outer House is regulated by A. S. 15 July 1865, and A. S. 2 Nov. 1872. The rules are as follows:—"When a cause is called either in the Debate Roll or Procedure Roll, and no counsel attends on either side, nor any admissible excuse is made for their non-attendance, the Lord Ordinary shall pronounce an interlocutor dismissing the action, and finding neither party entitled to expenses; and the said interlocutor shall not be recalled by the Lord Ordinary of consent, but may be recalled only on reclaiming note to the Inner House, upon such conditions as to expenses or otherwise as may be imposed by the Court, or by the Lord Ordinary under remit." "When, on such calling of a cause, counsel shall appear on one side only, and no admissible excuse shall be made for the non-attendance of counsel on the other side, it shall be competent for the counsel appearing to take decree by default in favour of his client; and if he shall not do so, the Lord Ordinary shall pronounce an interlocutor dismissing the action, finding neither party entitled to expenses; and the said interlocutor shall not be recalled by the Lord Ordinary of consent, but may be recalled only in the manner and on the conditions foresaid." "It shall not be competent to have such decree by default recalled of consent of parties, but the decree shall be recalled on reclaiming note only; and unless when the Court shall otherwise direct, the Auditor shall, in taxing any account of expenses incurred by the agent of the party against whom such decree is taken, disallow the expenses of having such decree opened up." "No excuse in respect of another engagement shall be admissible for the non-attendance of counsel, except his being at the time engaged in a case before the Inner House, and being the sole counsel on his own side in attendance, or, if not sole counsel, being the counsel addressing the Court, or about to reply to the counsel on the opposite side; or his being engaged in a jury trial, or at another Lord Ordinary's bar; but in the last-mentioned case, only if

either actually addressing the Lord Ordinary or about to reply to the counsel on the opposite side." "It shall be no excuse for the non-attendance of a counsel that he is engaged at a proof or jury trial, unless he be the sole counsel engaged on one side at the said proof or jury trial, or be actually addressing the Court or jury, or examining a witness at the time." "Every debate shall be proceeded with, and brought to a close by, the counsel at the time in attendance; and, except on special cause shown, no delay or adjournment of any debate shall be allowed. But it shall be always competent to the Lord Ordinary, on special cause shown, to continue or adjourn any debate to another day, not more than eight days afterwards, when the debate shall be proceeded with and completed by the counsel then in attendance." "The counsel who is addressing the Lord Ordinary, or who is about to reply to the counsel on the other side, shall not be entitled to leave the bar for any other Lord Ordinary's bar, but only if called to attend a jury trial or the Inner House; and, in the last-mentioned case, only if no other counsel on the same side be in attendance in the Inner House." "No counsel shall be entitled to leave the Lord Ordinary's bar on the ground that he is called to a proof or jury trial, or to a cause in the Inner House, unless he be the sole counsel engaged in the said proof, jury trial, or Inner House, or unless the services of the other counsel, if any, engaged along with him, cannot, for reasons stated to and held satisfactory by the Lord Ordinary, be obtained at the time."

A counsel is liable to censure for improper conduct by any judge before whom he is pleading (*Mowat*, 2 Fountainhall, 56; *Gilchrist*, 4 Pat. App. 26; *Russel*, Mor. 341). The Court of Session may punish by censure, suspension, or deprivation (A. S. 23 June 1756, A. S. 21 Dec. 1649, A. S. 26 July 1699).

Advocates' Clerks.—For some time after the institution of the Faculty, advocates commonly acted as agents as well as counsel, and were assisted by clerks, who were generally training for the Bar. This practice fell into disuse, and is now entirely abolished (A. S. 11 Mar. 1820). An advocate's "first" clerk was formerly entitled to act as an agent, but first clerks were amalgamated with the Solicitors before the Supreme Courts in 1850 (A. S. 4 Dec.); and to act as agent now, an advocate's clerk must be admitted in the same way as other law agents (Spottiswoode, *Forms of Process*, 50; *Lord Advocate*, 1848, 10 D. 987). An advocate has now only one clerk, who attends him in Court, copies papers, etc. His fees are regulated by A. S. 15 July 1876.

[See Shand, *Practice*, i. 3. B; Mackay, *Court of Session Practice*, i. 102 *et seq.*]

Advocates' Clerks.—The fees of advocates' clerks, formerly fixed by custom, are now regulated by the Act of Sederunt, 15 July 1876. They are paid by the client.—[Mackay, *Prac.* i. 120; *Manual*, 30, 673; *Parliament House Book*, Table of Fees VI.] See Advocate (*ad fin.*).

Advocates-Depute.—An Advocate-Depute is a deputy appointed by the Lord Advocate to assist in the discharge of the duties of the Lord Advocate's office, and by his commission he is vested with all the powers belonging to that office. There were occasional appointments to this office in the sixteenth century, and since the close of that century there have been regular Advocates-Depute. In last century there were three,

and the number is now fixed at four. In addition, the Solicitor-General is theoretically a fifth Advocate-Depute, because it is in that capacity, and as representing the Lord Advocate, that he appears in the Court of Justiciary. There are also two Extra Advocates-Depute—one who conducts the prosecutions in the second Court at Glasgow Circuit, and another who appears for the prosecution in the Sheriff Court where the nature of the case renders the attendance of counsel desirable. Advocates-Depute conduct the prosecution in all criminal trials in the Circuit Courts of Justiciary; and they also prosecute in the High Court of Edinburgh in the absence of the Lord Advocate and Solicitor-General. In the conduct of a criminal prosecution, the Advocate-Depute is vested with all the wide discretionary powers of the Lord Advocate. The administration of the routine criminal work of the Lord Advocate as the public prosecutor is vested in the Advocates-Depute. Every alleged breach of the criminal law which is not manifestly of a trivial character is reported by the Procurator-Fiscal of the district where it occurs to the Crown Agent, by whom the papers are submitted to one of the Advocates-Depute. The Advocate-Depute directs whether there is to be any further inquiry or a criminal prosecution, and if the latter is ordered, whether the accused is to be tried before the Court of Justiciary, Sheriff and jury, or the Sheriff summarily. In deciding whether or not an accused person is to be put upon his trial, the Advocate-Depute virtually exercises the functions of the Grand Jury in England. All incidental applications in connection with criminal inquiries and prosecutions transmitted to the Crown Agent, are disposed of by one of the Advocates-Depute. The Advocates-Depute also discharge the duties of coroners for Scotland. In every case of sudden or violent death an investigation into the circumstances is made by the local Procurator-Fiscal, who reports the result of his inquiries to the Crown Agent. The papers are then laid before one of the Advocates-Depute, who comes to a finding as to the cause of death for transmission to the local registrar, and, at the same time, determines whether there is any ground for criminal or other further proceedings. The appointment of his Deputes is one purely personal to the Lord Advocate, and the commission which they hold is from him, not from the Crown. Accordingly, they go out of office with the Lord Advocate, but in such an event they continue to discharge their duties until the appointment of their successors (50 & 51 Vict. c. 35, s. 3). Before provision was made for this, it used to be customary for the Court, on the announcement of the fall of a Ministry, to swear in the Advocate-Depute specially to prosecute in the Court then sitting. This is not now necessary. In case, however, of the inability of the Advocate-Depute, through illness or otherwise, to be present, the Court may swear in another advocate to prosecute on behalf of the Lord Advocate. At the trial of election petitions, and in incidental applications to the Court of Session in connection with the administration of the law, such as the making of interim appointments, the Lord Advocate is usually represented by one of the Advocates-Depute.—[Hume on *Crimes*, ii. 132: Omond, *Lord Advocates*, 20, note, and 51.]

Advocates in Aberdeen.—In early times lawyers practising in the inferior Courts were frequently called advocates as well as procurators; but the only class of such practitioners still styling themselves advocates are the members of the Society of Advocates in Aberdeen.

The origin of the Society cannot now be precisely ascertained: but it appears that in 1633 the Sheriff of Aberdeen passed an Act of Court recognising sixteen practitioners as qualified to conduct judicial proceedings, and prohibiting all other persons from practising before him. The practitioners thus admitted seem to have held themselves entitled to control the examination and admission of all future candidates. In 1685 the members then practising formed themselves into a regular Society, and a royal charter of incorporation was obtained in 1774, confirming all their former rights and privileges. Two other charters were subsequently obtained, in more comprehensive terms, in 1799 and 1862 respectively. In virtue of those charters, and of immemorial usage, the members of the Society were entitled to the exclusive privilege of practising in all the Courts within the City of Aberdeen, till the Law Agents' Act of 1873 abolished all such exclusive privileges. The number of the members of the Society is at present 111; but besides these there are about 80 law agents practising in Aberdeen, as they are entitled to do under the Law Agents' Act, without being members of the Society. The Society have erected a hall, containing a large and valuable library of books both in legal and in general literature. The whole funds and property of the Society amount to about £85,000, of which £56,000 belong to a fund for the benefit of widows of members, each widow being entitled to an annuity of £60. A very high standard of qualification has always been required by the Society from its apprentices. The following are the regulations at present in force:—Every intending entrant is required to serve a regular apprenticeship, entered into with the leave of the Entrants Committee, with a member of the Society or any enrolled law agent, or partly with one and partly with the other, for five years, unless the entrant is a M.A. or a B.A., in which case three years are sufficient. Before entering on his apprenticeship, he must have attained the age of sixteen years, and (unless a M.A. or B.A.) have satisfied the Entrants Committee either (1) that he has passed the examinations and attended the classes in Arts subjects necessary to qualify him for admission to examination as a candidate for the degree of B.L., or (2) that he has passed the preliminary examination in Arts at a Scottish University, or its equivalent, and that he has attended during two or more sessions either (*a*) full graduation courses in two subjects in the Faculty of Arts of a University in the United Kingdom, and has passed the examinations qualifying for graduation in such subjects, or (*b*) full graduation courses in four subjects in the Faculty of Arts of such a University, and has duly performed the work of such classes, one of these classes in both cases having been the graduation class in Humanity. In order to be admitted a member of the Society, it is not absolutely necessary that the apprentice shall have been matriculated to the Society as above mentioned, provided he has served a similar apprenticeship to an enrolled law agent, and has had the same educational training prior to his apprenticeship. In terms of the Law Agents' Act of 1873, every applicant for admission must be an enrolled law agent; and further, to comply with the rules of the Society, he must be not under twenty-one nor above forty years of age, nor be resident or practising in any county but Aberdeen. The matriculation fee payable by apprentices is £10, 10s., and the entry money on their admission is £117, 12s. Extraneans require to pay £155, 4s. 6d. of entry money. There are extra payments to be made to the widows' fund where the applicant's age exceeds twenty-five, or exceeds that of his wife beyond ten years. The annual contribution from members admitted after 15th October 1883 is £7.

Advocate, Lord, or Queen's Advocate.—See Lord Advocate.

Advocatio ecclesiæ—The duty performed by *advocati ecclesiarum*.—They were at first simply powerful individuals; but in later times they were the patrons of a church, who, as its defenders or guardians, had the duty to perform of defending and preserving its property from attack and dilapidation.—[Duncan, *Par. Eccles. Law*, 79; Bœhmer, *Jus Eccles. Protest.* vol. ii. 1, iii. T. 5, ss. 36–7; Blount, *Law Dictionary.*]

Advocation to Court of Justiciary.—This method of bringing the proceedings of inferior Courts under review of the High Court is still competent, though seldom used. Originally, it was the removal of a cause from the inferior to the superior Court, but it gradually became simply a process of review. It was the appropriate method for bringing under review decisions pronounced during the course of the trial and before final judgment (*E. of Kinnoull*, 1859, 3 Irv. 501; *Smith*, 1848, Ark. 427; *Prentice and Newbigging*, 1843, 1 Broun, 561; see also *Jameson*, 1855, 2 Irv. 273; *List*, 1867, 5 Irv. 559). In more recent times, however, it has been used and sustained after final judgment (*Craig*, 1881, 4 Coup. 541; *M'Rae*, 1882, 4 Coup. 561; *Duncan*, 1886, 1 White, 43). The procedure in advocation commences with a bill of advocation, which one judge can pass, but the final disposal of which must be by the ordinary quorum of three judges. The bill prays for letters of advocation, and for transmission to the Court of Justiciary of the inferior Court process; but the practice is to discuss and decide the case upon the passed bill, without expeding letters of advocation. It is unnecessary for the parties to attend during the discussion, except in the case of a complainer sentenced to imprisonment and liberated *ad interim* on caution under 38 & 39 Vict. c. 62, s. 10, who had to appear.

Form of Bill of Advocation of Judgment Dismissing a Complaint.

Bill of Advocation

Unto the Right Honourable the Lord Justice-General, the Lord Justice-Clerk, and Lords Commissioners of Justiciary;

Humbly shows your servitor *A. B.* [*designing him*],—*Complainer*; against *C. D.* [*designing him*],—*Respondent*;

That the complainer is under the necessity of complaining to your Lordships of a pretended interlocutor or judgment pronounced at , on the day of , by , Esquire, Sheriff-Substitute [*or other inferior Judge or Judges*] of , upon a petition or complaint at the instance of the complainer, as Procurator-Fiscal of Court for the county of [*or other prosecutor*], for the public interest, charging the respondent as therein set forth, with a contravention of the Statute [*or other crime or offence*], whereby the said Sheriff-Substitute [*or other inferior Judge or Judges*] dismissed the said petition or complaint erroneously and contrary to law, as will appear to your Lordships from the annexed statement of facts and note of pleas-in-law:

Wherefore the complainer prays your Lordships for letters of advocation in the premises at his instance in common form; and in the meantime to grant warrant to the Clerk of the Sheriff [*or other*] Court at , or other custodier of the proceedings at the instance of the complainer against the respondent, and interlocutors following thereon, to transmit the same to the Clerk of Justiciary; and on consideration of the said proceedings, to advocate the same, to recall the interlocutor or judgment complained of, to remit to the Sheriff of the counties

, or his Substitute, at [*or other Judge or Judges*], to proceed with the said petition or complaint according to law, and to find the complainer entitled to expenses; or to do further or otherwise in the premises as to your Lordships shall seem proper.

According to Justice.

(*Signed by Counsel or Agent.*)

[*Here follow statement of facts and note of pleas-in-law.*]

First Interlocutor.

Edinburgh, 18 .—Having considered this Bill, grants warrant for serving a copy thereof, and of this deliverance, on the therein-named *C. D.*, respondent; and further grants warrant for and ordains transmission of the proceedings complained of to the Clerk of Justiciary; and appoints the case to be heard on the day of .

(Signed) *E. F.*

[Hume, ii. 509; Alison, ii. 26; Macdonald, 532; *Jurid. Styles*, iii. 894: Bell, *Notes*, 306; Moncreiff, *Review in Crim. Cases*, 163; Chisholm, *Barclay's Digest, voce* "Advocation."] See Review; Justiciary Court.

Advocation to Court of Session.—This was a form of process, now abolished, by which an action was sought to be removed from an inferior to a superior Court, in order that it might be discussed in the latter, or remitted to the former, with instructions how to proceed. Advocations at one time required to pass through the Bill Chamber before they were admitted into the Court of Session. But by 1 & 2 Vict. c. 86, bills and letters of advocation were abolished; and final judgments from inferior Courts might be brought by note of advocation directly before the Court of Session, and advocation of brieves before any Lord Ordinary. Advocations of interlocutory judgments, with a view to jury trial, still required to be presented in the Bill Chamber in the first instance, but a written note was substituted for the bill. By 16 & 17 Vict. c. 80, all advocations might be brought direct before either Division of the Court, or by consent before a Lord Ordinary, in which latter event the judgment of the Lord Ordinary was final. The process of advocation is now in all cases abolished (31 & 32 Vict. c. 100, ss. 64, 65, 66).—[Shand, *Pract.* 440–2; Mackay, *Manual*, 12, 589.] See Appeal; Suspension.

Ædificatum solo cedit.—This maxim, or the more correct form, *Inædificatum solo cedit*, expresses the rule of law that where a moveable subject is annexed to an immoveable, the former becomes, as it were, part of the latter, and the property in the moveable passes to the owner of the immoveable. The moveable, in other words, is regarded as an accessory of the immoveable, and the rule is an application of the doctrine of Accessio (*q.v.*). This mode of acquiring property is technically known as "inædificatio." The maxim is not found, in either of the forms above mentioned, in the *Corpus Juris*, but is a gloss on the brocard, *Omne quod inædificatur solo cedit*, which frequently occurs in the texts (*e.g.* in *Inst.* ii. 1. 29; *Dig.* 41. 1. 7. 10).

By the XII. Tables no one could be forced to take out of his house a timber (*tignum*), though belonging to another, which had once been built into it. An *actio de tigno injuncto*, however, was given for double the value of the *tignum*; and under the term *tignum* all building materials were included (*Inst.* ii. 1. 29). When the materials were annexed to the land by a *bonâ fide* possessor, he could resist any action by the true owner claiming

the materials, unless the latter paid compensation in the shape of the price of the materials, and the workmen's wages (*Inst.* ii. 1. 30). On the other hand, where a *bonâ fide* possessor has given up or lost possession, he has no claim for compensation unless the expenditure has been made with the knowledge of the owner (*Dig.* 12. 6. 33). These rules regulating compensation had, in Roman law, no application to the case of landlord and tenant: "Whatever a tenant-farmer does to the land for its improvement, either by building or otherwise, gives him a title to compensation, if such improvements have not been part of the bargain" (*Dig.* 19. 2. 55. 1).

In Scots law the main exception to the application of the maxim is in the case of FIXTURES (*q.v.*); but, as the indulgence granted by the law to "fixtures" tends to increase, this exception has been gradually becoming more extended in its scope. In Scotland the doctrine of recompense is fully recognised in the case of buildings erected *in bonâ fide* by one man on the ground of another. The principle of recompense is, however, overstated by Stair when he lays down that "he who even *malâ fide* buildeth upon another man's ground is not presumed to do it *animo donandi*, but hath recompense by the owner *in quantum lucratus*" (Stair, i. 8. 6). This doctrine is doubted by Erskine (iii. 1. 11), and has not been ratified by later decisions (*Barbour*, 1840, 2 D. 1279; *Buchanan*, 1874, 2 R. 78). See ACCESSIO; FIXTURES.

Æmulatio vicini—"Envy (malice) towards a neighbour."—A plea competent in the Roman law (*Dig.* 39. 3. 1. 12; *cod. tit.* 2. 9; Nov. 63. c. 1), adopted from it by Erskine (ii. 1. 2), Bankton (ii. 7. 15, iv. 45. 112), and Bell (*Prin.* ss. 964, 966), and frequently tendered in argument in Scots cases; but never given effect to by the Court in circumstances which really raised the question. It goes to this, that one shall at the instance of a neighbour be restrained from, or made liable in damages for, an otherwise lawful use of property to the detriment of neighbouring property, if the sole motive be malice, or intent to injure. The plea is rejected in the English law; and it seems the better opinion that it would now have a similar fate in Scotland. Lord Watson, in a recent English case of abstracting or diverting subsoil water on its way to the ground of a neighbour (*Mayor, etc., of Bradford*, 1895, A. C. 587, at 597), observed: "I desire, however, to say that I cannot assent to the law of Scotland as laid down by Lord Wensleydale in *Chasemore* v. *Richards* (7 H. L. C. 349, at p. 388). The noble and learned lord appears to have accepted a passage in Mr. Bell's *Principles* (s. 966) which is expressed in very general terms, and is calculated to mislead, unless it is read in the light of the decisions upon which it is founded. I am aware that the phrase '*in æmulationem vicini*' was at one time frequently, and is even now occasionally, very loosely used by Scottish lawyers. But I know of no case in which the act of a proprietor has been found to be illegal, or restrained, as being *in æmulationem*, where it was not attended with offence or injury to the legal rights of his neighbour. In cases of nuisance, a degree of indulgence has been extended to certain operations, such as burning limestone, which in law are regarded as necessary evils. If a landowner proceeded to burn limestone close to his march, so as to cause annoyance to his neighbour, there being other places on his property where he could conduct the operation with equal or greater convenience to himself, and without giving cause of offence, the Court would probably grant an interdict. But the principle of *æmulatio* has never been carried further. The law of Scotland, if it differs in that, is in all other respects the same

as the law of England. No use of property which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious." The case of lime-burning here apparently alluded to (*Dewar*, 1767, Mor. 12803) does not give any indication of a divergence between the two systems, even to the extent suggested. As to motive in regard to matters other than use of property, see *Flood* (1895, 2 Q. B. 21).

Affidavit.—An affidavit is a written *ex parte* statement, emitted on oath, before one having authority to administer oaths.

An affidavit may be emitted before any Magistrate, Judge Ordinary, or Justice of the Peace. It may be emitted before a Baron Bailie (*Murray*, 1821, 1 S. 81, n. ed. 83). A Justice of the Peace may take an affidavit beyond the limits of the county to which his commission applies (*Turnbull*, 1828, 6 S. 676); and a Scottish Justice may take an affidavit even in England (*Kerr*, 1852, 14 D. 864; affd. 1 Macq. 736). Conversely, an English or Irish Justice may act in this matter in Scotland (*Taylor*, 1822, 1 S. App. Cas. 254); but in the case of *Place* (2 July 1814, F. C.) it was held "that a creditor's affidavit taken in a foreign country, and a long while previous to the application for the *meditatio fugæ* warrant, was not a sufficient ground for the apprehension of a debtor." The jurisdiction of a Judge Ordinary in the matter of taking affidavits is confined to his own territory. (Bell, *Com.*, 5th ed., ii. 346; Dickson, *Evidence*, s. 1539).

The following is the usual form of affidavit:—

> At , the day of , One thousand eight hundred and ninety years; in presence of *A. B.*, of C., one of Her Majesty's Justices of the Peace for the County of , compeared *D. E.* [*design him*], who, being solemnly sworn, depones that [*insert the facts*]. All which is truth, as he [*or* as the deponent] shall answer to God.
>
> (Signed) *D. E.*
>
> (Signed) *A. B.*, J.P.

The affidavit ought to set forth all the particulars contained in the above style, and must be signed by the deponent, and also by the Justice, or Magistrate, or Judge Ordinary before whom it is emitted. A Justice ought to append the initials "J.P." to his signature. Where the affidavit consists of more than one page, each page ought to be signed both by the deponent and the Justice, etc., before whom it is taken.

It is desirable to avoid as far as possible erasures, scorings, interlineations, and marginal additions. Where the amount of the debt was written on an erasure, the affidavit was held bad (*White*, 1846, 9 D. 283). A marginal note unsigned by the Justice was held no part of the affidavit (*Mackersey*, 1829, 7 S. 556; *Miller*, 1848, 10 D. 1419). But where the interlineation was in the handwriting of the Justice before whom the affidavit was sworn, and corresponded to the amount in an annexed account, an objection to the validity was repelled (*Dyce*, 1846, 9 D. 310). The filling up of immaterial blanks in printed affidavits, where the meaning was otherwise clear, was held not fatal to validity (*Hair*, 1830, 8 S. 671).

The words "*who being solemnly sworn, depones*" are called the *jurat*. The deponent must actually appear before the Justice, Magistrate, or Judge Ordinary; and he *must be sworn*. If he is not put on oath, the affidavit will be invalid (*Blair*, 1889, 16 R. 325; see also *Wylie*, 1884, 11 R. 968, 820). While the safe course is to swear that the statement

in the affidavit is true, "as I shall answer to God," it would seem that the actual mention of the name of the Deity is not essential, if the word "swear" be used. In an unreported case (*Aitken*, 1890, *Journal of Jurisprudence*, xxxiv. 617), these formalities were held sufficient by the First Division of the Court of Session (L. P. Inglis): viz. (1) the reading over of the affidavit: (2) the holding up of his right hand by the deponent: and (3) the use of the words "I *swear* that this statement is true." Where, however, a person objects to being sworn, and states as the ground of such objection either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, he may make a *solemn affirmation*, instead of taking an oath, in all places and for all purposes where an oath is or shall be required by law; and this affirmation has the same force and effect as if he had taken an oath (51 & 52 Vict. c. 46, s. 1). See AFFIRMATION. The form of affirmation in writing in lieu of an affidavit will be:—

I, *D. E.*, of , do solemnly and sincerely affirm that [*insert statement of the facts affirmed; and thereafter, in place of the* jurat, *follow these words*]. Affirmed at [*specifying the place*], this day of , 189 [*specifying the date*], before me [*name and designation of Justice, Magistrate, or Judge Ordinary, with signatures of deponent and Justice, etc.* (51 & 52 Vict. c. 46, s. 4)].

Where Affidavits are required.—In certain matters affidavits are required *by Statute* in support of claims, *e.g.* under the Bankruptcy Act, 1856 (19 & 20 Vict. c. 79, ss. 21–25, 28), the Entail Amendment Act, 1848 (11 & 12 Vict. c. 36, s. 6; also 16 & 17 Vict. c. 94, s. 17), and the Confirmation of Executors Act, 1858 (21 & 22 Vict. c. 50, s. 17). The Act of Sederunt, 10 February 1841, s. 17, also requires the production of an affidavit to satisfy the Court that a witness is likely to be unable to attend a jury trial. There are also cases in which affidavits are required *at common law* as *primâ facie* evidence. Thus, in applications for MEDITATIO FUGÆ warrants (*q.v.*), the creditor who applies for the warrant must swear in the presence of the Justice to the verity of his debt and to his belief that the debtor has a present intention of leaving the country, stating his grounds for such belief (Bell, *Com.* ii. 559).

Unnecessary Affidavits.—The practice of taking affidavits not acknowledged by law was long since condemned as useless and improper (Hume, i. 364, ii. 135; Tait, *s.v.* "Affidavit"; Blair, 7); and now by the Act 5 & 6 Will IV. c. 62, s. 13, it is declared to be *not lawful* for any Justice of the Peace, or other person, "to administer, or cause or allow to be administered, or to receive or cause or allow to be received any oath, affidavit, or solemn affirmation, touching any matter or thing whereof such Justice or other person hath not jurisdiction or cognisance by some Statute in force at the time being;" but this enactment does not extend to any oath, etc., before any Justice "in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences, or touching any proceedings before either of the Houses of Parliament, or any committee thereof respectively," nor to any oath, etc., which may be required by the laws of a foreign country to give validity to instruments in writing designed to be used in such foreign country (*ib.*). An Act of the following year provides that nothing in the Statute just quoted shall prevent the taking of oaths by married women in judicial ratifications "as the same might by the law and practice of Scotland have heretofore been taken" (6 & 7 Will. IV. c. 43).

Admissibility in Evidence.—An affidavit is usually admissible in evidence, without extrinsic proof of its genuineness, for the limited purpose

of enabling a party to establish a *primâ facie* foundation for a claim which he must afterwards substantiate by other evidence. But as the person against whom the affidavit is used has no opportunity of cross-examining the deponent, an affidavit is not admissible on the merits of the case, nor is it admissible after the death of the deponent (Kirkpatrick, *Digest of Evidence*, s. 39), or when he is abroad and refuses to give evidence before a Commissioner of the Court (*Magistrates of Aberdeen*, 1813, Hume, 502; *Glyn, Mills, Halifax & Co.*, 1834, 13 S. 126: cp. *Lauderdale Peerage*, 1885, L. R. 10 App. Ca. 692; and *Shields*, 1874, 2 R. 126: Dickson, *Evidence*, ss. 1535, 1717; Kirkpatrick, s. 207).

Perjury.—Voluntary affidavits do not warrant a prosecution for perjury (Macdonald, 3rd ed., 215; Burnett, *Crim. Law*, 205; Hume, i. 370: Alison, i. 471), but a false affidavit to a claim in bankruptcy infers the crime (Hume, i. 374, note and cases there). See Perjury.

[Dickson, *Evidence*, ss. 1534 *et seq.*, 1725, 1118, 272; Kirkpatrick, *Digest of Law of Evidence, ut supra*; Chisholm, *Barclay's Digest, s.v.* "Affidavit."]

Affiliation or **Filiation.**—Affiliation is the determination or ascertainment of a child's paternity.

1. *Children born in Wedlock.*—In regard to children born in wedlock, the maxim *Pater est quem nuptiæ demonstrant* applies; but that is merely a presumption, which may be redargued by contrary proof to the effect that the child could not be the issue of the husband and wife. Formerly, by our law this could only be done by proving that it was physically impossible for the husband to be the father of the child, in respect either that he was impotent and incapable of procreation, or that he had no access to his wife during the period of gestation, which is now fixed to be not more than ten nor less than six lunar months before the birth. Lord Fraser, in his work on *Parent and Child* (11), seems to suggest a doubt as to whether the longer period should not be ten *calendar* months, but in the only case where the point arose for decision Lords Gillies and Meadowbank gave conflicting opinions. The Court do not now take so strict a view of the proof necessary to redargue the presumption; and in the case of *Brodie* (1872, 11 M. 142) it was held that the presumption had been redargued, although there was possibility of access. It is now recognised as sound law that the fact that access or intercourse was physically possible, is not of itself sufficient to fix the status of legitimacy. The cases must be very rare indeed where access or intercourse is proved to have been physically impossible. If the result of a careful consideration of all the facts and circumstances proved, be, that the Court is satisfied that there actually was not access or intercourse, at or about the period when the child must have been procreated, and if the Court is also satisfied that another man had access and had intercourse with the wife at that time, then the presumption from the maxim *Pater est quem nuptiæ demonstrant* cannot receive effect in the face of such evidence. The presumption is rebutted by such evidence as is sufficient to satisfy the judicial mind that the husband could not be the father of the child. If there be clear evidence to the satisfaction of the Court that *de facto* a husband had not intercourse with his wife, and could not be the father of his wife's child, that child will be held illegitimate, though the utter impossibility of access be not established by the evidence. It may be physically possible, and yet in the circumstances and according to the evidence the possibility may be excluded. Nothing less than complete satisfactory evidence can be

sufficient; but if there be such evidence, then, on the face of it, the presumption cannot receive effect (per L. Ardmillan in *Brodie, ut supra*). In the case of *Steedman* (1887, 14 R. 1066), the Court held the presumption rebutted although the husband and wife at the time of the child's conception resided in the same village. A decree of separation in Scotland does not overcome the presumption, though a decree of separation *a mensa et thoro* in England has that effect. The maxim does not apply to one born beyond ten months after the dissolution of the marriage, or within six months of the ceremony. The presumption is not overturned by both husband and wife declaring the child to be that of another man, unless that declaration is corroborated by other evidence; the law, as the child's guardian, requiring the clearest evidence before declaring it to be illegitimate.

2. *Children born out of Wedlock.*—Actions of affiliation with regard to children not born in wedlock generally take place in the Sheriff Court. The quantity and quality of evidence required to prove paternity in such cases has undergone a complete change since the Evidence Act of 1853 (16 Vict. c. 20), which, by s. 3, made the parties to the action competent witnesses. Prior to that Act, a pursuer in an action of affiliation was entitled, on adducing a *semiplena probatio*, to give her oath in supplement that the defender was the father of her child, and this was conclusive as regards him. A *semiplena probatio* consisted of proofs of opportunity, acts of familiarity, etc., which suggested that the pursuer's story was true. The period of gestation which the Court have recognised in a series of cases is much the same as in cases of legitimacy; but in a comparatively recent case (*Gibson*, 1874, 1 R. 853), where the period of alleged gestation was ten lunar months and a week, the Court expressly guarded themselves from laying down that the period of time was as great as to make it impossible that the defender could be the father of the child. Affiliation cases have no longer the peculiarity that the evidence of one of the parties is received as conclusive after a *semiplena probatio* has been made out. The evidence is to be dealt with as in other cases; the parties are the principal witnesses, they know the facts which lie at the bottom of the case, and what the Court has to consider is, on the whole evidence, on which side is the balance of credibility. Where the parties distinctly contradict each other, the Court is in the position of a jury, to decide on which side is the preponderance of credibility. Still, however, the defender is entitled to say that the pursuer must prove her case (per L. J.-C. Inglis in *M'Bayne*, 1860, 22 D. 738). The rule of evidence to be followed in these cases thus enunciated by his lordship has been followed by the Court ever since, and in the recent case of *Young* (1893, 20 R. 768) it was expressly approved of. The rates of aliment allowed against the father vary in different parts of Scotland, as also does the period for which the father is liable in aliment. The usual sum of aliment allowed is £8 per annum, and the period varies in the case of a male child from seven years to ten, and in the case of a female child from eight years to twelve. In the case of *Oliver* (1894, 4 *Poor Law Magazine* (N. S.) 419), it was held by Lord Low that the offer by a father to aliment his illegitimate male child in his own house, when the child attained seven years, was no answer to the mother's claim for aliment where the decree awarded the mother aliment for a period of ten years. See Marriage; Bastard; Legitimacy; Parent and Child; Semiplena Probatio.

Affinitas, in Roman law, was the relation subsisting between a person and the cognates of his or her spouse. Persons so related by

marriage are *affines*. There are, properly speaking, no degrees of *affinitas* (*Dig.* 38. 10. 4. 5). The effect of *affinitas* as a bar to marriage in Roman law is discussed in *Inst.* i. 10. 6 *et seq.* The expression *affinitas affinitatis* is sometimes used to denote the relation between those in affinity with one spouse and those in affinity with the other. This relation is not, however, recognised by law; for *affinis mei affinis non est mihi affinis* (Stair, i. 9. 15 *ad fin.*, and iv. 43. 9; Ersk. *Inst.* i. 6. 8). Thus a man may marry a woman whose brother is married to his sister, or he may marry the widow of his deceased wife's brother. (See Fraser, *H. & W.*, 2nd ed., i. 119 *et seq.*) See AFFINITY.

Affinity.—"That tie which arises in consequence of marriage betwixt one of the married pair and the blood relations of the other; and the rule of computing its degrees is that the relations of the husband stand in the same degree of affinity to his wife in which they were related to the husband by consanguinity, which rule holds also *ex converso* in the case of the wife's relations" (Ersk. *Inst.* i. 6. 8, 9).

In its treatment of affinity as a barrier to marriage, as, indeed, of all matters relating to marriage, the law of Scotland formed itself prior to the Reformation on lines identical to those along which that of Christendom at large was developing under the influence of the Canon law. Canon LXV. of the Council of Perth, anno 1242, is in these terms: "Denuncient etiam . . . quod matrimonium prohibitum est intra quartum gradum consanguinitatis *vel affinitatis*." This Canon, confirmed by the king and estates, was the statutory basis of the Scottish law of marriage; and it so continues so far as not altered by later enactment (Fraser, *H. & W.* i. 109–113; Riddell, *Peer. and Consistorial Law*, 468). All marriages within this canonical prohibition were treated as null and incestuous, but a certain distinction seems to have been recognised between relationship by consanguinity and that by affinity, but that only to this effect, that Papal dispensation might be more easily obtained in the case of the latter (*Paterson and others*, 22 R. 513, 536).

At the Reformation, the Parliament of 1567, at the instigation of the General Assembly, passed the Acts 1567, cc. 14 & 15. The former relates to the crime of incest, of which it declares to be guilty "quhatsomever person or persons there be that abuses their bodie with sic persons in degrie as God in His Word hes expresslie forbidden . . as is contained in the 18th chapter of Leviticus." The later Act, c. 15, declares "that secunds in degries of *consanguinity and affinitie* and all degries outwith the samin contained in the Word of the Eternal God and that are not repugnant to the said Word" may lawfully marry. The matter was further dealt with by an Act 1649, c. 16, which in very express terms identified consanguinity and affinity as impediments to marriage, and contained a Schedule appended in which there were prohibited twenty-nine unions with *affines* (6 Thomson's *Acts*, Part II. 275, 276). This Act, however, being repealed at the Restoration, the Statute law now rests on the two Acts of 1567 coupled with the terms of the Confession of Faith, confirmed by Acts of the Scots Parliament in 1693, 1702, 1703, and 1707 (*cp. dicta* of L. Currichill, 23 D. 378). The Confession of Faith expressly declares that "the man may not marry any of his wife's kindred nearer in blood than he may of his own, nor the woman any of her husband's kindred nearer in blood than she may of her own." All the institutional writers are unanimous in regarding this as the true construction of the Acts 1567, cc.

14 & 15 (see the authorities collected in *Paterson and others* (*Purves' Trs.*), 1895, 22 R. 513, at p. 628; S. L. T. vol. ii. p. 528, etc.). Hume (*Com.* i. 449, 450) does indeed express a doubt whether a union which is not *expressly* prohibited in Leviticus ch. xviii. will infer the death penalty, but he seems to concede that if *within the degrees* prohibited, it is incestuous, and arbitrarily punishable. Such early case law as there is recognises no distinction between consanguinity and affinity in this respect (*Kinross*, 1575, in Fraser, 129; Riddell, *Consist. Law*, 1002; Hume, i. 450; Aberdeen Pres. Records (Spalding Club), 164, etc.; see also Sess. Papers, 1895, No. 104). In comparatively recent times, however, the Courts have on three occasions been asked to draw a distinction between affinity and consanguinity as an impediment to marriage. The first case is unreported, but its result was in conformity with the later decisions (Riddell, *Peer. and Consist. Law*, 177). In *Fenton* (23 D. 366), the Court decided against the legality of a marriage between a man and the sister of his deceased wife. "The view of the law is that as to this matter parties in the married state are to be held as identified, and that those related to the one in any degree are to be held as related to the other in the same degree" (per L. Currichill, 23 D. 377). Finally, in *Paterson and others* (*Purves' Trs.*) (1895, 22 R. 513, S. L. T. vol. i. No. 643, ii. No. 562, and vol. ii. p. 524, etc.), the Court was called on to pronounce on the legality of marriage between a man and the niece of his deceased wife. The case, in respect of the importance of the question raised, having been appointed to be laid before the whole Court on printed pleadings, the Court, following *Fenton*, held unanimously that the marriage was illegal. All the judges approved of the view that relationship by affinity falls to be treated by the law of Scotland as for purposes of marriage equivalent to that by consanguinity. (For the English law, see *Chadwick*, Q. B. Rep. 173, 205; *Magistrates of Brighton*, 30 L. J. May, Ca. 198; *Foden*, 10 T. L. R. 608; and see Session Papers, 1895, No. 104, pp. 82–7.) Contrary to the Canon law rule and to the terms of 1649, c. 16, mere illicit intercourse is not in modern practice treated as giving rise to relationship by affinity.

It is not a ground of declinature of jurisdiction that a judge is related by affinity to one of the parties to a suit, except in the case of those relationships—father-in-law, brother-in-law, and son-in-law—specially mentioned in the Statute (Mackay's *Manual*, 18; Act 1681, c. 13). Where, however, the *substantial* interest is in the spouse to whom the judge is related by consanguinity, the declinature falls to be sustained in more remote degrees (Mackay, *loc. cit.*; Acts 1594, c. 216; 1681, c. 13; *Calder*, 1712, Mor. 197).

Affirmanti incumbit probatio.—The leading rule is that the burden of proof rests upon him who alleges the affirmative. Its operation is determined not by the mere form, but by the substance of the averment; and, accordingly, it applies where a person asserts, and thereby makes part of his case, that a certain state of things does not exist (*Dominion Bank*, 1889, 16 R. 1081; affd. 1891, 18 R. (H. L.) 21; *Robertson's Tr.*, 1890, 18 R. 12). But he who makes an averment adverse to a legal presumption—*e.g.* of a criminal or culpable omission, or of fraud, or of neglect of duty, or that a person is insane or illegitimate, or that a recognised course of business has not been followed,—must prove it (see PRESUMPTIONS; and cp. *M'Intyre*, 1875, 2 R. 278). It is generally stated as another exception to the rule that the *onus* rests on him who makes an averment, affirmative or negative, regarding facts peculiarly within his own knowledge; and to

this principle is referred the incidence of the *onus* in certain cases, *e.g.* in prosecutions for concealment of pregnancy, or for doing an act which is illegal without special qualification. In these, and in many cases where the *onus* is imposed on the accused by Statute, he or she is, in the first instance, shown to have committed an offence, unless certain facts are proved; and, accordingly, it is thought that the principle, stated as an exception, applies rather to the weight of the evidence than to the incidence of the proof. If this be so, a *primâ facie* case must be made out in order to place the *onus* upon him who has special knowledge of the fact averred (*M'Clure, Naismith, Brodie, & Macfarlane*, 1887, 15 R. (H. L.) 1, per L. Ch. Halsbury; *Hood*, 1887, 15 R. (J. C.) 4; *Elkin*, 13 M. & W. 655; *Burdett*, 4 B. & A. 95, 140; *Whitehead*, 8 A. & E. 571; contrasted with *Turner*, 5 Man. & S. 206; *The Apothecaries Co.*, R. & M. 159). The *onus* may be shifted from the party upon whom it rests in the first instance, if he prove facts which, in the absence of contrary evidence, raise the presumption, as the only direct and logical inference deducible from them, that his averment is true; and it will then rest upon the opposite party, until he has proved facts which, while uncontroverted, are sufficient to establish his case (*Williams*, 1884, 11 R. 982; *Macfarlane*, 1884, 12 R. 232; *Adam*, 1890, 18 R. 153; *Bedouin Steam Navigation Co.*, 1895, 33 S. L. R. 96). Mere taciturnity, or acquiescence, may affect the incidence of the *onus* (*Sinclair*, 1837, 15 S. 770; *Rose*, 1837, 2 S. and M'L. 958; *Cuningham*, 1837, 2 S. & M'L. 984); and it may be materially increased by delay (*C. B.*, 1885, 12 R. (H. L.) 36, 40). Similarly, in criminal cases, the *onus* will be shifted by proof of facts rebutting the presumption in favour of innocence. In conjoined actions, the incidence of the *onus* will depend upon the presumptions arising in the circumstances. Thus the *onus* will be on a defender who is forced to raise an incidental process in order to establish his defence. It is otherwise where such an action is not necessary for the defence. In competitions between heirs, the *onus* will not be laid on one rather than on another, as each is *in petitorio*; but where a claimant is served, it will rest upon him who seeks to reduce the service (*cp. Willox*, 1846, 8 D. 1226; *M'Lean*, 1849, 11 D. 880; 31 & 32 Vict. c. 101, ss. 35, 41; with *Watson*, 1834, 7 W. & S. 535). The same rule applies in the case of the Crown, unless the reduction is at its instance as *ultimus hæres* (*Alexander*, 1868, 6 M. (H. L.) 54; *M'Lean*, 1846, 5 Bell's *App.* 60). In proving the constitution and subsistence of a debt by the defender's writ or oath, the *onus* rests on the pursuer; but where the defender's oath is qualified, the qualification, if extrinsic, must be proved by him (*Cowbrough*, 1879, 6 R. 1301). In such a case the defender's waiver of the plea of prescription will not shift the *onus* (*Simpson*, 1875, 2 R. 673; *Kerr's Trs.*, 1883, 11 R. 108).—[See BILL OF EXCHANGE; PRESUMPTIONS; Dickson on *Evidence*, s. 24–40; Kirkpatrick, *Digest*, ss. 149–51; Best, ss. 265–77; Stephen, *Dig. Art.* 93, *sqq.*; Taylor on *Evidence*, ss. 364–90.]

Affirmation.—"Every person upon objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath, in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath" (Oaths Act, 1888, 51 & 52 Vict. c. 46, s. 1; which Act, s. 6, repeals, *inter alia*, the Affirmation (Scotland) Act, 1865

(28 & 29 Vict. c. 9): and the Jurors' Affirmation (Scotland) Act, 1868 (31 & 32 Vict. c. 39)). The form of affirmation prescribed by the Act (s. 2), is: "I, *A. B.*, do solemnly, sincerely, and truly declare and affirm . . ."; "and then proceed with the words of the oath prescribed by law, omitting any words of imprecation or calling to witness" (s. 2). The form of affirmation in writing, as prescribed by sec. 4, is: "I , of , do solemnly and sincerely affirm"; and the form in lieu of *jurat* is: "Affirmed at , this day of 18 . Before me," with usual signatures. See OATHS: AFFIDAVIT. Any person making an affirmation who wilfully, falsely, and corruptly affirms any matter or thing which, if deposed on oath, would have amounted to wilful and corrupt perjury, is "liable to prosecution, indictment, sentence, and punishment in all respects as if he had committed wilful and corrupt perjury" (*ib.* s. 1). See PERJURY.

Affray.—This is an English law term, and signifies the fighting of two or more persons in some public place, to the terror of Her Majesty's subjects. The place must be public, for if the fighting is in private, *e.g.* a prize fight, it is not an affray, but an assault. Affrays are misdemeanours, and are punishable, if common affrays, by fine and imprisonment; if aggravated, by more serious punishment. The term affray also occurs in the English law of homicide. Homicide is excusable if it takes place *se defendendo* upon a sudden affray, as where a man protects himself from an assault in the course only of a sudden brawl or quarrel, by killing the person who assaults him.—[Stephen, *Com.*, 12th ed., iv. 180, 42; Chisholm, *Barclay's Digest*, *voce* "Affray."]

Affreightment.—See CHARTER-PARTY; BILL OF LADING.

Age.—A male child is in pupillarity till fourteen years of age; a female, till twelve. They then become minors, and remain so till they attain the age of twenty-one years, when they are said to be of full age.

During pupillarity a child has no legal capacity; during minority, a limited capacity.

An action on behalf of a pupil is raised in name of his guardian, and a decree against a pupil is null unless his guardians have been cited. All obligations and deeds of a pupil are null. A minor who has no curators may bind himself by deed; but if he has curators, a deed without their consent is null. A minor may sue alone; but a decree against him, where his curators do not sue, or are not sued along with him, is treated as a decree in absence.

A marriage contracted by a pupil is null, as a pupil has not the capacity to give consent to any contract. Consummation will not make the marriage of a pupil legal or binding; but if pupils, or a pupil and a person of full age, who have gone through a form of marriage, continue to cohabit after the contracting pupil has attained minority, it will be a question of proof as to whether marriage has been constituted.

A child in pupillarity may be examined as a witness, if the presiding judge is satisfied that the child is sufficiently intelligent to give evidence. A pupil is admonished to tell the truth, but not put on oath. A child in minority is sworn in the ordinary way.

In criminal law a pupil is held not to be responsible for criminal acts till the age of seven: but children above that age are responsible, and may be prosecuted. A sentence of capital punishment is not competent on a pupil. The Court, in passing sentence on a minor, will take into consideration his age, and also his state of mental development (*Ferguson*, 1894, 1 Adam, 517).

In cases of rape it is no defence that the accused is under the age of puberty. A female pupil cannot consent to carnal connection with a man; and therefore, if a man has connection with her, he is guilty of rape whether he use force or not. By the Criminal Law Amendment Act, 1885, a person who has, or attempts to have, connection with a girl under thirteen years of age, is liable to a sentence of penal servitude for life; and if the girl is between thirteen and sixteen years of age, to two years' imprisonment, unless the accused had reason to believe that the girl was over the age of sixteen.

By the common law of Scotland, there was no presumption that a person who had disappeared, and been absent for many years, had died, even though he had attained a very old age. But by the Presumption of Life Limitation Act, 1891 (which repealed an Act of 1881), if a person has disappeared and not been heard of for seven years, the Court may, after procedure and inquiry, find and declare that he died either at some definite date or at a date exactly seven years from the date on which he was last heard of.

There is no presumption of law that a woman is past child-bearing at any particular age (*Anderson*, 1890, 17 R. 337). See Pupil: Minor: Tutor; Curator: Contract: Marriage: Witness: Oath: Criminal Responsibility: Rape; Criminal Law Amendment Act; Presumption of Life: Education.

Agency may be defined as a contract under which A. acts for, or represents, B., for the purpose of bringing B. into contract relations with third parties. Some writers have described agency as a form of employment, but the reference to the contract of service does not render the definition more useful. Agency being a modern business contract, Professor Bell has pointed out that the principles of the gratuitous contract of mandate in the civil law are inapplicable. It is proposed here to state only the most general rules applicable to this contract: further information will be found under the heads Broker; Factor; Jobber, etc. The only peculiarity in the law of personal capacity touching agency is that, while the principal (who originates the authority and defines the scope of the mandate) must necessarily be *sui juris*, the part of agent may competently be sustained by persons under various forms and degrees of disability, such as minors or infants, married women, and others (see *D'Angibau*, 15 Ch. D. 228). The acts of such agents will bind their principals, and their contracts on behalf of their principals will bind third parties, but the extent of their personal liability in agency transactions has not yet been developed by decision. There are various well-known cases of joint principals, of which partnership is the most familiar; for each partner is the agent of all the other partners within the scope of the firm's business. This is not necessarily true in other cases of joint ownership, although the managing owner of a ship is the agent of all the owners. The members of a committee who take part in its work are generally responsible for contracts made by the secretary, unless it should appear that the contracting party relied

exclusively on the funds, and did not give credit to the names. The members of a club, however, are not regarded as joint principals of their committee. The most common case of joint agents, on the other hand, is that of the directors of joint-stock companies; and the general rule is that an authority given to a stated number of persons can be competently exercised only by all these persons, although where the joint agents have discretionary and deliberative powers, as in the case of a board of directors, they must necessarily act according to the vote of the majority. The *APPOINTMENT OF AN AGENT* for any purpose need not be in writing, except that in England it is held that the authority to execute a deed must be given by deed, if the principal be not present when the act is done. Such an authority is called a power of attorney. It was recently held, however (*Whitley*, 32 Ch. D. 337), that the memorandum of association of a limited company was not a deed in the sense of this rule, and had been well subscribed in the principal's name by an agent not authorised in writing. The question whether a personal subscription is required, depends frequently on the construction of a Statute, *e.g.* Lord Tenterden's Act, or the Trade Marks Act (*Jackson*, 35 Ch. D. 172). But writing, though not required by law, is commonly used in many cases. The appointment of a commission agent by a foreign merchant is usually contained in a full and formal letter; the authority given by an absentee proprietor to manage lands or affairs generally in Scotland, is contained in a formal factory and commission; the appointment of managing agents abroad by a British joint-stock company is frequently contained in an article of association. In the case of appointments by corporations, whether municipal or trading, the formalities prescribed by law must be observed. Authority is often given to an agent, however, by the single act, or by the conduct, of the principal. The mere sending of goods to a broker (as in the leading case of *Pickering*, 15 East, 38), whose common business it is to sell, accompanied by a transfer in the wharfinger's books, implies an authority to sell, whatever latent instructions may have been sent by the owner; and it is immaterial whether the liability of the principal be referred to implied contract or to the principle known in English law as estoppel, or personal exception. But authority may also be deduced from a series of acts, or conduct, which is sometimes called "holding out." Thus where a wife or other housekeeper has been habitually allowed to make purchases on credit at a particular shop, the tradesman so dealt with may reasonably infer that the husband has authorised the dealing. As was pointed out by Thesiger L. J. (*Debenham*, 5 Q. B. D. 403, and 6 A. C. 24), there is no necessity for the law conferring an agency on the wife, if the husband has not done so, because the transaction might be for ready money, or the tradesman might be supposed to trust to the wife getting the money, or he might ask the wife whether she has authority. In Scotland, the presumption of the wife's *præpositura in rebus domesticis* is stronger, and the husband is liable on all contracts necessary for the aliment of the family, apparently even when he has given the wife a sufficient allowance for such purposes (Fraser, *H. & W.* i. 607–8). There may be a "holding out" of authority beyond what the principal is legally capable of granting, as where directors profess to have authority to issue debentures or contract loans, *ultra vires* of a limited company or a building society; in such a case the company cannot be bound, but the directors will in the ordinary case be liable (*Chapleo*, 6 Q. B. D. 696; *Firbank*, 18 Q. B. D. 54). Lastly, agency may arise from necessity, as it has been variously called "extreme, stringent, commercial necessity." For example,

a shipmaster may have implied authority to sell his cargo before he arrives at the port of destination, where the expenditure required for taking on the cargo would clearly exceed the merchantable value of the goods there (*Atlantic*, 16 Ch. D. 474). Where authority to act has not been created by any of the methods above described, a contract entered into without authority may subsequently be ratified or adopted by the principal, so as to create liabilities, as at the date of the contract, not only between principal and agent, but also between the principal and the third party contracting. But the power of ratification is subject to conditions—

1. The contract must have been made as on behalf of the principal who seeks to ratify it; otherwise ratification would amount to an assignment of the liabilities under the original contract. This was well illustrated in a case of *Jones* (3 T. L. R. 247), where it was attempted to show that a contract for clothing, alleged to have been made with the colonel of a regiment personally, was subsequently ratified by the other officers of the regiment.

2. There must be a principal actually in existence at the date of the contract. For example, in *Kelner* (L. R. 2 C. P. 174), where the promoter of a limited company had contracted on its behalf a month before the incorporation of the company, it was held that the company, when formed, could not ratify such a contract, although in many similar cases it may not be difficult to imply a new contract. But it may be sufficient to let in ratification if the principal is capable of being ascertained and in contemplation at the date of the contract, as in the case of a broker taking a marine policy on goods to be afterwards declared (*Watson*, 11 C. B. N. S. 769).

3. The act of ratification must be at a time and under circumstances which would have permitted the original act. For example, an unauthorised stoppage *in transitu*, effected during the *transitus*, cannot be ratified, so as to affect third parties, after the *transitus* has come to an end. In fact, ratification cannot affect the rights of the parties, which have emerged during the interval, and cannot have complete retroactive effect where the effect of the original act, if authorised, would have been to place the third party under an immediate liability. Notice to determine a lease at a certain period, so as to avoid tacit relocation; notice of dishonour of a bill, so as to avoid discharge of indorser's liability; demand for payment, so as to justify action—are all cases in which time is of the essence of the proceeding, and in which, therefore, ratification comes too late. The third party, in such cases, is entitled to act with certainty. There is an apparent exception to this rule, also, in the peculiar circumstances of marine insurance; it has been held that a contract of insurance may be effectively ratified by the principal after the loss of the ship has come to his knowledge (*Williams*, 1 C. P. D. 757).

4. An act *ultra vires* of the principal can never become binding on anybody by ratification. This is the doctrine of *Ashbury Co.* (L. R. 7, (H. L.) 653), where a registered British company of mechanical engineers and general contractors were alleged to have ratified a contract to make and work a line of railway from Antwerp to Tournai. That was held to be beyond the power of all the shareholders; but where the contract is only *ultra vires* of the directors and within the objects of the company, the ratification of the shareholders may be by resolution, or even by acquiescence, without special resolution altering the articles which defined the powers of the directors (*Grant*, 40 Ch. D. 135).

5. It is also impossible to ratify an illegal or criminal act; but if A. takes no steps to prevent the complete uttering of a bill, to which he knows that his subscription has been adhibited without his consent, he will be held to

have authorised the subscription; and even after uttering, liability may be created by such conduct as induces a third party to believe that the bill is genuine (*Mackenzie*, L. R. 6 A. C. 82, 8 R. (H. L.) 8; *Brook*, L. R. 6 Ex. 89).

6. Ratification must proceed upon a full knowledge of material facts, or else upon a waiver of further inquiry; it must be complete, embracing the whole transaction; and where it is not express, it must necessarily imply an adoption of the agent's act. There are endless varieties of implied ratification: the implication is obviously more easy where there is an existing relationship of principal and agent, than where the character is assumed for the first time.

The *AUTHORITY OF AN AGENT* varies with the general or special character of his employment, and in many cases is largely determined by trade, custom, or usage; as where a broker is entitled to act according to the custom of the Stock Exchange, if this be consistent with his instructions. But an unreasonable custom, *e.g.* to omit from the contract the numbers of the shares, contrary to Leeman's Act, does not bind the principal, unless he knew of it and made it a term of the contract (*Perry*, 15 Q. B. D. 388). Similarly, no custom can justify a broker, employed to buy, in selling his own goods or shares to his principal (*Robinson*, 5 C. P. 646). As between principal and agent, the actual authority given must be followed to the letter: and deviation from this may involve the agent in liability for damages (*Bank of Scotland*, 18 R. (H. L.) 21, where the agent accepted payment subject to an unauthorised condition, and then cancelled the bill). But if the agent honestly acts upon a reasonable construction of an ambiguous authority, he cannot be held liable because the principal intended another construction (*Ireland*, 5 E. & I. App. 416). The authority extends to all means necessary or usual for executing it, *e.g.* there may be implied power to raise an action, or to stipulate for beneficial conditions in a contract of sale. While the limit of authority is, between principal and agent, truly a matter of express or implied intention, in a question with third parties dealing with the agent, the apparent and ostensible authority cannot be cut down by any undisclosed communication between principal and agent. The typical case of this principle is that of the factor, who, being intrusted with the possession and control of goods, or of the documents of title thereto, has, in accordance with universal custom, the right to sell these goods in his own name and receive payment of the price; so that, even if the sale were made contrary to the owner's instructions, on the bankruptcy of the agent the purchaser is entitled to the goods sold, so far as not delivered. Another result is that, if the principal sue upon the factor's contract, the third party is *primâ facie* entitled to set off a debt due him by the factor. The case of the factor is contrasted with that of the broker, who, although he may frequently sell in his own name, and occasionally may sell his own goods as well as those of other people, is not entrusted with the possession of either goods or documents. In such a case the purchaser cannot claim a right of set-off against the owner, unless he believed on reasonable grounds that the broker was principal, and this belief was caused, or contributed to, by the conduct of the owner (*Cooke*, 12 App. Ca. 271). The presumption of authority derived from possession was even stronger in Scotland than in England, for in Scotland it was held that at common law the factor could validly pledge, as well as sell, the goods. The presumption was found to be so indispensable for commercial interests, that by the Factors Acts (of which the last are those of 1889 and 1890, for England and Scotland respectively) it was extended to various new cases, particularly dispositions by sellers (in whose possession goods have

been allowed by the purchaser to remain after the sale) and by buyers (who have obtained possession of goods with the consent of the seller without payment). The Acts here practically overrule the decision in *Johnson's* case (3 C. P. D. 32; see also *Lee*, 1893, 2 Q. B. 318). The implied authority of servants is often determined by the nature of their duties. An acting bank sub-manager has been held not entitled to institute criminal proceedings against a customer of the bank (*Owston*, 4 App. Ca. 270). But the practice of the principal's firm would create authority, as where a manager, though not a partner, has been for some time permitted to draw bills. The effect of business understanding is further shown by contrasting the case of an auctioneer, who is not entitled to warrant what he sells (*Payne*, 51 L. J. Q. B. 642), with that of the agent of a horse-dealer, who, as matter of ostensible authority, was held to have bound his principal by the warranty of a horse, where such warranty had been prohibited by the principal (*Howard*, L. R. 2 C. P. 148). Custom may create a contingent authority in certain circumstances, *e.g.* a shipmaster may borrow, when he cannot communicate with the owner without unreasonable delay or expense.

In general, an agent is not entitled to *DELEGATE AUTHORITY* to a sub-agent, or "substitute," as Lord Thesiger calls him in the leading case of *De Bussche* (8 C. L. D. 286). But it may appear from the original contract, the usage of trade, or the nature of the particular business in hand, that the parties contemplated such delegation, and a necessity for delegation may arise from unforeseen emergencies. Where delegation proper takes place, privity of contract is established between the principal and the substitute, and the "intermediate" ceases to be liable to the principal *quoad* that part of the agency which has been delegated. Delegation must therefore be distinguished from the employment by the agent of others to do subsidiary acts, the agent remaining generally responsible to the principal, and is not liable for the acts or omissions of the substitute, if ordinary prudence has been used in his selection. In *De Bussche's* case, the object of the agency was to sell a ship at any port where she might be, which favoured the idea of delegation. On the other hand, it has been held that a Board of Directors is not entitled to delegate the allotment of shares (at least where allotment is made on special terms) to the manager and two directors (*Howard*, L. R. 1 Ch. 561). Wherever the principal may reasonably be held to have relied on the personal skill or individual discretion of the agent, delegation is excluded. In *Speight & Gaunt* (9 App. Ca. 1), the principles are explained on which, in trust administration, the trustee is entitled, according to the usual course of business, to devolve certain duties on solicitors, bankers, brokers, and others, and to rely on their exercising ordinary professional skill. There is also an important class of cases where authority has been given partly in view of the public interest, and where, accordingly, it has been held incompetent to transfer or delegate such authority. Among the leading *DUTIES OF AN AGENT* may be mentioned: (1) to make a binding contract, whether in his own name or that of the principal, the benefit of which will ensue to the principal; (2) to use ordinary skill and diligence; (3) to observe limits of authority; (4) to keep regular accounts, and to account punctually; (5) to account for all profits received in course of principal's business; (6) to disclose the extent of any personal interest he may have in an agency transaction. An example of (2) is that an agent will be liable in damages for insuring cargo or ship without the usual deviation clause, or for accepting a cheque where he should have taken cash. As to (4), the ordinary commission agent is not a trustee, but merely debtor on

his obligation to account, and is not bound to keep a separate banking account. The *del credere* agent guarantees the performance of contracts which he makes on behalf of the principal; and when, in the ordinary course of business, he receives cash, it should be at once paid over. The rule as to profits is strictly enforced, everything of the nature of a present or allowance being disallowed in an agent's account. Thus a commission on repairs to the engineer of the party ordering the repairs, and a division between brokers of the excess price, where the purchaser's broker had undertaken to get a ship as cheaply as possible, have been so treated (*Harington*, 3 Q. B. D. 549; *Morison*, L. R. 9 Q. B. 480). The remedy is not merely a claim of damages for breach of duty, but all profits acquired by a servant or agent in the course of, or in connection with, the service or agency (such as a higher rate of interest, a captain's Government money, a premium on a foreign bill, an army agent's discount), belong to the master or principal, with interest from the date of receipt (*Boston*, 39 C. D. 353). The person who, by a bribe, secures an improper contract from an agent, may also be liable to the principal; as in *Salford* (1891, 1 Q. B. 168), where, independently of the affirmance or disaffirmance of the contract, the principal recovered a bribe of one shilling per ton on tenders for coal from the sellers. The claim, however, is a money claim, and the principal cannot revindicate as trust property the investments of profits made by the agent (*Lister*, 45 C. D. 15). This case must be distinguished from the right of the principal to follow his property, or the proceeds of it, when sold (*Knatchbull*, 13 C. D. 696). In every case of a sale by a promoter to a company, where the promoter has concealed his profit, the company may elect to rescind, or to claim the profit (*Grant*, 11 C. D. 918). And the effect of discovering a single fraudulent entry, or entry in breach of trust, in agency accounts, may be to open them up for a long period (*Williamson*, 9 C. D. 529).

On the other hand, the agent is entitled, as against his principal, to (1) remuneration, and (2) indemnity; and generally to a lien on property or documents for these rights. The agent cannot maintain an action if he has agreed to leave his remuneration absolutely to the discretion of his principal. Further, the commission usually agreed upon covers everything incidental to the agency. Thus a managing owner cannot claim a separate commission for procuring charter-parties (*Williamson*, 1891, 1 Ch. 390). The common agreement for remuneration is by fixed commission on sales or other series of transactions (as where a commercial traveller receives commission on orders booked); and this commission is of course higher in *del credere* agencies. In the ordinary case of employing a broker to sell or buy, the rule is that reward comes with success, and commission is earned by the introduction of parties, if that results in a binding contract, although the contract was negotiated by the parties themselves. Difficult questions arise as to the right to commission where the contract is not carried out owing to (1) inability of purchaser to complete; (2) defect in seller's title; (3) breach of contract by seller; (4) refusal by seller to warrant (*Grogan*, 7 T. L. R. 132). It is necessary in such cases to distinguish between the commission allowed to a broker on price, and the discount allowed to a purchaser (*Walker*, 1873, 11 R. 369). By a recent Statute (55 Vict. c. 9, s. 2), commission cannot be claimed in respect of contracts which are void because relating to betting or gaming. And the same Statute excludes the agent's right of indemnity in respect of such transactions which had been upheld in *Read & Anderson* (11 Q. B. D. 779). As regards all other transactions within the scope of the agency, and not illegal, the agent's indemnity extends to his disbursements, loss and damage incurred in executing the

principal's instructions, and the costs of unavoidable legal proceedings. The effect of the agent's default or insolvency, in terminating or limiting the right of indemnity, has been mainly discussed in Stock Exchange cases. See STOCKBROKER. If not inconsistent with the terms on which the principal's property was originally received (*e.g.* as for custody, or on express trust), agents generally have a lien on that property for their claims against the principal. Some agents, *e.g.* factors and insurance brokers, have a general lien for the whole balance on their accounts; mercantile brokers have only a special lien for advances or other claims connected with the particular property over which the lien is claimed. This lien, not being a pledge, does not entitle the agent to sell, but it may be enforced (in the case of a purchase for the principal) by stoppage *in transitu*. The shipmaster's lien for proper disbursements and liabilities, which was denied in *The Sara* (14 App. Ca. 209), has now been declared by Statute (52 & 53 Vict. c. 46, s. 1). The general rule is that a mercantile agency may be terminated at any time by revocation, except where the mandate is given for valuable consideration, as where a creditor becomes agent to dispose of what is in substance a security. But a factor who makes advances has no irrevocable authority to sell, although revocation will not affect his lien. The rule of revocation at will applies to cases where a period of years is mentioned in the appointment of agent. In the absence of express stipulation, the principal is not bound to continue his business for any definite period (*Rhodes*, 1 App. Ca. 256). But where there is a definite contract to continue the employment so many years, the right of the agent is not defeated by the unavoidable stoppage of business (*Turner*, 1891, 1 Q. B. 544). The revocation operates from the time of notice to the agent. Generally speaking, agency is also terminated by the death or bankruptcy of the principal, and this apart from notice to the agent. But a distinction as to notice has been taken in the case of winding up (*Guillemin*, 28 C. D. 634); and notice is required to complete revocation in the case of the principal's insanity (*Drew*, 4 Q. B. D. 661). As regards England, these questions are now partly regulated by the Conveyancing Act, 1882. In the event of the agent's bankruptcy in Scotland, the principal's goods do not pass to his trustee. In England, this question depends on reputed ownership, or whether the fact of agency as regards the particular goods was sufficiently notorious. The question whether an agent has incurred personal liability on a contract, is one of construction of the instrument; or of intention to be deduced from all the circumstances, where the contract is not in writing. There is a certain presumption that the person who executes a contract assumes liability; but where an agent contracts for a disclosed principal, this presumption is displaced, and no liability attaches to the agent, except by express agreement. And the tendency of recent decision has been to exclude personal liability, wherever the document is executed *factorio nomine*. Where, however, no principal is disclosed, and, of course, where the agent contracts as principal, the agent is liable on the contract, whatever other rights or liabilities may emerge. Where the principal is a foreign merchant, the presumption is that he gives no authority to the commission agent in this country to pledge his credit, or to establish privity of contract with the British seller. But this presumption will yield to proof of express authority (*Elbinger Actien Gesellschaft*, L. R. 8 Q. B. 313); and the law appears to be the same in Scotland (*Bennett*, 18 R. 975; *Girvin Roper*, 33 S. L. R. 73).

As regards the relations of the principal with third parties, the principal is bound by every representation, though fraudulent, made by the agent in

the course of negotiating the contract or conducting the business of the agency; and he is liable for the quasi-delicts of the agent arising out of the subject-matter of the agency. Where the principal affirms a contract procured by the agent, he necessarily adopts the fraud by which it was procured; and this applies to every fraud committed for the master's benefit, at least where that benefit has accrued and is retained, but not to those committed for the agent's benefit, although by means of his official character as agent (*British Mutual*, 18 Q. B. D. 714; see also Pollock on *Torts*). The liability for fraud is more extensive where the agent is a servant under orders. In the case of representations by an agent as to character or credit, the principal is protected by Statute. Further, where the agent who concludes a transaction is the agent to whom the principal would look for information, knowledge of material facts acquired by the agent during the agency will be held to amount to constructive notice to the principal (*Blackburn*, 12 App. Ca. 531; *Buist*, 1875, 3 R. 1078; *Bawden*, 1892, 2 Q. B. D. 534). The undisclosed principal may sue on the contracts made in the agent's name, subject to any defences or equities existing between the agent and the third party (*Calder & Dobell*, L. R. 66 P. 486; *Browning*, L. R. 5 P. C. 486). If the agent be entitled to receive payment, the principal's action will be excluded by such payment. The third party's right of set-off in the case of a factor and a broker has already been considered. As regards negotiable instruments given to an agent for sale, and improperly pledged by him, the third party, if in good faith, is entitled to retain them for the whole of his advances, but if he knows they do not belong to the agent, his security will be restricted to the amount for which the agent was secured (*Simmons*, 1892, App. Ca. 201; *Sheffield*, 13 App. Ca. 333: *National Bank of Scotland*, 1895, 22 R. 740. See also FACTOR. The principal is also liable to third parties on his agent's contracts, unless at the time of the contract there was apparent an intention to give exclusive credit to the agent, or subsequently (as by recovering decree) the third party has elected to go against the agent. It is not clear, however, that the mere debiting of the agent, after the principal's name is known, would amount to proof of exclusive credit (*Thomson*, 9 B. & C. 78). The right to sue of the third party may also be excluded by the alteration of accounts between principal and agent. In the case of a commission agent, who may or may not be a principal, and is believed by the third party to be a principal, the action against the principal will be excluded by the principal's settlement with the agent while exclusive credit was still given to the agent. In the case of a broker, who cannot be a principal, and whom, therefore, the principal cannot have expected that sellers would treat as a principal, it is necessary, in order to discharge the principal by payment to his agent, that the principal has been induced by the conduct of the seller to believe that the matter has been settled with the agent. Delay, for example, might be sufficient, where there is a custom of prepayment, on which the principal relied (*Irvine & Watson*, 5 Q. B. D. 414).

Agent and Client.—See LAW AGENT.

Agents for Poor.—See POOR'S AGENTS.

Aggravation of Crime.—Aggravations determine, in great measure, the class of tribunal which will take cognisance of a crime, and the

degree of punishment with which it will be visited. There are two distinct classes of aggravations:—

1. *Statutory or Special*, determined by peculiar circumstances in the crime committed. Thus, under our former law, certain cases of homicide were punished with more than ordinary severity as aggravated murders. Murder under trust was punished as treason by 1587, c. 51. Assassination, by 1681, c. 15, was similarly punished. Murder by poison was regarded by Mackenzie as an aggravated murder; and the Act 1594, c. 224, placed the crime of parricide in the same category. There are several well-known special aggravations of theft. Thus, if the thief is a police officer on duty, or is the guardian of the property stolen, there is aggravated theft (*Ferrie* and *Banks*, 1831, Bell's *Notes*, 34). Plagium, or the theft of a child, is an aggravated theft, and so are thefts of horses, cattle, and sheep. Theft by one who is habit and repute a thief, is an aggravated theft. By 18 Geo. II. c. 27, as amended by 51 Geo. III. c. 41, it is aggravated theft to steal linen from bleaching-grounds. There are many cases in which assault is held to be aggravated. Thus it may be aggravated in the intent, as where there is intent to kill, to ravish, to rob, etc.; in the mode of commission, as when fire-arms or knives are used, or acids are thrown; from the extent of the injury inflicted, as when there is effusion of blood or mutilation; from the relationship of the victim to his assailant, as when a child assaults a parent, or a soldier an officer (Hume, i. 286; Macdonald, 46, 155).

2. *Previous Conviction of a similar Offence.*—This is an aggravation which it is always competent to charge (*Campbell*, 1822, Shaw, 66); but the conviction must be previous to the offence under trial (*Mitchell* or *Carr*, 1837, Bell's *Notes*, 32; *Graham*, 1842, 1 Broun, 445, and Bell's *Notes*, 32): and it must be a proper legal conviction (*Grant*, 1889, 2 White, 261). Before 1887 it was necessary that the previous conviction should be for the same crime, though the conditions did not require to be exactly the same in both charges. This has been altered by the Criminal Procedure (Scotland) Act, 1887 (50 & 51 Vict. c. 35). Three classes of aggravations by previous convictions have been established by that Act:—

(1) *Dishonesty.*—Under s. 63, extracts of previous convictions of crime inferring dishonest appropriation of property, or attempts to commit such crimes, may be lawfully put in evidence as aggravations against any person accused on indictment of any crimes of a similar nature, *e.g.* theft, robbery, reset, forgery, falsehood, etc.

(2) *Violence.*—Under s. 64, extracts of previous convictions of any crime inferring personal violence may be lawfully put in evidence as aggravations of any crime inferring personal violence.

(3) *Indecency.*—Under s. 65, extracts of previous convictions of any crime inferring lewd, indecent, or libidinous conduct, may be lawfully put in evidence as aggravations of any crime of a lewd, indecent, or libidinous character.

Under each of these sections any aggravations set forth in such extract convictions may be lawfully used in evidence to the like effect.

It is not necessary to libel in the indictment the particular offence with regard to which previous conviction has been obtained. It is enough to state, "and you have been previously convicted of dishonest appropriation of property," or "of attempt to appropriate property dishonestly," or "of personal violence," or "of lewd, indecent, or libidinous conduct" (Schedule A of Act of 1887). At one time it was the general rule that the previous conviction, if it was founded on at common law, must have been by a Scottish tribunal. This was altered by the Act 33 & 34 Vict. c. 112, s. 18, which

enacted that a previous conviction in any one part of the United Kingdom may be proved against a prisoner in any other part of the United Kingdom. The Act of 1887 declares this to be the law as to the three classes of aggravation by previous conviction before mentioned. Secs. 66 and 67 of the Act of 1887 prescribe the mode of proving extract convictions, and the manner in which they may be used at the trial (Hume, ii. 170; Alison, ii. 233; Macdonald, 13; Anderson, *Crim. Law*, 20). See PREVIOUS CONVICTION.

Agnate.—A person's agnates are those of his kindred who are related to him through his father. His relatives through his mother are called his cognates. According to the Roman law, a person's agnates were persons related to him through males; but that definition does not hold in the law of Scotland, for the children of a sister of a person's father are classed among his agnates. When both parents of a child have died without nominating a tutor, the nearest male agnate of twenty-five years of age is entitled to the office, and is called tutor-at-law. The nearest male agnate of a pupil orphan has a right to intervene as to the child's custody (*Reilly*, 1895, 22 R. 879). In actions of choosing curators, the minor is pursuer and his nearest agnates are called as defenders. In cognitions the nearest agnate is usually pursuer, though another near relative may pursue; but in any case where a person is found insane, the nearest agnate of full age has the right to become his guardian. As such he has the custody of the ward's estate. The custody of the person of the lunatic is usually given to the nearest cognate.

[Stair, iii. 4. 8; Bell, *Prin.* ss. 2078, 2111; Mackay, *Manual*, 496, 500.] See TUTOR; CURATOR; LUNATIC.

Agreement.—An agreement is the joint act of two or more persons, whereby one or more of them undertakes obligations in favour of the other or others. The essence of an agreement is the consent of the parties to it, which may be expressed by words or acts; but is not, in general, to be inferred from mere silence (*Wylie*, 1873, 1 R. 41; *Griffith's* case, 1892, 19 R. 550). Consent is a fact to be proved.

As the result of the agreement, one or both of the parties to it may be bound to performance. Where one only of the parties is bound, the obligation resembles a promise; where both parties are bound in mutual performance, the agreement is a contract.

"Agreement" is sometimes used as synonymous with "contract" (Stair, i. 10 *passim*); but if contracts be regarded as "agreements enforceable by law' (Pollock, p. 2), then "agreement" is a word of wider connotation, including agreements not so enforceable. So we may speak of agreements in restraint of trade, induced by fraud, in fraud of creditors, etc., which are either voidable or void. See CONTRACT; CONSENT; OFFER AND ACCEPTANCE; PROMISE; RESTRAINT OF TRADE; FRAUD; ESSENTIAL ERROR; STAMPS.

The Agricultural Holdings (Scotland) Acts, 1883 & 1889 (46 & 47 Vict. c. 62, and 52 & 53 Vict. c. 20.—*OBJECT OF THE LEGISLATION.*—The general object of the principal Act is to ameliorate the law of landlord and tenant, in favour of the tenant, and in the interests of agriculture, by abolishing certain

presumptions and privileges which have hitherto existed in favour of the landlord.

Application of the Act.—The Act applies (s. 35) to every holding in Scotland which is "either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden," with the exception of any holding which is "let to the tenant during his continuance in any office, appointment, or employment of the landlord." Where a holding is only in part agricultural, the Act does not apply. It was held not to apply in the case of a Highland hotel with 30 acres attached let as one holding (*Mackintosh*, 1886, 14 R. 282), nor to subjects of about three-quarters of an acre in extent, one-third of which was occupied as a dwelling-house and garden and the remainder as a grass park (*Taylor*, 1892, 19 R. 399). "Landlord" and "tenant" seem, for the purposes of the Act, to be relative terms (s. 42), so that it was generally understood that a sub-tenant is entitled to the privileges of the Act, as against the party from whom he immediately holds, as fully as if he himself held directly from the owner of the soil; but apparently in *Livingstone* (1891, 18 R. 735, a case under the Crofters Act, which latter Act adopts the definitions of the Agricultural Holdings Act by reference) the Court took the view that sub-tenants are not within the provisions of the Agricultural Holdings Act. The terms "landlord" and "tenant" include the successors and the predecessors in title of any landlord or tenant.

How far Compulsory.—With the exception of the clauses relating to compensation for unexhausted improvements (s. 36) (and even this, as will appear, is a qualified exception), the Act is permissive, and does no more than change the presumption of law. It is therefore in the power of parties to contract themselves out of all the other provisions of the Act. The Act applies, however, to leases current when it became law (1 Jan. 1884), and in this case no opportunity is given to either party to declare that any of the provisions of the Act shall not apply. The result is a curious inversion of the ordinary rule of legislation. Under contracts the terms whereof were adjusted with reference to a different state of the law, the tenant is allowed all the privileges of the present Act; whilst, in all contracts of tenancy entered into in the full light of the Act, it will be in the power of the landlord to insist upon the exclusion of most of the provisions of the Act.

Branches of the Law Affected.—The following branches of the law of landlord and tenant are affected by the Act:—

1. The tenant's right to compensation for unexhausted improvements (ss. 1–23 and 36–39).
2. Removing for non-payment of rent (s. 27).
3. Notice to quit at the termination of a tenancy (s. 28).
4. Bequest of a lease by the tenant (s. 29).
5. Tenant's property in fixtures (s. 30).

The provisions in reference to compensation for unexhausted improvements bulk so largely in the Act, that it will be most convenient to consider this subject in its entirety, in the first place, irrespective of the order of the clauses of the Statute. The further changes effected by the Act are of a heterogeneous character, and will therefore be considered together under the head of "Miscellaneous Provisions."

I. Compensation for Unexhausted Improvements.

The most important effect of the Act, as it was the special and immediate object of the Bill, is to secure to the tenant compensation for

"unexhausted improvements,"—in other words, compensation for skill and capital employed in the execution of improvements which, at the date of the tenant's quitting the holding, have increased the letting value of the same. The Act commences (s. 1) by setting forth that, subject to certain conditions, any tenant "who has made on his holding any improvement specified in the Schedule" to the Act, is to be entitled, "on quitting his holding on the determination of a tenancy," to such compensation "as fairly represents the value of the improvement to an incoming tenant." It is not necessary that the improvement shall have been made during the tenancy then expiring: it is sufficient that it shall have been made at any time during the tenant's occupancy of the holding (s. 39). An improvement which justly entitles the tenant to compensation has been effected *when by a work of supererogation, the tenant has increased the letting value of the holding.* As will appear below, the Act provides a further limitation (s. 1, and Schedule) by expressly enumerating the classes of improvements for which the tenant shall be entitled to compensation. An attempt is made further to safeguard the interests of the landlord, by a provision (s. 1) that the tenant shall not receive compensation for what is "justly due to the inherent capabilities of the soil"—an equitable provision, but one to which it has been found very difficult to give practical effect. The best soil bears no fruit so long as it is allowed to lie waste: capital and skill are thrown away upon unfertile soil; only by the application of capital and skill to fertile soil can beneficial results be obtained; but who shall determine in what proportion these results flow from the one source or the other? As well try to determine how much of the value of a fat bullock is due to care and feeding, and how much to the "inherent capabilities" of the stirk. Except, then, as an indication to arbiters of the general principles by which they are to be guided, this proviso is of little practical value.

Formerly, in the matter of improvements, the presumption of law favoured the landlord; for, in the absence of any express stipulation to the contrary, the benefit of all improvements executed by the tenant accrued to the landlord at the determination of the tenancy, without any obligation to compensate the tenant therefor. The general effect of the recent legislation has been to substitute for that presumption one in favour of the tenant. Considerations of supposed public policy, however, have dictated a still more sweeping change. Not only has a presumption in favour of the tenant been substituted for the old presumption in favour of the landlord, but the former presumption has been made absolute by a provision (s. 3) invalidating any agreement by which a tenant deprives himself of the right to claim the compensation for improvements allowed by the Statute. The stringent character of this provision has rendered it necessary for the Legislature to introduce certain important limitations in favour of the landlord, which probably would not have been necessary had the Act done no more than change the presumption of law *when claim arises.* The most important of these limitations has reference to the occasion on which the tenant is to be entitled to receive compensation. The provision under this head (s. 1) is to the effect that the tenant shall receive compensation only "on quitting his holding at the determination of a tenancy." It is obvious that, so long as the tenancy subsists during which the improvements were made, the tenant can have no claim for compensation. He pays the same rent which he paid before the improvements were executed, and consequently he himself reaps the full benefit of the increased value of the holding. It is only on the determination

of the tenancy that any claim for compensation can arise; and if the tenancy be then renewed, it is for the tenant to make his own terms with the landlord. Accordingly, the Act provides that the tenant shall receive compensation only on his quitting the holding at the termination of a tenancy. Direct remedy to the sitting tenant the Act has provided none; but it has indirectly furnished him with a strong weapon in his negotiations with the landlord for a new lease, by adding a new terror to the loss of a tenant. If the landlord seeks to raise the rent upon the tenant's improvements, the tenant can, not only quit—he could do that before—but he can quit, and take the value of his improvements with him. A renunciation of his lease by the tenant accepted by the landlord does not bar the tenant from recovering compensation for unexhausted improvements under the Act (*Strang*, 1887, 14 R. 637).

Classification of Improvements.—Another important limitation of the tenant's right has reference to the classification of improvements (s. 1, and Schedule) for which the tenant is entitled to claim compensation. Improvements are by the Act divided into two great classes,—namely, structural or "permanent" improvements, and "temporary" improvements incident to tillage,—corresponding generally to what were popularly known as "landlord's" and "tenant's" improvements. The claim of the landlord to have a right to veto the former is very strong; for not only are most of them radical and irrevocable, but the expediency of executing any of them must always be more or less matter of discretion; and where discretion is to be exercised, it is only just that the right to do so should be vested in the proprietor, who has the permanent interest in the soil. The latter class of improvements, on the other hand, are of a class—all of them generally, and some of them universally—advantageous; and they are so much the ordinary incidents of agriculture, that it would be deemed harassing and vexatious were the consent of the landlord to their execution made a condition precedent to the claim for compensation. Between these two classes of improvements, then, an important distinction has been drawn by the Act, in so far as no claim for compensation is allowed in respect of the former, unless the consent of the landlord has been obtained previous to their execution (s. 3); whilst in the case of the latter no such consent is required.

But a third class of improvements, occupying an intermediate position, is recognised by the Act. These are drainage operations. The position assigned by the Act (s. 4) to improvements of this class may be regarded as a compromise between two conflicting theories. In some respects drainage appears more closely to resemble the former, in others the latter, of the two great classes of improvements. On the ground, probably, that it is generally advantageous, and not of a structural or radical character, drainage has been classed with improvements which do not require the consent of the landlord as a condition to the claim for compensation; whilst, on the other hand, as it is not an ordinary incident of agriculture which must necessarily be carried out by the tenant, an opportunity has been afforded to the landlord, if so minded, to execute the improvement himself.

"Permanent" Improvements.—As regards "permanent" improvements, the chief change introduced by the Act (ss. 1 and 3, and Schedule, Part I.) has been to alter, in the case of such improvements executed by the tenant with the consent of the landlord, the presumption of law by which all such improvements formerly belonged to the landlord without any claim for compensation on the part of the tenant. The Act, it is true, declares (s. 36) null any agreement whereby the tenant deprives himself of the right

to claim compensation: but such a provision can have little effect in reference to improvements, the landlord's consent to which is a condition precedent to any claim for compensation. The fact should not be lost sight of, that the Act does not increase, or diminish, or in any way affect the common law or conventional right of the tenant to execute such improvements: its provisions have reference solely to claims for compensation in respect of their execution.

"*Drainage*" *and* "*Temporary*" *Improvements.*—In regard to the two other classes of improvements, "drainage" and "temporary" improvements (ss. 1, 4, 5, and 36, and Schedule, Parts I. and III.), no consent upon the part of the landlord is necessary in order to entitle the tenant to compensation. It is, it is believed, popularly supposed, and it may perhaps even be contended, that the effect of the Act is to render null and void any stipulation in a future lease which deprives the tenant of the right to make such improvements to any extent he may think fit, and then claim compensation for them. But this is not expressly laid down in the Act, and it is thought that it is not there even by implication. Section 36, the only clause in the Act which limits freedom of contract, provides that—

> Any contract or agreement made by a tenant by virtue of which he is deprived of his right to claim compensation under this Act in respect of any improvement specified in the Schedule hereto (except an agreement providing such compensation as is by this Act permitted to be substituted for compensation under this Act), shall, so far as it deprives him of such right, be void.

Now it may be urged that any agreement whereby a tenant deprives himself of the right to make an improvement, deprives him of his right to claim compensation for such improvement. The terms of section 40, saving every right not expressly affected by the Act, seem, however, to forbid such a method of construction, and, apart from that, the Court will probably be disposed to construe very narrowly any provision which limits freedom of contract. The view here taken is confirmed by the fact that section 36 applies also, without distinction, to those improvements, the consent of the landlord to the execution of which is a condition to the claim for compensation; and therefore it is clear that, in the view of the framers of the Act, the right to claim compensation for an improvement, if made, does not necessarily imply a right to make such an improvement. Further confirmation of this view is found in the fact that the Irish Land Act of 1870, after providing compensation to the tenant for improvements, *expressly* declares (s. 4) that "any contract between a landlord and a tenant whereby the tenant is prohibited from making such improvements as may be required for the suitable occupation of his holding and its due cultivation, shall be void." No such provision is found in the present Act.

The landlord may prohibit unauthorised drainage, or the application to the land, without the consent of the landlord, of anything other than natural manure made on the holding; and if a tenant took the holding on such terms, it would be in the power of the landlord, in respect of drainage and of "temporary" improvements, other than the consumption of feeding-stuffs, to regulate their extents, and to make a bargain for himself with the tenant as the price of his consent. "Temporary" improvements differ, however, from "permanent" improvements and drainage, in so far that if the tenant has executed them, no agreement can defeat his claim for "fair and reasonable" compensation (s. 5); whereas in the case of "permanent" improvements and drainage, no such test is to be applied to the conditions of any agreement which may be arrived at between the parties.

Improvements Executed prior to the commencement of the

Act, or subsequent thereto under Leases then current.—The preceding remarks have reference to the provisions of the Act, in so far as these deal with improvements executed under tenancies beginning after the commencement of the Act; but the same provisions, subject to a certain limitation, apply (ss. 2 and 5) to improvements executed after the commencement of the Act under tenancies subsisting at the date of its commencement, and even, but with greater limitations, to improvements executed before the commencement of the Act.

As regards "permanent" improvements and drainage, executed within ten years prior to the commencement of the Act, landlords were merely *invited* to recognise the tenant's claim for compensation, by consenting, *ex post facto*, to the execution of such improvements, within one year after the commencement of the Act, in which case the tenant was to have a claim for compensation. On the other hand, "temporary" improvements, executed before the commencement of the Act, were placed upon the same footing as those executed subsequent thereto, except that no compensation was to be claimable under the Act—(1) where the tenant was under an express obligation to make the improvement, and (2) where the tenant was under any contract or custom entitled to *any* compensation (not as in the case of "temporary" improvements, executed subsequent to the date of the Act, to "fair and reasonable" compensation).

Improvements executed subsequent to the commencement of the Act, under a tenancy current at that date, were placed (s. 5) upon the same footing as improvements executed under a new tenancy, with only this difference, that where the compensation fixed by any agreement was "specific" (whatever that means), the tenant could not raise the question whether or not such compensation was "fair and reasonable."

Agreements to exclude the Compensation Clauses.—Although the Act interferes to a limited extent with freedom of contract, it gives every encouragement to landlords to make their own bargains with their tenants. In regard to such agreements, the Act stands on this footing, that whilst, in respect of "permanent" improvements and drainage (ss. 3 and 4), freedom of contract is practically unrestricted, the compensation for "temporary" improvements fixed by any agreement must not be elusory, but must (s. 5) be "fair and reasonable, having regard to the circumstances existing at the time of making such agreement." Any honest bargain ought to stand this test. It is not the province of the Court to make a bargain for the parties, which it would practically be doing were it to inquire whether the terms were on the whole more favourable to the landlord or to the tenant. The provision is meant to strike at bargains for elusory compensation, secured by undue pressure; and where there is no suggestion that the compensation is elusory, or that the tenant has been concussed into a bargain which no reasonable man would willingly make, there is no ground for the interference of the Court.

"*Reductions*" *and* "*Deductions*."—The Act prescribes (s. 6) that certain matters are to be taken into account in assessing the amount of compensation. Any benefit which the landlord has allowed to the tenant, on consideration of his executing the improvement, is to be taken into account in ascertaining the amount of compensation; and an absolute right is given to the landlord to have deducted from any compensation, payable in respect of manures, the value of the manure which would have been created by the consumption upon the holding of any crop sold off within the two last years of the tenancy, unless a proper return of manure has been made in respect thereof.

The section next deals with certain "deductions" which are to be made from the amount of compensation payable to the tenant. These are sums due to the landlord in respect of (1) rent, (2) taxes, rates, etc., (3) the breach by the tenant of any stipulation of the lease, and (4) deteriorations. Counter-claims in respect of the breach of any stipulation in reference to cultivation or management and of deteriorations, are limited to acts committed during the four last years of the tenancy.

These provisions in no way affect the right of the landlord to recover, by the ordinary processes of law, sums due to him under any of the foregoing heads. Of course, if the landlord has recourse to the Law Courts, he must run the risk of the tenant's obtaining and enforcing an award under the reference, before the landlord's counter-claims are settled. On the other hand, if the referee under the Act finds that the balance is in favour of the landlord after crediting the tenant with the compensation to which he is entitled, he may decern in favour of the landlord for that balance (*Birrell*, 1887, L. Fraser, *unreported*).

Purchase of his Predecessor's Improvements by the incoming Tenant.—The Act contains one provision (s. 37) which, though intended as a privilege to the landlord, may be regarded by some as the first step towards the creation in Scotland of a "tenant-right" similar to that which, under the fostering care of the Legislature, has grown up in Ireland. The incoming tenant is authorised to pay the compensation for, or, in other words, to purchase, with the landlord's consent, the improvements of the outgoing tenant, and to keep up a claim for compensation in respect thereof. Instead, therefore, of agreeing to pay a rent upon the present value of the holding, the incoming tenant may, if the landlord consents, pay to the outgoing tenant the amount due to him as compensation for improvements, in which case he will agree to pay to the landlord only such a rent as the holding would bring without the improvements. On his quitting the holding, he will be entitled to claim compensation for these improvements,—so taken over, as it were, from his predecessor,—in so far as they are still unexhausted, exactly on the same footing as if the improvements had been executed by himself.

Compensation under the Act exclusive.—A tenant cannot claim, otherwise than under the Act, compensation for an improvement in respect of which he is "entitled to claim compensation under the Act" (s. 38). Accordingly, a claim under the Act must be referred to the statutory arbitration, and cannot form the subject-matter of a counter-claim to be investigated in any action by the landlord against the tenant (*Gaslight & Coke Co.*, 52 L. T. R. (N. S.) 434, and *Schofield*, 58 L. J., Q. B. 147, 60 L. T. R. (N. S.) 573). Of course, where there is an agreement sanctioned by the Act substituting compensation for that provided by the Act, the tenant is to be regarded as one *not* "entitled to claim compensation under the Act."

Procedure.—No fewer than seventeen sections (7 to 23) of the Act of 1883 are devoted to the procedure which is to be adopted under the Act for the ascertainment and recovery of compensation for improvements. This subject is dealt with separately at the end of this article.

Power to charge Tenant's Compensation (ss. 24 to 26).—Power is conferred upon the landlord, with the authority of the Sheriff, to charge the holding or the estate of which it forms a part with the amount paid as tenant's compensation for improvements, or expended in the execution himself of improvements proposed to be executed by the tenant (*i.e.* presumably drainage). The object of this provision is to allow limited owners,

who have no power at common law to burden their property, to charge upon their estates the amount of sums which they may have been called upon to disburse for improvements. No charge is in such a case to extend beyond the period when the improvements are to be held as exhausted.

II. Miscellaneous Provisions.

Removing for Non-Payment of Rent (s. 27).—Under the Act of Sederunt anent Removings, of 14th December 1756, as amended by the Hypothec Abolition (Scotland) Act, 1880 (43 Vict. c. 12), a landlord was entitled at any time to have a tenant who was twelve months' rent in arrear summarily removed, and a tenant who was six months' rent in arrear also summarily removed, unless he paid his arrears or found caution for them and for one year's rent further. The tenant had the privileges of an outgoing tenant as at the immediately preceding term of Whitsunday or Martinmas.

The changes introduced by the present Act are—

1. The restoration of s. 4 of the Act of Sederunt against s. 2 of the Hypothec Abolition Act, to the effect of imposing an immediate irritancy, only when the tenant has run two years' rent in arrear,—a penalty which, under the Hypothec Abolition Act, was incurred by running a single year's rent in arrear.
2. The provision that the tenant shall not be removed for non-payment of six months' rent, and subsequent failure to find caution, save at Whitsunday and Martinmas, and shall have the privileges of an outgoing tenant as at the term of removal.
3. Fourteen days' notice to the tenant of an intention to raise an action of caution and removing, as required by s. 2 of the Hypothec Abolition Act, is no longer necessary.

This section applies only where the landlord's right of hypothec has ceased, *i.e.* under all leases executed subsequent to 11th November 1881. It has been found, in the case of an action of removing under this section, that when a tenant is bound to pay rent at a certain term, the landlord then in possession is entitled to enforce the obligation, notwithstanding that he may be liable to account for the rent recovered to the representatives of his predecessor (*Lennox*, 1893, 21 R. 77).

Notice of Termination of a Tenancy.—Formerly, a tenant was entitled to forty days' warning prior to the term of removal, or, where there was more than one ish in his lease, prior to that which was first in date. The tenant is now (s. 28) to receive, and is to be bound to give, not less than one or more than two years' notice in the case of a tenancy for three years or more, and six months' notice in the case of a tenancy of less than three years' duration. There is no provision against contracting out of the requirements of this section, and therefore the present Act seems to apply only where there is no obligation to remove without warning; but the matter is doubtful, and it is safer in all cases to give the statutory notice. The provisions of this section do not apply to the case of a conventional break in a lease.

Bequest of Lease.—The Act confers upon the tenant authority to bequeath his lease (s. 29). Prior to the commencement of the Act, the tenant under an ordinary agricultural lease had no power to affect the destination of his lease by any testamentary writing; and, in the absence of any express stipulation, the lease passed to the heir. This provision of the Statute interferes with what has always been regarded as one of the most valuable privileges of the landlord—the *delectus personæ*, or right to

choose his own tenant. Formerly the landlord, in letting the farm, was generally able to conjecture who would be the tenant's legal successor; and even where his expectation was disappointed, he had the consolation of knowing that his tenant had been chosen for him by the operation of the law. This is now changed; but as security against having an objectionable tenant thrust upon him, an opportunity is afforded to the landlord to state before the Sheriff any objection he may entertain against receiving the legatee as a tenant; and, in the event of the Sheriff being satisfied that the objection is a reasonable one, the bequest is to be null. It is doubtful whether the right to a lease is carried by a general bequest of estate or residue, or requires, on the other hand, to be specific (see Johnston, *Agricultural Holdings Acts*, 56).

Tenant's Property in Fixtures.—Hitherto a tenant has had no right to remove fixtures on quitting the holding, although it is true that the law of Scotland has always been very liberal to the tenant in the construction put upon the term "fixtures." By this Act (s. 30) the tenant is allowed to remove fixtures and buildings on quitting the holding, subject always to two conditions—namely, (1) that the landlord shall first have an opportunity of taking over the same at a price to be fixed, in default of agreement, under a statutory reference; (2) that any damage done to the holding, in removing the fixtures or buildings, shall be made good by the tenant. The landlord has no right to insist upon taking over anything which the tenant was formerly entitled to remove, but the Court has no longer the same inducement, as formerly, to attach a narrow construction to the term fixtures.

Crown Lands and Limited Owners.—Three sections (ss. 31–33) of the Act, which deal with Crown lands, and with the powers of limited owners, call for no special comment. Ministers are not to act without the consent of their presbyteries, nor trustees for public purposes without the approval of a Secretary of State. With these exceptions, a limited owner has the same powers under the Act as if he were absolute owner of the holding.

III. Procedure.

Procedure is authorised by the Act for the purposes of—

1. Ascertaining the amount of compensation due to a tenant for improvements, and the amount due to the landlord under any counter-claims, and for determining the value of fixtures erected by the tenant.
2. Enabling the landlord to charge improvement outlay upon the estate.
3. Removing a tenant for non-payment of rent.
4. Determining whether or not there is any good ground for objection to the legatee of a lease.

Proceedings may be taken either under a reference or before the Sheriff.

Under a reference.

(*a*) To determine the compensation due to the tenant for improvements, and, in the event of a counter-claim, the amount due to the landlord for rent, reparation for deteriorations, etc. (ss. 7, 8, 11–23 of 1883 Act and whole of 1889 Act).

(*b*) To determine the value of fixtures left by the tenant (s. 30).

Before the Sheriff.

(*a*) To appoint a referee (s. 2 of 1889 Act).

(*b*) To extend the time within which the referee may issue his award (s. 3 of 1889 Act).

(*c*) To extend the time within which the oversman may issue his award (s. 16).
(*d*) To review the taxation by the auditor of the Sheriff Court of the expenses of a statutory reference (s. 18).
(*e*) To determine an appeal against the award in a reference (s. 20).
(*f*) To appoint a *tutor* or *curator*, for the purposes of the Act, to any one unable to act for himself (s. 22).
(*g*) To obtain authority for the landlord to charge estate with improvement outlay (ss. 24–6).
(*h*) To remove a tenant for non-payment of rent (s. 27).
(*i*) To determine the validity of the bequest of a lease (s. 29).

The parties to all proceedings under the Act must be the landlord and the tenant, or those in right of their respective interests. Every formal act, in the course of any proceedings under the Act, other than intimations in reference to the bequest of a lease, must be in writing. Provision is made (s. 22) for the appointment of a tutor or a curator, for the purposes of the Act, to a landlord or a tenant incapable of acting for himself.

1. ORDER OF PROCEDURE UNDER A REFERENCE.

Notice of Claim (s. 7).—Notice in writing by the tenant to the landlord of an intention to claim compensation under this Act, given at least four months before the determination of a tenancy, is a necessary preliminary to every reference for the purpose of ascertaining the amount of compensation for improvements due to the tenant under the Act. Accordingly, no claim for compensation can arise in the event of the sudden determination of the tenancy through any unforeseen contingency, as, for example, an irritancy incurred through bankruptcy or the breach of any stipulation of the lease (*Gaslight & Coke Co.*, 52 L. T. R. (N. S.) 434, and *Schofield*, 58 L. J. Q. B. 147, 60 L. T. R. (N. S.) 573). In the case of a Whitsunday ish as to the houses and pasture, and Martinmas as to the arable land, it is sufficient if notice be given four months before the term of Martinmas (*Black*, 1893–4, 21 R. 41, affd. *ib.* (H. L.) 72; *Strang*, 1887, 14 R. 637; In re *Paul ex parte L. Porturlington*, L. R. 24 Q. B. D. 247): but a right to eat-off turnips or occupy buildings after a Martinmas ish does not prolong the lease after that term, and notice must be given four months before Martinmas (*Waldie*, 1896, L. Low, 3 S. L. T. No. 385). On receipt of notice, the landlord, if he desires to make a counter-claim for "compensation" under the Act, must give the tenant written notice of the same not later than the fourteenth day after the determination of the tenancy. The landlord, it should be observed, cannot pursue a claim under the Act unless the tenant has first preferred a claim for compensation. If the tenant makes no claim, the landlord must work out his remedy, at common law or under the lease, by the ordinary processes of the law.

The notice and the counter-notice must state, "as far as reasonably may be, the particulars and the amount of the intended claim." It should contain such specific information as to the various items, such as the quantity, nature, quality, and date of application of manure, as will enable the landlord to determine whether he will entertain the claim or not (*Sinclair*, 1892, 19 R. 780). If these conditions are not complied with, the notice is invalid; and if the period allowed for giving notice has expired before this error is rectified, the claim for compensation is forfeited. The manner in which such notices are to be conveyed is regulated in the English Act (46 & 47 Vict. c. 61, s. 28), but there is no corresponding provision in the

Scottish Act. Accordingly, if the receipt of a notice be denied by either party, the matter must be determined by evidence in the usual way.

After notice of a claim has been given, or notices interchanged, the parties may settle by private arrangement "the amount, and mode, and time" of the payment of the compensation to be allowed in respect of the various items claimed by either party (s. 8). There is no limit to the time during which negotiations towards such a settlement may be carried on; but it is in the power of either party at any time to force on a statutory reference by appointing a referee, and giving notice of such appointment to the other party.

The Act provides (s. 8) that, in the event of a difference between the parties, "the amount, and mode, and time of payment of compensation" are to be settled by a statutory reference. Accordingly, these are the only matters to be submitted to a statutory reference; and, save of consent of parties, it is not within the scope of such a reference to determine whether or not any claim is a competent one under the Act. Such questions, for example, as whether compensation provided by an agreement is either "fair and reasonable" or "specific," must be determined in the ordinary way by a Court of Law. So too, whereas, when there is a reference, under the Act, in respect of some other matter, the amount of compensation payable under any such agreement is to be determined by the statutory referees (s. 16)—where this can be done consistently with the terms of the agreement—the question whether or not such a method is consistent with the terms of the agreement is one not for the referees, but for a Court of Law. It would be unreasonable if the law compelled either party to submit to arbitration any matters which practically involved the question of the jurisdiction of the arbiters.

The Act makes no provision for the case where one party insists upon submitting to a statutory reference claims which, in the opinion of the other party, cannot competently be determined by such procedure. It is, however, always open to the aggrieved party to refuse to concur in the appointment of a referee, and to resist any application to the Sheriff to appoint a referee. No doubt the appointment of a referee by the Sheriff is a quasi-ministerial act; but before performing that act, the Sheriff must satisfy himself that the duty has devolved upon him in terms of the Statute; in other words, he must be satisfied that the reference is a competent one. Sec. 2, subsec. 3, of the 1889 Act, providing for the appointment of a referee by the Sheriff, applies only when the claims to be adjudicated upon are competent ones. Perhaps it may be held that a summary application to appoint a referee is not a suitable process in which to raise the question of the validity of a claim under the Act, but in this case the Sheriff would sist proceedings in the summary application until the matter had been otherwise adjudicated upon. If the party opposed to the reference were to take proceedings at a sufficiently early stage, he might have the other party interdicted from applying for the appointment of a referee. If a referee has been appointed in an incompetent reference, the party aggrieved may interdict him from proceeding, and the other party from prosecuting the reference (*Sinclair*, 1887, 15 R. 185. See also *Hunter*, 1886, 13 R. 883).

Appointment of Referees.—If the parties fail to arrive at a mutual adjustment of their claims, the next formal proceeding is (s. 8 and s. 2 of 1889 Act) either for the parties to make a joint appointment in writing of a referee, and hand this to the referee, or, in the event of their being unable to concur in such an appointment, they may agree each to appoint a referee. Failing such agreement, a referee falls to be appointed by the Sheriff on the

application of either party. The Sheriff must make the appointment within fourteen days of the presentation of the application to him; but if he have not done so, a second application is competent (*Sinclair*, 1892, 19 R. 780).

Every referee must accept the reference or act within seven days of notice of his appointment, otherwise the appointment falls, and another referee must be appointed in his place. Provision is also made for the death or the supervening incapacity of a referee (ss. 2 and 4 of 1889 Act).

Delivery of his appointment to the referee is to be deemed a submission to a reference by the party delivering it, and is irrevocable, save of consent of parties (s. 11).

Appointment of an Oversman (s. 4 of 1889 Act).—As soon as two referees have been duly appointed and have accepted office, their first duty is to appoint an oversman. Provision is made for the appointment of another oversman in place of one who has died or become incapable of acting; none for the case where the oversman declines to act—but, in such a case, the referees have probably the power at common law to appoint another oversman (Bell on *Arbitration*, 188).

Conduct of the Referee.—The referee or referees and oversman having been appointed, the referees proceeds in the usual manner. The referees have all the usual powers of such functionaries at common law, some of which are expressly enumerated in the Act (s. 12). The giving of false evidence before a referee or oversman is perjury; and the referees or oversman, after notice given, may proceed in the absence of either party (s. 13).

The Award (s. 15 and s. 3 of 1889 Act).—A single referee must pronounce (*i.e.* sign) his award, and have it ready for delivery within twenty-eight days after his appointment, but this period may be extended by the Sheriff to forty-nine days, on the application of the referee or of either party. If it is not ready by that time the reference falls, and no valid award can thereafter be issued.

Two referees are allowed to prolong the period from twenty-eight to forty-nine days, but that only by a joint writing under their hands executed before the expiry of the twenty-eight days (s. 15). If the two referees fail to comply with these requirements, the reference then devolves upon the oversman (s. 16); or the referees, if unable to agree, may at common law, at any time within the period allowed them to issue an award, execute a minute of devolution. The oversman is allowed twenty-eight days to prepare his award after notice in writing of the devolution of the reference given him "by either party or referee," but this period may be extended to forty-nine days by the Sheriff, on the application of the oversman or of either party. If the award is not then ready, the reference falls.

The form of the award is of some importance (s. 14). It must be in writing, subscribed by the referees or oversman, and it must not decern for "a sum generally for compensation," but must, "as far as reasonably may be," specify the details (s. 17). The award must also fix a day not sooner than one month after the delivery of the award for the payment of the sum awarded (s. 19); and it may also contain a decerniture for the payment, in whole or in part, of the expenses, which, on the application of either party, may be taxed by the auditor of the Sheriff Court in the usual way, subject to review by the Sheriff (s. 18). Where the expenses have yet to be taxed, it will not be possible to specify in the award the amount of expenses which will be ultimately recoverable—yet section 18 imperatively requires that where there is any decerniture for expenses, the amount of expenses to be paid shall be specified in the award. This difficulty may be got over by

the award simply finding expenses due, without *decerning* for them; but in that case, as, after delivery of the award, the arbiter is *functus*, the expenses, if not paid, must be recovered in an ordinary action, unless, as is reasonable, it be held that the power conferred upon the Sheriff to review the taxation of the account implies a power to decern for the taxed amount.

The absence of any express statutory requirement will render the award invalid (per J. Manisty in *Schofield*, 58 L. J. Q. B. 147, 60 L. T. R. (N. S.) 573). But a reference, although begun under the Act, may, by the actings and the implied consent of parties, become a common law reference, so as to bar objections on the ground of non-compliance with certain statutory requirements (*Shrubb*, 59 L. T. R. (N. S.) 376; see also *Carver*, 86 L. T. 316). As to the right of appeal against an award, see *infra*.

To Ascertain the Value of Fixtures (s. 30).—A reference to determine the value of fixtures or buildings erected by the tenant is to be conducted in a similar manner. In place of giving notice of a claim for compensation, the tenant must give one month's previous notice to the landlord of an intention to remove the fixture or building; and if the landlord elects to purchase the same, he must give notice to that effect within the month. Here, as the only question which can arise is a practical one, there is no right of appeal.

II. ORDER OF PROCEDURE BEFORE THE SHERIFF.

Incidental Applications. — The incidental applications to the Sheriff in the course of a reference should be made by petition in the ordinary way. Service or notice is in the discretion of the Sheriff. The Sheriff may either award expenses against either party, or leave that matter to the arbiter.

Appeal against an Award (s. 20).—Where the amount claimed —which, it is thought, means the amount claimed by either party, not the joint amount of two conflicting claims, which are matters of subtraction rather than of addition—exceeds £100, an appeal to the Sheriff is allowed (if taken within seven days of the receipt of the award by the party appealing) upon certain grounds which are enumerated in s. 20. This appeal is virtually a general appeal upon any question other than the practical one appropriate to a man of skill: "Admitted that a sum is due in respect of an improvement, a breach of stipulation, or a deterioration, which is the just amount?" What the Sheriff has to determine is "whether the arbitrator has taken into consideration subjects which he ought not to have considered, and not considered points which he should have considered; whether he has properly applied the section of the Act in making his award, and whether he has kept within the scope and principles of the Act" (*Smith*, 53 L. T. R. (N. S.) 230; *Brunskill*, 29 Solicitor's Journal, 29). Where the sum claimed is less than £100, there is no appeal, but this does not affect the right of either party to set aside an invalid award by any of the ordinary processes of law. Any award under this Act, whatever be the amount claimed, may be reduced and set aside in respect of—

1. The neglect of a requirement of the Statute, either in the course of the proceedings or in the award itself.
2. The invalidity of the award at common law, on any of the grounds upon which an ordinary decreet-arbitral may be set aside.

Where a statutory appeal is taken, the note of appeal should set out clearly upon which of the grounds enumerated in s. 20 the appeal is taken, and the particulars upon which it is founded. The Sheriff may either dispose of the case himself, or else remit the case to the oversman or

referees, with such directions as he may think fit. In remitting the case, the Sheriff ought, in accordance with the spirit of the preceding provisions, to fix some time within which the case must be disposed of. The Sheriff's decision upon appeal is final. And there is no appeal from the Sheriff-Substitute to the Sheriff.

Petitions to Charge (s. 24). — Under petitions to charge the holding or estate with improvement expenditure, the Sheriff must be satisfied of—

1. The actual payment of the sum sought to be charged.
2. The observance in good faith by the parties of the conditions imposed by the Act.

When the landlord is not absolute owner of the property, the charge authorised must not impose upon the holding or estate the payment of any instalment subsequent to the period at which the improvement is to be held to be exhausted. The course of procedure is similar to that adopted under entail petitions to charge.

To Determine the Validity of the Bequest of a Lease (s. 29). — The legatee of a lease must, within twenty-one days of the death of the tenant, or, if unavoidably prevented, as soon as possible thereafter, intimate the bequest to the landlord. Such intimation imports acceptance of the lease. If the landlord objects to receive the legatee as tenant, he must intimate his objection within one month of notice of the bequest. It then devolves upon the legatee to petition the Sheriff to have it declared that he is tenant under the lease as from the death of the testator. The landlord may appear, and state any objection. The decision of the Sheriff is final. The interim possession is with the legatee, unless the Sheriff shall otherwise direct on cause shown. Failing the legatee, the lease descends to the heir.

Removing for Non-Payment of Rent (s. 27). — The procedure in actions of caution and removing under this Act calls for no special comment. The Act need not be specially founded upon in the petition, which differs from the form in use under the Hypothec Abolition Act of 1880 only in two particulars—

1. The prayer is not for summary ejection on failure to find caution, but for ejection at the next term of Whitsunday or Martinmas.
2. The petition does not set forth that fourteen days' notice of an intention to raise the action has been given, such notice being no longer required.

[Johnston, *Agricultural Holdings* (Scotland) *Acts*; Philip, *ditto*; Lely and Pearce on the *English Act*; Hyslop, *Lectures on Agricultural Law*; Rankine on *Leases*.]

Aid, Extent in.—See Extent.

Alba firma.—When lands are held blench, the vassal is liable only for an elusory yearly duty to the superior, rather as an acknowledgment of, than as profit to, the superior. The duty is said to be in name of blench-farm—*nomine albæ firmæ*. See Blench.

Alias—"Otherwise called."—In an indictment of a person who goes by several names, it was formerly the usual practice to describe him as

"A. B. *alias* C. D."; and in earlier times, when the pleadings were in Latin, this was expressed "*alias dictus*." In Scotland, however, this mode of designing an accused person is no longer necessary or usual. The prosecutor cannot be called upon to set forth any "*alias*" by which an accused person has passed (Crim. Procedure (Scotland) Act, 1887, 50 & 51 Vict. c. 35, s. 4; Macdonald, *Crim. Law*, 290, and authorities there); and the accused may be indicted by the name given by him when examined on declaration (Crim. Procedure Act, 1887, s. 4). This is the mode now almost invariably adopted: but where an accused has not been apprehended, and consequently has not been examined on declaration,—as in the case of "Edward Sweeney, *alias* Davis, *alias* Scott," indicted along with *Alfred Monson*, for murder (1893, High Court, 1 Adam, 115),—it would seem to be a proper precaution to set forth the several names by which he has passed; and further, where a series of previous convictions have been obtained against an accused person under various names, there may be some practical convenience in setting forth these names in the indictment. See CRIMINAL PROSECUTION; INDICTMENT.

Alibi.—This is a defence which consists in proving that the accused was not at the place when the offence was said to have been committed, but was at that time at a different place, thus making it impossible that he could be the perpetrator. It is a special defence, the plea of which 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 not be less than two clear days before the second diet to which the accused is cited for trial (Crim. Proc. Act, 1887, s. 36). But this does not apply in Courts of Summary Jurisdiction, in trials in which notice of the defence of *alibi* is not required (*Howman*, 1891, 19 R. (J. C.) 19). The place must be specified (Fraser, 4 Coup. 70).

The form of the defence is—

> *D.* [*name of Counsel or Agent*] stated the panel pleaded not guilty, and particularly that on the night of [*date*], from half-past nine until a quarter past eleven (between which times the alleged crime is said to have been committed), he was at [*here specify minutely the place or places where the panel was*], in company with certain persons who are called as witnesses for the defence [*or as the case may be*]
>
> [*Signed by Counsel or Agent.*]

[Hume, ii. 399; Alison, ii. 369; Macdonald, 424.] SEE DEFENCE (SPECIAL); CRIMINAL PROSECUTION.

Alien.—A foreigner; one who is not a British subject; "a subject of a foreign State, who has not been born within the allegiance of the British Crown" (per Bramwell B. in *Burke*, 1868, 11 Cox, Crim. Ca. 138).

ALIEN BY BIRTH.—British nationality being at common law determined according to the feudal principle of the *jus soli*, every person actually born outwith the British dominions is an alien, unless made a British subject by Statute. The only exceptions are persons such as the children of British ambassadors, or those born to British soldiers within the lines of a British army on active service, who are deemed born within the British dominions in virtue of the fiction of EXTERRITORIALITY (*q.v.*). Conversely, no person actually born in the British dominions is, at common law, an alien, except children of foreign ambassadors, or children born to an enemy father during the hostile occupation of any part of British territory. The

consequence of British nationality attaching to birth in the British dominions may now, however, be avoided by any person who, at the time of his birth, is, by the law of any foreign State, also a subject of that State, by his taking, when of full age, a declaration of alienage in the manner prescribed by the Naturalisation Act, 1870, s. 4. Both in Scotland and England, at common law, no effect is given to descent as a source of nationality; but the inconvenience of making the place of birth the sole criterion of the rights and duties of citizenship has led in modern times to the introduction of the principle of the *jus sanguinis* followed in the law of Rome. By the Acts 7 Anne, c. 5, s. 3; 4 Geo. II. c. 21, s. 4; and 13 Geo. III. c. 21, s. 7, British nationality has been extended, and the status of alienage removed, in the case of children and grandchildren, wherever born, of parents who, at the time of the birth of such children, were British subjects, not attainted or liable to the penalties of high treason or felony in Britain, or actually in the service of an enemy State. The status of natural-born British subject thus conferred is merely personal, however, and is not made transmissible to the descendants of those to whom it is thereby given. Such descendants are therefore aliens (*De Geer*, 1882, 22 Ch. D. 243; Re *Willoughby*, 1885, 30 Ch. D. 324; and the joint effect of the statutory enactments is that "no children, neither whose fathers nor whose paternal grandfathers were born within the British dominions, have been made British subjects by Act of Parliament" (Westlake, *Priv. Int. Law*, s. 283). Thus the grandchild and child of a man who was by the common law a natural-born British subject, are themselves natural-born British subjects by force of Statute, although they may both happen to be born abroad; but the children of the grandchild, if born abroad, are aliens.

Alien by Separation of Crowns.—While the crowns of two countries are held by the same person, the inhabitants are not aliens in the two countries respectively. Thus the *Post nati*, persons born in Scotland after the accession of James I. to the throne of England, were held not to be aliens in England (*Calvin's* case, 1608, 2 St. Tr. 585). And persons born in Hanover while its crown was united to that of Great Britain, were held to be of British nationality (*Isaacson*, 1886, 17 Q. B. D. 54). But when the crowns of Hanover and Britain became separated upon the accession of Queen Victoria, the Hanoverians already born ceased to owe allegiance to the British Crown, and became aliens in Britain. Those born subsequently were of course *a fortiori* in the same position (*Isaacson*, *ut supra*).

Alien by Separation of Territory.—The dissolution of the tie of allegiance by cession, or conquest, or by separation of territory in such a manner that the separated portion becomes an independent State, renders the inhabitants of the disjoined territory aliens in the State to which it formerly belonged. The option of retaining nationality is frequently provided by the treaty governing the separation, as, *e.g.*, in the Anglo-German agreement respecting the cession of Heligoland in 1890 (53 & 54 Vict. c. 32). But if no option is expressly given, the nationality of an individual depends on whether he actually quits, or prefers to remain in, the separated territory (see *Dundas*, 1839, 2 D. 31)—in other words, upon the voluntary transference or retention of domicile (*Westlake*, P. I. L. s. 27). If the domicile in the separated territory is retained, the inhabitants of it become aliens in the State to which it formerly belonged.

Alien by Choice, Statutory Alien.—At common law the British nationality is imposed, and not merely offered for acceptance. The allegiance

to the Crown implied in it is indelible, for *nemo potest exuere patriam* is a maxim of British law (*Æneas Macdonald's* case, 1747, 18 St. Tr. 857). Except by virtue of recent legislation, therefore, voluntary expatriation on the part of natural-born British subjects is impossible. But by the Naturalisation Act, 1870, s. 6, any natural-born British subject who voluntarily becomes naturalised in any foreign State, thereby ceases to be a British subject, and becomes what the Act calls a "statutory" alien. A naturalised British subject may also divest himself of British nationality, and resume that of the State to which he originally belonged, when Her Majesty has entered into a convention with that State for the purpose, by taking a declaration of alienage in the manner prescribed by the Naturalisation Act, 1870, s. 3. The only convention as yet concluded on this subject is that with the United States, which will be found in the Schedule to the Naturalisation Act, 1872 (35 & 36 Vict. c. 39). At common law, marriage has no effect upon the nationality of women. A woman who was a British subject did not cease to be so by marriage with an alien, and an alien woman remained an alien in spite of her marriage with a British subject. The latter anomaly was removed by 7 & 8 Vict. c. 66, sec. 16 of which provided that any woman married "to a natural-born subject or person naturalised shall be deemed and taken to be herself naturalised, and have all the rights and privileges of a natural-born subject." This provision has been repealed, and the status of married women definitely settled by the Naturalisation Act, 1870, sec. 10 (1) of which declares that "a married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject." This provision is further qualified by the Naturalisation Act, 1872 (35 & 36 Vict. c. 39), sec. 3 of which declares that nothing contained in the Act of 1870 shall deprive any married woman of any estate or interest in real or personal property to which she became entitled previously to the passing of the Act, or affect such estate or interest to her prejudice. If she has married an alien, she is deemed a statutory alien in Britain, and as such she may, on becoming a widow, obtain a certificate of readmission to British nationality in the manner provided by the Act, s. 10 (2). It would appear doubtful whether this provision extends to a *divorcée*. In a recent case, a private Act of Parliament (von Roemer's Resumption of British Nationality Act, 1895) was passed to enable an English lady who had divorced her German husband to reacquire the status of a British subject. By sec. 15 of the Naturalisation Act, 1870, any British subject who has become an alien under the provisions of the Act is not discharged from liability in respect of acts done before the date of his so becoming an alien.

Any statutory alien, *i.e.* a natural-born British subject who has become an alien in pursuance of the Naturalisation Act, 1870, may cease to be so by obtaining a certificate of readmission to British nationality in manner provided by sec. 8 of the Statute. He thereby resumes his position as a British subject from the date of the certificate, but not in respect of any previous transaction, and subject to the qualification that he is not to be deemed a British subject when within the limits of the foreign State of which he became a subject, unless he has ceased to be a subject of it by its laws or in virtue of a treaty with it. An alien born may acquire British nationality (1) by Act of Parliament, (2) by Letters of Denisation (*q.v.*), or (3) by naturalisation under the Naturalisation Act of 1870 (*v.* Naturalisation; Nationality).

Status, Rights, and Disabilities of Alien Residence.—The right of residence within the British dominions is in general freely accorded to aliens. Great Britain has only had occasion to regard their presence as a

source of danger to the State, in view of some temporary emergency, and then only during limited periods. The influx of foreigners at the time of the French Revolution led to the passing of a series of Statutes called the Alien Acts, which required the masters of vessels arriving from foreign countries to give an account of the number and names of any foreigners on board to the Custom House officer at the port of arrival. These have now been repealed, and the admission of foreigners to the United Kingdom is now regulated by the Peace Alien Act (1836, 6 & 7 Will. IV. c. 11), which contains similar provisions. But the rights of exclusion and expulsion of aliens are still exercised on occasion. Thus the Prevention of Crimes Ireland Act, 1882 (45 & 46 Vict. c. 25), re-enacted for a period of three years the Alien Act, 1848 (11 & 12 Vict. c. 20), and authorised the Secretary of State or Lord Lieutenant of Ireland to order aliens to depart the realm within a certain time, on pain of imprisonment and deportation. And the right of exclusion was recently affirmed by the Privy Council (*Musgrove*, A. C. (1891) 272), to the effect of refusing to an alien a right of action to compel admission to British territory. See on this subject articles by W. F. Craies (1) in the *Law Quarterly Review*, 1890, vol. vi. p. 27, on "The Right of Aliens to enter British Territory"; and (2) in the *Journal de Droit International Privé*, 1889, vol. xvi. p. 357, on "Le Droit d'Expulsion des Etrangers en Angleterre." The Queen's Speech at the opening of Parliament, on 11 Feb. 1896, promises, amongst other legislative projects, "measures for checking the importation of destitute aliens."

Political Rights.—Political rights, which imply a share in the government of the State, cannot be exercised unless there is a permanent obligation to loyalty. They are therefore everywhere denied to aliens. Aliens resident in Britain, although their civil disabilities have been almost entirely removed by sec. 2 of the Naturalisation Act, 1870, are not thereby qualified for any office, or for any municipal, parliamentary, or other franchise; nor are they entitled to any right or privilege as British subjects, except such rights and privileges in respect of property as are expressly conferred by the Act, s. 2 (2). They are not capable of entering the Privy Council, or of becoming members of Parliament, or of holding any place or office of trust, or taking any grant from the Crown (12 & 13 Will. III. c. 2, s. 3). All these disabilities, however, may be removed by Naturalisation (*q.v.*). The certificate of naturalisation issued under the provisions of the Naturalisation Act, 1870, s. 7, entitles the alien obtaining it to "all political and other rights, powers, and privileges . . . to which a natural-born British subject is entitled . . . in the United Kingdom, with this qualification, that he shall not, when within the limits of the foreign State of which he was a subject previously to obtaining his certificate of naturalisation, be deemed to be a British subject unless he has ceased to be a subject of that State in pursuance of the laws thereof, or in pursuance of a treaty to that effect." A doubt has been expressed as to the effect of the qualification. In Re *Bourgeoise* (41 Ch. D. 310), Kay J. held that it prevented the naturalisation from being complete, and disabled the naturalised alien from transmitting British nationality to his children. The Court of Appeal, however, decided the case on other grounds, and avoided expressing an opinion on the question. The disabilities of the Act 12 & 13 Will. III. c. 2, s. 3, are not removed by Denization (*q.v.*). It would appear that the effect of s. 2 of the Act of 1870 is by implication to abolish the disqualifications imposed upon aliens by the Act 12 & 13 Will. III. c. 2, s. 3, which are declared to apply both to naturalised persons and to denizens. When naturalisation

was effected by Act of Parliment, it was usual, in the case of any distinguished foreigner, to repeal that Statute (and also the explanatory Act 1 Geo. I. st. 2, c. 4), so far as he was concerned—*e.g.* the instance of the Baron de Ferrières (*Cheltenham Election Petition*, 1880, 3 O. M. & H. 86). The restrictions are still operative as regards denizens, but the terms of the section imply that naturalisation under the Act of 1870 confers unrestricted political rights and capacities upon the person so naturalised.

Civil Rights.—As regards civil rights, the position of aliens prior to the Naturalisation Act, 1870, was one of equal capacity with natives, except in two particulars—*first*, they were unable to hold landed estate except for a term not exceeding twenty-one years; and *second*, they were unable to own British ships. The latter restriction is preserved by the Act of 1870, s. 14, and is based upon obvious considerations of public policy, for otherwise the national character, and the protection of the British flag, would be afforded to persons who, once beyond the limits of our territory, are no longer subject to our laws, and might compromise us with other nations, without being amenable to our jurisdiction. The former restriction is abolished by s. 2 of the Act of 1870, which puts aliens on the same general footing as British subjects as to acquiring, holding, and disposing of real property, and enables a title to such property to be derived through, from, or in succession to an alien, in the same manner as through, from, or in succession to a British subject. The Act is not retrospective, and does not affect rights accrued anterior to its passing (*Sharp*, 1871, L. R. 7 Ch. 343). Nor does it extend to aliens the privileges conferred upon British subjects by Lord Kingsdown's Act (24 & 25 Vict. c. 114), of making a valid will according to the *lex loci*, the *lex domicilii*, or the *lex domicilii originis* (*Bloxam*, 1884, 9 P. D. 130). In respect of personal rights, an alien, so long as he remains on British territory, is in the same position as British subjects. He may carry on trade or industry as freely as the native. The law gives him the same rights as a British subject in respect of copyright, patents, and trade marks. As a litigant, he is entitled to equal rights and liabilities with the native, subject to the obligation of giving security in England, and in Scotland of sisting a mandatary, who shall be responsible for costs (see Jurisdiction). He is subject to the operation of the Bankruptcy and Poor Laws, and is also entitled to the benefit of them (see *infra*; and Bankruptcy) (*Higgins*, 1824, 3 S. 168).

Alien Enemy.—A distinction, however, is to be observed between an alien subject of a friendly State, called an alien friend, and one with whose country Britain may be at war. An alien enemy, so called, has no civil rights in this country, unless he is here under a safe-conduct or licence from the Crown. He becomes an enemy by the declaration of war (but not before, *Blomart*, 1644, Mor. 16091), and has thereafter no title to sue in the Courts of Scotland (*Arnauld*, 1704, Mor. 10159); and a contract made with him is void, and cannot be enforced even after peace is restored (*Johnston*, 15 Feb. 1809, F. C.). An alien, however, sued in this country, was held entitled to insist in a counter-action even after war intervened (*Burgess*, 12 Jan. 1813, F. C.). But in the case of a cause of action arising before the war, his right to sue is only suspended during the war (*Carron*, 28 Nov. 1809, F. C.), and will revive on peace being restored. In the proclamation of war, however, it is usual in modern times to insert permission for subjects of the enemy resident in this country to remain, so long as they demean themselves peaceably, and while they do so they are to be regarded as alien friends (*Burgess*, 12 Jan. 1813, F. C.). A British subject who continues to reside in an enemy's country, is in England

regarded as an alien, unless his detention is involuntary. In Scotland it has been held that a natural-born subject does not lose his title to pursue in the Courts of this country by residing in a foreign country at war with Great Britain (*Aitken*, 10 June 1813, F. C.). By sec. 5 of the Act of 1870, the right of an alien to a jury *de medietate linguæ* is abolished, the law of England being thereby assimilated to that of Scotland (*Hansen*, 1858, 3 Irv. 3). It has not been decided whether an alien is competent or compellable to serve as a juryman in the Criminal Courts (*Bartlett*, 1876, 3 Coup. 357). He is, even although an alien enemy, admissible as a witness in a criminal trial (*M'Guire*, 1857, 2 Irv. 620). Every person, whether a British subject or not, is answerable for the offences which he commits against the law of Scotland within the jurisdiction of the Scottish Courts. See NATIONALITY; EXTERRITORIALITY; DENIZEN.

[Cockburn, *Nationality*, London, 1869; Cogordan, *La Nationalité au point de vue des rapports internationaux*, Paris, 1879; Hume, *Commentaries on the Law of Scotland respecting Crimes*, Edinburgh, 1844.]

ALIEN (BANKRUPTCY).—An alien may be rendered notour bankrupt, provided he is at the time subject to the jurisdiction of the Courts of Scotland in respect of domicile, or of ownership of heritage in Scotland, or of residence for forty days in this country (*Joel*, 1859, 21 D. 929; *Fraser*, 1870, 8 M. 400; Mackay, *Practice*, 53 *et seq.*; Goudy on *Bankruptcy*, 78). An alien may be sequestrated (*Joel, ut supra*, per L. P. Inglis), and is also apparently liable to cessio (Goudy on *Bankruptcy*, 473).

Alienation.—For alienation of heritage, see DISPOSITION; FEU-CHARTER; and ENTAILS.

Alienations by Bankrupt or Insolvent. — See BANKRUPTCY; INSOLVENCY.

Alieni juris.—In Roman law, persons were divided into those *sui juris*, who were independent and not subject to any family head, and those *alieni juris*, who were dependent and under the power of a family head. In the earlier law the latter class included children *in patria potestate*, slaves *in dominica potestate*, women *in manu*, and free persons *in causa mancipii* (Gaius, i. 49 *et seq.*). In the Justinianian period, persons *alieni juris* were either children *in potestate parentum*, or slaves *in potestate dominorum* (*Inst.* i. 8. pr.). As regards public law, the distinction between a *filius familias*, who was *alieni juris*, and a *pater familias*, who was *sui juris*, had no importance. The effect of the distinction was confined wholly to private law. In private law a person *alieni juris* was under certain disabilities in holding property, in incurring obligations, and in the matter of testaments. These disabilities, however, became gradually less with the progress of the law. The term *alieni juris* is frequently somewhat loosely applied by lawyers in Scotland to persons, such as married women and pupils, who are under certain disabilities in dealing with their property and in binding themselves in obligations. This use of the term, however, is not sanctioned by the institutional writers. See EMANCIPATIO; PATRIA POTESTAS; FORISFAMILIATION.

Aliment.—This term denotes the maintenance or support which certain persons are legally entitled to claim from others on account of their connection with them by kinship or marriage.

An indigent person is entitled to claim aliment from the members of his family in the following order, those more remote having no liability unless those nearer are unable to discharge the obligation:—

1. Husband. For the support of a married woman her husband is primarily liable. See Poor Law Act, 1845 (8 & 9 Vict. c. 83), s. 80; and, *infra, Wife's Claim to Aliment from Husband.* Whether a wife with separate estate is liable to aliment an indigent husband is still unsettled. See *infra, Liability of Wife to Aliment Children or Husband.*

2. Descendants, in order: first, children, then grandchildren, etc. It appears that children, and even grandchildren, are liable before the parents of the indigent person; but the point does not seem to have arisen. (Fraser, *P. & C.* 85: Dunlop, *Parochial Law*, 371; M'Glashan on *Aliment*, 53; Guthrie Smith, *Poor Law*, 256.)

3. Father, or, in certain cases, his representatives; see *infra.*

4. Mother (Ersk. *Prin.* iii. 1. 4; Fraser, *P. & C.* 86; More, *Notes on Stair*, 29). Erskine in his *Institutes* (i. 6. 56) postpones the liability of the mother to that of paternal ascendants; but this seems erroneous. (As to the mother's liability in general, see Stair, i. 5. 7; Bankt. i. 6. 13; *Buchan*, 1666, Mor. 411; *Scott*, 1759, Mor. 440; *Kirkland*, 1685, Mor. 403; *Macdonald*, 1846, 8 D. 830: *Fairgrieves*, 1885, 13 R. 98: *Dick*, 1895, 3 S. L. T. No. 311.)

5. Paternal grandfather (*Bell*, 1890, 17 R. 549).

6. Paternal grandmother.

7. Paternal great-grandfather, etc.

8. Maternal grandfather, and so on, in like order (*Wilson*, 1825, 3 S. 547: Fraser, *P. & C.* 88).

A father is not bound to aliment the widow of his deceased son, at any rate unless she is the mother of the next heir of entail (*Hoseason*, 1870, 9 M. 37); nor, it is thought, is he bound to aliment his son's wife, *e.g.* if she is deserted by her husband (*Chrystie*, 1802, Mor. Apx. *voce*, No. 5, "Aliment": *Tait*, 1802, *ib.* 3; *Belch*, 1798, Hume, i.: *Hamilton*, 1807, *ib.* 3; *M'Kissock*, 1817, *ib.* 6; *Pagan*, 1838, 16 S. 399; *Hoseason, ut supra*; More, *Notes*, xxx.; Bell, *Prin.* s. 1633: Fraser, *P. & C.* 87, 105; but see *Duncan*, 17 Dec. 1810, F. C.).

A brother is not bound *ex debito naturali* to aliment his brothers or sisters, and still less more distant collaterals; but he may be liable as his father's representative (*Mackintosh*, 1868, 7 M. 67: *Eiston*, 1870, 8 M. 980: Stair, i. 5. 10; Ersk. i. 6. 58; Fraser, *P. & C.* 88; and *infra* as to representation).

A stepmother is not liable *super jure naturæ* (*Macdonald*, 1846, 8 D. 830). A stepfather is liable during the marriage, as having taken liability, for his wife's antenuptial debts (see Antenuptial Debts of Married Woman); but if married since 1 January 1878, his liability is limited to the amount by which he was *lucratus* by the marriage (40 & 41 Vict. c. 29, s. 4). (See *M'Allan*, 1888, 15 R. 863.)

How Payment of Aliment is enforced.—The indigent person may bring a direct action against the relative or husband liable. And a parochial board, or a person who has supplied necessaries, has, in general, an action of relief (Stair, i. 5. 7; Ersk. i. 6. 56; Fraser, *P. & C.* 95; Dunlop, *Par. Law*, 369). The mother of an illegitimate child can obtain a continuing decree for payment of aliment to be expended (see *infra*); but a parochial

board will only get a decree for sums actually expended (*Den*, 1891, 19 R. 77).

A husband or father who neglects to maintain his wife or children, being able to do so, whereby the wife or child becomes chargeable to a parish, is liable to imprisonment under the Poor Law Act, 1845 (8 & 9 Vict. c. 83, s. 80). And so are the mother of an illegitimate child, and its putative father when the paternity has been proved or admitted.

The creditor in a sum of aliment decerned for, *e.g.* a woman holding a decree for aliment to be paid by the putative father of her bastard child, may enforce payment of arrears by an application for a warrant to imprison the debtor under the Civil Imprisonment (Scotland) Act, 1882 (45 & 46 Vict. c. 42.) (See *Cain*, 1892, 19 R. 813; *Cook*, 1889, 16 R. 565; Dove Wilson, *Sheriff Court Practice*, 381 *et seq.*) See CIVIL IMPRISONMENT.

But a parochial board, or a person who has supplied aliment and has obtained a decree for reimbursement against the relative liable, cannot enforce the decree by imprisonment (*Tevendale*, 1883, 10 R. 852).

REPAYMENT OF ALIMENT.—For necessaries supplied to a child not provided for *aliunde*, a direct action lies against the father, and that even though the child was not living in his father's house (Stair, i. 5. 7; More, *Notes*, xxix. No. 3; Ersk. i. 6. 57; Fraser, *P. & C.* 95; *Wallace*, 1672, Mor. 13425; see *Ligertwood*, 1872, 10 M. 832). And on the same principle the husband may be sued for the price of necessaries supplied to the wife (Fraser, *H. & W.* i. 607; see *infra*, *Claim by Wife against Husband*). By s. 71 of the Poor Law Act, 1845 (8 & 9 Vict. c. 83), a parochial board which has given relief has recourse against the person legally bound to maintain the indigent person. Such a claim is essentially one of relief; and a continuing decree for sums proposed to be expended, such as is granted to the mother of an illegitimate child against its father, will not be pronounced (*Den*, 1891, 19 R. 77). By sec. 2 of the Custody of Children Act, 1891 (54 & 55 Vict. c. 3), where a parent, or relative entitled to do so, applies for a writ or order for the production of a child which has been brought up by a third person or by an institution or a parochial board, the Court, if it orders the child to be given up to the parent, may, in its discretion, order him to pay the whole or part of the costs incurred in the child's upbringing (*Soutar*, 1894, 21 R. 1050). Where aliment has been furnished *ex pietate*, an action will not lie for its repayment, though the person alimented have subsequently acquired property (*Home*, 1757, Mor. 412; *Drummond*, 1756, Mor. 412; More, *Notes*, xxxii. 16; Fraser, *P. & C.* 100). But see *M'Gaws*, 1882, 10 R. 157. Nor can a parish claim reimbursement if a pauper acquires estate (*Insp. of Kilmartin*, 1885, 12 R. 713). Whether aliment has been given as a donation and *ex pietate*, is a question of fact. The general presumption is that it was given on that footing if the person alimented was a major, or a minor with a curator. For then, if repayment had been contemplated, a bargain might have been made (Stair, i. 8. 2; Ersk. iii. 3. 92; Fraser, *P. & C.* 100; Dickson on *Evidence*, s. 163). This presumption extends to persons not liable *ex jure naturæ* (*Drummond*, 1834, 12 S. 342; *Ferguson*, 1831, 9 S. 472; see *M'Gaws*, *ut supra*).

In the case of pupils or minors without curators, if they are brought up by their father or one *in loco parentis*, and have no means of their own, aliment is presumed to be given *ex pietate* (*Home*, *ut supra*; *Guthrie*, 1672, Mor. 10137; *Gourlay*, 1697, Mor. 11438; *Wilson*, 1826, 4 S. 817). Where the child has estate of its own, it would seem that the relative alimenting it is entitled to claim repayment of aliment out of the child's income (Ersk. i. 6. 56; Fraser, *l.c.*; Dickson, *l.c.*; *Fairgrieves*, 1885, 13 R. 98). In the last named case the

opinion was expressed by Lord President Inglis that a father's obligation to maintain his children was so absolute that he could not claim reimbursement. This *dictum*, it is respectfully thought, is not borne out by authority; and it is submitted that even a father may, as his child's administrator-in-law, apply the rents or interest of the child's estate, up to a reasonable amount, in payment of its maintenance. Without express agreement or authority, it does not seem to be permissible to encroach upon the child's capital for its maintenance (*Winrahan*, 1668, Mor. 11433; *Maxwell*, 1669, Mor. 11435; *Irvine*, 1725, Mor. 11433; *Menzies*, 1839, 1 D. 601; *Steele's Trs.*, 1830, 8 S. 926; Bankt. i. 6. 4; Ersk. *l.c.*; Fraser, *l.c.*; Dickson, *l.c.*; M'Glashan on *Aliment*, 96; see *Galt*, 1830, 8 S. 332; *Fairgrieves, ut supra*).

When the estate of a pupil child is vested in trustees, they will usually have power under the trust deed to pay income, or part thereof, to the father or other person having the custody of the child, for its maintenance. Where the trustees doubt their power to do this, it is competent for them, or for the father, to present a petition praying the Court to grant the necessary authority, upon such conditions as they may think fit (*Scott, petr.*, 1870, 8 S. L. R. 260; *Stewart's Trs.*, 1871, 8 S. L. R. 367; *Edmiston*, 1871, 9 M. 987; *Seddon*, 1891, 19 R. 101, 20 R. 675).

A. *Claims of Legitimate Descendants for Aliment.*—By the law of nature, as recognised in our jurisprudence, parents are bound to support their children, for whose existence they are responsible. Nor is this obligation limited to immediate children. It extends to grandchildren, or even more remote descendants, provided that the ascendants nearer in degree are unable to fulfil the obligation. A renunciation or discharge of such claims is invalid, as *contra bonos mores* (Stair, i. 5. 1; Bankt. i. 6. 7. *For order of liability and authorities, see beginning of article*). The claim for aliment is in a sense a claim of debt, and transmits against the representatives of the person liable. So a posthumous child was found entitled, as a creditor, to aliment out of the father's trust estate (*Spalding*, 1874, 2 R. 237). But the claim of legitimate children for aliment cannot compete with claims of the father's creditors, or entitle the children to a ranking in his sequestration (*Oncken's Judicial Factor*, 1892, 19 R. 519).

Duration of Obligation.—The obligation is perpetual, but is suspended when the child becomes self-supporting (Ersk. i. 6. 56).

A son is not entitled to look to his father for support when he is major, and has been put to any trade or profession; or if, even before majority, he has left his father's house, and has supported himself by his own industry. A daughter has a claim to be supported by her father till her marriage, if her father is in such a position that it would be contrary to the usages of society for her to earn her own livelihood. In the humbler ranks of life her claim is suspended when she can earn her own subsistence (Ersk. i. 6. 56; Fraser, *P. & C.* 104; *Dunn*, 1842, 4 D. 454; *Cleland & Geddes*, 1678, Mor. 449; *Dalziel*, 1788, Mor. 450; *Bisset*, 1748, Mor. 413).

But although the child has been self-supporting, the parent's obligation is not extinguished, and revives if the child becomes unable to support itself (Ersk. *l.c.*; More, *Notes*, xxix.; Fraser, *P. & C.* 102; *Smith*, 1885, 13 R. 126; *Parochial Board of Elgin*, 1893, 20 R. 763). See Forisfamiliation.

Quantum of Aliment.—The obligation is to supply food, clothing, and other *necessaries*.

The measure is "support beyond want . . . and all that is beyond that is left to parental affection," a phrase of Lord Kames approved of by Lord Redesdale (*Maule*, 1825, 1 W. & S. 266, in C. of S., July 9, 1823, F. C., and

2 S. 464). But this does not mean that the father can discharge his obligation by giving the child the relief to which he would be entitled as a parish pauper. The child is entitled to be "secured against that pressure of want, which would place him in the position of a pauper, relatively to his position in life" (per L. P. Inglis in *Thom*, 1864, 3 M. 177; see *Smith, ut supra*; *Foulis*, 1887, 14 R. 1088).

But a son who has been educated and put into a profession cannot claim an allowance from his father on the ground that he cannot make a livelihood by it. If his profession will not yield him a subsistence, he must turn to other pursuits (*Smith, ut supra*).

Mode in which the Obligation may be implemented.—The general rule is that the person upon whom the burden falls may implement it in the way least oppressive to himself, provided this causes no injury to the person alimented (Fraser, *P. & C.* 91; *Bell*, 1890, 17 R. 549). So the parent may, if he choose, compel the child to live in a separate lodging (*Bain*, 1860, 22 D. 1021; Fraser, *l.c.*; Bell, *Prin.* s. 1630; Stair, i. 5. 7); and an offer by the father to take the child into family with himself is in general a sufficient defence (Ersk. i. 6. 56; Fraser, 92; Bankt. i. 6. 13; *Dick*, 1666, Mor. 409; *Buchan*, 1666, Mor. 411; *Smith, ut supra*). It was held to be so even where the claimant was a married woman, and would have had to leave her husband to enter her father's house. In that case the father's means were very small (*Wallace*, 1848, 10 D. 1510).

And where a grandchild was eight years old, and the paternal grandfather in straitened circumstances, an offer by him to take the child into his house was held a good answer to a claim for aliment by the child's mother (*Bell, ut supra*; and see *Jameson*, 1845, 8 D.8 6). But where it would be dangerous to the child's safety or morals to live with its father, as where he has formerly maltreated it, he cannot discharge his obligation by offering to take the child (*Ketchen*, 1871, 9 M. 690; *Hepburn*, 1734, Mor. 410; *Morrison*, 1716, Mor. 410; Ersk. i. 6. 56; Fraser, *P. & C.* 92).

It is a valid defence that the ascendant is so poor that he could not support the descendant without being himself greatly impoverished (Stair, i. 5. 7; Ersk. iii. 3. 89; Fraser, *P. & C.* 93; *Wilson*, 1825, 3 S. 547; *Allan*, 1895, 3 S. L. T. No. 206).

B. *Illegitimate Children.*—The father and mother of an illegitimate child are jointly liable to aliment the child until it is able to support itself. The inability of either parent casts the whole liability on the other (Bankt. i. 5. 64; Ersk. i. 6. 56; Fraser, *P. & C.* 123; *Oncken's Judicial Factor*, 1892, 19 R. 519; *Clarke*, 1891, 18 R. (H. L.) 63). But in order to fix the father with liability, the paternity must be admitted, or must be established in a Court of Law (see *Downs*, 1886, 13 R. 1101). His debt is to the child, or, in a sense, to the community, which is not unnecessarily to be taxed to support the fruit of his profligacy (see per L. Watson in *Clarke, ut supra*, at 68). So a discharge by the mother of all claims for a single sum will not prejudice the child's natural right to demand aliment from its father: and either the mother or a third person who has supported the child may have recourse against the father, in spite of the discharge (*A. B.*, 1842, 4 S. 670). The obligation is a claim for debt, and transmits against the parents' representatives (*Oncken, ut supra*). The claims of legitimate children for aliment cannot compete with claims of creditors on the father's sequestrated estate. But an illegitimate child is in this respect in a better position: the mother is entitled to rank on the father's estate for the child's future aliment as a contingent claim (*Downs, ut supra*; *Oncken, ut supra*).

The mother is as much a debtor to the child as is the father, and her

claim against him is for ratable contribution towards the payment of a debt for which they are jointly liable (Bell, *Prin.* s. 2062; *Com.*, 7th ed., i. 681; Fraser, *P. & C.* 123; *Downs, ut supra*; see Poor Law Act, 8 & 9 Vict. c. 83, s. 80). Her claim is not liable to be barred by the triennial prescription, which applies only to claims founded on contract (*Moncreiff*, 1859, 21 D. 216; Dickson on *Evidence*, s. 488, and cases cited; see *Westlands*, 1887, 14 R. 763; *Ligertwood*, 1872, 10 M. 832). The mother's liability to aliment her natural child, as being one of her Antenuptial Debts (*q.v.*), was formerly transferred to her husband if she married (*Aitken*, 1815, Hume, 217). His liability, if married since 1 Jan. 1878, is now limited to the amount by which he is *lucratus* by the marriage (40 & 41 Vict. c. 29, s. 4; see *M'Allan*, 1888, 15 R. 863).

The liability of the parents is equal: and if the mother leave the child in the father's custody during the period in which she might claim to have the child with her, the father may sue her for relief to the extent of one-half (see a Sheriff Court case, *Alexander*, 1883, Guthrie, *Select S. C. Cases*, 2nd Ser. 13).

Where the man who has been found to be the father persistently denies the paternity of the child, but nevertheless offers to take it into his custody at the age when this is usual, it is doubtful if this is an offer which the mother is bound to accept (*Caldwell*, 1773, 5 Sup. 390; *Keay*, 1825, 3 S. 561 (N. E. 387); *Hardie*, 1878, 6 R. 115; Fraser, *P. & C.* 129).

A married woman whose husband had gone abroad and had not been heard of for some years, was found to have a title to sue for aliment of an illegitimate child (*M'Quillan*, 1892, 19 R. 375). See Custody of Children.

It is only the parents of a bastard who are liable to maintain it. A grandfather is not liable. If he does so, he may have a claim for relief against the parish liable (*Nicoll*, 1832, 10 S. 670; *Lumsden*, 1846, 8 D. 1251; Fraser, *P. & C.* 124).

Failing the father and mother, the bastard's claim for aliment is against the parish (Fraser, *P. & C.* 124). See Poor; Settlement.

How long is the Mother entitled to Relief from the Father? —"The general rule in such cases," said L. P. Inglis, "is that the father of an illegitimate child has to contribute one-half to its support till it is the age of seven, and in some cases till the further age of ten. The reason for that rule is that during these years it is proper that the child should be left with its mother, and that it is not able to do anything for its own support. After that age a great deal depends upon the condition of parties; and if the mother chooses to go on keeping the child, without asking for more money or insisting upon the father taking the child, then, if she thinks fit to bring an action for aliment of the child at the end of two or three years, she may be held to be debarred by her conduct from making any such demand. On the other hand, if the father of the child desires to have the custody and charge of the child, then is the time for him to offer to take it; and if the mother does not offer to keep it, the father will have to support it until it is fourteen, or until it is able to do for itself" (*Dunnet*, 1883, 11 R. at 282). As to *mora* as a bar, see *Westlands* (1887, 14 R. 763).

Probably seven is the lowest age at which a father of an illegitimate child can relieve himself of his obligation to contribute by offering to take the child himself (*Westlands, ut supra*).

The mother is not bound to make an offer to give the child to its father when it is seven years old. If he leaves it with her, knowing it cannot support itself, and if she intimates to the father that she holds him liable, his liability continues (*Shearer*, 1877, 5 R. 263).

Duration and Amount of Aliment.—The rule is that the child is entitled to aliment till it is able to support itself. This is a question of circumstances. A common practice is to give decree in the first instance for aliment till the age of seven in the case of boys and ten in the case of girls, reserving the right to make a further application at the expiration of the first period. It is to be observed that the age of seven in boys, as that at which they may be supposed to do something for their own support, was fixed upon at a time when there was more opening for child labour than at present. The Factories Acts and Mines Acts have much restricted the avenues for such labour, and the requirements of the Education Act make it in most cases impossible for a boy of seven to earn anything. See the elaborate opinion of L. Fraser, when Sheriff of Renfrew, in *A.* (1875, *Journal of Jurisprudence*, vol. xix. 165). But as circumstances are so liable to change, seven years is probably a period long enough for which to fix the amount at first. A renewed application may easily be made at the expiration of that period (*Baird*, 1877, *ib.* vol. xxi. p. 525). In *Dunnet* (*ut supra*), the father was held liable to aliment a male child till twelve; and in *Shearer*, *ut supra*, till thirteen years of age. Erskine (i. 6. 56) and Bell (*Prin.* s. 2062) extend the obligation till puberty; and the cases must be few in which a girl under twelve is able to support herself (Bell, *Prin.* s. 2062; M'Glashan on *Aliment*, 68; Fraser, *P. & C.* 127; *Short*, 1795, Mor. 442).

The obligation, apart from special circumstances, falls, at latest, on the child's attainment of the age of puberty. "There is no case in which a parent (whether father or mother) who had launched a bastard into the world, after educating and fitting the child to support itself, has been held liable, upon the child subsequently becoming indigent, to relieve its necessities" (per L. Watson, *Clarke*, 1891, 18 R. (H. L.), at 69). But, as in the case of legitimate children, if the child is unable from bodily or mental infirmity to support himself, his parents are bound to maintain him during his entire life (*Majoribanks*, 1831, 10 S. 79; *Pott*, 1833, 12 S. 183; *Anderson*, 1848, 10 D. 961; Fraser, *P. & C.* 127; Ersk. *Prin.*, 17th ed., iii. 1. 4, Moir's Note; *Oncken's Judical Factor*, 1892, 19 R. 519; *Clarke*, *ut supra*).

The amount of aliment granted is a question of circumstances, and depends on what is the cost of the child's maintenance. In Glasgow the practice is to give £8 a year, payable quarterly in advance. In some counties 2s. 6d. a week, in others 3s., is often granted (Bell, *Prin.* s. 2062; *A.*, 1875, *Journal of Jurisprudence*, xix. 165). Decree will be granted irrespective of the ability of the father to pay, as the claim is simply one of debt (*A.*, 1878, *Journal of Jurisprudence*, xxii. 448). Fraser says the rank of the father is not an element for consideration. More than what is necessary for bare subsistence will not be allowed (*P. & C.* 126). And it rather seems that the position of the mother is also immaterial, and that if she belong to the upper class, and chooses to bring up and educate her child suitably to her own station, she cannot claim from the father more than would be given to a woman in the humbler ranks. The considerations as to the measure of support being relative to the child's position in life, which were advanced by L. P. Inglis in *Smith* (1885, 13 R. 126), do not seem applicable to the case of an illegitimate child, which at its birth does not take the rank of either its father or its mother. (But see *Lamb*, 1842, 5 D. 248: Ivory's Note to Ersk. i. 6. 56; *A.*, 1878, *Journal of Jurisprudence*, xxii. 448).

Claims for Aliment by Ascendants.—The obligation between parents and children is reciprocal, and children are bound to support their paternal and maternal ascendants (Bankt. i. 6. 20; Stair, i. 5. 9;

Ersk. i. 6. 57 : Fraser, *P. & C.* 114 : *Buie*, 1863, 2 M. 208, Liability to Aliment Grandmother).

"In order to support the claim of a father, two things are necessary—first, that the father should be indigent, and second, that the children should have a superfluity after providing for the maintenance of themselves and their own families" (per L. P. Inglis in *Hamilton*, 1877, 4 R. 688.) Here the claim was against a son, whose wages were at most 25s. a week, having a wife and two children to support. In considering the amount to be given, regard will be had to the position of the claimant, and something more than the scale of an allowance to a pauper may be given. But the sum will not exceed a bare subsistence relative to the claimant's position. The wealth of the children is immaterial, provided they are in a position to discharge the obligation. But possibly it may be a reason for granting a larger sum, that the child's wealth has not been gained by his own exertions, but has come to him from his father or some other near relation (*Landers*, 1859, 21 D. 706). In that case it was held that a mother having an income of £60 could not claim additional aliment from a son who had an income of £1500 a year. And in two cases between mothers and their children, £40 a year has been regarded as a reasonable sum to allow to ladies unaccustomed to earn money by their own work (*Thom*, 1864, 3 M. 177; *Foulis*, 1887, 14 R. 1088). Sons and daughters are equally liable: and in the case of a daughter it makes no difference that she is married, if she has separate estate (*Foulis, ut supra*). A son-in-law married since the Married Women's Property Act, 1877, is not liable to aliment his wife's indigent parents beyond "the value of any property which he shall have received from, through, or in right of his wife, at, before, or subsequent to the marriage" (*M'Allan*, 1888, 15 R. 863). See Antenuptial Debts of Married Woman.

But the father's estate or his representatives may be liable before the children for the aliment of their mother (see *infra, Aliment ex jure Representationis*, and *Aliment to Indigent Widow*; Fraser, *P. & C.* 114; *M'Culloch*, 1778, 5 Br. Sup. 376).

It has been held in two Outer House cases that a child against whom an action for aliment was raised, could not insist on its being dismissed on the plea that there were other children able to discharge their share of the obligation, and that these had not been called (*Duncan*, 1882, 19 S. L. R. 696; *Dear*, 1896, 3 S. L. T. No. 379; see *Hamilton*, 1877, 4 R. 688). The obligation transmits to the children's representatives (*Buchanan*, 21 Jan. 1813, F. C.; *Muirhead*, 1849, 11 D. 1262, and 12 D. 356).

A parent, as has been seen, may in general implement his obligation by an offer to take the child into his own house. But the converse does not hold good. If the parent is unwilling to live in the child's family, he must, as a general rule, be provided with a separate maintenance. But this is a question of circumstances: and if the child's means are very small, such an offer may be regarded as a sufficient implement of the duty (*Greig*, 1817, Dunlop, *Parochial Law*, 372, n. 5; *Jackson*, 1825, 4 S. 186; *White*, 1829, 7 S. 567; *Heritors of Ettrick*, 1824, 2 S. 715; *Buie*, 1863, 2 M. 208; Fraser, *P. & C.* 94).

A bastard child is not liable to aliment either his mother or his putative father (*Clarke*, 1891, 18 R. (H. L.) 63). As there is no duty to aliment a brother, so, *à fortiori*, there is none to aliment an uncle or other collateral ascendant.

Aliment ex jure Representationis.—An eldest son who has succeeded to a "competent estate" is bound to aliment his younger brothers and

sisters if they are unprovided for (*M'Intosh*, 1868, 7 M. 67; *Netherlie*, 1663, Mor. 415; Stair, i. 5. 10; Ersk. i. 6. 58, *Prin.* iii. 1. 4; Fraser, *P. & C.* 107; see *Howard's Executor*, 1894, 21 R. 787). The rule applies where the succession was to moveables, and by a will (*Thomson*, 1678, Mor. 419; *Scot*, 1759, Mor. 440 and App. (*v.* Parent and Child, 1); Ivory, *Note on Ersk. l.c.*; Fraser, *P. & C.* 108). It applies to a half-brother consanguinean (*Fraser*, 1663, Mor. 415); and a son or daughter who succeeds to a mother is, as representing her, liable to aliment other children who are unprovided for (*Scot, ut supra*; *Thomson, ut supra*). Where this liability *ex jure representationis* exists, the heir is liable before persons, *e.g.* the mother, whose liability is only *super jure naturæ* (*Douglas*, 1739, Mor. 425). But when the estate is small and the widow well provided for, she may be bound to contribute (*Bissets*, 1748, Mor. 413). The liability transmits against the trustees or general representatives of the person liable *ex debito naturali* (*Spalding Trs.*, 1874, 2 R. 237; Fraser, *P. & C.* 107; M'Laren on *Wills*, ii. 1162).

In one case where a landed estate had passed to two distant collateral relations, these were found liable to aliment the mother and maternal grandmother of the deceased proprietor (*Buchanan*, 21 Jan. 1813, F. C.). And it is thought that the heir to a considerable estate, however distantly he may be related to the deceased, would be bound to aliment the latter's children (Fraser, *P. & C.* 109; see *Howard's Executor*, 1894, 21 R. 787).

The doctrine would, probably, not be carried further. Aliment cannot be claimed on the ground that the claimant's grandfather possessed the estate, and that the heir represents him (*Seaton & Paterson*, 1761, Mor. 429; see *Anderson & Gibson*, 1754, Mor. 427; *Duncan*, 28 Feb. 1809, F. C.; *Clark*, 1799, Mor. App. "Aliment," 2; *Stuart*, 1848, 10 D. 1275).

It is based upon the fact of representation; and as an heir of entail does not represent his predecessor, he incurs no liability on this ground. So it has been held that an heir of entail was not bound to aliment his brothers and sisters (*Fletcher*, 11 July 1838, F. C.; *Jackson*, 1836, 15 S. 313: see Ersk. iii. 8. 51; Fraser, *P. & C.* 111; M'Laren on *Wills*, ii. 1162). But of course the fact that the heir takes under an entail will not remove his liability to aliment his own relations where he is liable *ex jure natura* (*Muirhead*, 1849, 11 D. 1262, 12 D. 356).

The heir's liability to aliment his brothers ceases at their majority, or even when they become minors, if the heir's means are such as to make it unreasonable that he should support his brothers. But the obligation continues if, from bodily or mental infirmity, they cannot maintain themselves (*Thomson*, 1678, Mor. 419; *Hastie & Ker*, 1671, Mor. 416; *Don*, 1697, Mor. 420; *Seatons*, 1764, Mor. 431). As to sisters, if the estate is sufficient, and they are of a rank in which it is unusual for them to earn their own livelihood, the heir is liable to aliment them till their marriage. A married sister has no claim against her brother for aliment (*Maxwell*, 1711, Mor. 423). In the humbler ranks, the obligation ceases when the sisters are of an age to support themselves (*Douglas*, 1739, Mor. 425; *Bissets*, 1748, Mor. 413; *Dalziel*, 1788, Mor. 450; *Fletcher*, 1696, 4 Sup. 294; *M'Rostie*, 1818, Hume, 9; Ersk. i. 6. 58, *Prin.* iii. 1. 4; Fraser, *P. & C.* 111).

As the obligation is not a natural one, if it has once ceased, or been satisfied or discharged, it does not again revive by the claimant's falling into destitution (*Strathmore Trs.*, 1825, 1 W. & S. 402; *Stuart*, 1848, 10 D. 1275; More, *Notes on Stair*, p. xxxix.; Ersk. *Prin.* iii. 1. 4, editor's note). Mr. More's statement that, in a question with the parish, the representatives would still be liable, seems contrary to principle. As to claim of widow, see *infra*.

Wife's Claim to Aliment from Husband.—The husband is bound to aliment the wife while she is living with him, and while she is living apart, if he has been guilty of adultery, or cruelty, or has deserted her, or if the conjugal cohabitation was broken up with his consent (Stair, i. 4. 10; Ersk. i. 6. 19; Fraser, *H. & W.* i. 836). For wilful neglect, whereby she becomes chargeable to a parish, he is liable to imprisonment (8 & 9 Vict. c. 83, s. 80.). Unless there is a contract of voluntary separation, which bears *in gremio* an admission of adultery or cruelty, the wife's demand is validly met by a *bonâ fide* offer to take her back (*Arthur*, 1769, 2 Pat. 184; *Hood*, 1871, 9 M. 454; *Paterson*, 1861, 24 D. 215; *Crombie*, 1868, 6 M. 776). The wife's claim during the cohabitation is only for *necessaries*, and the husband is the sole judge as to the style in which they shall live (Fraser, *H. & W.* i. 614, and i. 55; *Manby*, 1 Mod. 138; 2 *Smith's Leading Cases*, 9th ed., p. 466; *Waithman*, 1807, 1 Camp. at p. 121. But the Court may find the husband liable for *necessaries* for his wife, though he has been unwilling to supply them, *e.g.* the expenses of going to a watering place recommended by physicians as a course necessary for the wife's health (*Kinfauns*, 1711, Mor. 5882). Where the wife is living apart on account of the husband's misconduct, or with his consent, the husband is liable for necessaries suitable to his position supplied to her (Fraser, *l.c.* and i. 848: Ersk. i. 6. 26; *Buie*, 1827, 5 S. 464, and 1831, 9 S. 923; *Bazeley*, 1868, L. R. 3 Q. B. 559). But the husband is not liable if the wife have sufficient means of her own (Fraser, i. 639; *Johnston*, 1858, 3 H. & N. 261), or if he pay her a suitable allowance (see *Auchinleck*, 1675, Mor. 5879; *Robins*, 1688, Mor. 5955), or one to which she has agreed at the separation (*Eastland*, 1878, 3 Q. B. D. at 436; *Hunt*, 1829, 5 Bing. 550: Fraser, i. 640); or if she have agreed to support herself (*Biffin*, 7 H. & N. 877). And in England it is settled that the wife cannot pledge the husband's credit if she have been guilty of adultery, whether this be known to the tradesmen who supply her or not (*Govier*, 1796, 6 T. R. 603; *Harris*, 1801, 4 Esp. 41; *Cooper*, 1859, 6 C. B., N. S., 519. See Fraser, i. 644; but see *Crichton*, 1561, Mor. 5877; and *Logan*, 1561, *ib.*).

Aliment Pendente lite.—Where a wife has raised an action of divorce or separation against her husband, she is not to be expected to continue to live with him during the action. Accordingly, if she have a good case *ex primâ facie*, and have no means of her own, an order for interim aliment will generally be granted to her (Fraser, i. 851; *Macfarlane*, 1844, 6 D. 1220, and 10 D. 962; *Borthwick*, 1848, 10 D. 1316, note). Where the wife is defender, she is also entitled to aliment *pendente lite*, however strong the case against her may appear (*Cook*, 1700, Mor. 5905; *Ritchie*, 1874, 1 R. 826; *Hoey*, 1883, 11 R. 25). But a mandatary for the husband is, apparently, not liable to pay the interim aliment awarded as a condition of insisting in the action (*Webster*, 1896, 3 S. L. T. No. 396).

A wife who is pursuing an action of nullity of marriage will be entitled to aliment *pendente lite* if a ceremony of marriage is proved or admitted, or she had other reasonable grounds for supposing the marriage to be valid (*S.*, 1884, 9 P. D. 80; *Langworthy*, 1886, 11 P. D. at p. 86. But see Fraser, i. 851).

If she is defender in such an action, she is generally entitled to aliment (*Ballantyne*, 1866, 4 M. 494; Fraser, i. 850). In an action of declarator of marriage at the woman's instance, she may get an order for aliment if she produce *primâ facie* evidence of marriage (*Sassen*, 20 Jan. 1819, F. C., 1826, 2 W. & S. 309; *Browne*, 1843, 5 D. 1288; *Fleming*, 1858, 21 D. 179; Fraser, i. 846).

Aliment after Decree of Separation.—A wife after decree of separation, even for her own fault, is, as a general rule, entitled to such a yearly aliment as will enable her to live suitably in the station which she occupies in virtue of her husband's position. The amount of aliment is eminently a matter of discretion in the particular circumstances, and the Court will be slow to bind itself by any fixed rules. From one-fourth to one-third of the husband's income is often given. It is very unusual to give more than one-third (*Lang*, 1868, 7 M. 24; *Scott*, 1894, 21 R. 853). The Court will be inclined to accept a sum previously agreed on by the spouses themselves in a contract of voluntary separation (*Thompson*, 1890, 17 R. 1091; *Scott*, *ut supra*). The amount originally fixed by the Court may be varied on proof of change of circumstances (*Symington*, 1874, 1 R. 871; *Hay*, 1882, 9 R. 667; *Stewart*, 1887, 15 R. 113; *Scott*, *ut supra*). A wife who has adequate separate estate is not entitled to aliment (*Pitt*, 1861, 24 D. 1444; *M'Farlane*, 1844, 6 D. 1220, and 10 D. 962; see *Milne*, 1885, 13 R. 304; Fraser, i. 859).

It may be an element for consideration, that the wife is capable of earning money, and has been in the habit of doing so. But the Court will not expect a woman who had never worked for money before the decree, to take to some occupation in order to lessen the burden on the husband (*Alexander*, 1849, 12 D. 117; *Goodheim*, 1861, 2 S. & T. 250; Fraser, i. 860).

Aliment after Divorce to Wife who has Custody of Children.—A divorced wife has no claim for aliment for herself, and a wife who has divorced her husband has a claim not for aliment, but for her legal provisions. See Divorce. But a wife in whose custody the children of the marriage are left, is entitled to aliment, to be expended in their maintenance and education (*Dunn*, 1842, 4 D. 454; see Conjugal Rights Act, 1861, s. 6). If the order is made under the powers given by this section, it falls *quoad* each child when it attains minority (*Watson*, 1895, 33 S. L. R. 150).

Permanent Aliment to indigent Widow from Husband's Estate.—It may happen that a husband dies possessed of considerable estate, and yet that the widow's legal provisions are so small as not to afford her a decent maintenance. In such a case it is in the discretion of the Court to award her an additional aliment (*Lowther*, 1786, Mor. 435, Hailes, ii. 1012; *Thomson*, 1778, Mor. 434; *Harvie*, 1828, 6 S. 1144, and 7 S. 305; *M'Conochy*, 1830, 8 S. 604; *Hobbs*, 1845, 7 D. 492; Fraser, ii. 968). Such additional aliment will not be granted unless there is a great disproportion between the heir's income and the income from the widow's share. It will be a payment out of income. The Court will not order the heir or next of kin to divest themselves of part of the capital of the estate in favour of the widow. The criterion of the amount of additional aliment to be granted is not the widow's income, but the amount of the total income of the estate (*Howard's Executor*, 1894, 21 R. 787). The claim will be barred by the wife's having accepted a provision under an antenuptial marriage contract (*Countess of Seafield*, 8 Feb. 1814, F. C.; Ersk. i. 6. 41, note). But not by a renunciation in a postnuptial contract if the provision be inadequate (*Lee*, 1840, 3 D. 317). It would seem that an indigent widower has a similar claim (*Lowther*, 1786, Hailes, ii. 1012; Fraser, ii. 969).

Liability of Wife to Aliment Children or Husband.—A wife with separate estate is bound to aliment her children, if her husband is incapable of doing so (Ersk. i. 6. 56; More, *Notes*, xxix; Fraser, *P. & C.* 86).

It is thought, however, that she is not bound to contribute to the expenses of the household when the husband's means, though small, are sufficient to supply her and the children with the necessaries of life (see *Fingzies*, 1890, 28 S. L. R. 6: and cp. *Hodgens*, 1837, 4 C. & F. 323; *Coleman*, 1881, 6 Q. B. D. 615; Walton, *H. & W.* 265. But see Fraser, i. 837.

It would seem that a wife has no liability to aliment her husband (see *Fingzies, ut supra*).

Aliment of Widow till first Term after Husband's Death.—In a question with her husband's representatives, but not in competition with his creditors, a widow is entitled to aliment from the death of the husband till the first term at which her provisions, legal or conventional, become payable. The theory is that she is entitled to keep up the husband's establishment until the term following his death, and she will, accordingly, get aliment, although she have means of her own (*Ormiston*, 1708, Mor. 5909; *Moncrieff*, 1712, Mor. 5915; *M'Intyre*, 1865, 3 M. 1074; *Palmer*, 27 June 1811, F. C.; *Buchanan*, 1822, 1 S. 322 (N. E. 299); Ersk. i. 6. 41; Fraser, ii. 965). The claim is not renounced by a general clause accepting provisions in lieu of all legal rights (*Palmer, ut supra*), but it is impliedly renounced by acceptance of the liferent of the whole residue of the husband's estate (*De Blonay*, 1863, 1 M. 1147; *Hadaway*, 1830, 8 S. 800).

Aliment of Fiar by Liferenter.—The Act 1425, c. 25, ordains that, where lands fall in ward or are "*given in conjunct fee or liferent as well to burgh as to land*," the Sheriff shall take surety that the ward superior shall not waste the subjects. The Act further provides, "and an reasonable living to be given to the sustentation of the air, after the quantitie of the heritage, gif the said air has na blanche ferme, nor feu ferme land, to susteine him on, alsweil of the ward lands that fallis to our Soveraine Lordis Lands, as onie uther baronne, spiritual or temporal." By interpreting the last clause as if, like the first, it applied to liferenters as well as to wardatars, it was held in a number of cases (Mor. 381–409) that a liferenter is burdened with the support of an heir who has no other means of subsistence. The doctrine is attacked by Mackenzie (*Observations on Act* 1491, p. 101, vol. i. 226 of ed. of 1716); but is not doubted by Erskine (ii. 9. 62, 63). In *Maule* (1825, 1 W. & S. at 294), it was characterised by L. Redesdale as "the most monstrous misconstruction of an Act that was ever brought under the view of a Court of justice." In addition to the argument on the intention of the Act, is the consideration that the fiar may raise money upon the estate which is vested in him, and is not, therefore, destitute. (See *Woolley*, 1818, 6 Dow, 257.)

According to the old decisions, the doctrine never applied to the liferenter of a sum of money (*Marrie*, 1731, Mor. 397); nor to an annuitant (*Stewart*, 1780, Mor. 398, Hailes, 861); nor where the fiar had renounced the succession and had taken the estate by a singular title (*Lyon*, 1712, Mor. 383); nor after he had sold the land (*Sandilands*, 1700, Mor. 385). No attempt seems to have been made to set up the doctrine since *Maule's* case, and it is probably no longer law (Bell, *Prin.* s. 1065).

Jurisdiction in Questions of Aliment.—The Court of Session has, no doubt, jurisdiction to grant interim aliment to a wife when the spouses are resident but not domiciled in Scotland. This is upon the principle that the wife must not be allowed to starve until her right to live separate can be determined by the Court (Fraser, ii. 1295; per L. Mackenzie in *Ringer*, 1840, 2 D., at 316; Walton, *H. & W.* 448). It is at present undecided whether the Court may not have jurisdiction to grant a separation although

the husband's domicile is not within the territory. If this should be held, the right to decree permanent aliment will, of course, follow. (See Fraser, ii. 1294; *Niboyet*, 1878, 4 P. D. per L. J. Cotton, at 21; *ib.* per L. J. Brett, at 19; *Le Mesurier* [1895], A. C., per L. Watson, at 527 and 531; Westlake, *Priv. Int. Law*, 81; Bishop, *Marriage and Divorce*, ii. 69; Walton, *H. & W.* 446).

Jurisdiction of Sheriff.—In cases as to the aliment of children, legitimate or illegitimate, or of ascendants, the Sheriff is competent, for no question of status is raised. In cases between husband and wife, the wife's claim generally depends upon her right to live separate from her husband. This is a consistorial question, and the power of the Sheriff is limited to making an interim award pending its determination by the Court of Session. This power exists only when the parties are *de facto* separate, and the marriage is admitted (*Smith*, 1874, 1 R. 1010; *M'Donald*, 1875, 2 R. 705; *Benson*, 1854, 16 D. 555; *M'Leod*, 1893, 1 S. L. T. Nos. 284, 385. In Sheriff Court, *Murphy*, 1883, *Journal of Jurisprudence*, xxvii. 441; *Niven*, 1877, *Journal of Jurisprudence*, xxi. 523; *M'Aulay*, Guthrie, *Select S. C. Cases*, ii. 16).

[Stair, i. 4. 10, i. 5. 7 *et seq.*: More, *Notes*, xxiii.–iv., xxix. Bankt. i. 6. 4, i. 6. 13 *et seq.*; Bell, *Com.*, 7th ed., i. 680–1, i. 58–9; Bell, *Prin.* ss. 1538, 1545, 1620, 1629, 2062, 1065; Ersk. i. 5. 26, i. 6. 19, i. 6. 41, i. 6. 56, 57, 58, ii. 9. 62, iii. 3. 29; Fraser, *P. & C.* 85 *et seq.*; *H. & W.* i. 837 *et seq.*, 905, 912, 965 *et seq.*, 1463; M'Glashan on *Aliment*; Guthrie Smith, *Poor Law*, 255 *et seq.*; Dunlop, *Parochial Law*, 369 *et seq.*: Dickson on *Evidence*, s. 163; Walton, *H. & W.* 100 *et seq.*, 264 *et seq.*, 448.] See Poor; Settlement; Custody of Children; Forisfamiliation; Donation; Married Woman.

Aliment (in Bankruptcy Law).—1. *Aliment to Bankrupt.*—Under the Bankruptcy Act, 1856 (19 & 20 Vict. c. 79), the creditors on a sequestrated estate may, by a majority of four-fifths in value present at the meeting, authorise payment of an allowance to the bankrupt from the estate (s. 78). This may be done either at the meeting for election of the trustee, or at the meeting held after the bankrupt's examination, or at any meeting called for the purpose (*ib.*). The maximum is £3, 3s. per week (*ib.*). The duration of the allowance is until the period assigned by the Act for the second dividend, namely, ten months after the first deliverance (ss. 78, 131). Where the sequestration is that of a partnership, an allowance may be made to each partner (s. 78). It is essential to the validity of an allowance that the bankrupt shall have complied with the provisions of the Act (*ib.*). A special and additional allowance may be made by the Lord Ordinary on the Bills or the Court, on application by the trustee, provided that a majority of the creditors present at a meeting have resolved that it is for the interest of the estate, and that the Accountant of Court has reported in favour of it (*ib.*). The Act does not assign any limit to this special allowance, either in respect of duration or amount. The creditors cannot sanction the employment of the bankrupt to discharge duties falling within the scope of the ordinary management of the trustee (*Turner*, 1822, 1 S. 444). [Goudy on *Bankruptcy*, 372, 316; Bell, *Com.*, 5th ed., ii. 435; Kinnear on *Bankrupcty*, 101.]

2. *Alimentary Debts in Bankruptcy.*—An obligation for a periodical alimentary payment falls to be valued and ranked for in the sequestration (*Downs*, 1886, 13 R. 1101; *Webster*, 1886, 24 S. L. R. 67). A claim by the mother of an illegitimate child for aliment against the father, is valued and ranked as a contingent claim under s. 53 of the Bankruptcy Act, 1856 (*Downs, ut supra*).

It is not settled how far alimentary debts, or debts arising *ex jure naturæ*, are affected by the debtor's discharge in bankruptcy (*Majori-*

banks, 1831, 10 S. 79; *Downs, ut supra*; see *Tulloch*, 1847, 9 D. 582).—[Bell, *Com.* i. 688; Goudy on *Bankruptcy*, 190, 193, 405, 427.]

3. *Alimentary Funds belonging to Bankrupt* do not pass to the trustee in sequestration or cessio (Bell, *Com.* i. 124–5; Goudy on *Bankruptcy*, 269, 385, 484). But if the fund exceeds a reasonable provision, taking into account the bankrupt's circumstances in life, it is, to the extent of the excess, available to his creditors, and may be claimed by the trustee. Thus, in the case of the younger son of a landed proprietor, an alimentary income of £860 was held to be attachable *quoad* the excess above £500 (*Livingstone*, 1886, 14 R. 43). Where the bankrupt is in possession of a salaried office at the date of sequestration, as, *e.g.*, a minister or a professor, the trustee cannot claim more than the excess above a *beneficium competentiæ*, the amount of which depends on circumstances (*Laidlaw*, 1801, Mor. App. *voce* "Arrestment" No. 4; *A. B.*, 1824, 3 S. 133; *Learmonth*, 1858, 20 D. 418; *Moinet*, 1833, 11 S. 348). Government pay, half-pay, salaries, emoluments, and pensions can only be made available through the medium of a petition by the trustee to the Lord Ordinary on the Bills, or the Sheriff, for an order recommending the head of the Department in question to pay a portion of the salary or pension, etc., to the trustee (19 & 20 Vict. c. 79, s. 149). An order so granted may be subsequently recalled or varied. A salary or pension paid by the Treasury is not subject to this provision (*Latta*, 1857, 19 D. 1107). The petition will be refused when the salary, etc., does not exceed a *beneficium competentiæ* (*Scott's Tr.*, 1885, 12 R. 540).

[Bell, *Com.* i. 126, ii. 129–30; Goudy on *Bankruptcy*, 384–5.]

Alimentary Interest.—Where it is desired to protect a beneficiary against his own improvidence, this can be done, where a trust has been created by another than the beneficiary, by declaring the interest of the beneficiary in a periodic payment out of the trust estate to be alimentary. A valid alimentary interest can only be created in a periodic payment out of a capital sum, and a trust must be created to protect that capital sum. A direct gift of a capital sum, with a declaration that the interest of the donee therein shall be only alimentary, is, in the case of moveable estate at least, held to be an unconditional gift of the capital. A donor cannot derogate from his gift, and the condition expressly attached to the gift is therefore held void for repugnancy (as to the effect of declaring *legitim* alimentary, see *Wishart*, 1895, 3 S. L. T. No. 42). To support the alimentary condition of the gift, a trust must be created. The alimentary condition then prevents the beneficiary assigning his interest by anticipation for other than alimentary considerations, and the fund, which is the source of the alimentary interest, is protected from dissipation by the title of the trustees. "It has long been settled that the Court will not supply the means for restricting the rights of legatees. If there is a trust constituted for the special purpose, and the trust fails, the Court will supply the deficiency by the appointment of new trustees or a judicial factor, but the Court will not set up a trust to protect a legatee against himself, unless it is clear that the settler has directed the constitution of such a trust" (*Murray*, 1895, 22 R. 927, per L. M'Laren, at 941).

For the purpose of rendering the interest of the beneficiary unassignable in anticipation by him, and unattachable by the diligence of his ordinary creditors, the use of the word alimentary, without any qualification, has been held to be quite sufficient, it being a word "which, according to high authority, has a very comprehensive effect" (*Reliance, etc., Society*, 1891, 18 R. 615, per

L. M'Laren, at 622). The word "alimentary" is not, however, necessary, nor are any special terms of art, if the purpose of the truster be sufficiently declared (*Chambers' Trs.*, 1875, 5 R. (H. L.) 151, per L. Hatherley, at 156, and per L. Blackburn, at 163; cp. expressions in *Nairn, etc.*, 1893, 1 S. L. T. No. 65). Where the interest is declared alimentary, the qualification operates as a conventional incapacity of the beneficiary, restraining him from, by depriving him of the power of assigning, either gratuitously or onerously, his interest, as far as unrealised. It is only the prospective assignation that is struck at. "An alimentary annuity cannot be validly assigned, but each term's annuity, when reduced into possession, is, of course, at the absolute disposal of the owner" (*Herats*, 1881, 9 R. 195, per L. J. C. Moncreiff, at 181). This conventional incapacity of an alimentary beneficiary prevents him discharging his interest by anticipation, and so bringing to an end the trust administration. The rule has "long been settled" that "the combined action of all parties interested cannot defeat the settler's intention to make the annuitant's right alimentary, a result which cannot be attained except by continuing the trust" (*Hughes*, 1892, 19 R. (H. L.) 33, per L. Watson, at 35; cp. *Cosens*, 1873, 11 M. 761, and *Sanders*, 1879, 7 R. 157). Even when the alimentary beneficiary becomes vested with the fee on which his alimentary interest is a burden, the incapacity still remains, and he cannot do more than appoint the fee (*Barron*, 1887, 24 S. L. R. 735; *Duthie's Trs.*, 1878, 5 R. 858). He may make this appointment, however, for a present consideration, and so improve his position financially during his lifetime (*Eliott's Trs.*, 1894, 21 R. 975, per L. J. C. Macdonald, at p. 979). A fee burdened with an alimentary interest has been released from the trust administration, on the alimentary interest being made a real burden on the fee, and the real burden so created being held in trust for the alimentary beneficiary (*Munro, etc.*, 1878, 16 S. L. R. 126). The distinguishing feature of this arrangement is the retention of the alimentary interest in the hands of the trustee (*White's Tr.*, 1877, 4 R. 786; *Smith*, 1873, 10 S. L. R. 433). It is a moot question whether an alimentary interest can be discharged with the consent of the truster (see discussion in *Eliott's Trs.*, 1894, 21 R. 975). As the alimentary qualification renders the interest not only non-assignable, but also non-attachable by creditors, the alimentary beneficiary must be other than the truster himself. "I know of no authority or precedent," says L. J. C. Moncreiff, "either here or in England, for holding that a man of full age and *sui juris* can put his property out of his power, and beyond the reach of his creditors, without constituting at the same time some right, direct or contingent, in regard to that property in another" (*Hamilton's Trs.*, 1879, 6 R. 1216, at 1221). The only exception is the case where a woman, under her marriage contract, creates an alimentary interest in her own favour in property derived from herself. Such an interest is protected by the marriage contract *stante matrimonio* (see MARRIAGE CONTRACT). An interest is only protected by the alimentary qualification in so far as it is a reasonable allowance for aliment in the circumstances. "It is fixed in our law," says L. Mackenzie, "that a party can make an alimentary provision not alienable. But there must be some limit to this power. A party cannot leave to another £20,000 a year, and render it inalienable by calling it alimentary" (*Paterson, etc.*, 1849, 21 Sc. Jur. 125, at 127. For examples of sums held to be inordinate alimentary allowances, see cases of *Hamilton's Trs.*, 1879, 6 R. 1216; *Livingstone*, 1886, 14 R. 43; *Haydon*, 1895, 3 S. L. T. No. 286). Owing to the nature of the beneficiary's interest in the fund, it does not pass on his

bankruptcy to his trustee in bankruptcy. His alimentary creditors have an exclusive claim to it, in so far as the interest is a properly alimentary one. The trustee in bankruptcy can only acquire the beneficiary's interest in the alimentary fund by buying up the claims of the strictly alimentary creditors (*Corbet, etc.*, 1879, 7 R. 200, per L. Shand, at 211). What is in excess of a proper alimentary interest, of course, falls into the hands of the trustee in bankruptcy.—[See generally, Ersk. iii. 5. 2, and iii. 6. 7.]

Alioqui successurus.—Where the heir of the last proprietor succeeds to his property under a different character, he is *alioqui* (or, *alioquin*) *successurus*. Where he takes up the succession as the heir of the last proprietor, he takes responsibility for the debts of his ancestor, at least to the extent of the succession (37 & 38 Vict. c. 94, s. 12). Where, however, he is *alioqui successurus*, he takes the succession free from responsibility for the debts of the last proprietor. Thus, in the ordinary instance of son succeeding father in an entailed estate, the son makes up his title as heir under the entail, and not as heir of his father, and incurs no liability for his father's debts, beyond those authorised by the deed of entail to be charged on the estate. In all cases where the heir of the last proprietor is *alioqui successurus*, the extent of his liability is defined by the title under which he takes, and not by the obligations of the last proprietor. It has been lately decided that the heir of a tenant does not, on taking up the lease as heir under the destination of the lease which excluded assignees and subtenants, incur responsibility for the previous tenant's obligations (*Bain*, 1896, 3 S. L. T. No. 439).

Alkali Works.—The Alkali, etc., Works Regulation Act, 1881 (44 & 45 Vict. c. 37), provides that alkali works shall be carried on so as to ensure the condensation of any noxious gases (s. 3), and that the best practicable means shall be used for preventing the discharge of noxious and offensive gases in alkali works, sulphuric acid works, chemical manure works, gas liquor works, nitric acid works, sulphate of ammonia works, muriate of ammonia works, chlorine works, or works in which chlorine bleaching powder or bleaching liquor is used (ss. 3, 48, 29, and Schedule). By the Alkali, etc., Works Regulation Act 1892 (55 & 56 Vict. c. 29), alkali waste works, barium works, strontium works, antimony sulphide, bisulphate of carbon, venetian red works, lead deposit works, arsenic works, nitrate and chloride of iron works, muriatic acid works, fibre separation works, tar works, and zinc works are also included. Every work in which acid is produced or used must be carried on so that the acid does not come in contact with alkali waste, or the drainage therefrom, so as to cause a nuisance (s. 5). If alkali waste is deposited or discharged, the best practicable means must be taken to prevent a nuisance (s. 6). Contravention of any of the above provisions entails a penalty. Local authorities, at the expense of the owners of works, must construct drains to carry off acid, where such is discharged (s. 5). The works above specified must be registered, and a certificate of registration must be obtained every year (s. 11). The Secretary for Scotland appoints inspectors and a chief inspector, who have power to enter and inspect the works dealt with in the Act (ss. 14, 16, and 17), and 48 & 49 Vict. c. 61. A local authority, on a written representation of any of their officers, or of any ten inhabitants of their district, may complain to the Secretary for Scotland

in regard to any works which contravene this Act or cause a nuisance. The Secretary for Scotland may direct proceedings to be taken (s. 27).—[Alkali, etc., Works Regulation Act, 44 & 45 Vict. c. 37; Skelton, *Handbook of Public Health*, 239; Broun on *Nuisance*, 187; Alkali, etc., Works Regulation Act, 1892, 55 & 56 Vict. c. 29.] See NUISANCE.

Allegiance.—The bond between the sovereign and his subject (Skene, *de Verb. Sig.*, *voce* "Ligeantia"; Du Cange, "Ligius," etc., "Ligeancia"), and hence "a true and faithful obedience of the subject due to his sovereign." (Coke, quoted by Broom, *Const. Law*, 25, ep. 3, 8; Blackstone, *Com.* bk. i. ch. 10; Stephen, *Com.*, 12th ed., ii. 398; Kent, *Com.*, 13th ed., ii. 39). *Natural* allegiance is that which is due by a natural-born subject (Hume on *Crimes*, i. 534; Blackstone, Stephen, Broom, *ut supra*, Kent, ii. 42. See ALIEN; NATIONALITY; TREASON.) The name *acquired* allegiance (*Ligeantia acquisita*) has been applied to the allegiance due by persons who become subjects by DENISATION or NATURALISATION (*q.v.*; Blackstone, Broom, *l.c.*). *Local* allegiance is temporary. It is due by aliens while they reside in British territory (Bell, *Prin.* s. 2133; Hume, i. 535; Blackstone, *ut supra*; Stephen, ii. 403; Kent, ii. 64; Broom, 9). In certain cases the duties of allegiance are *expressly* undertaken by an OATH (*infra*). Prior to the passing of the Naturalisation Act, 1870 (33 & 34 Vict. c. 14), natural allegiance was perpetual and indefeasible, and could not be severed or altered by "anything but the united concurrence of the Legislature" (Blackstone, Hume, etc., *ut supra*); but now, subject to the provisions of this Act, a British subject may renounce his allegiance to the British Crown (Nelson, *Private International Law*, pp. 47 and 56). Cases of conflict arising from double allegiance must be dealt with by the royal prerogative or diplomatic negotiation.—[Hume, *loc. cit.*; Stephen, ii. 402, n. (*c*); Forsyth, *Cases and Opinions on Constitutional Law*, pp. 262, 333; Wheaton's *International Law* (3rd ed., Boyd), p. 238, etc.; Bar's *Private International Law* (Gillespie's *tr.*), 2nd ed., 192; Cockburn, *Nationality*; Report of Naturalisation Commission, 1869.]

Allegiance, Oath of. — A simple form of the oath of allegiance is prescribed by the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72). It is as follows:—

> I, *A. B.*, do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, her heirs and successors, according to law. So help me God."

See OATHS; AFFIRMATION.

Allenarly (All, *adv.*, and anerly = singly: alone, solely, merely, Dr. Murray's *New Dictionary*).—The word is used in connection with the conveyance or reservation of liferents of heritable estate. Upon the principle that the fee of an estate cannot be *in pendente*, it was finally settled in *Frog's* case, 1735 (*Ross*, L. C. 3 L. R. 602; followed in *M'Clymont's Exrs.*, 1895, 22 R. 411), that a conveyance to "A. in liferent, and his children *nascituri* in fee," is truly a conveyance of the fee to A. Where, however, the word "allenarly" is introduced, or its synonym "only," so that the disposition runs: "To A. in liferent allenarly and his children *nascituri* in fee," then A.'s right is restricted to a liferent, and there vests in him a fiduciary fee for the children yet unborn (*Newlands*, 1794: *Ross*, L. C. 3 L. R. 634; *Camstie's Trs.*, 1876, 3 R. 921). In the latter of

these cases Lord Ardmillan said: "I read the word as creating a very marked and stringent limitation of the word 'liferent,' as meaning 'only a liferent,' a 'mere liferent,' or, still more accurately, 'a liferent and nothing more,' which is, I think, the true meaning of the expression."

Allies, Fighting against King's, Is punishable as an adherence to the king's enemies (Hume, i. 529; Alison, i. 613; Macdonald, 230).

Building, or offering to build, commissioning, equipping, or despatching a ship to be used against a friendly State, is a crime (33 & 34 Vict. c. 90, s. 8), unless ordered before war; and when neutrality proclaimed, information and security given, and means taken to prevent breach of neutrality (*ib.*). The same applies to increasing the warlike force of ship (*ib.* s. 10); or being active in the preparation of, or being employed in, any sea or land expedition (*ib.* ss. 11, 12).

Allocation of Seats.—See Church.

Allodial.—By the expression "allodial" property is meant property enjoyed by the owner of it independent of a superior (Ersk. *Prin.* ii. 3. 4). Moveable goods are allodial; and under allodial property there also fall to be included:—(*a*) Crown property, including the superiority of the lands belonging to subjects in property, the rights reserved to the Crown out of lands feued to subjects, *e.g.* mines of gold, salmon fishings, etc., the sovereign's lands, castles, strongholds, and palaces (*Menzies*, 516; Bell, *Prin.* ss. 668 *et seq.*); (*b*) The principality of Scotland, consisting of lands belonging to the sovereign's eldest son, as Prince and Steward of Scotland, and to the sovereign when there is no prince (Menzies, 516; Bell, *Prin.* s. 674); (*c*) Church property, consisting of churches, churchyards, manses, and glebes, to which a title is vested by the designation of the presbytery (Menzies, 516; Duncan, *Parochial Eccl. Law*, 386); (*d*) udal property, comprehending those lands within the islands of Orkney and Shetland which have not been feudalised by the proprietors of them obtaining a charter from the Crown; but lands in Orkney and Shetland, feudalised by charter and sasine from the Crown, are subject to the ordinary feudal principles, with the exception of church lands not exceeding £20 Scots of valued rent, which, under 1690, c. 32, are appointed to be held by the udal right (Menzies, 516); and (*e*) lands acquired under sec. 80 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 19) (*Magistrates of Inverness*, 1893, 20 R. 551; and see *Magistrates of Elgin*, 1884, 11 R. 950). After stating that allodial is that whereby the right is without recognisance or acknowledgment of a superior having a real right in the thing, Stair says (ii. 3. 4): "Now there remains little allodial; for lands holding feu, or blench, or burgage, or lands mortified, are not allodial, seeing they acknowledge a superior having the direct right of property, and to whom there must be some rent or return." [Stair, ii. 3. 4; Ersk. ii. 3. 8; Ersk. *Prin.* ii. 3. 4; Bell, *Prin.* ss. 667 *et seq.*, 932, 1679; Duff, *Feudal Conveyancing*, 39; M. Bell, *Lect.* i. 562, 566–7, ii. 1002; Menzies, 509, 510.]

Allonge.—An allonge (French, *allonger*, to lengthen) is a piece of paper annexed to a bill of exchange for the purpose of containing additional

indorsements, in the event of there being no further space available on the back of the bill itself. By sec. 32 (1) of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), an indorsement written on an allonge is deemed to be written on the bill itself. An allonge does not require an additional stamp. Allonges are more frequently met with in countries where the *Code Napoleon* is in force, than in Scotland, because the Code requires that the consideration shall be expressed in an indorsement, holding it to be otherwise merely a procuration.—[See Byles on *Bills*, 15th ed., 170; Chitty on *Bills*, 11th ed., 24, 166.] See BILLS OF EXCHANGE.

Allotment of Shares.—See COMPANY.

Allotments.—There has been legislation to facilitate the provision of allotments for the labouring classes in Scotland. It is contained in the Allotments (Scotland) Act, 1892, 55 & 56 Vict. c. 54 (of which s. 9 is now repealed), and the Local Government (Scotland) Act, 1894, 57 & 58 Vict. c. 58, s. 24, subs. 4, and s. 26. These contain the whole law on the subject.

The object of this legislation is mainly twofold—(1) to enable local authorities to undertake, on the security of the rates, pecuniary responsibility for the purchase or leasing of lands for allotments or common pasture; (2) to provide local authorities with compulsory powers for the acquisition of land for such purposes, on purchase or on lease, where suitable lands cannot be obtained by agreement.

The local authorities intrusted with these powers are—in royal, parliamentary, and police burghs, town councils or police commissioners; and in counties, county councils, and, in certain cases, parish councils. They act on a written representation, which must be made in a burgh by six resident parliamentary electors or ratepayers, and in a county by the same number resident in any one parish or by the parish council or landward committee. Before proceeding to exercise its powers, the local authority must be satisfied that there is a demand for allotments which cannot be met by voluntary agreement between those desiring allotments and the owners of suitable lands.

Land may be purchased or leased for allotments or common pasture either voluntarily or by compulsion. The provisions for purchase, whether voluntary or compulsory, are contained in the 1892 Act, and can be exercised only by county and town councils. Under the 1892 Act, county and town councils may lease by agreement, but have no compulsory powers of leasing. Under the 1894 Act, in rural districts, parish councils and landward committees may lease land for allotments either by agreement or by compulsion. It is a question if they can lease compulsorily for common pasture.

In the case of purchase by agreement, the appropriate portions of the Lands Clauses Acts apply. In compulsory purchase, the local authority proceeds by Provisional Order, which puts in force, as to the lands therein specified, the appropriate sections of the Lands Clauses Acts. The Provisional Order requires confirmation by Parliament, and the Secretary for Scotland introduces the confirming Bill. In compulsory leasing, the procedure is by Order, made by the county council on the representation of the parish council or landward committee, and requiring confirmation by the Local Government Board for Scotland. Questions of price, rent, compensation, etc., are in all cases determined by a sole arbiter.

The local authority has power to improve and adapt the land for allotments, power to dispose of superfluous lands, and other necessary powers. It makes regulations as to the management of allotments, which require the confirmation of the Secretary for Scotland, and it must keep a register of tenancies. In burghs, the management may be placed in the hands of allotment managers appointed by the local authority; in counties, it is vested in the parish council or the landward committee; in both cases the management is subject to the direction of the local authority.

The maximum allotment which may be held by one tenant under the 1892 Act is one acre; under the 1894 Act, it is either four acres pasture, or one acre arable and three acres pasture, or of £4 annual value. The rents must be fixed so as to afford the local authority reasonable security against loss, and there are provisions for recovery of rents and for removal and ejection.

The expenses incurred by local authorities under the 1892 Act are defrayed as if they were expenses incurred for water supply under the Public Health (Scotland) Acts; but in counties they fall on the district in which the parish lies for which the allotments were supplied. Expenses incurred under the 1894 Act by a parish council or a landward committee fall on the special parish rate.

[For details the Statutes must be consulted.]

Allowance of an Apprizing.—See Adjudication for Debt.

Alluvio.—"Alluvium," says Gaius (*Inst.* ii. 70), "is an addition of soil to land by a river, so gradual that it is impossible to estimate how much is added in a short period, or, as is usually said, the change is so gradual as to be imperceptible." *Alluvio* was, in Roman law, one of the recognised modes of acquiring ownership. It is, indeed, a particular instance of Accessio (*q.v.*), the owner of the land to which the addition has been made, obtaining the ownership of the increment (*Inst.* ii. 1. 20 *et seq.*). It is to be distinguished from Avulsio (*q.v.*). A man might protect his land against loss from the action of a river by securing the banks, provided he did not injure the navigation (*Dig.* 43. 15; *Marquis of Tweeddale*, 1822, 1 S. 397 (N. E. 373)). In Scotland, the principles of the Roman law in regard to these natural changes have been fully adopted (Stair, ii. 1. 34; Ersk. ii. 1. 14; Bell, *Prin.* ss. 934 *et seq.*). The doctrine of *alluvio* is also applied to land left exposed by the gradual retreat of the sea (Bell, *Prin.* s. 936); but in order that a landlord may successfully maintain a claim in such a case, it is necessary that his lands should, either expressly or as a matter of fact, be bounded by the sea, flood-mark, or other fluctuating boundary (*Kerr*, 1840, 3 D. 154, affd. 1 B. App. 499; *Hunter*, 1869, 7 M. 899; *Blyth's Trs.*, 1883, 11 R. 99; *Montrose Mags.*, 1886, 13 R. 947).

Alternative (or, **A me vel de me) Holding.**—See Disposition.

Altius non tollendi.—This is a negative servitude restraining the owner of the servient tenement from building beyond a certain height—the advantage to the dominant tenement being the preservation, wholly or

partially, of light, air, or prospect (Rankine, *Landownership*, 401 *et seq.*; Stair, ii. 7. 9.; Bell, *Prin.* s. 1007). Like other negative servitudes, the servitude *altius non tollendi* can be constituted only by writing. But the writing need not be holograph nor tested (*Gray*, 1792, Mor. 14513), and it does not require to appear on the records (*Cowan*, 1872, 10 M. 735). This last point is the principal respect in which this servitude is distinguished from a simple building restriction, which depends for its validity on its being duly recorded (*Banks & Co.*, 1874, 1 R. 981). There is, however, a recent tendency, even in decisions, to give a more extended significance to the expression "servitude," which seems more properly applicable only to a limited number of well-known burdens, borrowed, for the most part, from the civil law (*M'Ritchie's Trs.*, 1880, 7 R., at 392, 395, and 8 R. (H. L.), at 102). Although an informal writ is sufficient to constitute a servitude *altius non tollendi*, the words founded on must clearly indicate a continuing servitude, and not merely a temporary personal obligation. Hence an agreement in missives of sale that, in consideration of the seller, as proprietor of adjoining subjects, concurring in an application to be made by the buyer to the Dean of Guild for authority to erect certain buildings, the buyer should restrict the height thereof, was held to be merely a personal obligation with regard to a particular application, and not to constitute a permanent servitude *altius non tollendi* (*Cowan*, *ut supra*). The restriction, in any case, imposed on the servient owner is not made more burdensome than is consistent with the existence of the servitude. Thus, where a proprietor was restrained by a servitude *altius non tollendi* from building a house beyond one storey high, he was nevertheless held entitled to build a chimney four storeys high (*Banks & Co.*, *ut supra*: see *Craig*, 1861, 24 D. 20; *Morier*, 1895, 23 R. 67).

In Rome there is said to have been a servitude *altius tollendi*, which was a privilege acquired by an individual from the neighbouring owners, of building higher than was permitted by the street regulations of Augustus. There is, however, nothing analogous to such a right in Scots law (Bell, *Prin.* s. 1008).

See Servitude (Negative); Building Restrictions; Real Burdens.

Alvei mutatio.—*Alvei mutatio* is the shifting of the bed of a river, which in law operates a change of ownership. Where a river entirely abandons its old channel, and begins to flow in a new one, the old channel, *alveus derelictus*, belongs to the owners of the banks on either side, while the new channel becomes public, like the river itself (*Inst.* ii. 1. 23). If the shifting of the bed be gradual, the general doctrine of Alluvio (*q.v.*) applies. The Roman law is concisely stated in *Dig.* 41. 1. 38. (See also *Marquis of Tweeddale*, 1822, 1 S. 397 (N. S. 373).) The fact that land is temporarily flooded does not, of course, operate any change of ownership (*Inst.* ii. 1. 24). See Accessio; Insula Nata.

Amand.—An amand is a pecuniary penalty or fine, which a judge has power to impose upon litigants in a civil cause pending before him. This power was at one time frequently exercised to prevent undue delay on the part of litigants in conforming to the orders of the Court, and to punish the putting forward of ill-founded pleas *animo differendi litem*. Thus defenders who pleaded improbation or forgery were called upon to consign an amand, which would be forfeited should the judge be of opinion that the

plea was not well founded, but urged merely for the purpose of delay. Before 1825, when by the Judicature Act, 6 Geo. IV. c. 120, the time for the lodging of pleadings, etc., in causes was fixed by Statute, the judges used to fix a time for lodging papers, and enforce the implement of their orders by imposing an amand. The amand is never used in modern practice (Stair, iv. 1. 63; 40. 12 and 49.

Ambassador.—The political intercourse of sovereign States is carried on by agents authorised under credentials to negotiate for their Governments in the countries to which they are sent. Popular usage applies the term ambassador to all such agents; but in strictness the name denotes specifically those of the highest rank alone. By the Congresses of Vienna, 1815, and Aix-la-Chapelle, 1818 (Hertslet, *Map of Europe*, by Treaty, i. 62, 575), "diplomatic characters" were classified as follows:—(1) Ambassadors, legates, or nuncios; (2) Envoys, ministers plenipotentiary, and others accredited to sovereigns; (3) Ministers resident accredited to sovereigns; (4) *Chargés d'affaires* accredited only to ministers for foreign affairs. This classification has only a ceremonial value, as settling questions regarding precedence, and does not now correspond to any distinction in privileges or duties. For the personal audience with the sovereign to whom he is sent, which the ambassador can claim as representing the "person and dignity" as well as the affairs of his own sovereign, is now accorded on suitable occasions to all grades, and is of no practical importance under modern methods of government; and the "solemn entry," or state-pageant, with which an ambassador's mission used to be inaugurated, has in most countries fallen into desuetude.

History.—"Diplomacy," it has been said, "is as old as the world," but it was not until the fifteenth century A.D. that diplomatic missions became, through the multiplication and increasing complexity of international relations, a regular practice; and the establishment of permanent embassies, which originated in the statecraft of Louis XI. of France, is usually dated from the middle of the seventeenth century.

Privileges.—In recognition of their representative character, and for the more convenient conduct of international intercourse, ambassadors and other public ministers have been invested by the law of nations with many privileges. These are sometimes explained by the doctrine of "Ex-territoriality," viz. that an ambassador is in law outside of the territory of the State to which he is sent. But though the term "Ex-territoriality" is a picturesque and convenient designation for a certain class of immunities, it does not correspond to a legal fact. The chief of the privileges in question is personal inviolability. Long before there was a systematised international law, the persons of envoys sent by State to State were held sacred. The assassination of the heralds of Darius at the hands of the Spartans was stigmatised by Xerxes as a violation of "obligations which all men acknowledge" (Herodotus, i. 136); and in the *Digest*, 50. 7. 17, we read, "Si quis legatum hostium pulsasset, contra jus gentium id commissum esse existimatur, quia sancti habentur legati."

Being personally inviolable, the ambassador is wholly exempt from the territorial criminal jurisdiction, and cannot be tried or punished for any offence whatsoever. If he commits a crime, his recall and punishment may be demanded of his Government, or he may be ordered to leave. Generally speaking, he cannot even be arrested. The only exception occurs when he has been guilty of conduct endangering the peace and safety of the State

to which he is accredited, as complicity in a plot against the Government. In that event he may be seized, and forcibly expelled, or imprisoned until his State recall him (cases of *Count Gyllenburg*, 1717, and *Prince Cellamare*, 1718, De Martens, *Causes Célèbres*, i. 99, 149).

The ambassador's person is equally exempt from the territorial civil jurisdiction, and he cannot be arrested, imprisoned, or compelled to plead. This rule of international law is fortified by the municipal enactments of some countries. Thus in Great Britain the Statute 7 Anne, c. 12, s. 3, which purports to be declaratory of the law of nations, and which was passed on the occasion of the arrest for debt in London of the Czar's ambassador, enacts that: "All writs and processes that shall, at any time hereafter, be sued forth or prosecuted, whereby the person of an ambassador or other public minister of any foreign prince . . . may be arrested or imprisoned, . . . shall be deemed and judged to be utterly null and void . . ."

Penalties are denounced against attorneys, etc., suing forth such processes.

His immunity from the local jurisdiction protects an ambassador from being compelled to appear and give evidence either in criminal or civil causes.

The immunity of the ambassador's person extends, according to the practice of most countries, to his moveable property, which cannot be touched by suits arising out of transactions into which he has entered, even in a wholly unofficial capacity, as trader, executor, trustee. The Statute 7 Anne, c. 12, declares null and void all writs and processes whereby his "goods and chattels may be distrained, seized, or attacked." It has been held on this Statute that an ambassador cannot be sued against his will while he remains such public minister, although neither his person nor his goods are touched by the suit (*Magdalena Steam Navigation Co.*, 2 Ellis, 94). Redress for civil injuries must be obtained through the ambassador's Government.

The ambassadorial hotel, too, is exempt from the local jurisdiction, though the ambassador's real property unconnected with the mission is subject thereto. The hotel may not be entered against the ambassador's will by the local authorities save in the circumstances which justify his arrest; but it must not be used as an asylum for criminals, nor—except in the Central and South American States and Oriental States—for political offenders. The British Government, moreover, has claimed the right to arrest a servant in the ambassador's residence for an offence committed outside (*Mr. Gallatin's Coachman*, Hall, *International Law*, p. 185); and it seems that a State would be entitled to demand for trial in the local courts a subject committing a crime against another subject in the hotel, neither having any connection with the mission. Within the precincts of the hotel the ambassador is entitled to the exercise of his religion, though it be a form proscribed by the local law.

An ambassador is not liable for taxes or contributions to the public revenue, but is required to pay local rates, though no process can issue against him in respect of these. He is in most countries, to a greater or less extent, exempt from payment of duties or customs on commodities imported for his use; he pays tolls and postages, but may send his own couriers with sealed despatches.

An ambassador does not lose his domicile by the fact of residence in a foreign country; and children born to him abroad are not subjects of the State to which he is accredited, even though the local law declares children born of foreigners in the territory to be subjects.

It has been held in Great Britain that a British subject accredited to

Great Britain as ambassador of a foreign Government is entitled to ambassadorial privileges, unless he has been received on the express condition that he is to remain subject to the territorial jurisdiction (*Macartney*, L. R. Q. B. D. xxiv. 368). A State, however, may refuse to receive a subject as ambassador of a foreign Power, or may receive conditionally on waiver of privileges.

The immunity of an ambassador continues for such a reasonable period after he has presented his letters of recall as to enable him to wind up his official business, and he is not deprived of the immunity by reason that his successor is appointed before the period has elapsed (*Musurus Bey*, L. R. 1 Q. B. (1894), p. 533).

International law extends the privileges of the ambassador to his wife and family, because of their relationship to him, and to his suite, as being necessary to him. The secretary of legation and the secretary to the embassy are especially entitled as official persons to these privileges.

The authorities are not agreed as to the extent to which domestic servants in the regular employment of the ambassador enjoy similar immunities under international law, nor is the practice of nations uniform. In Great Britain the Statute 7 Anne, c. 12, exempts domestic servants from civil process, but declares this exemption lost by the circumstance of trading, or by failure to have name duly registered; and the British Government claims criminal jurisdiction in respect of offences committed by domestic servants outside the hotel. The more usual course is to leave it to the ambassador to determine whether a civil suit or criminal action against a servant shall be tried in the local court or reserved for the courts of the ambassador's country. Ambassadors used to claim to exercise themselves criminal and civil jurisdiction over their suite and servants. Such derogation of the territorial sovereignty is no longer permitted. The ambassador's criminal jurisdiction is wholly obsolete, and all that is left of civil jurisdiction is the power to legalise, according to the forms prescribed in his own country, wills and contracts, including probably the contract of marriage, made by and between members of his suite.

[*Dig.* l. 50. t. vii. *De Legationibus*; Albericus Gentilis, *De Legationibus*; Grotius, *De Jure Belli ac Pacis*, l. ii. c. 18; Wicquefort, *L'Embassadeur et ses Fonctions*; Stair, B. i. t. i. s. 11; Wheaton, *International Law* (Dana's edition), p. 289; Phillimore, *International Law*, ii. 156; Woolsey, *Introduction to the Study of International Law*, 131.]

Amendment, in (1) *Public* and (2) *Parliamentary Proceedings*, may be defined as any alteration of, addition to, or omission from a motion, bill, or other proposal submitted to the meeting.

(1) *Public Meetings.*—A motion may, before it is put to the vote, be amended by alterations, additions, or omissions; but the amendment must be relevant to the motion, and ought not to amount to a direct contradiction of the motion. The proper course for opponents of the motion is simply to vote against it. When several amendments have been proposed and seconded, the chairman decides the order in which each separately is to be discussed. As a rule, this order ought to be that of the sentences or clauses of the motion to be amended; but when the effect of an amendment depends on the fate of the amendment of some subsequent part of the motion, the latter amendment takes precedence. That is, amendments should be disposed of in the logical, and not necessarily in the grammatical sequence of the clauses of the motion. After each amendment, singly and

in turn, has been discussed, voted upon, and disposed of, the motion, with or without amendment, as the case may be, is then read by the chairman. But before it is put to the vote, further amendments may be proposed, provided they affect parts of the motion subsequent to the parts already amended or proposed to be amended, it being incompetent to re-open questions previously discussed and settled. When it is proposed to amend an amendment, the difficulties of which are also noticed in the following paragraph, the amendment becomes for the time the substantive motion, amendments to which fall to be disposed of on the same principles as amendments to the original motion. And lastly, the motion, whether modified or not by amendments or amended amendments, is put to the meeting. An amendment cannot be moved or seconded by the mover, seconder, or supporter of the motion; but when moved and seconded by others, it may be discussed by all.

(2) *In Parliamentary Procedure* the rules are similar, but present certain peculiarities. Thus a motion to omit all the words of a motion after the introductory "that," with a view to insert words of opposite import, although really a negation of the motion, is technically deemed an amendment. In this case, as with all substitutional amendments, the procedure is divided into two stages—

(1) The question whether certain words are to be left out, and (2) the question whether other words are to be inserted in their place. The first of these questions is put to the House in the affirmative form: "That the words proposed to be left out stand part of the motion," motions of a negative form being prohibited. If this motion be affirmed, the whole amendment falls to the ground. But if it be negatived, the second question is: "That such and such words be inserted in the motion." Lastly, if no further amendments are moved, the amended motion is put to the vote in its final shape. This double procedure is at once logical and practical. It ensures a fair competition (1) between the whole motion and the abridged motion, and (2) between the abridged motion without, and the abridged motion with, added words. The meeting may therefore pass the motion in the intermediate (abridged) form (with certain words omitted, but no new ones added), which it cannot do, if, according to the looser popular practice, the substitutional amendment is put to the meeting as a whole. Another advantage is that further amendments may be proposed, with a view to fill up the blank in a different way. It should also be noted that certain formal motions, such as "adjournment," with a view to defeat a motion, the "previous question," etc., cannot be amended. Like motions, amendments can only be competently withdrawn with consent of their seconders, and by leave of the House. Difficulties in the amendment of amendments generally disappear if the above rules are adhered to. When the amendment is that certain words be left out of the motion, and the amendment of the amendment is that some of these be left out of the amendment, it must be kept in view that whatever is omitted from the omission is retained in the original motion.

[Sir R. E. D. Palgrave, *Chairman's Handbook*; G. F. Chambers on *Public Meetings*; Sir T. Erskine May, *Parliamentary Practice*.] See also Chairman; Motion; Previous Question.

Amendment of the Libel.—Where an objection to the libel is sustained, an amendment by striking out words has sometimes been permitted (Macdonald, 435). But this is not permissible if the substance

of the charge is altered by the amendment (*Spiers*, 1 Swin. 163). It was formerly questionable whether the alteration could be made if the accused objected (Hume, ii. 280; Alison, ii. 365; Macdonald, 435; *Kermath*, 3 Irv. 602; *Dawson*, 4 Irv. 357), and in some cases the Court made the alteration although the accused did object (Hume, ii. 280; *M'Caffie*, Shaw, 165; *Mackenzie*, 2 Swin. 350; see also *M'Gregor*, 1 Br. 331). But in other cases the Court refused (*Jardine*, 3 Irv. 173; *Dudley*, 4 Irv. 468; see also Macdonald, 435, cases in note 9).

In a recent case the Court allowed some words to be added to the libel (*Livingstone*, 1 White, 578). This may have been done under the belief that it is now allowable by Statute (Crim. Proc. Act, 1889, s. 70). But it is to be noted that this new statutory rule applies only to amendments after evidence, to correct unimportant discrepancies between the libel and the evidence, where the accused cannot be prejudiced by the alteration. Such alterations may be made at any time before the prosecutor closes his case (*ib.*).

Summary complaints may be amended, by deletion or addition, but only in matters not changing the character of the offence (27 & 28 Vict. c. 53, s. 5: *Jackson*, 5 Irv. 409; *Morris*, 5 Irv. 529; *James*, 4 Coup. 321; Crim. Proc. Act, 1887, ss. 70, 71). It is not competent after evidence to add a new *locus* to the complaint (*Stevenson*, 4 Coup. 196), or to delete a *locus* (*Henderson*, 4 Coup. 120; *Mackintosh*, 1 White, 218). But an alteration may be made in the date of the offence (*Matheson*, 5 Coup. 582).

Amendment of Record.—1. *In undefended Actions.*—"In undefended actions any error or defect in any summons or other pleading, whereby the action is commenced in the Court of Session, may be amended upon application to the Lord Ordinary or the Court before whom it depends, if the Lord Ordinary or the Court think such amendment should be allowed; and such amendment shall be made in writing either upon the summons or pleading, or in a separate paper, and shall be authenticated by the signature of counsel; and the Lord Ordinary or Court may, if he or they think fit, order the amended summons or other pleading to be served upon the absent defender or defenders, with liberty to him or them to enter appearance within such time as shall seem proper; provided that the expenses occasioned by such amendment shall not be chargeable against the defender or defenders" (31 & 32 Vict. c. 100, s. 20).

2. *In defended Actions.*—"The Court or Lord Ordinary may at any time amend any error or defect in the record or issues in any action or proceeding in the Court of Session, upon such terms as to expenses or otherwise as to the Court or Lord Ordinary shall seem proper (*Keith*, 1877, 4 R. 958, and cases therein referred to); and all such amendments as may be necessary for the purpose of determining, in the existing action or proceeding, the real question in controversy between the parties shall be so made" (31 & 32 Vict. c. 100, s. 29). This section has no application to alterations made by parties at the adjustment of record (*Cairns*, 1892, 20 R. 16, per L. Kinnear; but see *Henderson*, 1894, 2 S. L. T. No. 149). It is thought that the power of allowing an amendment is still in the discretion of the Court; and if the proposed amendment is in their opinion inexpedient, it may be rejected (*Taylor*, 1885, 12 R. 1304; *Macleod*, 1880, 8 R. 227; see, however, *Guinness, Mahon, & Co.*, 1890, 28 S. L. R. 285; and *Carruthers*, 1890, 17 R. 769). Such amendments are not limited to the statements of facts or pleas-in-law or issues, but apply likewise to the conclusions of the

summons, wherever the conclusions do not exhaust the matter submitted to the adjudication of the Court (*Shotts Iron Co.*, 1870, 8 M. 383). A new ground of action or defence may be stated by amendment (*Guinness, Mahon, & Co., ut supra*; *Keith, ut supra*). The omission of a formal conclusion is within the power of amendment conferred by the Statute (*Shotts Iron Co., ut supra*; *Dobson*, 1858, 20 D. 610); and in several cases decided prior to the Act of 1868, and which it is thought still hold good, an alternative conclusion of substance was allowed to be added (*Millar*, 1831, 9 S. 625; *Campbell*, 1831, 9 S. 875; *Colquhoun*, 1852, 14 D. 997; *Dickson*, 1851, 13 D. 1291). Leave to amend a second time is sanctioned by the Act of 1868 (*Lynch*, 1871, 9 M. 860). In a note of suspension and interdict, the complainer was entitled at the closing of the record to correct an error by amending the quotation from the title on which he founded, no alteration in the prayer of the note being necessary (*Cairns*, 1892, 20 R. 16). The Court may attach such conditions as it may think proper while authorising an amendment, such conditions not being limited to questions of expenses; and where a party has been allowed to amend on certain conditions, he cannot, after making his amendments, object to the competency of the conditions (*Duthie Brothers*, 1892, 19 R. 905).

3. *Limitations of Power of Amendment.*—The Court of Session Act, s. 29, provides that "it shall not be competent, by amendment of the record or issues under this Act, to subject to the adjudication of the Court any larger sum or any other fund or property than such as are specified in the summons or other original pleading, unless all the parties interested shall consent to such amendment" (*Shotts Iron Co.*, 1870, 8 M. 383; *Edinburgh & Glasgow Union Canal Co.*, 1842, 1 Bell's *App.* 316; *Gillespie*, 1874, 1 R. 423; *Gibson's Trs.*, 1877, 4 R. 1001). In an action of declarator, an amendment to include a heritable subject, not included in the original summons, was refused (*Forbes*, 1870, 9 M. 96), as was also an amendment to substitute a cumulative for an alternative claim of damages. An amendment to convert a declarator of a common right of property into a declarator of separate and exclusive right, is incompetent (*Levy*, 1894, 21 R. 749; *Laming*, 1889, 16 R. 828); again, an amendment to substitute separate conclusions against several defenders, in place of a joint and several conclusion, was refused (*Taylor*, 1885, 12 R. 1304); and in a recent case of damages for breach of contract, an amendment was held incompetent, though *ex facie* it was for a smaller sum than the amount originally sued for (*Russell, Hope, & Co.*, 1895, 33 S. L. R. 242). An amendment to raise a question different from that in the original summons is incompetent (*Gibson's Trs., ut supra; Forbes, ut supra; Paterson*, 1883, 11 M. 76). A diligence to recover documents to enable a party to make an amendment will not be allowed (*Thomson*, 1869, 7 M. 687).

The Act of 1868 does not, it is thought, countenance an amendment where the summons is null (*Campbell*, 1826, 4 S. 766; *M'Indoe*, 1826, 5 S. 92), or bad for want of jurisdiction (*Morley*, 1888, 16 R. 78), or so as to validate an irrelevant action after the period for raising a new action has expired (*Paul*, 1823, 2 S. 628; *Mitchell*, 1838, 16 S. 409; *Clark*, 1885, 12 R. 1092). In an action founded upon a Statute which limited the right of action to one year, a proposal by the defender, after the year had elapsed, to add a plea that before raising the action the pursuer had not given timeous notice, was refused (*Livermore*, 1865, 3 M. 410).

A further proviso is applicable to both defended and undefended actions, viz. "That no such amendment shall have the effect of validating diligence used on the dependence of the action so as to prejudice the rights of creditors

of the defender interested in defeating such diligence, but shall be operative to the effect of obviating any objections to such diligence when stated by the defender himself, or by any person representing him by a title, or in right of a debt contracted by him subsequent to the execution of such diligence" (ss. 20, 29).

4. *Addition to Number of Pursuers or Defenders.*—The Act of 1868 does not contemplate the importation of new parties into the litigation (*Hislop*, 1881, 8 R. (H. L.) 95). It therefore follows that a third party cannot be sisted as a pursuer without the consent of the defender (*Anderson*, 1871, 10 M. 217; *Remington, Crawford, & Co.*, 1829, 7 S. 692; *Trinity House of Leith*, 1829, 7 S. 374; *Taylor*, 1833, 12 S. 39). Nor can a pursuer change his character from an individual to an executor (*Turnbull*, 1889, 16 R. 1079; *Smith*, 1850, 12 D. 1185). In one case a judicial factor was sisted, not as a pursuer, but as a party concurring with the pursuer, the general rule being expressly reserved (*Morison*, 1873, 1 R. 116). A new defender cannot be added by amendment without his own consent. A pursuer cannot, without his consent, force a singular successor or a trustee in bankruptcy of an original defender, to take up action against him. If such an one fails to sist himself, decree can be asked for. The original action can, however, be continued against singular successors by a motion for transference. See Sisting.

5. *Restriction of Summons.*—A summons can always be restricted whether the action be defended or not (31 & 32 Vict. c. 100, s. 23). Dismissal of an action proceeding on a minute of restriction does not preclude a pursuer from bringing a new action (*Stewart*, 1868, 6 M. 954). A minute of restriction which completely changes the scope and nature of the action is incompetent (*Campbell's Trs.*, 1863, 1 M. 217; *Gibson's Trs.*, 1877, 4 R. 1001). A minute containing a reservation of a right to bring a new action, unaccompanied by a tender of expenses, is incompetent, such a minute being virtually an action of abandonment on terms that are inadmissible (*Wilson*, 1868, 6 M. 483). "If there are alternative conclusions, the minute of restriction should state in terms of which conclusion decree is desired; and in such cases, or where the restriction is not of a simple character, it is expedient, though not necessary, to enroll the case in the Motion Roll, and instruct counsel to explain the restriction" (Mackay, *Manual*, 251). See Restriction; Abandonment.

6. *Stage at which Amendment Competent.*—An amendment is competent at any time before final judgment (*Gelot*, 1870, 8 M. 649; *Rose*, 1878, 5 R. 600; *Grey*, 1890, 17 R. 890), but in certain instances proposals to amend at late stages of a case have been refused; the stage at which they are proposed is a material element in determining whether they ought to be allowed (*Gibson's Trs.*, 1877, 4 R. 1001; *North Berwick Gas Co.*, 1884, 22 S. L. R. 93; *Carsewell*, 1887, 24 S. L. R. 643; *Mackenzie*, 1869, 7 M. 676; *Simpson*, 1881, 8 R. 469; *Menzies*, 1889, 17 R. 881).

7. *Expenses of Amendment.*—When either party desires to amend the record or issues, it is usual for the Court to award all expenses against him up to the date of lodging the minute of amendment (*Arnott & Others*, 1872, 11 M. 62; *Cruickshank*, 1863, 1 M. 928; *Bignell*, 1859, 22 D. 190; *Lawrie*, 1848, 11 D. 110; *Bell*, 1862, 24 D. 505), unless the amendment be an immaterial one (*Mackenzie*, 1859, 21 D. 304; *Gray*, 1847, 9 D. 925). When a defender desires to add a new plea, he is only allowed to do so on condition that pursuer may abandon the cause; and if he does abandon, he is allowed all his expenses incurred from the date when the defence ought to have been stated (*Thomson*, 1861, 23 D. 679; *Railton*, 1834, 13 S. 26;

Keith, 1877, 4 R. 958). The Court, however, may modify expenses (*M'Leod*, 1869, 7 M. 1103), or award none at all (*Watson*, 1834, 13 S. 196; *Rose*, 1827, 5 S. 883). When an important plea is withdrawn or added, the payment of expenses thereby incurred (usually the expenses of process up to date) is a condition precedent to further procedure (*Struther*, 1846, 8 D. 815; *Haughton*, 1892, 20 R. 113; *Wallace*, 1876, 4 R. 264). When the Court orders a new trial on fresh issues to be adjusted upon an amended record, the defender will be awarded all the expenses of the old trial, in so far as they are not available for the new trial (*Gelot*, 1870, 8 M. 649). An important amendment will, as a rule, only be allowed in the Inner House on payment of expenses from the date of closing the record (*Morgan, Gellibrand, & Co.*, 1890, 18 R. 205; *Guinness, Mahon, & Co.*, 1891, 28 S. L. R. 285; *Gallagher*, 1891, 19 R. 79); but expenses have been modified, where part of the previous costs may be available for the case as amended (*Cochrane*, 1891, 28 S. L. R. 697).—[Mackay, *Manual*, 250–5; Shand, *Practice*, 494–9; Dove Wilson, *Sheriff Court Practice*, 139, 239; Monteith Smith on *Expenses*, 90–4.] See ABANDONMENT; SISTING; SUPPLEMENTARY SUMMONS; MINUTE OF RESTRICTION.

Amendment of Record (in Sheriff Court Proceedings).—In the Sheriff Court the rules as to this are adapted from, and, with the necessary verbal changes, are identical with, the provisions regulating the same matter in the Court of Session, viz. 31 & 32 Vict. c. 100, ss. 20, 29.

I. Amendment of Petition in Undefended Causes.

39 & 40 Vict. c. 70 (Sheriff Courts Act, 1876), s. 13, provides—

1. Any error or defect may be amended, if the Sheriff thinks the amendment should be allowed.
2. The mode of amendment is by writing, either on the petition or in a separate paper signed by the pursuer or his agent.
3. The Sheriff may then order, if he considers the amendment of sufficient importance, the petition as amended to be served on any defender who has not entered appearance, and allow him such time to do so as shall seem proper.
4. The expenses of such an amendment are not chargeable against any defender.
5. The amendment does not validate diligence on the dependence so as to prejudice the rights of creditors of the defender, but does so in questions with the defender himself, or with any person representing him by a title, or in right of a debt contracted by him subsequent to the use of the diligence.

II. Amendment of Record in Defended Actions.

The rules as to this are contained in 39 & 40 Vict. c. 70 (Sheriff Courts Act, 1876), s. 24, and are to the following effect:—

1. Any defect or error in the record, that is, in any of the pleadings of either of the parties, may be corrected, and all amendments necessary to determine in the action the real question in controversy between the parties shall be allowed.

   Practically, the only discretion in the Sheriff as to allowing an amendment competent under the Act is as to the terms as to expenses, and as to the other conditions on which it is to be allowed; though doubtless in extreme cases, where it is obvious that allowing the

amendment can serve no possible purpose, the Sheriff would be entitled to follow the example of the Court of Session and refuse it (*Taylor*, 1885, 12 R. 1304; *Macleod*, 1880, 8 R. 227).

The real question in controversy is the question intended to be raised by the petition (*Gibson's Trs.*, 1877, 4 R. 1001; *Forbes*, 1870, 9 M. 96).

2. Amendments varying the real question at issue, or subjecting to the adjudication of the Sheriff any larger sum or estate, or any other fund or property than that specified in the petition, except with the consent of all the parties interested, are incompetent.
3. The amendment may be made at any time during the course of the action before final judgment in the Inner House.

The view that the stage at which it is proposed is a material element in determining whether an amendment competent under the Act should be allowed is not warranted by the Act; but it is an element in determining the rigour of the conditions on which the amendment is to be admitted (*North Berwick Gas Co.*, 22 S. L. R. 93; *Carswell*, 1887, 24 S. L. R. 643; Dove Wilson, *Sheriff Court Practice*, p. 244).

4. The Sheriff allows the amendment on such terms as to expenses, and on such other conditions, as he thinks fit. The general rule as to expenses is that amendments are allowed on payment of the expenses incurred by failure to state the matter at the proper time.

An amendment having been permitted, the parties, except where some special condition has been attached to the granting of it, are put in the same position as if it had formed part of the original pleading, provided always (as in the case of undefended petitions) that—

5. An amendment shall not have the effect of validating diligence on the dependence of the action, so as to predjudice the rights of creditors interested in defeating such diligence; but shall be operative to obviate any objections to such diligence when stated by the defender himself, or by any person representing him by any title, or in right of a debt contracted by him subsequent to the execution of such diligence.

The Act of 1876 gives no method by which amendments are to be added. They are accordingly made, as formerly, by minute, which is allowed or disallowed after hearing parties; and thereafter, if necessary, answers are allowed, which, if long, may also be in the form of a minute. By interlocutor the amendment and answer, if any, are allowed to be added, which is done by the parties, and authenticated by the clerk (Sellar, *Forms*, vol. i. pp. 258, 262, 266).

As has been already pointed out, amendment in the Sheriff Court and amendment in the Court of Session are ruled by practically identical provisions. Authority on the one accordingly illustrates the other; wherefore see the article on AMENDMENT IN THE COURT OF SESSION for the authorities bearing on the above propositions.

See SISTING; SUPPLEMENTARY SUMMONS (*res noviter*).

A mensa et thoro, "From board and bed."—In the language of the Canon law and of the older writers, what is now called judicial separation is generally designated as *divortium a mensa et thoro*, or, simply

divortium. See in the *Canon Law Decret.*, Greg. IX. lib. iv. tit. xix. *De Divortiis.* Such a decree does not dissolve the bond of marriage,—*vinculum matrimonii,*—but it absolves the spouses from the conjugal duty of cohabitation at bed and board. And accordingly, a summons of separation prays that the defender shall separate himself from the pursuer *a mensa et thoro.* See SEPARATION.

Amicus curiæ.—A person who, being in Court, and having nothing to do with the case under discussion, gives the judge information of which he may take judicial notice. Counsel, for example, not unfrequently in cases with which they are not concerned, mention reported cases within their knowledge, but unknown to the judge, or refer to unreported cases in which they themselves have acted. In England a person was permitted, as *amicus curiæ*, to move to quash a bad indictment (Tomlin, *Dict.*), while another was allowed to inform the Court of a usurpation of jurisdiction by an inferior Court (2 Shower's Rep. 406). Where, in a criminal action, a counsel urged that he might, as *amicus curiæ*, inform the Court of an error in its proceedings, the Court refused to allow him to do so unless the party to the proceedings was present (*The King*, 2 Shower's Rep. 297).

Ammunition.—Any person who sets on fire or destroys ammunition of war at any place where such ammunition is kept in any part of Her Majesty's dominions, is guilty of felony (12 Geo. III. c. 24). Section 156 of the Army Act, 1881 (44 & 45 Vict. c. 58) makes it an offence punishable on summary conviction by fine or imprisonment to buy or receive ammunition from a soldier. Provision is made for the carriage of ammunition by the Railway Act of 1842 (5 & 6 Vict. c. 55, s. 20), the Railway Act of 1844 (7 & 8 Vict. c. 85, s. 12), and the Cheap Trains Act, 1883 (46 & 47 Vict. c. 34, s. 6).

Amotio.—Amotio signifies *removal*, and it is an element essential to the constitution of the crimes of theft and robbery. In each of these crimes it does not amount to felonious appropriation that an article is merely moved: there must be actual removal of it. Thus it is not theft if the hand of a pickpocket is discovered in a person's pocket, and held there (*Lyndsay*, 1829; Bell's *Notes*, 19); or if an owner seizes, before it leaves his pocket, his watch, which a thief is attempting to purloin (*Cameron*, 1851, J. Shaw, 526). But it is theft if the watch is extracted from the pocket, though still attached by a chain to the person. And it is theft though the article taken be immediately recovered by the owner, or be at once thrown away by the thief (*Lyndsay, ut supra*). The slightest removal completes the crime. Thus the insertion of a stick into a window and the drawing of articles towards the person using the stick, constitutes theft (*O'Neil*, 1845, 2 Broun, 394). To pack up goods, preparatory to removing them, is to steal them, though they be left on the premises (*Carter*, 1832, Bell's *Notes*, 19; *Philips and Simpson*, 1832, Bell's *Notes*, 19; *M'Caughie*, 1836, 1 Swin. 205). The removal of a receptacle, such as a box or till, constitutes theft of its contents (*Walker*, 1836, 1 Swin. 294; *Smart*, 1837, Bell's *Notes*, 19).—[Hume, i. 70; Alison, i. 265; Macdonald, 25, 55; Anderson, *Crim. Law*, 102, 112.] See THEFT; ROBBERY.

Anatomy Acts.—The Anatomy Acts regulate the conditions under which anatomy may be practised for the purposes of science, but do not interfere with *post-mortem* examinations directed by the legal authorities.

The principal Act is 2 & 3 Will. IV. c. 75, which is amended in one detail by 34 & 35 Vict. c. 16. Licences to practise anatomy will be granted by the Secretary of State to qualified practitioners, and to teachers and students of anatomy, on presentation of a petition, accompanied by a certificate signed by two justices of the peace, certifying their belief that the applicant intends to carry on the practice of anatomy (s. 1). A week's notice must be given to the Secretary of State of any place in which it is intended to practise (s. 12). Inspectors of anatomy are to be appointed by the Secretary of State (s. 2), and he may appoint their districts and regulate their method of supervision (s. 3); but they must report quarterly on all bodies subjected to anatomy in their district (s. 4), and must inspect all places where anatomy is practised (s. 5).

Any one who has the lawful custody of a body, except for the purposes of interment, may permit it to undergo anatomical examination (s. 7), unless to his knowledge the deceased in his lifetime expressed a wish to the contrary (s. 7). The objection of a near relative is always sufficient to stay the examination (s. 7), even if the deceased had expressed a wish that his body should be examined (s. 8).

No dead body may be removed until forty-eight hours after death, and twenty-four hours' notice of the intention to remove it must be given to the inspector of the district (s. 9). The body must be placed in a decent coffin prior to its removal (s. 13), and a certificate of death obtained from a doctor, which must be handed with the body to the person receiving it for anatomical purposes (s. 9). (See *John Daniel*, Glasgow C.C., 1891, 3 White, 103.) A licensed practitioner (s. 1) who has complied with the above regulations is entitled to be in possession of a dead body (s. 10), but he must transmit the death certificate to the district inspector within twenty-four hours of his receiving the body, with full particulars as to how and from whom he received it (s. 11), and he must send the inspector a certificate of the interment in consecrated ground (s. 13) within such period as the Secretary of State shall from time to time order (34 & 35 Vict. c. 16).

No restriction is placed on *post-mortem* examinations directed by legal authorities (s. 15), but dissection of murderers is forbidden, and their bodies must be buried within the prison (s. 16). But see DEAD BODY (4 & 5 Will. IV. c. 26; 31 & 32 Vict. c. 24, ss. 6 and 13).

Ancestor.—In the law of Scotland, an ancestor is a person from whom an heir has derived an estate, whom he represents, and for whose debts the estate is responsible. If a person purchase an estate from another, that other is not his ancestor, but his AUTHOR (*q.v.*). And there is no representation of an author by a person who has purchased an estate from him. The creditors of an ancestor are entitled to a preference over the creditor of the heir, and that preference continues for three years as against the heritable estate which belonged to the ancestor, and for a year and a day as against his moveable estate (Act, Car. II. 1661, c. 24). After the lapse of a year, the heir is entitled to convey or burden the heritable estate for onerous causes (*M'Alpine*, 1885, 12 R. 604; *Bain*, 1896, 3 S. L. T. No. 439).

[M'Laren on *Wills*, 3rd ed., 1294; Goudy on *Bankruptcy*, 2nd ed., 567; Stair, iv. 35. 16; Bell, *Prin.* s. 1931.] See AUTHOR; HEIR.

Animals: Contagious Diseases.—See CONTAGIOUS DISEASES (ANIMALS) ACTS.

Animals, Cruelty to.—See CRUELTY TO ANIMALS.

Animals, Liability for Damage caused by dangerous.—The liability of an owner of an animal for damage done by it depends upon his knowledge of its propensities. He is bound to take precautions against such injurious acts as he might reasonably expect it to commit: he is not bound to guard against unlikely and novel outbreaks (Stair, i. 9. 5). Knowledge of the dangerous tendencies of an animal, which imposes on an owner the duty of taking precautions, may be obtained from (1) the natural habits of the class to which the animal belongs, (2) previous acts of the individual animal.

(1) Animals of the former class, said to be *feræ naturæ*, are known to be untrustworthy, and the possessor of one, although that particular animal may seem to be quiet, and may have exhibited no dangerous proclivities, is presumed to know that it may at any time become a source of danger. He is therefore bound to keep it safe, and if it does damage he will be liable. The injured person does not require to prove that the owner was negligent in his manner of keeping it. The duty to keep it safely is absolute, and the owner can avoid liability only by taking precautions which are effectual (*Filburn*, 1890, L. R. 25 Q. B. D. 258, 260). Animals held to be *feræ naturæ* are: lions and tigers (*Rex*, 2 L. Raymond, 1730, 1574, 1583), monkeys (*May*, 1846, 9 A. & E. Q. B. 101, 111), bears (*Wyatt*, 1886, 2 T. L. R. 282), wild boars (*Kelly*, 1848, 2 I. L. R. 424, 430), elephants (*Filburn*, *ut supra*), and the like. The duty to keep such animals safely being absolute, it is doubtful if the owner will avoid liability where the animal has been set free by *vis major* (*Nichols*, 1875, L. R. 10 Exch. 255, 260), or by the malicious act of a third party. But he will not be liable where the person injured has brought the injury on himself (*Filburn*, *ut supra*).

(2) Animals of the second class, *mansuetæ naturæ*, such as horses, oxen, dogs, are not kept at an owner's peril, and for damage done by an outbreak of vice on their part an owner is not liable, unless he has previous knowledge of the vicious disposition of the animal (*Filburn*, *ut supra*). Having this knowledge, an owner incurs practically the same responsibility as that for an animal *feræ naturæ* for subsequent outbreaks of the same vice. But actual knowledge must be proved, and is not to be inferred from the fact that there were previous outbreaks known to parties other than the owner (*Thomas*, 1835, 2 C. M. & R. 496). If these parties, however, are connected with the owner, as his wife (*Gladman*, 1867, 36 L. J. 11 C. P. 647), or servant having charge of the animal (*Baldwin*, 1872, L. R. 7 Exch. 325; *Applebee*, 1874, L. R. 9 C. P. 647), their knowledge will be imputed to the owner: though that of a servant who has no charge or control of the animal will not (*Stiles*, 1864, 33 L. J. Q. B. 310).

The circumstances which ought to put an owner on his guard with respect to an animal *mansuetæ naturæ* vary with different species, as all domestic animals are not equally quiet. Some are by nature fierce and prone to mischief, and in those cases the animals should be carefully noticed, and slight indications that their natural tendencies are active is sufficient. To this class belongs the boar (*Hennigen*, 1882, 9 R. 411).

Contrasted with it stands the horse. A person is entitled to consider

his horse free from vice until it shows him the contrary, and is not liable for a sudden outbreak (*Hammack*, 1862, 11 C. B. (N. S.) 588), unless induced by his negligence (*North*, 1861, 10 C. B. (N. S.) 572. For *Driving Accidents*, see HORSES AND VEHICLES, NEGLIGENT USE OF).

A bull also is clearly outside the category of wild beasts, and an owner only requires to keep it in a way which is usual and reasonably safe (*Harper*, 1886, 13 R. 1139); unless it has shown itself to be more fierce than bulls ordinarily are (*Clerk*, 1862, 24 D. 1315), or to have some special peculiarity of temper (*Blackman*, 1827, 3 C. & P. 138. A bull, if ordinarily quiet, may be driven through the streets of a city, and does not require to be put in a float (*Harper, ut supra*). The same applies *a fortiori* to an ox (*Tillet*, 1882, L. R. 10 Q. B. D. 17).

When exciting causes are known to be present, however, extra precautions have to be taken. This applies to all kinds of cattle (*Phillips*, 1884, 11 R. 592). Such extra precautions, if reasonably sufficient, will afford a good defence, since an owner does not keep an animal *mansuetæ naturæ* at his peril. But sometimes the only reasonable precaution to be taken with a dangerous animal is to kill it.

That is the course to be followed with a dog known to be vicious. Though a dog, being a domesticated and useful animal, is not presumed to be vicious by nature, and the liability of an owner is in general that attaching to owners of animals *mansuetæ naturæ* (*Fleeming*, 1855, 2 Macq. 14; *Gray*, 1890, 18 R. 76), yet when the ferocity of a dog is known to the owner, his obligation is not one of reasonable care, but not to keep the dog at all, unless he does it in such a way as to make it perfectly secure (*Burton*, 1881, 8 R. 892; *Smillies*, 1886, 14 R. 150). Vice is conclusively instructed by the dog having previously bitten some one, but less may suffice (*Worth*, 1866, 2 C. P. 1), as a habit on the part of a dog of fierce breed of rushing at people, though out of reach (*Renwick*, 1875, 2 R. 855), and showing an inclination and attempt to bite (*Fraser*, 1887, 14 R. 811). Certain propensities also, not instructing general viciousness, impose on an owner the duty of effectually guarding against them. Instances are: killing sheep, game (*Read*, 1864, 34 L. J. C. P. 31), and swine (*Boulton*, 1632, Cro. Car. 254).

The injury inflicted by the previous outbreak of vice does not require to be of exactly the same character as that which is the cause of action, if the tendency to commit injuries is similar. Where a vicious dog by its violent rush and barking startled one person and caused him involuntarily to injure another, the owner was treated as if the injury had been caused directly by a bite from the dog (*Fraser*, 1887, 14 R. 811). Previous sheep-worrying also rendered an owner liable for his dog subsequently biting other cattle (*Jackson*, 1813, 1 M. & S. 232). It is doubtful, however, if a previous habit of sheep-worrying will sustain an action where a person has been bitten (Shearman & Redfield on *Negligence*, 4th ed., 631); and a frolicsome habit of jumping on people, although injurious to their clothes and annoying, will not (*Line*, 1862, 3 F. & F. 731). Further, if the person injured has provoked the dog which has bitten him, he has no action (*Charlwood*, 1851, 3 C. & K. 46). On similar grounds it is held that persons improperly putting themselves within reach of a watch-dog cannot recover damages for a bite (*Sarch*, 1830, 4 C. & P. 297; *Daly*, 1886, 14 R. 154). A watch-dog is necessarily prone to attack people; but a person is entitled to keep one for the protection of his property if he ensures the safety of others by giving them distinct warning to avoid it, and keeping it confined (*Curtis*, 1833, 5 C. & P. 489). An owner should either keep the dog chained, or,

when loose, take effectual precautions to prevent its having access to any public place (*Brown*, 1824, 3 S. (*n*) 127, (*o*) 187), or attacking any person who is on the premises by the permission and invitation of the owner, and who is not himself in fault (*Smillie*, 1886, 14 R. 150).

An exception to the rule that knowledge of previous vice is required, is introduced by Statute (26 & 27 Vict. c. 100) in the case of injuries done by a dog to sheep and cattle (cattle including horses, *Wright*, 1869, L. R. 4 Q. B. 582). It provides that it shall not be necessary to prove a previous propensity to injure sheep or cattle (s. 1), so that apparently a pursuer requires only to prove the injury and the ownership of the dog (*M'Intyre*, 1870, 8 M. 570). The same Act also provides that the occupier of any premises in which the dog causing the injury has been kept or permitted to live at the time of the injury, shall be liable as the owner of such dog, unless he can prove that he was not the owner, and that the dog lived there without his knowledge (s. 2). Allowing a dog belonging to a late tenant to stay on at a farm, and feeding it, was held to render the landlord liable under this section (*Murray*, 1881, 19 S. L. R. 253). Evidence of identity of the dog being usually difficult to obtain in a sheep-worrying case, it has been said that slight circumstances in corroboration of one eye-witness are sufficient (*M'Intyre, ut supra*).

At common law, a custodier of a dog or other animal is liable equally with an owner when he has knowledge of its vice (*Cowan*, 1877, 5 R. 241; *Fleeming*, 15 D. 486, 2 Macq. 14). A carrier, therefore, who has knowledge of an animal's dangerous disposition, from notice given by the owner or from his own observation in transit, incurs this liability (*Gray*, 1890, 18 R. 76). Failing notice by a cognisant owner, the owner will be liable (*Harpers*, 1886, 13 R. 1139). A person is also held to incur liability, as a custodier, who allows a dog to resort to and remain at his premises (*M'Kone*, 1831, 5 C. & P. 1). But for a stray dog which comes uninvited on to a person's premises there is no liability, unless there has been negligence in not getting rid of it (*Smith*, L. R. 2 C. P. 4).

Injuries from game, apart from contract (for which see LEASE), have not been the subject of decision in Scotland; but it is thought that creating, or allowing to arise, an excessive load of game on one's land, to the injury of one's neighbour, would amount to an infraction of the rule, *Sic utere tuo ut alienum non lædas*, and would found an action (*Cox*, 1863, 13 C. B. (N. S.) 430; *Read*, 17 C. B. (N. S.) 245, 260). Keeping pigeons has been dealt with by Statute (see PIGEONS).

[See WINTER HERDING ACT; Glegg on *Reparation*, 312–29.]

Animals, Property in, and Theft of, Wild.—As there is no property in a wild animal while it remains free, there can be no theft of it while in that condition.

To wild animals the maxim is applicable, *Quod nullius est fit occupantis*—they are the property of the first captor, and remain his property so long as he retains possession of them (Thomson's *Acts*, i. 749; *Wilson*, 1872, 10 M. 44). But if an animal *feræ naturæ* which has been captured, regains its liberty, the ownership in it *ipso facto* comes to an end (Thomson's *Acts*, *l.c.*). To the general rule of the common law, that first capture of a wild animal confers the property of it on the captor, "the only proper exception is that of royal fish, which belong to the Crown" (Bell's *Prin.* s. 1288), viz. whales found stranded on the sea-coast, if larger than can be drawn by a wain with six oxen (Thomson's

Acts, i. 748; *Bruce*, 1890, 17 R. 1000). Although salmon-fishings belong to the Crown, and illegal fishing may be punished, the salmon itself is *feræ naturæ*, and falls under the general law of occupancy which is expressed in the maxim referred to (Ersk. ii. 1. 10).

It is always a question of circumstances whether a wild animal has been reduced to possession or not. In one case our law recognises constructive appropriation, holding that where one wounds a wild animal so that it may be forthwith taken, and continues in pursuit of it, his claim will exclude that of another who intervenes to capture it (Stair, ii. 1. 33). Since a wild animal becomes the property of its captor from the moment that it falls within his power and control, the crime of theft is committed if it is then feloniously appropriated by another. In charging theft of an animal *feræ naturæ*, it is necessary to specify distinctly the mode in which it was reduced into, and remained in, the possession of the person from whom it is alleged to have been stolen (*Huie*, 1842, 1 Broun, 383; *Wilson*, *ut supra*; see also Hume, i. 81; Alison, i. 279; Macdonald, 19; Anderson, *Crim. Law*, 99. As to the conventional rule of "fast and loose" recognised in whale-fishing in the North Sea, see *Addison & Sons*, 1794, 3 Pat. App. 334; *Sutter*, 1862, 4 Macq. 355). See THEFT.

The offence of poaching is purely statutory, and consists in any violation of a proprietor's right of hunting and killing game,—a right which is vested in him in virtue of his real title to the lands, and which remains with him as a separate estate after the lands have been let for other purposes (Irvine, *Game Laws*, 32). Unless the Statutes dealing with poaching expressly provide for forfeiture of the animals captured (*e.g.* 2 & 3 Will. IV. c. 68, s. 5), the general law of occupancy is applicable, and they remain the property of the taker.—[Stair, *l.c.*; Ersk. *l.c.*; *Scott*, 1853, 15 D. 288.] See GAME LAWS.

Ann or **Annat.**—The half-year's stipend payable in addition to the stipend vested in a parish minister at the time of his death. If he survive Whitsunday (15th May), a half-year's stipend is vested; and if he survive Michaelmas (29th September), a whole year's stipend is vested. The Ann is a half-year's stipend in addition to what is vested at either of these terms (Act 1672, c. 13, 24, Thomson's edit.; see Mackenzie, *Observations*, 149). The stipend vested must be taken up by confirmation, but the executors have right to the Ann under the Act "without necessity or expenses of a confirmation."

The *annates* or *primitiæ* were the first fruits out of tithes exacted by the pope, as explained by English writers (Degge, *Parsons' Counsellor*, 224). Lord Selborne (*Defence of Church of England*, 224) says that at the Reformation first fruits were "taken from the pope and given by Act of Parliament to the king." In the reign of Queen Anne they were handed over to the Church. His lordship adds, "First fruits were one year's profits levied originally (A.D. 1316) from the successors to vacant bishopries, and afterwards extended to other ecclesiastical benefices." These authorities seem satisfactorily to account for the term Annat being applied to the fruits of a year (Lat. *Annus*). (See also Ersk. ii. 10. 65; Duncan, *Par. Law*, 320.) The early history of Annat in Scotland is not so satisfactorily traced. The Acts 1546, c. 4, and 1571, c. 41, imply that Annat was then a known exaction, and it seems probable that it would be intermittently paid to papal collectors. The object of both Acts was to

transfer the Annat to the next of kin of Churchmen killed in the service of the king during the hostilities of these periods, and they imply the power to set the papal claim aside. The old form of Annat was put an end to by the Act 1587, c. 26, which declares that the benefices which, under prelacy, were subject to first fruits and fifth penny, were thereafter to be free. The extent of the Annat appears to have been a full year's fruits of the benefice. And even so late as 1671 a whole year's stipend was decerned for as Annat after it had come into operation in its new form (*Turner* v. *Lord Borthwick*, 3 Nov. 1671, B. Supp. 1. 639).

Mackenzie (*Observations*, 150) remarks that the Act of 1672, c. 13, was not well expressed in declaring that Ann belonged to the executors, for it belongs to the nearest of kin and the widow, because the Ann was of old introduced in favour of the nearest of kin (Act 1546, c. 4), "for Churchmen had no wives under popery." It was all the more singular that the Act should have referred only to executors, since the rights of widows and children had been recognised in decisions of the Court from the year 1626 downwards (Brown, *Synopsis*, *s.v.* "Ann," 84). The Act 1672, c. 13, had in view the extension of the provision to the next of kin of bishops, and the limitation of the Ann to a half-year's stipend (Stair, ii. 8. 34).

The benefit of Ann is supposed to have been conferred on the widow and children after the Reformation, following a German practice referred to by Erskine (ii. 10. 66), and more fully noticed by Lord President Inglis in *Latta* (1877, 5 R. 266). Where there were no children, it was held that the Ann fell to be divided equally between the widow and next of kin (*Scrimgeour*, 1633, Mor. 464; *Spence*, 1679, Mor. 465). The claim of the widow where there were children was held to be one-half, the other half going to the children (*M'Dermet's Children*, 1747, Mor. 464). Doubt was thrown upon this decision by Erskine (ii. 10. 67), but most writers approve of it (see Forbes on *Tithes*, 136; Buchanan, 430; Connell, ii. 93). The last very properly points out that the Ann is not a succession, and never belonged to the minister, and, he adds, "it has been justly decided that the widow gets half." It is important to add that it has been followed, and continues to be followed, in practice, both by the collector of the Church Schemes (who collects stipend provided by the Endowment Committee for *quoad sacra* parishes) and the collector of the Widows' Fund (who collects vacant stipend under the Act 54 Geo. III. c. 169). There is often great difficulty in tracing the next of kin, which suggests a doubt whether Ann should go further than the widow and children. When the scheme for the Ministers' Widows' Fund was instituted in 1744 [for its origin and progress see Morren, *Annals*], the Ann was not touched. In a later Act, however, in 1778 (19 Geo. III. c. 20, s. 14), it was provided that a sum of half the particular rate of the minister (or other contributor connected with the Universities) shall be payable out of the Ann where the Ann is by law competent, and where no Ann is competent the half-rate shall be paid by the contributor's heirs and executors. The highest rate is £7, 17s. 6d., so that a half-rate is not an excessive burden upon the Ann.

The Ann is payable out of all stipends, whether paid in money or victual, and was held exigible in town charges (*Shiels*, 1709, Mor. 466; *Hutchison*, 1747, Mor. 467), and is allowed out of sums contributed by Exchequer to small livings under 50 Geo. III. c. 84, s. 16, and 5 Geo. IV. c. 90, s. 21. The vacant stipend in *quoad sacra* parishes falls to the Widows' Fund (*Cheyne*, 1863, 1 M. 963); and in consequence of that decision Ann is also allowed. The ministers of *quoad sacra* parishes fall to contribute to the Widows' Fund. In *Grant* (1849) a first minister in a parliamentary

church was not held eligible, but in *Maclagan* (1887), in an ordinary *quoad sacra* parish, a first minister was held liable. The decision was followed by the Act 53 & 54 Vict. c. 124. The ordinary income from glebes is not subject to Ann (*Colville*, 1665, Mor. 464); but under the Glebe Lands (Scotland) Act, 1866 (29 & 30 Vict. c. 71, s. 15), it is provided that the Act 1672, c. 13, shall apply to the feu-duties and rents under the Act. It is thought that the provision also applies to interest on prices of glebes sold. The revenue in all cases under the Act arises from the authority to feu or lease being granted by the Court. When a sale takes place, it is only after the authority to feu, and the price, when invested, produces an income coming in place of the feu-duty.

Ann is not payable where the minister has demitted his charge or been deposed (*Archbishop of Glasgow*, 1675, Mor. 15897).

The title to the Ann, as already pointed out, is complete by survivancy without confirmation, and it is not subject to the debts or deeds of the incumbent (*Bairns of the Bishop of Galloway*, 1628, Mor. 470; *Donaldson*, 1694, *ib.*); nor is it subject to the Apportionment Act, 1870 (33 & 34 Vict. c. 35). See *Latta's* case, *ut supra*. And it cannot be subjected to the payment of an assistant and successor's stipend (*Dow*, 1887, 14 R. 928).

Annexation.—I. *Annexed Patrimony of the Crown.*—All lands and revenues belonging to the sovereign were either annexed to the Crown by Statute or otherwise acquired. The annexed property was properly called the Patrimony of the Crown. The term annexation is applied to the act of conjoining lands to the Crown, such lands being declared inalienable by the sovereign, except with the approval of Parliament, which ought only to be given for "great seen and reasonable causes of the realm." The first great Act of Annexation was the Act 1455, c. 41. The object of this Act was to restrain the unbounded liberty of our kings towards their favourites, and to secure for the sovereign a patrimony sufficient for the maintenance of his dignity; it was therefore declared that any alienation of annexed lands by the king was of no avail, except with the approval of Parliament as above mentioned, and that the reigning monarch might summarily take back such lands, and that the grantees were liable to refund all bygone profits intermeddled with by them during their possession. Following this Act came a series of Statutes, which to a certain extent rendered inoperative the Act of 1455, in that they authorised our kings to feu their estates, so long as the feu-duty was not less than the just avail of the lands; or, in the words of the Statute, "sa that it be set till a competent availe without prejudice to the king" (1457, c. 71; 1540, c. 115; 1584, c. 6; 1597, cc. 233, 234). By 1584, c. 6, the extent of this avail is declared to be "the duty to which the lands are, or may justly be, retourned for the new extent." In 1633 an Act was passed, by which it was provided that, subsequent to its date, no annexed land could be set feu by the king without the consent of Parliament, either by Act of dissolution or by particular ratification. This Act, taken with that of 1455, finally tied up annexed Crown lands, so that they could neither be alienated nor feued without the consent of Parliament.

In modern times the Crown patrimony has been given over to Parliament, and a fixed sum set apart for the maintenance of the royal dignity (1 Will. IV. c. 25). The management of the Crown property generally is now under the care of the Commissioners of Woods and Forests (2 & 3 Will. IV. c. 112; 3 & 4 Will. IV. c. 69; 14 & 15 Vict. c. 42). The

Crown's right to the foreshore is now transferred to the Board of Trade (29 & 30 Vict. c. 62).

[Stair, ii. 3. 35, 36; Ersk. *Inst.* ii. 3. 14; Bankt. ii. 3. 18; Bell, *Prin.* 672.] See Crown; Crown Lands; King.

II. *Annexation of Church Lands to the Crown.*—At the time of the Reformation, on the suppression of the monasteries, all benefices, including the spirituality as well as the temporality, returned *jure coronæ* to the king; but the king, actuated either by fear or by generosity, had alienated the greater part of them to the nobles and gentry, under the burden of making proper and sufficient provisions for the ministers. By the Act 1587, c. 29, these gifts were reduced; by it the temporality of all benefices belonging to archbishops, bishops, priors and prioresses, or belonging to any abbey, cloister, friars, monks, canons, common kirks, and collegiate kirks, were, with certain exceptions, annexed to the Crown. The spirituality or teinds were declared by the Act not to be annexed. The Act was passed to check abuses, and to secure some remnant of the Church lands to the Crown. It proceeded upon a narrative of grants made by former kings, whereby they had impoverished themselves, and that it was just that the benefices should revert to the Crown, besides that thereby a constant rent would be secured to the king, the necessity for taxes precluded, and future kings engaged not to return to Popery. The exceptions to the general annexation under the Act were as follows:—*Firstly*, All lands which prior to 1587 had been erected into temporal lordships by the Crown. *Secondly*, All lands made over to hospitals, universities, or schools, and which were still employed for their original purposes. *Thirdly*, Benefices, the patronage of which was vested in laymen before the Reformation. *Fourthly*, Manses and glebes were excepted, on the ground that they formed part of the spirituality. *Fifthly*, Grants of pensions out of benefices were, in certain cases, excepted from the Statute.

Feus and leases granted by Churchmen prior to the Act were secured to the feuars or tacksmen for payment of the duties formerly paid by them, while the superiority of the lands feued returned to the king.

[Ersk. *Inst.* ii. 10. 19, 20, 21; Stair, ii. 8. 35; Buchanan on *Teinds.*]

III. *Annexation of Lands*, quoad sacra.—When it happens that lands lie at a great distance from the church to which they originally belonged, they may be transferred to a church in greater proximity to them. By this annexation the inhabitants of the annexed lands are for convenience placed under the care of the nearest minister, but the lands themselves remain in all civil respects part of the old parish, and they remain responsible for the payment of stipend to the church to which they originally belonged; moreover, they are in no wise liable for the upkeep of the manse, or for any parish burdens of the church to which they are annexed, with the exception that they are liable for a proportional share of building or repairing the church (*Park*, 1748, Mor. 8503; *Drummond*, 1773, Mor. 7920). Annexation of lands *quoad sacra* does not affect the liability of the lands annexed for poor rates to their original parish (*Thomson*, 17 Nov. 1808, F. C.).

[Stair, ii. 3. 35; Ersk. ii. 10. 64, see Notes to Nicolson's edition.] See Teinds; Erection; Disjunction.

Annualrent.—The interest of money, or the yearly consideration paid for the use of money or other fungibles. The Jews were prohibited by the Mosaic Law from taking interest from their brethren, though not from

strangers (Lev. xxv. 36; Deut. xxiii. 19, 20). By the Canon Law, because money was a barren subject which yielded no fruit, all lending on interest was forbidden, and he was declared a heretic who should maintain the lawfulness of it (Clement, *Tit. de Usur.* s. ult.). This strict rule of law led to its evasion by the device of purchasing annualrents or annuities out of land, which was equivalent to lending upon interest. Hence infeftments of annualrent took their rise, and the term annualrent came to be synonymous with interest. It is now obsolete.

[Stair, i. 15. 7; Bankt. i. 21. 1; Ersk. ii. 2. 5, ii. 8. 31–35, iii. 3. 75; Ersk. *Prin.* ii. 2. 3; Bell, *Prin.* s. 908; Brown, *Synop. h.t.*; Kames, *Stat. Law Abridgt.*; Watson, *Stat. Law.*] See Interest; Annualrent Right.

Annualrent Right, or Infeftment of Annualrent.—A right constituted by infeftment upon land, whereby, in consideration of a money payment, the lands contained in the deed were charged with the yearly payment of a certain sum,—at first an irredeemable annuity. This was an ancient mode of lending money, devised to evade the rule of the Canon Law prohibiting loans of money upon interest; and was at first, strictly speaking, not a security for debt, but a proper purchase of an annuity. Before the abolition of the Canon Law, a clause giving the debtor the right to redeem was introduced,—the transaction thus becoming an impignoration of rents, and the payments *annualrents*. Later, after the Reformation, a clause of *requisition* was added, whereby, for the first time, the creditor could call for payment of the principal sum: and subsequently, instead of the power of redemption and requisition, a proper personal bond was introduced, obliging the borrower personally to repay principal and interest,—the security, for *the interest only*, being the infeftment in an annualrent payable from the land. The obligation to pay the annualrent was a real burden by constitution, and the debt was heritable. As the right constituted a *nexus* over the rents, the arrears of interest after seisin were *debita fundi*, payment of the annualrent was competently enforced by poinding of the ground, and tenants were liable to the extent of their term's rents. The right was extinguished at first by a discharge or renunciation by the annualrenter, recorded in the Register of Reversions; but later, when the obligation to pay annualrent became accessory to the personal obligation, it might competently be extinguished not only by an unregistered discharge, but by payment or intromission with the rents. The deed was superseded by the heritable bond, now the heritable bond and disposition in security, and is obsolete. (For bonds of annualrent and rent charges for improvements under the Montgomery and Rutherfurd Acts, and Improvement of Land Acts, see 27 & 28 Vict. c. 114, s. 51; 38 & 39 Vict. c. 61, s. 8; *Juridical Styles*, i. 440–53; *Scottish Drainage Co.*, 1889, 16 R. (H. L.) 16; 41 & 42 Vict. c. 28; 45 & 46 Vict. c. 53, s. 6: Rankine on *Landownership*, 965 *et seq.*).

[Stair, ii. 5; More, *Notes*, ccix.; Ersk. ii. 2. 5, ii. 8. 31–5; Bankt. ii. 5. 1; Ersk. *Prin.* ii. 2. 3, ii. 8. 15: Bell, *Prin.* s. 908; Bell, *Com.*, 7th ed., i. 713; Ross, *Lect.* ii. 372. 322. 328; Ross, *Leading Cases*, iii. 108; Menzies, *Conveyancing*, 845; *M'Donald*, 1829, 7 S. 826.] See Burdens; Redeemable Rights; Heritable Securities; Ground Annual.

Annuities.—The right to an annuity may be defined as a right to a periodical payment of money, which amounts to a fixed sum in each year.

The magnitude of the annuity depends upon the sum payable in each year; but payment need not be yearly. Periodical payments may be made at any interval that may be chosen, and accordingly there may be quarterly, monthly, weekly, or daily annuities (*Smith*, 1847, 9 D. 1344). As a general rule, however, in Scotland, annuities are payable twice in the year—at Whitsunday and Martinmas.

They may be granted either for a fixed term of years—when they are known as annuities certain—or during the continuance of a given life, or of a given series of lives (*Mackenzie*, 1840, 2 D. 833); or, indeed, they may be granted in perpetuity, though this rarely occurs. They may be immediate or deferred. Accordingly, the termination or the commencement of an annuity, or perhaps both, may depend upon some contingency, or some combination of contingent events.

An annuity may, according to the terms of the contract, or testament, or disposition, in which the annuity is reserved, or other instrument by which it is created, exist during the life of the granter, or of the grantee, or during the life of any third party, or during the joint continuance of any number of lives; and it may commence from the date of the grant or from a more distant period.

According to Bell, in his *Commentaries* (Bell, *Com.*, 7th ed., i. 355), the rule of law upon which an annuitant is entitled to bring his action, or to do diligence, is as follows:—He may claim a capital sum corresponding to the annuity; that is to say, such a capital as would, if invested, produce an annual return equal to the annuity to which he is entitled. The interest thereon is to be paid to him in terms of his ground of debt. At the termination of the period for which the annuity is to last, the capital will go back to the debtor. The rule in bankruptcy used to be the same, but questions of bankruptcy are now regulated by various sections of the Bankruptcy Act of 1856.

The instrument in which an annuity is usually set forth is called a bond of annuity, and forms of it may be found in the style books. The bond of annuity is defined as a contract in which the obliger engages to make to the obligee a certain yearly payment in consideration of a price deemed adequate at the time of granting it, or in the intention of settling on the annuitant a yearly sum for family purposes, or from favour, as a permanent aliment (Bell, *Com.*, 7th ed., i. 353). When a price is paid, the sum should be set forth, in order to comply with the Stamp Acts. The obligant binds himself and his heirs, in the usual form, to pay, for the period agreed upon, at such terms as may be arranged, with penalty and interest in the event of due payment not being made. It should set forth whether the termly payments are to be in advance or at the end of each termly period. A widow's annuity is payable in advance *ex lege* (Ersk. i. 6. 41, ii. 9. 67), and should be declared payable in advance. Until the passing of the Apportionment Acts (*q.v.*), if an annuitant died between two terms nothing was due for the current term, but now the matter is regulated by the Act of 1870 (33 & 34 Vict. c. 35), which provides that all rents, annuities, dividends, and other periodical payments in the nature of income, shall be considered as accruing *de die in diem*, and be apportionable accordingly, unless there be special stipulation to the contrary.

Redeemable bonds of annuity were, during the existence of the Usury Laws, much used as a device for evading the prohibitions of these Statutes. These bonds acknowledged receipt of the money as the price of an annuity, which was to endure for the life of a person selected, or until redeemed, and which was made large enough to cover the interest on the sum

advanced, and the premiums of insurance on the selected life, for a sum corresponding to the sum advanced (Bell, *Com.*, 7th ed., i. 359). This use of an annuity as a security is still made. The borrower is the granter and the lender the grantee of such an annuity.

Annuities may be secured over heritable property, and this may be done by absolute disposition qualified by back letter, by a disposition in security ancillary to the bond of annuity, or by making the annuity a real burden by reservation. It is to be kept in view that a real burden must be for a sum certain. In marriage contracts the security for the wife's jointure is usually granted in the form of a disposition in security of such a portion of the husband's lands, if he is a fee-simple proprietor, as will fully cover the annuity; or the disposition may be not of the lands, but of an annuity payable out of the lands. The heir of entail in possession of an entailed estate may exercise the powers usually granted in deeds of entail, or, under the Aberdeen Act (5 Geo. IV. c. 87), he may infeft his wife in an annuity not exceeding one-third of the free rents of the estate, after deducting public burdens—but not income-tax (*Maclaine*, 1845, 8 D. 150)—and other deductions mentioned in the Act. An heir-female can similarly infeft her husband in an annuity not exceeding one-half of the rents. Not more than two annuities granted over an estate under this Act can coexist. By the Entail Act of 1868 (31 & 32 Vict. c. 84), an heir-apparent, with consent of the heir in possession, can grant provisions to his wife, and these may be provided out of entailed money. By the Entail Act of 1882 (45 & 46 Vict. c. 53, s. 24), such provisions may be secured over the fund into which an entailed estate may be converted.

A real annuity is a yearly revenue payable out of the ground without respect to a stock or principal sum, in which respect it chiefly differs from an annualrent. In other respects an annuity constituted by infeftment resembles an infeftment of annualrent, with the following variations:—(*a*) An annuity is subject to a proportion of the public burdens affecting the lands out of which it issues, unless it is otherwise stipulated, or it is provided that it shall be payable out of the first and readiest of the rents. (*b*) An annuity remains always the same, and does not vary with any rate of interest (Ersk. ii. 9. 43; Bankt. 651).

When lands are so burdened in favour of a wife, the husband cannot dispose of the lands except under burden of the annuity, and they cannot be freed of the burden except with her consent; nor can the husband's creditors take the lands except under the same restrictions. Her consent may discharge the burden (*Standard Prop. Co.*, 1877, 4 R. 695).

In the case of an annuity granted by a husband who is not in a position to give security, or who does not give it, the annuity, subject to the rules which govern marriage-contract provisions, as they are antenuptial or post-nuptial, is a debt due by his estate to the wife, contingent on her surviving him, and postponed till his death, for which she will be entitled to rank with his creditors in the event of his bankruptcy (Bell, *Com.*, 7th ed., i. 682). An aliment granted to a wife did not fall under the *jus mariti*, so as to be affectable by her husband's creditors, or to be liable to compensation for debts due by him; but in order to this the fund must have been alimentary, and it is not sufficient to make it alimentary that it be the sole fund of subsistence (*Turnbull*, 1709, Mor. 5895; *Robb*, 1794, Mor. 5900). It has been held where, by antenuptial contract of marriage, an annuity was granted to the wife, and declared to be alimentary, but was allowed by her to fall into arrear, that she was not entitled to rank for the arrears, the existence of alimentary

debts not being alleged (*Muirhead*, 1877, 4 R. 1139; *Donald*, 1860, 22 D. 1118). This was during the husband's lifetime.

Annuities being rights that bear a tract of future time are in their nature heritable (Bell, *Prin.* s. 1490; Stair, ii. 1. 4, and iii. 5. 6; Ersk. ii. 2. 6; Bell, *Com.*, 7th ed., ii. 4; *Hill*, 1872, 11 M. 247; *Mackintosh's Trs.*, 1870, 8 M. 628; revd. 1873, 11 M. (H. L.) 28; *Crawford's Trs.*, 1867, 5 M. 275; *Wallace*, 1846, 8 D. 1038; *Brealalbane's Trs.*, 1873, 11 M. 912; *Reid*, 1878, 5 R. 630), and therefore, in the absence of express provision or stipulation, fall to be paid out of heritage, where in a succession there is sufficient heritage to satisfy the heritable debts. This rule applies both in testate and intestate succession. By the Titles to Land Consolidation Act of 1868 (31 & 32 Vict. c. 101), and the Conveyancing Act of 1874 (37 & 38 Vict. c. 94), heritable securities and real burdens were made moveable as regards succession, unless executors are expressly excluded. They remain heritable *quoad fiscum*, are not to be computed in calculating the amount of a legitim fund, and are still heritable in questions between husband and wife. By the interpretation clause of the Act of 1868, "heritable security" includes "bond of annuity." By Act 1661, c. 32, bonds containing clause of annualrent and profit, where there was no obligation to infeft, had been made moveable.

Annuities are primarily payable out of income (*Currie*, 1846, 8 D. 1021). But if the income of an estate be insufficient to provide the annuities with which it is burdened, capital must be used: and they are preferable to a gift of residue (*Knox's Trs.*, 1869, 7 M. 873; *Kinmond's Trs.*, 1873, 11 M. 381; *Adamson*, 1891, 18 R. 1133; but see *Hutcheson*, 1886, 13 R. 915). A direction to purchase an annuity gives rise to a charge upon capital. In the case of *Webster* (1882, 10 R. 169), it was held that an annuitant was entitled to insist that each year's annuity should either be paid to him, or expended for his behoof within the year.

If an annuity be validly declared to be alimentary, it will not be capable of being attached, except for alimentary debts, nor will compensation be pleadable against the annuitant's claim for payment. If it be unreasonably large, the Court will restrict it to a reasonable sum, and allow the balance to be affected by diligence (Ersk. iii. 6. 7; *Livingstone*, 1886, 14 R. 43; *Reid*, 1884, 12 R. 178; *Corbet*, 1879, 7 R. 200: *Lewis*, 1852, 14 D. 857, 15 D. 263; *Harvey*, 1840, 2 D. 1095; *Monypenny*, 1835, 13 S. 1112; *M'Donell*, 25 Nov. 1819, F. C.). No one can put his own property out of the reach of his creditors and at the same time retain the beneficial use of it (Ersk. iii. 6. 7; Bell, *Com.*, 7th ed., i. 125; *White's Trs.*, 1877, 4 R. 786; *Reid, ut supra*). If not alimentary, the annuity may be assigned or renounced, and arrears of an alimentary fund may be attached (Bell, *Com.*, 7th ed., i. 126).

If an annuity be left to a person with power to burden it or dispose of it, he can claim its capitalised value, on the principle that the Court will not compel a man to do that which he can at once undo (*Lawson's Trs.*, 1890, 17 R. 1167; *Dow*, 1877, 4 R. 403; *Kippen*, 1871, 10 M. 134; *Teal*, 1871, 9 M. 728). If, however, the annuity is alimentary, no such claim can be made (*Duffus* (*White's Trs.*), 1877, 4 R. 786; *Cosens*, 1873, 11 M. 761; *Smith*, 1873, 11 M. 639).

It is thought that an annuity may be secured by arrestment (*Macdonald*, 15 June 1811, F. C.), or heritable property may be adjudged to secure it. Arrestment used against those in right of an annuity will only affect the payment for the current term and any arrears that may exist (*Smith*, 1847, 9 D. 1344; Bell, *Com.*, 7th ed., ii. 72; Stair, iii. 1. 27; Ersk. iii. 6. 9).

Annuities granted to the widows of ministers by 19 Geo. III. c. 20, are by s. 78 declared not arrestable, and cannot be assigned beforehand (*Mackenzie*, 1791, Mor. 10413). Professors' pensions, under 17 Geo. II. c. 11, are similarly favoured; but annuities under the Schoolmasters' Widows' Fund are not protected (*Irvine*, 1829, 7 S. 317). The diligence to carry *acquirenda* is adjudication (*Clunies*, 1739, Mor. 713; *M'Leod*, 1891, 18 R. 930). Government Funds are of the nature of an annuity, but they are personal by Statute (Bell, *Com.*, 7th ed., i. 101; Bell, *Prin.* s. 1342; *Hog*, 28 Dec. 1791, F. C.).

It has been decided that annuities do not fall under a clause conveying *acquirenda* to marriage-contract trustees (*Boyd's Trs.*, 1877, 4 R. 1082).

Where a capital sum has to be set aside to secure payment of an annuity, those in right of the reversion are not entitled to distribute the balance of the estate on purchasing an annuity (*Wilson*, 1833, 11 S. 343, 7 W. & S. 457. See *Forsyth's Trs.*, 1854, 17 D. 208.)

The mere fact that payment of a legacy is postponed to the lapsing of an annuity, does not suspend vesting of the legacy (*Cunninghame*, 1889, 17 R. 218; *Duncan's Trs.*, 1882, 9 R. 731; *Millar*, 1875, 2 R. (H. L.) 1; *Carleton*, 1867, 5 M. (H. L.) 151; *Nimmo*, 1864, 2 M. 1144); nor will a trust be kept up merely for the purpose of securing annuities (*Kerr*, 1858, 20 D. 561).

In the case of *Bryce* (1878, 5 R. 722), it was held that an alimentary annuitant was entitled to a share of residue proportional to the capitalised value of her annuity.

There are English cases which establish the principle that the gift of an annuity is a gift for life only, but that if, in giving the annuity, a certain description of property is pointed out as the fund to pay it, this generally constitutes a gift of the thing indicated (*Bright*, 1881, 19 Ch. Div. 294; Re *Taber*, 51 L. J. Ch. 721; *Stokes*, 12, Cl. & Fin. 161); In the event of a deficiency of assets, an annuity bequeathed would suffer abatement along with other legacies.

Under the Life Assurance Co.'s Acts, 1870 and 1872 (33 & 34 Vict. c. 61; 35 & 36 Vict. c. 41), assurance companies dealing in life policies and annuities are bound to keep all receipts in respect of life assurance and annuity contracts separate, and the fund thus set aside is to be security for the life policy and annuity holders, and is not to be liable for any contracts but such as would be entered into in carrying on a life assurance business. Investigations have to be made periodically by an actuary. When a life assurance company is being wound up, all annuities must be valued according to the tables used by the company granting the annuity at the time of granting; and where such tables cannot be ascertained or adopted to the satisfaction of the Court, then according to the tables known as the Government Annuity Experience Tables, interest being reckoned at the rate of four per cent. per annum.

Bankruptcy.—Special provision is made in the Bankruptcy Act of 1856 for fixing the value of an annuity. Sec. 54 provides that no creditor in respect of an annuity granted by the bankrupt shall be entitled to vote and draw a dividend until the annuity shall be valued; but he may, if the trustee has not been elected, apply to the Sheriff, or, if the trustee has been elected, to the trustee, to put a value upon such annuity. The value of the annuity is, in the ordinary case, its market price, as estimated either by the Government tables, or by any of the recognised life assurance tables (*Fergusson*, 1836, 15 S. 25; Ex p. *Pearce*, L. R. 13 Ch. Div. 262). The Sheriff or trustee, as the case may be, is directed to put a value upon the annuity, regard being had to the original price given, deducting therefrom such

diminution in its value as has been caused by the lapse of time since the grant thereof to the date of sequestration. In the case of an annuity certain, this is a mere matter of discounting interest. The creditor is entitled to vote and draw dividends in respect of such value, and no more. Notice of the application has to be given to the bankrupt, and to the petitionary or concurring creditor (*Watson*, 1848, 10 D. 1414). The judgment valuing the annuity is subject to review; and any creditor may appeal, or appear in any appeal. Pending an appeal, the creditor may vote. It is a question whether the successor of an annuitant who dies during the sequestration, before the annuity has been actually valued, is entitled to vote and rank for the estimated value (see *Watson, ut supra*; *Garden*, 1860, 22 D. 1190). It is also provided that the creditor in an annuity is not to sue or charge any cautioner for the annuity after the date of the sequestration, except for the value fixed in the manner above set forth, and arrears and interest. On the cautioner making payment of such value and arrears and interest, he is to be discharged of all liability for the annuity, and he may thereupon enter a claim in the sequestration for the sum so paid, and vote and draw dividends thereon. But until he makes such payment he is to be liable for the various payments of the annuity as they shall become due. In making the payment of the value, arrears, and interest, he is entitled to deduct such dividends as the creditor shall have received before full payment as aforesaid. Where several persons are bound for an annuity, it may be inferred, perhaps on the general principle, that the creditor will not be entitled to enter into a compromise for valuing the claim against the principal debtor without the consent of the cautioner (Bell, *Com.*, 7th ed., i. 378).

Stamp Act.—Under the Stamp Act of 1891 (54 & 55 Vict. c. 39), ss. 54–60, a grant of an annuity is treated as a conveyance on sale. Where the consideration consists of money payable periodically for a definite period not exceeding twenty years, the duty is to be charged on the total amount so payable. When such definite period exceeds twenty years, duty is to be charged on the total amount which will, or may, according to the terms of the sale, be payable during the twenty years next after the date of the instrument by which the grant is made. When the consideration consists of money payable periodically during any life or lives, the conveyance is to be charged with *ad valorem* duty on the amount which will be payable during the term of twelve years next after the date of the instrument. Where, upon the sale of any annuity, such annuity is not created by actual grant or conveyance, but is only secured by bond, warrant of attorney, covenant, contract, or otherwise, the bond or other instrument, or some one of such instruments, is to be charged with the same duty as an actual grant or conveyance.

Taxes.—With regard to income tax (5 & 6 Vict. c. 37; 16 & 17 Vict. c. 34), annuities from any public revenue, imperial, colonial, or foreign, are charged under Schedule C of the Income Tax Act. As regards annuities from the National Revenue, the assessment is made by Commissioners appointed for that purpose. In the case of annuities from foreign sources, all persons charged with the payment of them in this country are bound to account for income tax to the Special Commissioners. Annuities charged upon land fall under Schedule A, and the owner of the land pays the duty, and deducts it. All annuities, either as a charge on any property of the person paying the same, by virtue of any deed, or will, or otherwise, or as a reservation thereout, or as a personal debt or obligation, by virtue of any contract, and whether payable half-yearly or at any shorter or more distant period, are

charged with duty by the Act of 1853, s. 40; Act 1842, s. 102. Every person paying an annuity is entitled to deduct and retain thereout a proportionate amount of the several rates which were chargeable in respect of such annuity during the time it was accruing due (27 & 28 Vict. c. 18, s. 15).

These deductions must be made at the time of payment, otherwise they may not be recovered (*Currie*, 2 Mad. 163; *Galashiels Provident Building Co.*, 1893, 20 R. 821). By 51 & 52 Vict. c. 8, s. 24, the person so deducting is bound to render an account of the sums so deducted to the Commissioners. By 16 & 17 Vict. c. 34, s. 54, and 22 & 23 Vict. c. 18, in returning income, a deduction may be made by persons who have contracted for deferred annuities on their own or their wives' lives, of the annual premium paid in respect of such annuities, such deduction not to exceed one-sixth part of the person's profits and gains.

A contract to pay an annuity free of income tax is void by 5 & 6 Vict. c. 35, s. 103, but this has been decided not to apply to a bequest. When an annuity is left by will, if the testator leaves it free of income tax, that is just increasing the amount of the legacy (*Kinloch's Trs.*, 1880, 7 R. 596; *Mackie's Trs.*, 1875, 2 R. 312; but see *Rodger's Trs.*, 1875, 2 R. 294).

Death Duties.—By s. 2 (1), subsec. d, of the Act of 1895 (57 & 58 Vict. c. 30), property passing on the death of a deceased person is deemed to include any annuity or other interest purchased or provided by the deceased . . . to the extent of the beneficial interest accruing or arising, by survivorship or otherwise, on the death of the deceased. But by s. 3 (1) and (2), estate duty is not payable in respect of the determination of an annuity for lives where the annuity was granted for full consideration, in money or money's worth, paid to the vendor or granter for his own use and benefit. When partial consideration was so given, the value of the consideration is allowed as a deduction. The value of any property is to be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased (s. 7, subsec. 5). By s. 15, estate duty is not to be payable in respect of a single annuity not exceeding £25 purchased or provided by the deceased, either by himself or in concert with any other person, nor in respect of any pension or annuity payable by the Government of British India.

For the purchase of Government annuities, see 10 Geo. IV. c. 24; 2 & 3 Will. IV. c. 59; 1 & 2 Vict. c. 49; 16 & 17 Vict. c. 45; 27 & 28 Vict. c. 43; 36 & 37 Vict. c. 44; 3 & 4 Will. IV. c. 14; 7 & 8 Vict. c. 83; 26 & 27 Vict. c. 87; and 45 & 46 Vict. c. 51.

Annuity of Teinds, or King's Annuity.—This was a yearly charge, estimated at 6 per cent., on money and victual teinds, granted to King Charles I., as a compromise of his claim to resume the teinds which had been appropriated by Lords of Erection and others about the period of the Reformation. From the annuity were excepted (1) teinds paid to bishops; (2) teinds paid as stipend; and (3) teinds devoted to colleges, hospitals, and other pious uses. Commissioners in 1627 and 1631 fixed the rate, and it was ratified by Act 1633, c. 15, which declared that the annuity, though payable to the king and his successors, was not annexed to the Crown, but left to His Majesty's disposal. The Act also declared that the annuity should commence with crop and year 1628, and should be payable for subsequent years in all time coming as well from "the unvalued as valued teinds." When unvalued, the teind was fixed at one-fifth of the

rental. The king assigned the annuity, in security of a debt of £10,000, to one Livingstone. The right was purchased by the Earl of Loudoun, and in 1642 the king granted him a commission to sell to such landowners as chose to purchase. In 1674, King Charles II. stopped the further collection, and cancelled all arrears prior to 1660. The collection was never resumed, although the matter had been under consideration (Connell, i. 264–70).

The annuity, though not collected, has continued as a deduction in sales of teinds down to the present reign. It is usually called "Queen's Annuity," but in one case it has been called "Queen's Ease" (Elliot, *Teind Court Procedure*, 27, 28, 97). An example of the sale of the annuity, in 1644, is found in *Countess of Rothes* (1874, 2 R. 106). The question whether the annuity was *debitum fundi*, as affirmed by Mackenzie (378), or only *debitum fructuum*, as suggested by Erskine (ii. 10. 39), is now of no importance. See TEINDS.

Annus deliberandi.—By the common law of Scotland, an apparent heir, in most cases (cp. ALIOQUI SUCCESSURUS for exception) incurred a general responsibility for his ancestor's obligations on his entry to the succession (cp. Scots Acts, 1695, c. 24, and 1696, c. 11). It was therefore of importance to him to consider whether he should renounce the inheritance or take it up. To permit of his consideration of this question, a year was given him, during which he could not either be called upon to renounce the inheritance or be proceeded against as representing his ancestor. This year was called the *annus deliberandi*. It ran from the death of the ancestor, whether known or not to the apparent heir, or from the apparent heir's birth, if born after the ancestor's death. If the first apparent heir died during the year, the *annus deliberandi* of the next apparent heir ran from the death of the first. The heir-apparent may sue for exhibition of writings connected with the succession, to enable him to come to a decision (Ersk. *Inst.* iii. 8. 56 *et seq.*). By Statute (21 & 22 Vict. c. 76, s. 27; 23 & 24 Vict. c. 143, s. 16, repealed and in part re-enacted by 31 & 32 Vict. c. 101, s. 61), the period for deliberation is now reduced to six months. Though the *annus deliberandi* still exists in this limited form, its practical importance has now greatly disappeared, for the responsibilities of an heir at common law, which made the *annus deliberandi* a very practical favour to him, have now been modified by Statute. By the Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94, s. 12), it is enacted as follows: "An heir shall not be liable for the debts of his ancestor beyond the value of the estate of such ancestor to which he succeeds; and if an heir shall renounce the succession, the creditors of the ancestor shall have the same rights against the estate as upon a renunciation according to the law before the commencement of this Act. When an heir has, before renunciation, intromitted with the ancestor's estate, he shall be liable for the ancestor's debts to the extent of such intromission, and no further." This statutory provision places the apparent heir, on his entry to the succession, in the same position as an apparent heir entering to the succession formerly *cum beneficio inventarii* (Ersk. *Inst.* iii. 8. 68; Scots Acts, 1695, c. 24), and makes the exercise of his *jus deliberandi* during the *annus deliberandi* of no practical use. See BENEFICIUM INVENTARII: APPARENT HEIR.

The Roman law doctrine of *Annus deliberandi* is dealt with in the article *HEREDITAS* (*q.v.*).

A non domino.—A grant or conveyance of lands is said to be *a non domino* when it proceeds "from one who is not the proprietor" of the lands so granted. Such a grant is necessarily invalid, but the defect may be cured by the grantee's possession of the lands for a period, formerly of forty years under the Act 1617, c. 12, now of twenty years under the Conveyancing Act, 1874 (37 & 38 Vict. c. 94), s. 34. Assuming the title to be *ex facie* valid, all inquiry into its original nature becomes, after the lapse of that period, incompetent. To exclude this extrinsic objection to the validity of a title may, indeed, be said to be one of the main objects of the positive PRESCRIPTION (*q.v.*).

A non habente potestatem.—"From one who has not power," owing to the fact that he himself is not infeft, to grant a precept of sasine, which, under the system of conveyancing in force prior to 1874, was necessary to enable a vassal or disponee to feudalise his title. The title of one infeft upon a precept of sasine granted a *non habente potestatem* laboured under a fatal extrinsic defect, which could only be cured by prescriptive possession. See A NON DOMINO and PRESCRIPTION.

Answer.—Answer is the written pleading stated by a party, as a reply to the condescendence and claims in a multiplepoinding, and to the statement of facts by the complainer in a suspension, and in petitions where the parties dispute as to the facts. The term is further applied to the replication ordered by the judge to a statement. See MULTIPLEPOINDING; SUSPENSION; PETITION; ACTION.

Antenuptial Contract of Marriage.—See MARRIAGE CONTRACT.

Antenuptial Debts of a Married Woman.—Any debt contracted by a woman before her marriage is an antenuptial debt, though it may not become prestable until after the marriage. Under this head fall, therefore, a wife's natural obligations to aliment her indigent parents (*M'Allan*, 1888, 15 R. 863; *Reid*, 1866, 4 M. 1060; *Foulis*, 1887, 14 R. 1088), her children by a former husband (see *Greig*, 1865, 3 M. 575; *Reid*, *ut supra*), or an illegitimate child born before marriage (*Aitken*, 1815, Hume, 217). A wife's obligations as an heir, a vitious intromitter, an executrix, or a trustee, contracted before marriage, are antenuptial debts (*Knows*, 1627, Mor. 5862; *Dumbar*, 1663, Mor. 2367; *Burnet*, 1665, Mor. 5863; *Palmer*, 3 Beav. 227; Fraser, *H. & W.* i. 588; Williams on *Executors*, 9th ed., ii. 1742; and see *Pattison*, 1886, 13 R. 550). And so is her obligation as a contributory in the liquidation of a company in which she held shares at marriage (*Wishart*, 1879, 6 R. 823). And her liability for a call made before marriage would be an antenuptial debt. (As to the husband's liability to contribute, see *infra*.) So also is her liability incurred before marriage in damages for non-performance of contract (Fraser, i. 590).

Where before marriage her father was dead, or she was not living in his house, ordinary furnishings made to her will be presumed to have been made on her credit, and her liability for them will be among her antenuptial debts if they are unpaid at her marriage (*Hopekirk*, 1698, Mor. 13426 and 12482; Fraser, *H. & W.* i. 590). But if she was living *in familia* with her

father, ordinary clothes or similar necessaries will be presumed to have been furnished to her on her father's credit, and unless this presumption is rebutted, she will not be liable for them (*Bannatyne*, 1768, Mor. 5860; More, *Notes*, xxii.; Bell, *Com.*, 5th ed., i. 675; Fraser, *l.c.*). Where it appeared that the wife's wedding clothes were furnished on the credit of the husband, as, *e.g.*, where her father was in prison for debt, the husband was found liable for them, as for her antenuptial debts: and also on the ground that they were *in rem versum* of him (*Henderson*, 1696, Mor. 5881; *Neilson*, 1672, Mor. 5878; see *Alston*, 1682, Mor. 6007).

Wife's Liability for her Antenuptial Debts.—A married woman is exempt from personal diligence, and is not personally liable for her antenuptial debts (*Gordon*, 1704, Mor. 6078: Ersk. i. 6. 19: Fraser, *H. & W.* i. 601). The creditor may constitute his debt in an action against both the spouses, but, *quoad* the wife, execution will be superseded so long as the marriage subsists (*Gordon, ut supra*; *Graham*, 1668, Mor. 12491). But as imprisonment for debt is, except in a very limited class of cases, now abolished, this rule is of less importance than formerly. The protection falls with the marriage, and at its dissolution the wife becomes personally liable for her antenuptial debts (*Killock*, 1612, Mor. 5861; *Wilkie*, 1678, Mor. 5876; Bell, *Prin.* s. 1570: Ersk. i. 6. 16; Fraser, *H. & W.* i. 593).

Wife's Estate is Liable.—If a wife has estate from which the *jus mariti* has been excluded, this is liable for her antenuptial debts, and a creditor may poind her moveables or adjudge her heritage (Ersk. i. 6. 17: Fraser, *H. & W.* i. 602; *Leven*, 1683, Mor. 5876, 5803, & 3217). The estate of a married woman exempted from the *jus mariti* by the Married Women's Property (Scotland) Act, 1881 (*q.v.*), is similarly liable. Even in the cases afterwards noticed in which the husband is also liable, he is not the proper debtor, and may require that her estate be first discussed (Stair, i. 4. 17. 7; Ersk. i. 6. 17; Fraser, *H. & W.* i. 602; *Wilkie*; *Leven, ut supra*). And if he pays such debts, he is entitled to relief against her separate estate (*Leven, ut supra*; *Gordon*, 1681, Mor. 5924; *Robertson*, 1821, 1 S. 48; Bell, *Com.*, 5th ed., i. 676, *Prin.* s. 1571; Fraser, *H. & W.* i. 596).

Husband should be called.—The safer course is in all cases to call the husband, as his wife's curator, and for his interest, though, when she has separate estate, which is here the hypothesis of the action, this is, probably, not strictly necessary (Mackay, *Manual*, 166; Walton, *H. & W.* 315.

Liability of the Husband (A) *when the Marriage took place on or after* 1 *January* 1878.—The Married Women's Property (Scotland) Act, 1877 (40 & 41 Vict. c. 29), provides by sec. 4: "In any marriage which takes place after the commencement of this Act, the liability of the husband for the antenuptial debts of his wife shall be limited to the value of any property which he shall have received from, through, or in right of his wife at, or before, or subsequent to the marriage; and any Court in which a husband shall be sued for such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, and value of such property." See the corresponding provisions in England (45 & 46 Vict. c. 75, ss. 13 and 14). It has not been decided if this limited liability continues after the dissolution of the marriage. But it is submitted that this is the case, the intention of the Legislature being to remove the hardship of the husband's liability where he was not *lucratus*, but not to enable him to take property without satisfying the just claims of creditors upon it. And it is thought that the old doctrine that he was not liable as *lucratus* when he had received merely a moderate tocher, has no application. See Bell, *Prin.* 1570, and authorities *infra*, as to

a moderate tocher). For the statutory language is not, "he shall be liable *in quantum lucratus*," and even a moderate tocher is "property received through his wife." Apart from contract, in a marriage to which the Married Women's Property (Scotland) Act, 1881, applies, the husband receives no property "from, through, or in right of his wife," and consequently he has now no liability *stante matrimonio* for her antenuptial debts. But any legal or conventional rights accruing to him through her at the dissolution of the marriage, including his statutory right, conveniently called his JUS RELICTI (*q.v.*), will, it seems, be subject to payment of her antenuptial debts. (See *Cunningham*, 1662, Mor. 5870; Ersk. i. 6. 17, and iii. 9. 22; Fraser, *H. & W.* i. 599, and ii. 985).

The words of the section, "subsequent to the marriage," appear to mean "during the marriage, and after its dissolution."

Liability of Husband to be a Contributory in respect of Wife's Shares.—Where the wife held shares in a company before her marriage, it was held that the husband married after the Act of 1877 was entitled to have his name removed from the list of contributories on surrendering any property he had acquired through his wife (*Wishart*, 1879, 6 R. 823). In England, it has been held that, in terms of sec. 78 of the Companies Act, 1862, the husband is a contributory in his own right, and is liable *in solidum* (*Ex parte Hatcher*, 1879, 12 Ch. D. 284; Lindley on *Companies*, 5th ed., 42; Walton, *H. & W.* 242). And in a subsequent case, where, however, the marriage was prior to the Act of 1877, the names of both husband and wife were put on the list (*Hill*, 1879, 7 R. 68). By sec. 78 the husband's liability is only during the marriage. The section does not apply to the case of a woman acquiring shares after marriage (*Biggart*, 1879, 6 R. 470; *Forbes*, 1879, 6 R. 112; Lindley, *Companies*, 41). (See, for the present law in England, sec. 13 and sec. 14 of the Married Women's Property Act, 1882.) In the view of some writers, the husband, in England, is even yet liable *in solidum* as a contributory in his own right (Lindley on *Companies*, 42; Thring on *Companies*, 87).

Debts contracted after Proclamation of Banns.—It is laid down by Erskine and Fraser, that after banns have been proclaimed in the parish church of the bride, she is disabled from contracting debt, being already under the curatory of her future husband (Ersk. i. 6. 22; Fraser, *H. & W.* i. 592 and 681). But this appears erroneous, except as regards gratuitous alienations (Bell, *Prin.* s. 1551; *Com.*, 5th ed., i. 673; *Gilchrist*, 1682, Mor. 6032; arg. in *Blair*, 1776, Mor. 5846, at 5848). And since the Married Women's Property (Scotland) Act, 1881, there seems to be no foundation for the theory that such alienations are *in fraudem* of marital rights (Bell, *Prin.* s. 1551).

Wife's Heritable Debts.—For the wife's heritable debts contracted before marriage, the husband was never liable, except *in quantum lucratus* by the marriage (Ersk. i. 6. 17 and 18; Bell, *Com.*, 5th ed., i. 675; Fraser, *H. & W.* i. 597; *Leslie*, 1708, Mor. 5853). He is liable for her heritable as well as moveable debts when her whole estate has been conveyed to him *per aversionem*. For such a conveyance must be understood as made *deductis debitis* (*Dick*, 1738, Mor. 5857; *Weir*, 1738, Mor. 5857; Bell, *Prin.* s. 1570; Fraser, i. 599).

Reference must be to Oath of Husband.—Where it is necessary to prove the constitution and resting-owing of a debt of the wife by a reference to oath, this must be to the oath of the husband to fix him with liability (*Munro*, 1809, Hume, 215; see *Mitchell*, 1882, 10 R. 378). The wife's oath will be effectual against her, or her heirs, after the dissolution of

the marriage, and will affect her separate estate during its subsistence (*Anon.*, 1628, 1 Sup. 259; *Ker*, 1627, Mor. 12478, 12489; Fraser, *H. & W.* i. 601).

Husband is freed by his Discharge in Bankruptcy.—It has been held in England that the husband's discharge extinguishes his liability for his wife's antenuptial debts (*Miles*, 1 P. W. 257; *Lockwood*, 5 B. & Ad. 303; and see Williams, *Bankruptcy Practice*, 4). And as the deliverance releases him "of all debts and obligations contracted by him, *or for which he was liable at the date of the sequestration*" (Bankruptcy Act, 1856, s. 147), it cannot be doubted that it covers such liabilities (Fraser, *H. & W.* i. 595).

Effect of Change of Wife's Domicile on Husband's Liability.—Where a man domiciled in Scotland marries a woman domiciled in another country, the question what law determines his liability for her antenuptial debts is not free from difficulty. It is thought that where her estate remains separate, as in the case of a domiciled Scotsman marrying a foreigner after the Married Women's Property (Scotland) Act, 1881, his liability will be limited by the Act of 1877. But in an English case, an Englishman who had married a Jersey woman was held to be not liable *in solidum*, because England was the *locus contractus*. Grove and Lopes, JJ., said, however, that if the marriage had been in Jersey he would have been liable *in solidum* (*De Greuchy*, 1879, 4 C. P. D. 362). It is submitted, notwithstanding, that as the Act of 1881 protects a foreign wife's fortune, the husband's liability must be limited.—[See Burge, *Commentaries*, i. 636; Westlake, *Priv. Int. Law*, 68 and 273; Fraser, *H. & W.* ii. 1321; Walton, *H. & W.* 417; Murray, *Property of Married Persons*, 58.]

Liability of the Husband (B) *when the Marriage took place before 1 January* 1878.—In this case the husband is still liable *in solidum* during the marriage for his wife's antenuptial debts which are moveable by nature; *i.e.* which, if they had been due to her instead of by her, would have fallen under his *jus mariti* (*Osborn*, 1696, Mor. 5785; Bell, *Prin.* s. 1570; Fraser, *H. & W.* i. 588). It is immaterial that he has received no fortune with her, or that he has renounced his *jus mariti* (*Simpson*, 1682, Mor. 5852; Ersk. i. 6. 16; Fraser, *H. & W.* i. 592). The husband's liability has been ascribed by some writers to the doctrine of the *communio bonorum* (Stair, i. 4. 17. 5; Bankt. i. 5, 92; Ersk. i. 6. 16). But this doctrine is now generally discredited, and the husband's liability is referred, with greater reason, to the personal subjection of the wife, and to the fact that she is placed by the marriage beyond the reach of personal diligence (*Osborn*, *at supra*; *Gordon*, 1704, Mor. 5788; see Fraser, *H. & W.* i. 586).

The Husband, after the Dissolution of the Marriage, is Liable only in quantum lucratus, unless the debts have been fixed during the marriage as debts on his estate. But he remains liable if a completed diligence have been done *stante matrimonio*, by which a *nexus realis* has been imposed upon his property (Ersk. i. 6. 17; Bell, *Prin.* s. 1571; Fraser, *H. & W.* i. 596; *Wilkie*, *at supra*; *Bryson*, 1698, Mor. 5869). But an inchoate diligence, *e.g.* an arrestment not followed by a furthcoming, and any personal diligence against him, fall on the dissolution of the marriage (Ersk.; Bell, *Prin.*; *Wilkie*; *Bryson*; *Douglas*, 1623, Mor. 5861; More, *Stair*, i. 4. 17, note, and xxiii.; Fraser, *l.c.*). But completed diligence does not make the debts proper debts of the husband; and if he is compelled to pay them, he has relief against his wife's estate (Bell, *Prin.*; Fraser, *at supra*; Bell, *Com.*, 5th ed., i. 676; *Leven*, 1683, Mor. 5876 (5803, 3217); *Gordon*, 1681, Mor. 5924; *Smith*, 1829, 1 Sc. Jur. 334; *Robertson*, 1821, 1 S. 48). Contrary to older decisions, it is now settled that summary diligence against the husband on bills by the woman, or decrees against her, is not competent (Bell, *Prin.*

s. 1571; *Com.* i. 675–6; Fraser, *H. & W.* i. 595). If the marriage is dissolved by the death of the husband, or by divorce, the wife again becomes personally liable for her antenuptial debts (*Killoch*, 1612, Mor. 5861; *Wilkie*, 1678, Mor. 5876; Bell, *Prin.* s. 1570; Ersk. i. 6. 16; Fraser, *H. & W.* i. 594). If the wife predecease, the creditor's remedy is against her representatives, or her separate estate (Ersk.; Bell, *l.c.*; Fraser, *H. & W.* i. 593). But the husband or his heirs are liable, and that whether the wife's debts are heritable or moveable, to the extent to which he was *lucratus* by the marriage (*Wilkie, ut supra; Weir, ut supra; Robertson*, 1821, 1 S. 48; Ersk. i. 6. 17; Fraser, *H. & W.* i. 600). But he is not *lucratus* if he have merely received a tocher of moderate amount, looking to the position of the parties (*Burnet*, 1665, Mor. 5863; *Drummond*, 1740, Mor. 5858; Ersk. i. 6. 17; Bell, *Prin.* s. 1570; Fraser, i. 598).

[See Stair, i. 4. 17. 5; Bankt. i. 5. 92; Ersk. i. 6. 16; Bell, *Com.*, 5th ed., 675; *Prin.* s. 1570; Fraser, *H. & W.* 586; Walton, *H. & W.* 190; Murray, *Property of Married Persons*, 58.]

Antichresis.—In Roman law a creditor could not, as a rule, make use of a subject pledged by a debtor. An arrangement, however, was frequently come to between a debtor and a creditor, who had possession of property in security of a debt, that the latter might take the profits (*fructus*) of the subject of security by way of interest on the debt due. Such an arrangement was called Antichresis (*Dig.* 20. 1. 11. 1; *Dig.* 13. 7. 33). Bankton compares the right of a creditor under a pact of this kind to the right of a creditor in a proper wadset (*Bankt.* i. 384). "If," says Lord Stair, "the profit of the pledge be allotted for the profit of the debt, which is called antichresis, it is a mixed contract, having in it a mandate, and the exchange of the usufruct or use of the pledge for the use of the debt" (Stair, *Inst.* i. 13. 11. See also Poth. *Oblig.* s. 535, and Poth. *Traités de Droit Civil*, 2nd ed., vol. ii. 951).

Antinomy.—Antinomy is the opposition of one law or rule to another law or rule.

Apocha Trium Annorum.—In the case of periodical payments, three consecutive written discharges raise a presumption that the previous dues have been paid. If the terms be short, the presumption is correspondingly weakened. It will not be inferred from a single discharge embracing three terms' dues; nor from payment for three consecutive terms, where discharges have not been granted; nor from irregular payments, amounting in all to three terms' dues; nor where the debts of which it is sought to presume satisfaction differ in character from those embraced in the discharges; nor where the arrears have been constituted by bill, bond, or decree. But receipts for payments to account, of which the *cumulo* amount suffices to meet a term's due, may be read as one receipt therefor. Discharges granted to different persons will raise the presumption, provided they have been granted by the same person. But it is otherwise in case of discharges granted by different persons, *e.g.* ancestor and heir, unless the latter's knowledge of the previous discharge be proved. The presumption applies where discharges are granted by a duly authorised factor (see *Buccleuch*, 1845, 7 D. 927); and will avail the creditor as well as the debtor.

It may be redargued, and the proof is not limited to writ or oath (*Cameron*, 1891, 18 R. 728; cp. *Henry*, 1884, 11 R. 713).

[See Stair, i. 18. 2, iv. 40. 35; More, *Notes*, cxxiii.; Ersk. iii. 4. 10; Dickson on *Evidence*, ss. 177–84; Tait, 469; Bell, *Prin.* s. 567; Rankine, *Leases*, 284; Kirkpatrick on *Evidence*, s. 157.]

Apology.—In an action of damages for slander, an apology by the defender is, under certain conditions, held to be adequate reparation to the pursuer, and after its date the pursuer is considered to have no occasion to insist further in his action. In order to be afterwards successfully founded upon by the defender, an apology must have been judicial (*Curror*, 1839, 11 S. J. 463), have been accompanied by a tender of a definite sum of money, have been capable of immediate acceptance (*Bisset*, 1847, 10 D. 233), and have contained a complete retractation of the charge as innuendoed by the pursuer (*Faulks*, 1854, 17 D. 247). A tender of money alone is insufficient (*Macfie*, 1854, 26 S. J. 459); but the defender does not require to admit that he used the expressions complained of, provided that he admits their falseness, and withdraws them. If these requisites have been complied with, and the jury return a verdict in favour of the pursuer for a sum of damages less than that tendered, the defender is entitled to expenses against the pursuer for the period subsequent to the date of the tender (*Mitchell*, 1890, 17 R. 795; *Arrol*, 1855, 18 D. 98). See PALINODE; SLANDER.

Apparent Heir.—The person who is entitled to enter heir to a deceased ancestor, or stands in the position of nearest heir, is, before his actual entry, an apparent heir. Though the doctrine of apparency is rendered of little practical importance by the Conveyancing (Scotland) Act, 1874, s. 9 (see *ad fin.*), it may be of advantage to note its general principles, since it bulks largely in the institutional writers, and in the decisions prior to the Act.

1. *THE* JUS DELIBERANDI.—As the heir's entry carried with it universal liability for the ancestor's debts, the apparent heir was allowed six months from the death of the ancestor (formerly a year and day,—*annus deliberandi*, —1695, c. 24) to consider the expediency of taking up the succession upon a comparison of the value of the estate with the debts (31 & 32 Vict. c. 101, s. 61; see ANNUS DELIBERANDI). If the heir were posthumous, the time ran from the date of his birth (*Livingstone*, Mor. 6870; *Summers*, Mor. 6882). Though the heir might competently be charged to enter, or an action might be served, no action or diligence could proceed against him, within the time (*Lockhart*, Mor. 6878; *Mackintosh*, 1829, 7 S. 882; *Fergusson*, 1829, 7 S. 580), except in regard to the widow's provisions (*Pitcairn*, Mor. 6876); because, if he had defended, founding on an ancestor's right, he would have incurred a passive title (see PASSIVE TITLES). An action of ranking and sale brought against the ancestor might, however, be continued against the heir without waiting till the expiry of the *tempus deliberandi* (A. S. 23 Nov. 1711, s. 5). The privilege could not be pleaded by an apparent heir who had acted as heir (*Hamilton*, Mor. 6873; see GESTIO PRO HEREDE). The objection that diligence was used within the *tempus deliberandi* might be pleaded by any competing creditor, if the heir did not take advantage of it (*Summers*, Mor. 6882).

2. *ACTION OF EXHIBITION* AD DELIBERANDUM.—Further, within, and

even after, the lapse of the *tempus* (*Nisbet*, Mor. 3982), every heir who might be charged to enter (even if he had behaved as heir), had the additional privilege before his entry of bringing an action for exhibition *ad deliberandum* (see EXHIBITION, ACTION OF) of all writings granted to or by his ancestor relating to his estate or debts (*Spark*, Mor. 3988). This was to enable him, by an inspection, to decide upon the expediency of entering as heir (*Tailzifer*, Mor. 4006). Any irredeemable disposition divesting the ancestor of any special estate was a good defence to the action, so far as affecting the subjects contained in it (*Catheart*, Mor. 3993, 1 W. & S. 239). But it has been held that a general *mortis causa* trust disposition, the trustees under which could not complete their title without an action of constitution and adjudication in implement, did not exclude the heir's right to call for exhibition (*Liddell*, 1855, 18 D. 274; *Douglas*, 1854, 16 D. 1116; but see 31 & 32 Vict. c. 101, s. 19); nor did the heir's renunciation of the succession on a charge to enter by one creditor bar him from suing another for exhibition (*Waird*, Mor. 3983). Until he had completed his title, the heir could not call for *delivery* of deeds belonging to his ancestor (*Smith*, 1871, 10 M. 211; see also *Campbell*, 1869, 7 M. (H. L.) 101, and *Fulton*, 1878, 5 R. 752.)

3. *LIMITATION OF HEIR'S LIABILITY FOR DEBTS.*—By the Act 1695, c. 24, the apparent heir, if he had not immixed with the heritable estate, could limit his liability for the ancestor's debts to the value of the estate, by entering upon a sworn inventory,—*cum beneficio inventarii*,—of all the heritable rights to which he succeeded, signed within year and day of the death, and recorded, as directed, within forty days after the expiry of the year (see BENEFICIUM INVENTARII). The Act did not require actual entry thereafter within the year. An heir entering by inventory became a trustee for creditors, and any creditor dissatisfied with the value of the inventory might insist that the estate, if unsold, be put up to public sale (*Strachan*, Mor. 5348). This procedure was superseded by the Acts 10 & 11 Vict. c. 47, ss. 23, 25; The Titles to Land Consolidation (Scotland) Act, 1868, ss. 47, 49; and, finally, by The Conveyancing (Scotland) Act, 1874, s. 12, limiting the heir's liability for ancestor's debts to the value of the succession.

4. *ACTION OF RANKING AND SALE.*—The same Statute, 1695, c. 24, empowered the apparent heir to bring an action of RANKING AND SALE (*q.v.*) of the ancestor's estate, whether bankrupt or not. It was competent even where the heir had incurred a passive title (*Blair*, Mor. 5247), and, in *Hamilton's Creditors* (Mor. 13323), the Court refused to authorise creditors to interfere. If there was a balance after payment of the debts, warrant was granted to pay it to the heir, even though he should not enter (*Middlemore*, Mor., Heir Apparent, App. No. 2; *Hamilton*, Mor. 6297). An heir who had renounced in an action of constitution might bring a ranking and sale without incurring passive representation (*Smith*, 1854, 16 D. 727). He was also entitled before entry to *institute* proceedings under the Entail Statutes (see *Maule*, 1876, 3 R. 831). The necessity for the action, with its extremely cumbrous procedure, has been in great measure obviated by the provisions of the Bankruptcy (Scotland) Act, 1856.

5. *THE ESTATE, RENTS, ETC.*—Although the heir had no active title to his ancestor's rights till feudally entered by service or otherwise, he was, nevertheless, entitled to the natural possession of the estate, and had right even to cut wood. He could continue his ancestor's possession (*Heron*, Mor. 5239), and defend the titles of tenants granted by the ancestor (*L. Roslin*, Mor. 5233). If he took infeftment before decree, the heir might sue his ancestor's

tenants for rent, and proceed with actions of removing (*Scott*, 1832, 10 S. 284 : *Mackintosh*, 1854, 17 D. 99). The *dictum* of L. J. C. Inglis to the contrary effect in *Malcolm* (1866, 5 M. 18, at 20) has been thought to be merely *obiter*. No tenant holding on a title granted by the apparent heir could impugn the heir's title (*Traill*, 1873, 1 R. 61). The principal subjects which vest without service are (1) titles of honour (*Cockburn*, Mor. 150); (2) tacks (*Boyd*, Mor. 14375), even to the extent that the heir could assign them; and (3) rights, not feudal, having a course of future time. Long leases recorded under the Act 20 & 21 Vict. c. 26, ss. 8, 9, appear to need service, at all events to give the tenant a good title to sell (M'Laren on *Wills*, i. 99). The course of possession for acquiring a right by prescription, if founded on seisin, might be continued on apparency.

6. *The Heir's Aliment.*—By an extension of the Act 1491, c. 25, applicable to the lands of ward-minors, the doctrine grew up that the heir (including heir-apparent) should receive maintenance or aliment from the liferenter of his heritage, when he had no other means of subsistence (*Hepburn*, Mor. 381); and, according to Erskine, the "bare name of an employment" was no good answer to the claim (*Aiton*, Mor. 390). This burden is not imposed upon liferenters of money (*Mirrie*, Mor. 397), or annuitants upon the estate (*Stewart*, Mor. 398). It was held in *Cunningham* (Mor. 405), that though part of the liferenter's lands were evicted, he was bound, notwithstanding, to contribute to the heir's aliment, unless what remained was only a "bare pittance" for himself. It is doubtful if these decisions would now be regarded as authoritative (see *Maidment*, 25 May 1815, F. C., revd. 6 Dow, 257; *Maule*, 1825, 1 W. & S. 266; *Smith*, 1855, 13 R. 126; Ersk. i. 6. 56, Ivory's *note*).

7. *Reduction* Ex capite lecti, *etc.*—The apparent heir's right to reduce deeds granted to his prejudice by his ancestor on deathbed—*ex capite lecti*—was abolished, as regards persons dying after 16 Aug. 1871, by 34 & 35 Vict. c. 81. He had also right to reduce infeftments where the right of challenge had first accrued to himself, and had not been derived by service (see *Rutherford*, 1830, 9 S. 3, where it was necessary for the apparent heir to reduce a service and infeftment, in order that he might procure himself served).

8. *Gestio pro hærede.*—While in the ordinary case the heir incurred no liability till he entered, an apparent heir who behaved himself in regard to the heritage "as none other but a legally served heir had a right to do"—gestio pro hærede (*q.v.*)—incurred liability for all the ancestor's debts. Examples of such behaviour are; dealing with the rents of the lands (*Gardener*, Mor. 9840), or granting a lease thereof, or meddling with the title-deeds of the estate (*Elcis*, Mor. 9668), or granting discharges for debts due to the ancestor. It has been decided in *Bain* (1896, 3 S. L. T. No. 439), that an heir did not incur passive representation by taking up a lease in his ancestor's favour, and passing on the tenant's death to his heir, "excluding sub-tenants and assignees," on the ground that a lease with such a destination was a subject that creditors could not attach (see Bell, *Com.* i. 78, and note 5; More, *Notes*, ccclxiv.; Rankine on *Leases*, 159; Bell, *Prin.* s. 1924).

9. *Ancestor's Creditors.*—(1) By the Act 1661, c. 24, the creditors of the ancestor were preferred to those of the heir, if they used and perfected (*L. Ballenden*, Mor. 3127) diligence against the estate within three years after the ancestor's death. A decree of sale at the instance of the apparent heir was held such diligence attaching the ancestor's estate as entitled his creditors to claim the statutory preference over the heir's creditors (*Irvine*, Mor. 5264); but an inhibition used within the three years

was held not to create a preference over the creditors of the heir whose debts were contracted prior to its date (*Menzies*, 1841, 4 D. 257). The three years must in every case be reckoned from the date of the ancestor's death (*Paterson*, Mor. 3126). By the Bankruptcy (Scotland) Act, 1856, s. 102 (2), it is expressly provided that the trustee's act and warrant of confirmation shall operate as complete diligence in favour of the creditors of the bankrupt's ancestor (see also 19 & 20 Vict. c. 91, s. 4).

(2) The second part of the Statute enacted that no disposition of the ancestor's heritage granted by the heir within a year of the ancestor's death should be valid, if to the prejudice of the ancestor's creditors. This Act relates only to heritable rights.

10. *Liability for Ancestor's Debts*, under the Act 1695, c. 24.—(1) This Statute "for obviating the frauds of apparent heirs" enacted, that if an heir, passing by his own immediate predecessor, who had been three years in possession, should serve, or adjudge upon his own bond, and so enter to a more remote ancestor, he should be liable for the "debts or deeds" of the interjected person, to the extent of the value of the estate. *De facto* possession by the interjected heir was sufficient to infer the liability (*Knox*, Mor. 5276). Possession by any one in the deceased's right was enough (*Yule*, Mor. 5299), but not by a liferenter (*MacCaul*, Mor. 9748), or a judicial factor (*Buchan*, Mor. 9822), or a tenant of the deceased after his death. The "debts or deeds" must have been onerous, and were held to include marriage contract obligations (*Muirhead*, Mor. 9807; *Carmichael*, 15 Nov. 1810, F. C.; *Lindsay*, 1794, Hume, 429; *Russell*, 1852, 15 D. 192; *Taylor*, 1854, 16 D. 885). Where the person possessing was an heir of entail, the heir succeeding was held liable for bonds of provision granted by him (*Kennedy*, 1829, 7 S. 397; *Russell*, 1852, 15 D. 192; see also *Orr*, 1871, 9 M. 500; *Glen*, 1881, 9 R. 317; *Burness*, 1882, 9 R. 1013). The heir serving had the benefit of discussion as between himself and the heir-at-law of the deceased (*Vint*, Mor. 3562; see Beneficium Ordinis); and also right of relief against the deceased's representatives in any other estate for any personal debt he might pay (*Clydesdale*, Mor. 1275; see *Morris*, 1867, 6 M. 60), but not where the obligation had reference to the particular estate succeeded to (*Ogilvy*, 16 Dec. 1817, F. C.). The Act has been strictly interpreted; and in *Grant* (Mor. 9819, affd. H. L., 15 April 1755, 1 Pat. 605), it was held that the heir who possessed without making up a title incurred no liability under the Statute. The liability is only *personal* on the heir succeeding (*Simpson*, Mor. 9807).

(2) *Passive Title.*—The Act also provided that (*a*) if rights or legal diligence belonged to a near relation to whom the heir succeeded, and if the heir should possess the estate on such rights, except on purchase by public roup, and (*b*) if he purchased any right to, or diligence against the estate otherwise than at a sale by public roup, he should incur a universal liability for the ancestor's debts.

The former procedure for forcing an heir to enter, or renounce, by letters of charge, has been abolished, and the simpler procedure, with the same effect, of the action of constitution, or constitution and adjudication combined, whether in respect of the ancestor's or the heir's obligation, has been substituted. The action may be insisted in after the lapse of six months from the time the heir becomes apparent heir (31 & 32 Vict. c. 101, s. 60).

It has been said (*M'Adam*, 1879, 6 R. 1256) that the Act of 1695 is superseded by s. 9 of The Conveyancing (Scotland) Act, 1874, which provides that "a personal right to every estate in land descendible to heirs

shall, without service or other procedure, vest, or be held to have vested, in the heir entitled to succeed thereto, by his survivance of the person to whom he is entitled to succeed, and such personal right shall . . . be attended with the like consequences as a personal right to land under an unfeudalised conveyance," and that this enactment renders it impossible for any heir to possess an estate on apparency.

[Stair, iii. 5. 1 *et seq.*, 50, iv. 26. 8; More, *Notes*, cccxxxii., cccxxxvi., ccclviii.; Ersk. ii. 9. 62, ii. 12. 61, iii. 8. 54–8–77–94–100; Ersk. *Prin.* (Rankine) ii. 12. 5, iii. 7. 2, iii. 8. 25, 46; Bankt. iii. 4. 65, iii. 5. 1; Bell, *Prin.* ss. 1677 *et seq.*, 1929; M'Laren, *Wills and Succn.* 99 *et seq.*, 1291, 1294; Bell, *Com.* i. 94, 702; Menzies, *Conveyancing*, 781, 803; Mackay, *Prac.* i. 285, 623, ii. 605.]

See Succession; Annus Deliberandi; Beneficium Inventarii; Beneficium Ordinis; Adjudication; Discussion; Deathbed; Exhibition; Ranking and Sale; Attainder.

Appeal.—In this work the subject of appeal from a lower to a higher tribunal is treated in the following separate articles:—

1. Appeal to the House of Lords.
2. Reclaiming—that is, appeal from the Outer to the Inner House of the Court of Session.
3. Appeal to Court of Session from Sheriff Court.
4. Appeal from Sheriff of Chancery.
5. Lands Valuation Appeal Court.
6. Registration Appeal Court.
7. Appeal to Sheriff from Sheriff-Substitute.
8. Burgh Court.
9. Police Court.
10. Dean of Guild Court.
11. Appeal to High Court of Justiciary.
12. Appeal to Circuit Court of Justiciary.
13. Appeal to Quarter Sessions.
14. Church Courts.

See also Review; Reduction; Suspension; Advocation.

Appeal from Sheriff of Chancery.—The procedure is regulated by the Titles to Land Consolidation Act (31 & 32 Vict. c. 101, ss. 41–4), and the Court of Session Act, 1868 (31 & 32 Vict. c. 100).

In all cases where competing petitions have been presented, or where any one competently appears to oppose a service, any of the parties may, at any time before proof is begun to be taken by the Sheriff, remove the proceedings to the Court of Session by note of appeal, which note of appeal is proceeded with in the same manner as appeals for jury trial from the Sheriff Courts; and where the jury find a verdict in favour of a party petitioning to be served, a remit is made by the Court to the Sheriff, with instructions to serve.

Where, again, the Sheriff pronounces a decree refusing to serve, or repelling the objections of an opposing party, the decree may be brought under review of the Court of Session by note of appeal presented within fifteen days, and the appeal is dealt with in the same manner as appeals against final judgments of the Sheriff Courts; and the Court may, if they think fit, allow further evidence to be taken, either by way of proof or jury trial: and when the Sheriff has refused to serve, and the Court determine that the

party ought to be served, a remit is made to the Sheriff, with instructions to serve.

Decrees of service by the Sheriff may also be brought under review by process of reduction in the Court of Session, and the Court may allow further evidence to be taken by way of proof or jury trial; and where the decree brought under reduction has proceeded on competing petitions, and the Court of Session determines that a different person should be served from the person preferred by the Sheriff, a remit is made to the Sheriff, with instructions to serve such person.

The judgments of the Court of Session in appeals and reductions are appealable to the House of Lords, in the same manner as judgments in ordinary civil causes.

The procedure in appeals from the Sheriff of Chancery is applicable also to petitions for service presented to Sheriffs of counties.

See Chancery; Service of Heirs.

Appeal to the Circuit Court.—The Circuit Courts of the High Court of Justiciary have no appellate jurisdiction apart from that conferred by Statute. The rules governing the exercise of such appellate jurisdiction as they possess, must therefore be sought in the Statutes by which it is conferred. It is both criminal and civil.

Part I. Criminal Jurisdiction.

1. *Statutes conferring jurisdiction.*—A limited appellate jurisdiction concerning matters criminal is conferred on the Circuit Courts by the Heritable Jurisdictions (Scotland) Act, 1746 (20 Geo. II. c. 43), ss. 34, 36, and 37, made permanent as to appeals by 31 Geo. II. c. 42. Similar jurisdiction as regards particular prosecutions is conferred by many Statutes (in this article termed "special Acts"), containing penal clauses, *e.g.* the Salmon Fisheries (Scotland) Acts, 1828 to 1868; Licensing (Scotland) Acts, 1828 to 1887; Tweed Fisheries Act, 1857; Glasgow Police Act, 1866; Conspiracy and Protection of Property Act, 1875; Weights and Measures Act, 1878; and Coal Mines Regulation Act, 1887. The operative enactment determining the Court of Appeal is the special Act, when that Statute contains a clause expressly regulating review (*Wright*, 1874, 2 Coup. 504).

2. *Use in practice.*—Although competent in prosecutions for common law crimes, appeal to the Circuit Court is seldom used except in proceedings under Acts of Parliament. An appellant is guided by considering whether the special Act prescribes any mode of appeal; whether he seeks to have the judgment reviewed as erroneous, or quashed as *funditus* null; and whether any special advantage will result from his adopting one method or another. He has to observe that, although the special Act prescribes appeal to the Circuit Court, and expressly excludes all other modes of review, he may present a bill of suspension to the High Court of Justiciary, wherever the cause is taken outwith the special Act by a clear nullity, or a clear case of illegality *ab initio*, or of oppression, appearing *ex facie* of the proceedings, and not specified in the Statute as a ground of appeal (*Kidger*, 1888, 2 White, 107). If, however, the appellant objects to the judgment upon a ground which falls into one of the categories of review contemplated in the special Act, the Circuit Court alone can give redress, unless sufficient cause is shown for departing from the statutory course (*Mackenzie*, 1874, 3 Coup. 29). Again, although the special Act declares that review must be sought by appeal to the Circuit Court and not otherwise, the appellant may

take an appeal to the High Court, on a case stated under the Summary Prosecutions Appeals (Scotland) Act, 1875, against the inferior judge's determination as erroneous in point of law. To exclude such appeal, the special Act must expressly provide that, notwithstanding the 1875 Act, no appeal shall lie except to the Circuit Court (*Craig*, 1883, 10 R. (J. C.) 51). Where, therefore, the special Act directs appeal to the Circuit Court, and the appellant prefers a suspension, yet doubts its competency, his course is to note an appeal in terms of the Statute, and then present his bill of suspension. If the bill is refused as incompetent, he can follow out the appeal to the Circuit Court (*Kirkpatrick*, 1870, 1 Coup. 434). If, however, he elects to take an appeal under the 1875 Act, he is held to have abandoned his title to appeal in any other way (38 & 39 Vict. c. 62, s. 9).

3. *Court in which appeal taken.*—Appeal is permitted from the Courts of (1) a Sheriff, (2) a Steward, (3) a Royal Burgh, (4) a Burgh of Regality, (5) a Burgh of Barony, and (6) a Baron or Heritor whose jurisdiction was not abrogated by the Act (Her. Jur. Act, s. 34). Many special Acts prescribe appeal in this manner from the Justice of the Peace Court; but, without distinct statutory authority, there is no appeal from that Court to the Circuit Court (*Maxwell*, 1820, 20 F. C. App. 1), or from the Glasgow Water Bailie Court, or probably from a Dean of Guild Court (*Donaldson*, 1828, 7 S. 41), or from a Police Court, unless there is an irregularity patent on the face of the proceedings, or an allegation that the magistrate has exceeded his jurisdiction (*Burns*, 1850, 1 J. Shaw, 373).

4. *Judgments appealable.*—An appeal is competent against any interlocutor, decree, sentence, or judgment concerning matters criminal, of whatever nature or extent the same may be, except (1) a judgment in a case inferring the loss of life or demembration: and (2) an interlocutor before final decree, sentence, or judgment has been pronounced (Her. Jur. Act, s. 34; *List*, 1867, 5 Irv. 559). This provision includes judgments on charges both of crimes at common law and of contraventions of special Acts, provided the latter do not exclude or limit review.

5. *Appellant.*—Any party or parties conceiving himself or themselves aggrieved by the judgment, may appeal,—the accused against conviction, and the prosecutor against dismissal of his complaint or acquittal of the accused (Her. Jur. Act, s. 34; *Gray*, 1816, 19 F. C. App. 1; *Jopp*, 1869, 1 Coup. 240).

6. *Time of taking appeal.*—The appeal is taken and entered either (1) in open Court at the time of pronouncing the judgment (Her. Jur. Act, s. 34): (2) at any time thereafter within ten days (*ib.*): or (3) at any time during the appellant's imprisonment under the sentence appealed against, or within ten days after his liberation (38 & 39 Vict. c. 62, s. 11). But in the last case the imprisonment must have commenced within ten days after sentence was pronounced (*ib.*); therefore the extended period does not apply where more than ten days are allowed to elapse between sentence and incarceration.

7. *Court to which appeal taken.*—The appeal is taken to the next Circuit Court of Justiciary held in the circuit wherein is situated the county, burgh, or other territory of the Court which pronounced the judgment appealed against, provided such Court is held fifteen days at least *after service* of the appeal (Her. Jur. Act, s. 34). The times and places of these circuits are stated elsewhere (see CIRCUIT COURTS). Appeals from counties for which there are no Circuit Courts are taken to the High Court at Edinburgh. Except in the contingency mentioned in par. 15 *infra*,

appeals can be heard at no place except the appropriate circuit town. Appeals from Shetland may be brought to the Inverness Circuit (*Walker*, 1870, 1 Coup. 466). The additional Circuit Courts established by Order in Council, dated 18 May 1881, and relative Act of Adjournal, under 9 Geo. IV. c. 29, s. 3, have the same criminal and civil jurisdiction as the ordinary Circuit Courts (*Sinclair*, 1881, 4 Coup. 518). No appeals can be taken to Glasgow Winter Circuit (*Davidson*, 1844, 2 Broun, 13).

8. *Grounds of appeal.*—The Heritable Jurisdictions Act contains no limitation of the grounds of appeal; but these are usually restricted by the special Acts. In proceedings at common law, or under Statutes which either incorporate the Heritable Jurisdictions Act, or, like it, contain no limitation, an appeal is competent in respect of errors in fact or in law, or of fundamental nullities. The Circuit Court is, in such cases, entitled to review or to quash the judgment on the same grounds as would have been competent before the High Court (*Rhodes*, 1870, 1 Coup. 469). When the special Act restricts the grounds of review to certain categories, an appeal upon any other ground is incompetent. The unrestricted grounds include (1) error of inferior judge in point of fact; but there can be no appeal *on the merits*, unless the special Act makes provision for a record of the evidence being preserved (*Wright*, 1875, 3 Coup. 99); (2) proceedings or judgment fundamentally null in respect of a radical defect; (3) oppressive prosecution; (4) proceedings grossly irregular; (5) conviction on an irrelevant or defective complaint (*Kidger*, 1888, 2 White, 107); (6) Court has exceeded its jurisdiction (*Rhodes*, 1870, 1 Coup. 469); (7) Court has refused to exercise its jurisdiction (*Muckersie*, 1874, 3 Coup. 54); (8) inferior judge has improperly dismissed the complaint (*Jopp*, 1869, 1 Coup. 240). Severity of sentence is not, by itself, a ground of appeal, if the punishment awarded is within the powers of the Court (*Boyce*, 1891, 19 R. (J. C.) 13).

9. *Manner of taking appeal.*—The appellant lodges a written appeal in the hands of the clerk of the inferior Court (Her. Jur. Act, s. 34). Verbal notice, although given in open Court, is not sufficient (*M'Millan*, 1832, 10 S. 220; *Anderson*, 1872, 2 Coup. 359). The minute of appeal may be written in the Minute Book of Court, but preferably upon the principal indictment, complaint, or interlocutor sheet, immediately after the judgment—

Inverness, 28th November 1894.—I appeal in open Court against the foregoing judgment to the next Circuit Court of the High Court of Justiciary to be held at Inverness, and that for reasons to be stated at the bar of the said Circuit Court.

(Signed) Thos. Donald, Solicitor, 914 High Street, Inverness,
Pror. for John Grant, Appellant.

The appellant or his agent may give this notice (*Wyllie*, 1863, 4 Irv. 441). The Sheriff Clerk, in every case, should authenticate the appeal, as mentioned in par. 10 *infra*. It is necessary to quote, narrate, or refer to the judgment appealed against with perfect accuracy, as a material error is fatal (*Murphie*, 1872, 2 Coup. 216). An appeal on a separate paper may be lodged within the period stated in par. 6, *supra*. It may be expressed in the same terms as the foregoing minute, provided it clearly identifies the judgment. The Clerk of Court marks upon this appeal the date of lodging. It is not essential that written reasons for the appeal should be lodged (*Orrock*, 1844, 2 Broun, 189; *M'Gregor*, 1854, 1 Irv. 579); but it is prudent to furnish these when there is time to do so. The following form may, in that event, be used, premising that a more detailed statement of the facts will occasionally be necessary as a foundation for the reasons of appeal:—

UNTO THE RIGHT HONOURABLE THE LORD JUSTICE-GENERAL, LORD JUSTICE-CLERK, AND LORDS COMMISSIONERS OF JUSTICIARY, or such of their Lordships as may be the judges at the next Circuit Court of the High Court of Justiciary to be held at Inverness;

THE APPEAL OF

Inverness 28th Nov. 1894.

John Grant, public-house keeper, Milne's Wynd, Inverness,—*Appellant*;

AGAINST

Charles Esson, solicitor, Inverness, Procurator-Fiscal of the Justice of Peace Court for Inverness-shire, for the public interest,—*Respondent*;

Humbly showeth,

That the respondent instituted a prosecution against the appellant, in the Justice of Peace Court for Inverness-shire at Inverness, by a complaint dated 21st November 1894, in which complaint he alleged that the appellant [*here copy charge as in complaint*]:

That in said prosecution, after sundry steps of procedure, including the taking of proof for both parties, the presiding justices, on 28th November 1894, were pleased to pronounce the following judgment [*here accurately copy judgment*]:

That the appellant conceives himself aggrieved by the judgment above copied, and complains and seeks relief against the same by appeal to the next Circuit Court of the High Court of Justiciary to be held at Inverness, and that for the following reasons among others to be stated at the bar of the said Circuit Court, namely—(1) that the complaint in said prosecution does not contain any statement relevant to infer a contravention of the Act 25 & 26 Vict. c. 35, s. 17, upon which it is founded; and (2) that the said complaint does not set forth, in a relevant and sufficient manner, any crime or offence known to the law of Scotland:

May it therefore please your Lordships to recall the judgment appealed against; to annul and discharge *in toto* the conviction recorded against the appellant; to ordain repayment to the appellant of the penalty and expenses paid by him; and to find the appellant entitled to expenses; or to do otherwise in the premises as to your Lordships shall seem just.

According to Justice, &c.

(Signed) THOS. DONALD, Solicitor, 914 High Street, Inverness,
Pror. for John Grant, Appellant.

10. *Finding Caution.*—The appellant lodges with the Clerk of Court a bond of caution with a sufficient cautioner (1) for answering and abiding by the judgment of the Circuit Court, and (2) for paying the costs, if any shall be awarded by that Court (Her. Jur. Act, s. 36). The Clerk of Court is responsible for the sufficiency of the cautioner (*ib.*). The omission to find caution for both the statutory obligations is fatal (*M'Millan*, 1832, 10 S. 220; *Skinner*, 1844, 2 Broun, 185; *Christie*, 1854, 1 Irv. 560; *Keene*, 1866, 5 Irv. 248). The bond is lodged, either along with the appeal, or at least within the period mentioned in par. 6, *supra* (*Keene*, 1866, 5 Irv. 248). The Clerk marks on the bond the date of lodging. If the appeal is taken in open Court, he writes beneath it a certificate in this form:—

Inverness, 28th Nov. 1894.—I hereby certify that the foregoing appeal was taken and entered in open Court, at the time of pronouncing the judgment appealed against, and caution found, all in terms of the Statute.

(Signed) CHAS. GRAHAM, *Clerk of the Peace.*

This certificate, in a modified form, will be written upon the appeal if lodged as a separate paper. It is not indispensable, although customary. If it is disputed that caution has been found, the Circuit Court allow time for the production of evidence on that point (*Marshall*, 1849, 1 J. Shaw, 222). The bond is signed by both appellant and cautioner, but is sufficient although signed by the cautioner alone (*Wyllie*, 1863, 4 Irv. 441).

11. *Service.*—The appellant, or his agent, serves the adverse party with a duplicate of the appeal (Her. Jur. Act, s. 34; *Wyllie*, 1863, 4 Irv. 441). If the appeal contains any conclusion against the inferior judge by way of censure or reparation for alleged wilful injustice, oppression, or other

malversation, the appellant serves a duplicate upon the judge in like manner and within the same period as upon the adverse party (Her. Jur. Act, s. 34). It is, however, improper to call the inferior judge as a respondent (*Paterson*, 1895, 1 Adam, 576). The service must be made within the period mentioned in par. 6, *supra*, and at least fifteen days before the Circuit Court (Her. Jur. Act, s. 34). In calculating this period, the rule is to count either the day of service or the date of the Court, but not both (*M'Ritchie*, 1847, Ark. 270). If service has not been made within the period stated, the fact that a copy of the appeal had been sent within that period to the respondent will not supply the want of service (*Allan*, 1857, 2 Irv. 701; *Christie*, 1874, 2 Coup. 560). The appeal should be regularly served, even though it is taken in open Court (*Gall*, 1857, 2 Irv. 704). Service need not necessarily be made by an officer of Court. It is effected by delivering a duplicate to the adverse party personally, or at his dwelling-house, or to his procurator or agent in the cause (Her. Jur. Act, s. 34). Where the Circuit Court is held less than fifteen days after service, the notice, though bad for that circuit, is good for the next circuit at which the appeal can competently be heard (*Newlands*, 1866, 5 Irv. 245).

12. *Proof of service.*—Service is proved by either (1) a probative attestation of delivery written on the principal appeal, and signed by the person who delivered the duplicate, and two witnesses who were present and saw delivery made; or (2) by a notarial instrument attesting delivery, signed by a notary public and two witnesses; or (3) by an acceptance of service written on the appeal, holograph of the respondent or his agent, thus—

> *Inverness, 28th Nov.* 1894.—I accept service on behalf of the respondent.
> (Signed) Robert Gray, Solicitor, Inverness,
> *Agent of Respondent.*

(*M'Millan*, 1832, 10 S. 220; *Weatherstone*, 1860, 3 Irv. 589.)

13. *Interim liberation.*—The appellant, if imprisoned under the judgment or threatened with diligence, may obtain interim liberation or a sist of execution either by presenting a separate petition to the High Court, or by adding a crave to the prayer of the appeal, and moving for liberation at a special enrolment (*Lees*, 1888, 1 White, 565). If he obtains interim liberation, he must attend the Appeal Court in person (see par. 17, *infra*). Interim liberation is usually granted on the prisoner finding caution, the amount varying according as he is in prison under a sentence of imprisonment alone, or of fine with imprisonment in default of payment. In the latter case, caution is fixed at the amount of the fine and expenses, if any (*Pirrie*, 1867, 5 Irv. 433).

14. *Withdrawing appeal.*—If the appellant, after noting an appeal, is advised that he will obtain review more satisfactorily by another method, he lodges a minute intimating withdrawal of the appeal. The latest period at which he may withdraw is not decided, but leave to withdraw would probably be refused after the papers had been lodged with the Circuit Clerk of Justiciary. The appellant may, however, present a bill of suspension without withdrawing his appeal. If the bill is disposed of on the merits, he cannot proceed further with the appeal; but if suspension is refused as incompetent, he may insist in the appeal previously noted (*Kirkpatrick*, 1870, 1 Coup. 434; *De Belmont*, 1871, 2 Coup. 95).

15. *Lodging with Circuit Clerk.*—On the meeting of the Circuit Court, the appellant lodges in the hands of the Circuit Clerk of Justiciary the appeal, the original complaint, the judgment appealed against, or legal

proof of its terms, the bond of caution, the certificate of service, and other papers. He will have previously borrowed these from the clerk of the inferior Court. It is not necessary for the respondent to lodge written answers to the appeal. If no appearance is made for the appellant, the respondent may lodge a minute signed by his counsel, craving protestation and dismissal of the appeal, with expenses (*Keith*, 1766, Hailes, 135). If a Circuit Court is not held in respect of the absence of criminal cases, the appeal is heard either by the High Court of Justiciary in Edinburgh, or (when both parties consent) at a sitting of the High Court in any place (50 & 51 Vict. c. 35, s. 48).

16. *Objections to competency.*—One judge may constitute the Court (20 Geo. II. c. 43, s. 32; 31 & 32 Vict. c. 95, ss. 2 and 3). He first hears objections to the competency of the appeal. Such objections must be disposed of by the Circuit Court, and cannot be heard after certification to the High Court (*Whatman*, 1854, 1 Irv. 483). They are of great variety, *e.g.* (1) the appeal does not fall within the categories of the Heritable Jurisdictions Act, or of a special Act allowing appeal to the Circuit Court; (2) special Act prescribes a particular Court of Appeal (*e.g.* Quarter Sessions), and expressly excludes all other modes of review (*Shanks*, 1837, 1 Swin. 617; *Anderson*, 1872, 2 Coup. 225; *Porter*, 1858, 3 Irv. 57); (3) special Act expressly excludes review by Court of Justiciary (*Craig*, 1883, 10 R. (J. C.) 51); (4) cause belongs to a class for which a special mode of review is provided, *e.g.* Customs and Excise cases (*Mackenzie*, 1891, 2 White, 589); (5) no evidence produced of existence of a formal judgment of inferior Court (*Baxter*, 1861, 4 Irv. 84; *Jupp*, 1863, 4 Irv. 355); (6) the appellant has already appealed to another Court (*e.g.* Quarter Sessions), which has disposed of appeal (*Purdie*, 1863, 4 Irv. 447); (7) ground of appeal should have been stated in inferior Court, but was not (*Maitland*, 1892, 3 White, 298; (8) special Act prescribes certain grounds of appeal to Circuit Court, and reason stated is not one of these; (9) appeal is taken from an incompetent Court (par. 3, *supra*); (10) judgment is not appealable (par. 4, *supra*); (11) appeal is taken to an incompetent Court (par. 7, *supra*); (12) the procedure prescribed by the Heritable Jurisdictions Act, or the special Act, has not been correctly followed (pars. 6–12, *supra*). It is no objection to competency that the appellant has obtempered the judgment by going to prison, paying the fine, or otherwise (*Russell*, 1845, 2 Broun, 572; *Murray*, 1872, 2 Coup. 284; *Bonthrone*, 1886, 1 White, 279).

17. *Hearing.* — Objections to competency having been disposed of, counsel for the parties are heard on the merits of the appeal. The respondent need not appear unless he chooses. If the appellant has obtained interim liberation, he must appear personally at the hearing. Failing his doing so, he is held to have abandoned the appeal. The Court have then power to grant warrant to apprehend and recommit him to prison for any time, to run from the date of his apprehension, not longer than the period which, at the date of his liberation, remained unexpired of the term of imprisonment specified in the sentence brought under review (38 & 39 Vict. c. 62 s. 10). Prior to 1875, the Court, although they granted protestation, never granted warrant to reapprehend and imprison. The Court dispose of the appeal in a summary way. The terms of the judgment appealed against are proved by the record of the proceedings before the inferior Court. It is not competent to prove verbal statements by the inferior judge, to the effect of adding to or qualifying an interlocutor which is bad *per se*, so as to give it validity (*M'Garth*, 1869, 1 Coup. 260); nor can the judgment be supported by a

ground of conviction which was not pleaded before the inferior judge, and which does not appear *ex facie* of the procedure to have been a ground upon which the latter proceeded in convicting (*M'Donald*, 1868, 1 Coup. 105).

18. *Judgment.*—The Court dispose of the appeal by the like rules of law and justice as the Court of Session or Court of Justiciary respectively cognosce and determine in suspensions of the interlocutors, decrees, sentences, and judgments of inferior Courts (Her. Jur. Act, s. 34). They may (1) sustain the appeal, quash the sentence *simpliciter*, and order any fine, penalty, or expenses paid by the appellant to be refunded; (2) dismiss the appeal, and, where necessary, grant warrant to apprehend and recommit the appellant to prison (38 & 39 Vict. c. 62, s. 10); (3) remit back to inferior judge, with instructions to amend complaint (*Baird*, 1865, 5 Irv. 200); (4) remit back to him, with instructions as to judgment (*Mackintosh*, 1823, 2 S. 339); (5) remit back to him, with instructions to proceed with trial (*Snell*, 1834, 12 S. 626; *Cooper*, 1874, 2 Coup. 547); (6) remit to a competent person to take proof as to disputed jurisdiction (*Wotherspoon*, 1867, 1 Coup. 33); (7) partly sustain and partly dismiss appeal, where parts of judgment are separable (*Snaddon*, 1862, 4 Irv. 200); (8) certify to High Court (par. 19, *infra*). The judgment is in the following form:—

HIGH COURT OF JUSTICIARY.

Inverness, 10*th April* 1895.—*Act.* A. for appellant—*Alt.* B. for respondent.—Lord X., one of the Lords Commissioners of Justiciary, having heard counsel for the parties, in respect that the complaint on which the conviction appealed against was obtained does not contain any statement relevant to infer a contravention of the Act libelled on: sustains the appeal; recalls the judgment appealed against; annuls and discharges, *in toto*, the conviction recorded against the appellant; ordains repayment to the appellant of the penalty and expenses paid by him; finds the respondent in the appeal liable in expenses; modifies the same to £5, 5s., and decerns.

(Signed) *X.*

19. *Certifying to High Court.*—If the Court, in the course of the hearing, find any such difficulty arise that, in consequence thereof, they cannot proceed to the determination of the appeal, consistently with justice and the nature of the case, they may certify the same to the High Court of Justiciary (Her. Jur. Act, s. 37). This is the usual interlocutor:—

Inverness, 10*th April* 1895.—*Act.* A. for appellant—*Alt.* B. for respondent.—Lord X., one of the Lords Commissioners of Justiciary, in respect of the general importance of the questions raised in this appeal, and that it is expedient that the same should be authoritatively settled by a judgment of the High Court, certifies this case to the High Court of Justiciary to meet on 27th May next; and appoints the parties to be prepared to discuss the same at that sederunt, or at such other times as may then be fixed by the said Court. (Signed) *X.*

On the case being called in the High Court, the judge who certified it explains the grounds on which he did so. The appellant, if liberated, must attend personally, as before (par. 17, *supra*).

20. *Expenses.*—The Court may award costs against either a public or a private prosecutor, as they think proper, not exceeding the real costs *bonâ fide* expended (Her. Jur. Act, s. 34; *Nimmo*, 1872, 10 M. 477). They may refuse expenses when the appeal is sustained upon an objection not stated in the inferior Court (*Bole*, 1883, 5 Coup. 350). There is no absolute rule as to finding the unsuccessful party liable in expenses, either for the full amount as taxed, or for a modified sum. When modified to save taxation, the amount is not fixed according to the nature of the error into which the inferior judge has fallen, but is regulated by the importance

and difficulty of the case (*M'Intyre*, 1876, 3 Coup. 319). The Court may remit to the inferior judge to ascertain and decern for the expenses in both Courts (*Macintosh*, 1823, 2 S. 239; *Snell*, 1834, 12 S. 626; *Glass*, 1876, 3 Coup. 370; *Allison*, 1882, 5 Coup. 137).

21. *Finality.*—The decree, sentence, or judgment of the Circuit Court is final, even if pronounced in absence (Her. Jur. Act, s. 34; *Keith*, 1766, Hailes, 135).

Part II. Civil Jurisdiction.

1. *Statutes conferring jurisdiction.*—A limited appellate jurisdiction in matters civil is conferred on the Circuit Courts by the Heritable Jurisdictions Act (see Part I. par. 1 hereof). This has been curtailed by subsequent Statutes. The Small Debt (Scotland) Act, 1837 (7 Will. IV. and 1 Vict. c. 41), which is hereafter spoken of as the "Small Debt Act," confers on the Circuit Courts an appellate jurisdiction on special grounds, in the manner and by and under the rules, limitations, conditions, and restrictions contained in the Heritable Jurisdictions Act (S. D. Act, s. 31).

2. *Use in practice.* — In the Sheriff's Ordinary Court, appeal to the Circuit is practically superseded by other modes of review. In Burgh and Baron Bailie Courts, it has fallen into abeyance along with the civil jurisdiction of those Courts. Under the Small Debt Act, all other review is expressly excluded (S. D. Act, s. 30); but reference must be made to the remarks in Part I. par. 2 hereof, with regard to proceedings which are null *ab initio*. In such cases, reduction or suspension of a Small Debt decree may be competent (*Murchie*, 1863, 1 M. 800; *Manson*, 1871, 9 M. 492; *Shiell*, 1871, 10 M. 58; *Le Conte*, 1880, 8 R. 175). But if the ground of appeal falls within the categories of the Small Debt Act, an action of reduction is not competent (*Graham*, 1848, 6 Bell's *App.* 214). Again, as stated in Part I. par. 1 hereof, when the proceedings are founded upon a Statute which confers jurisdiction to appeal in a particular way, *e.g.* the Friendly Societies Act, 1875, which prescribes appeal on a case stated, the provision in the special Act is the operative enactment (*Linton*, 1895, 3 S. L. T. No. 174).

3. *Court in which appeal taken.*—The Heritable Jurisdictions Act allows appeal in the Courts named in Part I. par. 3 hereof. The Small Debt Act applies only to the Sheriff's Small Debt Courts. In the Sheriff's Ordinary Court, and Courts under the Debts Recovery (Scotland) Act, 1867, appeal to the Circuit Court is excluded, except as mentioned in par. 8, *infra*. The mere circumstance that a Small Debt action has been remitted to the Ordinary Roll does not take away the right of appeal (*Campbell*, 1871, 2 Coup. 142).

4. *Judgments appealable.*—Under the Heritable Jurisdictions Act, s. 34, an appeal was authorised against any interlocutor, decree, sentence, or judgment, in matters civil, where the subject-matter of the suit did not exceed in value £12; but no appeal to be competent before a final decree, sentence, or judgment had been pronounced. The limit of value was raised to £25 by 54 Geo. III. c. 67 s. 5; but 16 & 17 Vict. c. 80, s. 22, rendered it incompetent to bring under review of the Circuit Court any cause in the *Sheriff Court* not exceeding the value of £25, and thus practically abolished such appeals in the latter Court. This provision does not apply to proceedings in Burgh and Baron Bailie Courts; nor to cases under the Small Debt Act (*Aitken*, 1855, 2 Irv. 156). The Small Debt Act, s. 31, allows an appeal against any decree given by a Sheriff in a cause raised under the authority of that Act, upon special grounds

after mentioned (par. 8, *infra*). It has been decided that the limitation to "final judgments" does not apply to Small Debt appeals (*Gow & Sons*, 1895, 1 Adam, 534). Appeals under the Heritable Jurisdictions Act *alone* are rare. The person objecting to the appeal is under the burden of proving that the subject-matter of the suit exceeds in value £25 (*Wilson*, 1851, 1 J. Shaw, 495). Appeal is excluded when the conclusions are for a *definite* sum, exceeding that amount (*Davidson*, 1822, 2 S. 76; *Giffen*, 1824, 3 S. 301); or are brought above that sum by accruing interest (*Mitchell*, 1855, 17 D. 682); but not where they are raised by the addition of expenses (*Hopkirk*, 1855, 18 D. 299). Appeal is also excluded in actions of count and reckoning, interdict, *ad factum præstandum*, and delivery, where the conclusions are *indefinite*, if it does not clearly appear that the subject-matter is under £25 in value (*Stott*, 1834, 12 S. 828; *Lamb*, 1844, 2 Broun, 311; *Wilson*, 1845, 2 Broun, 519; *Wyher*, 1849, 1 J. Shaw, 265; *Cameron*, 1857, 19 D. 517; *Glass*, 1848, Ark, 468; *Jobson*, 1852, 1 Irv. 89; *Shotts Iron Co.*, 1871, 10 D. 195; *Aberdeen*, 1872, 10 D. 971). In a multiplepoinding, the criterion is the sum admitted by the common debtor (*Mathieson*, 1849, 1 J. Shaw, 266). Restriction of conclusions by a minute lodged after litiscontestation does not affect the question of appeal (*Buie*, 1863, 2 M. 208).

5. *Appellant.*—See Part I. par. 5.

6. *Time of taking appeal.*—See Part I. par. 6. In applying the rules to civil procedure, it has been decided that an appeal may be entered either within ten days of a judgment disposing of both merits and expenses (*Henderson*, 1849, 1 J. Shaw, 219; *Whitson*, 1853, 1 Irv. 221); or within ten days of a judgment on the merits, although expenses have not been taxed (*Dundee and Union Whale Fishing Co.*, 1848, 1 J. Shaw, 15); or within ten days from an interlocutor decerning for taxed expenses (*Launders*, 1850, 1 J. Shaw, 347).

7. *Court to which appeal taken.*—See Part I. par. 7.

8. *Grounds of appeal.*—Under the Heritable Jurisdictions Act, as restricted by 16 & 17 Vict. c. 80, s. 22, there is no appeal to the Circuit from the Sheriff's Ordinary Court, and Courts under the Debts Recovery (Scotland) Act, 1867, except on the ground that the Court has exceeded or refused to exercise its jurisdiction, or that the proceedings are otherwise taken outwith the Statutes, in consequence of fundamental illegality (*Dick*, 1860, 3 Irv. 617: *Stewart*, 1868, 1 Coup. 92). In the Burgh and Baron Bailie Courts, appeal is competent on all the grounds mentioned in Part I. par. 8. Under the Small Debt Act, ss. 30 & 31, it is not competent to review the decision of the Sheriff on the merits, or on the allegation that he took a wrong view of the facts, or of the law governing the facts (S. D. Act, s. 30; *Starrock*, 1866, 5 Irv. 234; *Mosson*, 1872, 2 Coup. 325; *Paterson*, 1872, 2 Coup. 327: *Wilson*, 1878, 5 R. 981; *Allison*, 1882, 5 Coup. 137; *Scott*, 1885, 23 S. L. R. 273: *Findlay*, 1886, 1 White, 110). Unless vitiated by fundamental nullity (see Part II. par. 2 hereof), no decree given by the Sheriff in any cause decided under the authority of that Act is subject to reduction, advocation, suspension, appeal, or any other form of review or stay of execution except an appeal to the Circuit Court on special grounds, namely—(1) corruption or malice and oppression on the part of the Sheriff; (2) such deviations in point of form from the statutory enactments as the Court shall think took place wilfully, or have prevented substantial justice from having been done; and (3) incompetency including defect of jurisdiction of the Sheriff. (S. D. Act, ss. 30 and 31).

(1) *Corruption, etc.*—This ground is not restricted to actual bribery,

personal malice, or intentional oppression. It arises where anything has been done by the Sheriff so grossly unjustifiable, or so unfair, as to be legally equivalent to corruption, or malice and oppression (*Phillip*, 1868, 1 Coup. 87; *Gordon*, 1891, 2 White, 576). Thus, it is oppression for the Sheriff to act as judge in his own cause (*Flowerdew*, 1852, 1 Irv. 91); or to unreasonably refuse to hear evidence after proof allowed (*Sinclair*, 1894, 1 Adam, 500). It is *not* oppression, where he proceeds in face of an erroneous citation (*Atherton*, 1843, 1 Broun, 524); or grants decree in error after he has fairly applied his mind to the facts and law (*Smith*, 1892, 3 White, 294).

(2) *Wilful deviation.*—This ground arises where the Sheriff has done something, knowing that under the Act he had no right to do it, or has acted in so capricious a manner as to cause grave injustice (*Paterson & Sons*, 1895, 1 Adam, 576). It does not arise where small irregularities in procedure have taken place, but substantial justice has been done (*Weatherstone*, 1860, 3 Irv. 589). The following have been held to be wilful deviations:—(*a*) amendment of instance by a radical alteration (*Welsh*, 1894, 1 Adam, 389); (*b*) decree given for what is *ex facie* inconsistent with account annexed to summons, *e.g.* decree for damages, when account for goods sold (*G. & S. W. Rwy.*, 1855, 2 Irv. 162); (*c*) account shows no ground of action, and omission has prevented substantial justice being done (*S. N. E. Rwy. Co.*, 1866, 5 Irv. 237; *S. N. E. Rwy. Co.*, 1866, 5 Irv. 298; *Grange*, 1866, 5 Irv. 324); (*d*) improper granting or refusal of a sist and rehearing (*Rowan*, 1863, 4 Irv. 377; *Wyllie*, 1863, 4 Irv. 441; *Montgomery*, 1891, 2 White, 597; *M'Neil*, 1891, 3 White, 1; *Gow & Son*, 1895, 3 White, 534); (*e*) admission of clearly incompetent evidence (*M'Lachlan*, 1871, 2 Coup. 45); (*f*) improper reference to oath (*Gordon*, 1891, 2 White, 576); (*g*) dispensing with production of a document which formed the ground of action (*Bell*, 1886, 1 White, 229); (*h*) failure to inquire into allegation of no contract and no transactions (*Bryce*, 1885, 5 Coup. 624); (*i*) extract issued before case completely disposed of by Sheriff, *e.g.* expenses not taxed (*Guthrie*, 1856, 2 Irv. 476); (*j*) granting warrant to carry back furniture without taking steps to ascertain facts (*Young*, 1890, 2 White, 527). The following are *not* wilful deviations:—(*a*) account annexed does not set forth title to sue, date, or explicit details of ground of action, but omission has caused no substantial injustice (*Bissell*, 1871, 2 Coup. 43); (*b*) informality in account which does not vitiate instance (*Sinclair*, 1863, 4 Irv. 390); (*c*) alteration of account which does not cause substantial injustice (*Sturrock*, 1866, 5 Irv. 234); (*d*) decree given for a claim which is stated in slump without detail (*Mowat*, 1856, 2 Irv. 435); (*e*) summons contains no account of origin of cause of action, except by reference to account annexed (*Aitken*, 1855, 2 Irv. 156); (*f*) rejection of a counter-claim which had not been duly served (*Cowie*, 1866, 5 Irv. 320); (*g*) cause proceeding without a regular continuation (*Flowerdew*, 1852, 1 Irv. 91); (*h*) alleged improper allowance or refusal of proof (*Buchanan*, 1862, 4 Irv. 225; *Hare*, 1871, 2 Coup. 40; *Paterson*, 1872, 2 Coup. 327); (*i*) granting sists on two separate occasions (*Grange*, 1866, 5 Irv. 324).

(3) *Incompetency, etc.*—This ground arises where an objection is alleged which strikes radically at the competency of the action, or totally excludes the jurisdiction of the Sheriff to try it (*Beattie*, 1862, 24 D. 431; *Murray*, 1892, 3 White, 314). Appeal has been allowed on the following grounds:—(*a*) action for recovery of a statutory penalty raised under Small Debt Act (*Grant*, 1888, 2 White, 6); (*b*) action raised at wrong instance (*Campbell*,

1871, 2 Coup. 142); (*c*) ground of action prescribed and unsupported by competent evidence; but this judgment has been questioned (*Murray*, 1869, 1 Coup. 247). On the other hand, *no* appeal on this ground was allowed where (*a*) Sheriff said to have misconstrued the Act on which proceedings founded (*Mosson*, 1872, 2 Coup. 325; *Allison*, 1882, 5 Coup. 137); (*b*) action raised in Ordinary Small Debt Court instead of Small Debt Circuit Court (*Stewart*, 1868, 1 Coup. 92); (*c*) pursuer had no title to sue (*Findlay*, 1886, 1 White, 110); and (*d*) where action proceeded with, and decree pronounced, after lapse of year and day (*Kean*, 1852, 1 Irv. 88).

9. *Procedure.*—The principles explained, and the forms given in Part I. pars. 9–21, with a few modifications, may be applied to civil appeals. No sist or stay of the process and decree pronounced under the Small Debt Act, and no certificate of appeal, can be issued by the Sheriff Clerk, except upon (1) consignation of the whole sum (if any) decerned for by the decree, and the expenses (if any); and (2) security being found for the whole expenses which may be incurred and found due under the appeal (S. D. Act, s. 31). The Sheriff Clerk adds to the certificate, in Part I. par. 10 hereof, a statement that such consignation has been made. The form of minute without reasons shown in Part I. par. 9, is often used in Small Debt appeals. The appellant lodges with the Circuit Clerk of Justiciary the Small Debt decree or evidence that it was pronounced, *e.g.* the Sheriff's Small Debt Court Book (*Baxter*, 1861, 4 Irv. 84; *Sinclair*, 1863, 4 Irv. 390). The appeal is heard and determined in open Court (S. D. Act, s. 31). It is not competent (*a*) to produce or found upon any document, as evidence on the merits of the original cause, which was not produced to the Sheriff when the case was heard, and to which his signature or initials were not then affixed; or (*b*) to found upon or refer to the testimony of any witness not examined before the Sheriff, and whose name was not written by him, when the case was heard, upon the record copy of the summons (*ib.*). The Circuit Court have power to correct deviations in point of form, or to remit the cause to the Sheriff, with instructions, or for rehearing generally (*ib.*; *Murray*, 1869, 1 Coup. 247; *Glass*, 1876, 3 Coup. 370; *Bryce*, 1885, 5 Coup. 624; *Bell*, 1886, 1 White, 229). Should difficulty arise, the Court certify appeals under the Heritable Jurisdictions Act to the Court of Session (Her. Jur. Act, s. 37). If *pericuriam*, an appeal under that Act is certified to the High Court of Justiciary, that Court will transfer it to the proper tribunal (*Cambuslang Road Trs.*, 1845, 2 Broun, 550). In appeals under the Small Debt Act, the Circuit Court usually certify to the High Court of Justiciary, who either transfer the appeal to one of the Divisions of the Court of Session (*Beattie*, 1862, 24 D. 431: *Burrell & Son*, 1868, 1 Coup. 103); or dispose of it themselves (*Allison*, 1882, 5 Coup. 137).

Appeal to Court of Session from Sheriff Court.—Appeal is the method of (*a*) bringing under the review of the Court of Session the merits of all judgments sisting process or giving interim decree for money, and final judgments in the Sheriff Court, which have not been extracted, except in those cases in which warrants may be issued before extract, where the mode of review is by suspension. Appeal is also used for (*b*) removing processes in certain circumstances to the Court of Session, not for review, but in order that further procedure in them may be carried through there.

Appeal may be from the judgment either of the Sheriff or of the Sheriff-Substitute without the necessity of first appealing to the Sheriff.

Value Limit.—No appeal, of any kind, except the few that can be brought under the Act of 1877 (see *infra*) can be made to the Court of Session, except in cases exceeding the value of £25 (16 & 17 Vict. c. 80, s. 22; *Welsh*, 1893, 20 R. 1014; *Mitchell*, 1855, 17 D. 682). The objection that the case is of less value cannot be got over by consent (*Singer Manufacturing Co.* 1881, 8 R. 695), nor by stating the action as a special case (*Bruce*, 1889, 17 R. 276). Nor may the requisite value be attained by assigning to one party, without consideration, debts under £25, due to others (*Gibson*, 1827, 5 S. 784); but the fact that the sum sued for is made up of sums under £25, due by different defenders, is immaterial, provided the total sum is sufficient (*Dykes*, 1869, 7 M. 603; *Nelson*, 1876, 3 R. 810; *Birrell*, 1884, 12 R. 151).

If the conclusions of the petition show the value of the action to be over £25, the action is appealable, and in computing the value interest is allowed (*Martin*, 1872, 10 M. 949), but not expenses (*Hopkirk*, 1855, 18 D. 299).

Where the sum sued for is under £25, but the decision, if favourable, will benefit the pursuer to a larger amount, as by the extinction of a counter claim, there is appellate jurisdiction (*Inglis*, 1859, 21 D. 822; *Brydon*, 1864, 3 M. 7), unless the counter claim arises out of the same transaction as the principal one (*Stevens*, 1877, 5 R. 19). If the sum sued for is under £25, but the decision determines the right to future or continuous payments bringing it to more, there is jurisdiction (*Drummond*, 1869, 7 M. 347; *Cunningham*, 1883, 10 R. 441); but the fact of continuous liability must be made quite clear (*Macfarlane*, 1870, 8 M. 438; *Nixon*, 1873, 3 R. (J. C.) 31), and it is not sufficient that the same case may arise again between the same parties (*Heddle*, 1880, 18 S. L. R. 96; *North British Railway*, 1889, 17 R. 30).

There is always right of appeal where the money value of the case is indefinite; as where less than £25 is concluded for, but with an alternative conclusion for such sum more or less than £25 as may be found due (*Lamb*, 1844, 2 Broun, 311; *Wilson*, 1845, 2 Broun, 519; *Stott*, 1834, 12 S. 828), as also in actions for interdict and *ad facta praestanda*, even though the subject of dispute is in itself manifestly below £25 in value (*Robertson*, 1857, 19 D. 594; *Purves*, 1867, 5 M. 1003; *Henry*, 1881, 8 R. 692). If in such actions there is an alternative conclusion for money, the amount of this determines whether or not the case may be appealed. If under £25, stated definitely, there is no appeal (*Cameron*, 1857, 19 D. 517; *Singer Manufacturing Co.*, 1881, 8 R. 695), but stated indefinitely and alternatively, "or such other sum as may be found due," there is appeal (*Shotts Iron Co.*, 1871, 10 M. 195; *Aberdeen*, 1872, 10 M. 971). In such cases the value of the cause is the sum by payment of which the defender can satisfy the claim of the pursuer (*North British Railway Co.*, 1889, 17 R. 30; *Dickson*, 1889, 16 R. 673. But see *Henderson*, 1896, 3 S. L. T. No. 451).

The sum originally sued for, although restricted, no matter to what extent, during the course of the action, still determines whether the case is capable of review, provided the restriction takes place subsequent to the closing of record (*Buie*, 1863, 2 M. 208; *Fleming*, 1881, 9 R. 11; *Robertson*, 1857, 19 D. 594), but the restricted sum rules if restriction takes place before closing (*Cairns*, 1884, 12 R. 167). Where, however, a practically new litigation arises as to a balance, less than £25, of a sum greater than that amount as originally sued for, there is no appeal (*Dobbie*, 1880, 7 R. 983).

(A) *Appeals for Review.*

There are only three kinds of interlocutors against which appeal for

review on the merits to the Court of Session is competent. In all other cases it is prohibited (16 & 17 Vict. c. 80, s. 24; *Ross*, 1894, 22 R. 174).

The cases where it is competent are:—

(*a*) Interlocutors sisting process.

(See *Watson*, 1872, 10 M. 492.)

(*b*) Interlocutors giving interim decree for money.

(See *Baird*, 1874, 2 R. 25; *Sinclair*, 1884, 11 R. 413.)

Interim decrees for expenses are not appealable (*Notman*, 1872, 9 S. L. R. 292), nor are interim orders for assignation (*Maxton*, 1886, 13 R. 912).

(*c*) Interlocutors disposing of the whole merits of the cause.

Section 24 of the Act of 1853 made such interlocutors appealable, "although no decision has been given as to expenses," but this is repealed by the Court of Session Act, 1868 (31 & 32 Vict. c. 100, s. 53), which substituted for interlocutors disposing of the whole "merits," interlocutors disposing of the whole "subject-matter," which includes expenses, that is to say, "final judgments." These are identical with the final judgments which admit of appeal from the Sheriff-Substitute to the Sheriff, wherefor see APPEAL TO THE SHERIFF FROM THE SHERIFF-SUBSTITUTE, for what constitutes a final judgment entitling to appeal to the Court of Session (16 & 17 Vict. c. 80, s. 24; 31 & 32 Vict. c. 100, s. 53; 39 & 40 Vict. c. 70, ss. 27 & 3).

The form of appeal is by writing on the interlocutor sheet, or by a separate note of appeal lodged with the Sheriff Clerk, to the effect that "the pursuer [or defender or other party] appeals to the Division of the Court of Session." The note must specify which Division, and must be signed by the appellant, or his agent with his authority (*Stephen*, 1863, 2 M. 287), and bear the date of signature (31 & 32 Vict. c. 100, s. 66). The appellant is not required to find caution for expenses (*ib.* s. 65).

The appeal may be taken any time up till the interlocutor is extracted, that is to say, fourteen days in every case where special leave to extract within a shorter time has not been allowed (39 & 40 Vict. c. 70, s. 32); and the time is extended to six months in the case of any final interlocutor that has not been sooner extracted or implemented (*ib.* s. 33; see *Tennents*, 1881, 8 R. 824; *Thompson*, 1883, 10 R. 469). The time runs from the date of signing, and the date of signing or extracting of any supplementary interlocutor is immaterial (*Baird*, 1882, 9 R. 970; *Thompson*, *ut supra*; *Macfarlane*, 1884, 12 R. 232).

Within two days of receiving the note of appeal, the Sheriff Clerk must give written notice of it to the respondent or his agent (and should note that he has done so on the interlocutor sheet (*Chisholm*, 1874, 1 R. 388). Failure to do so does not invalidate the appeal; but the Court of Session may give what remedy appears proper for any inconvenience or disadvantage that may result (31 & 32 Vict. c. 100, s. 70). Also within two days from receiving the note of appeal, the Sheriff Clerk must himself (*Innes*, 1859, 12 D. 1007) transmit the process to the Clerk of the Division to which it is marked, who must note on it the date of receiving (*ib.* s. 71).

The regulations as to boxing and printing the appeal are contained in the Act of Sederunt of 10th March 1870, and are to the following effect:— Within fourteen days after the process has been received by the Clerk of Court, the appellant must print and box the note of appeal, record, interlocutors, and proof (see *Muir*, 1881, 9 R. 10), if any, unless within eight days after the process has been received he has obtained an interlocutor of the Court, or, if in vacation, of the Lord Ordinary on the Bills (for which

purpose, if necessary, the process must be laid before him by the assistant Clerk) dispensing with printing in whole or in part (*Allan*, 1881, 8 R. 563; and see *Ross*, 1887, 14 R. 768; *Dolan*, 1885, 12 R. 1190); if in part, it is necessary to print and box only those papers whereof printing has not been dispensed with; if in whole, the appellant lodges with the Clerk of Court and also with the clerk of the President of the Division a manuscript copy of the note of appeal.

In vacation, the period within which the appellant must lodge with the Clerk of Court the necessary prints, or if printing has been wholly dispensed with, the manuscript copy, is likewise fourteen days; and on the first box day or sederunt day following on such deposit in vacation, if there are prints, these are boxed to the Court, and if there are none, a manuscript copy is furnished to the clerk of the President of the Division.

If the appellant, either in session or vacation, fails to observe any of these periods, he is held to have abandoned his appeal; but within eight days after it is held to be so abandoned, he may ask the Court in session, or the Lord Ordinary on the Bills in vacation, to repone him (*Greig*, 1880, 8 R. 41), which is only granted on cause shown (*Robertson*, 1877, 5 R. 257; *Greig, ut supra*; *Dougan*, 1885, 23 S. L. R. 133; *Macquian*, 1871, 9 M. 743; *Lattimer*, 1881, 9 R. 370), and on such terms as to printing, payment of expenses to the respondent, or otherwise, as seem just. On the other hand, also within the eight days, the respondent, by printing, and, if in session, boxing the papers himself, and, if in vacation, by lodging a copy thereof with the Clerk of Court, may insist in the appeal, in which case the appellant may insist also.

If, however, the eight days elapse, and the appellant is not reponed, nor does the respondent desire to insist, then the judgment or judgments complained of become final, and cannot thereafter be reviewed by appeal or suspension (*Park*, 1874, 12 S. L. R. 11; *Watt Brothers*, 1879, 7 R. 126); the process is forthwith retransmitted to the Sheriff Clerk, the Clerk of Court having first engrossed on the interlocutor sheet and signed a certificate to this effect: "[Date]—Retransmitted in respect of the abandonment of the Appeal"; which certificate is a warrant to the judge of the Sheriff Court to award, on a motion to that effect being made to him, three guineas of expenses to the respondent in the appeal (Act of Sederunt, 10th March 1870, s. 3). The Court have allowed trifling errors to be corrected, so long as the process has not been actually retransmitted and the other side has not been prejudiced (*Park, ut supra*; *Young*, 1875, 2 R. 456; *Walker*, 1877, 4 R. 714; *Boyd*, 1888, 16 R. 104).

Objection to the competency of the appeal is properly stated at the Single Bills (*Ross*, 1878, 15 S. L. R. 438), but is not incompetent later (*Hillhouse*, 1891, 19 R. 47; *Shirra*, 1873, 11 M. 660).

The appeal brings under the review of the Court all the judgments that have been pronounced in the case, whether final or interlocutory (*Cross*, 1879, 6 R. 974; *Weir*, 1892, 19 R. 858), no matter at whose instance, and without the necessity of any counter appeal (31 & 32 Vict. c. 100, s. 69).

An appellant may not withdraw or abandon an appeal without leave; and any party in the case may insist in it (*ib.*; *Bell*, 12 R. 961). Withdrawal, if at the Single Bills, entails paying £3, 3s. of expenses (*Gentles*, 1880, 8 R. 13); if later, expenses of respondent as taxed (*Sligo*, 1880, 8 R. 41); and if the appeal have been competent, the interlocutor becomes final (*Weir, ut supra*). If the respondent absent himself from the hearing, the Court will not sustain the appeal without argument sufficient to warrant it (*Dunbar*, 1884, 11 R. 652; *Aitken*, 1880, 8 R. 12; *Alder*, 1880, 7 R. 1093).

The record may, with leave, be amended on such conditions as the Court thinks proper (*Rose*, 1878, 5 R. 600; *Gibson*, 1870, 8 M. 445; *D. of Atholl*, 1869, 8 M. 57), and the Court gives judgment according to the law truly applicable to the circumstances, whether it is pleaded or not (31 & 32 Vict. c. 100, s. 72).

The Court, after hearing, may remit the case to the Sheriff for further procedure, or order proof or additional proof to be taken in the same way as proof in a case before the Inner House, or dispose of the case without any such order (*ib.*); or it may send the case to be tried by jury (*M'Donagh*, 1886, 13 R. 1000; *Gorman*, 1885, 12 R. 1073).

Interim possession till the time of the hearing of the appeal is regulated by the Sheriff Court, thereafter by the Court of Session (31 & 32 Vict. c. 100, s. 79).

(B) *Appeals for Removal of Process.*

1. *Appeal for Jury Trial.*—In all cases originating in the inferior Courts in which the claim is in amount above £40, as soon as proof is allowed (unless it be proof to lie *in retentis*, or diligence for the recovery and production of documents), either of the parties, who may conceive that the cause ought to be tried by jury, may appeal to the Court of Session to have it so tried (31 & 32 Vict. c. 100, s. 73; 6 Geo. IV. c. 120, s. 40). The mode of appeal is by note of appeal, subject to the conditions specified in 6 Geo. IV. c. 120, s. 40 (31 & 32 Vict. c. 100, s. 73).

If in such an action the claim is not simply pecuniary, so that it does not appear on the face of the petition that it is above £40, the party intending to appeal must previously apply by petition to the Sheriff for leave, which application must be intimated to the opposite party or his agent; and the petitioner is bound, if required by the Sheriff, to give his solemn declaration that the claim is in amount above £40 (A. S. 11 July, 1828, s. 5; *Ross*, 1894, 22 R. 174; *Rain*, 1877, 4 R. 732). The Sheriff then grants leave, which is certified by the Sheriff Clerk, or if he is dissatisfied, refuses it, his decision in either case being final and unappealable (*Rain, ut supra*).

In a pecuniary claim the sum must be over £40 (see *Hamilton*, 1877, 4 R. 688). The sum claimed determines the value (*Stewart*, 1862, 24 D. 1442; *Baird*, 1830, 8 S. 852).

The appeal must be taken in the ordinary case before fifteen days (*Kinnes*, 1881, 8 R. 386), and if in Orkney and Shetland, before thirty days have elapsed from the date of the interlocutor allowing proof, the time running from the date of the principal interlocutor, and not from that of any supplementary one (*Williams*, 1889, 16 R. 687; *Davidson*, 1891, 18 R. 1069; *Hillhouse*, 1891, 19 R. 47). In all cases where the petition is *ex facie* for more than £40, these periods should be allowed to parties to consider the advisability of appealing, but where it is not *ex facie* of that value, proof may be ordered sooner, and the parties must apply for leave to appeal at once (*Ritchie*, 1870, 9 M. 43). Leave to appeal must be obtained in time to allow of the appeal being taken within the above periods (*Duff*, 1881, 9 R. 17).

The stage of the action at which appeal is competent is after an order for proof at large. It may be proof "before answer" (*Stewart*, 1862, 24 D. 1442); or proof as to only a part of the case (*Conroy*, 1895, 32 S. L. R. 496); or a remit to a man of skill to report (*Tulloch*, 1838, 16 S. 983); but an allowance of proof by writ or oath only (*Robertson*, 1875, 2 R. 935; *Shirra*, 1873, 11 M. 660; *Wilson*, 1888, 15 R. 587) is not an order for

proof entitling to appeal for jury trial. An order for proof cannot be appealed for jury trial if at the time it is under appeal from the Sheriff-Substitute to the Sheriff (*M'Arthur*, 1887, 15 R. 117).

The rules as to boxing, printing, and stating objections to the competency, are the same as in appeals for review on the merits.

If the Court thinks the appeal should be tried by jury, it orders issues when the appeal appears in the Single Bills, where also they are adjusted, unless likely to lead to lengthy discussion, when they are sent for adjustment to the Summar Roll. Thereafter it is remitted to a Lord Ordinary to conduct the trial (31 & 32 Vict. c. 100, s. 73).

It is not imperative on the Court to send the case to trial by jury; where it considers other procedure more suitable, it may deal with the case as if it had originated in the Court of Session (*Cochrane*, 1883, 10 R. 1279; *Willing*, 1892, 20 R. 34; *Crawford*, 1895, 32 S. L. R. 272), and send it to proof before a judge of the Inner House or before a Lord Ordinary (*Laidlaw*, 1874, 2 R. 148; *Cochrane, ut supra*: *Sands*, 1829, 7 S. 290, in which case it was done on appellant's motion; see, however, *Mackintosh*, 1875, 3 R. 232: *Dennistown*, 1871, 9 M. 739; *Johnstone*, 1894, 21 R. 19): or the case may be remitted back to the Sheriff Court for proof (*Bethune*, 1886, 13 R. 882; *Nicol*, 1893, 20 R. 288; *Cunningham*, 1893, 21 R. 19; *Bain*, 1894, 21 R. 536; but see, *Donnachie*, 1892, 20 R. 210; *Crabb*, 1892, 19 R. 580; *Willison*, 1893, 20 R. 976).

2. *Removal of Process under the Act of* 1877.—The provisions for removal to the Court of Session of the actions made competent in the Sheriff Court by s. 8 of the Sheriff Courts (Scotland) Act, 1877 (40 & 41 Vict. c. 50), are contained in s. 9 of that Act, which provides that at any time before, or not more than six days after the record is closed, the defender may lodge in process a note that "the defender prays that the process may be transmitted to the Court of Session." The note is signed by the defender or his agent, and dated. The Sheriff Clerk at once transmits the process to the Keeper of the Rolls of the First Division, who, under the directions of the Lord President, remits it to the Division and Lord Ordinary before whom it is to depend, and the case proceeds as if it had been raised in the Court of Session (s. 9 (1)). If, however, in the event of his being successful, the Court are of opinion that the defender should have allowed the action to remain in the Sheriff Court, they will allow him only such expenses as he would have been entitled to if successful there (s. 9 (2)). Any action competent under the Act may be removed under the foregoing provisions, even though its value be under £25 (s. 9 (3)). If the value of an action raised in the Sheriff Court, under the Act, appears to exceed the amount specified by the Act, the Sheriff may, of his own accord or on the pursuer's motion, transmit it to the Court of Session after, and to proceed in, the manner stated above (*ib.* s. 10). See DECLARATOR: DIVISION, ACTION OF: DIVISION OF COMMONTY: DIVISION AND SALE; ARRESTMENT (OF SHIP); JURISDICTION; FOREIGNER; JURISDICTION, HERITABLE.

Actions raised under the Employers' Liability Act of 1880, in addition to being removable for jury trial under 31 & 32 Vict c. 100, s. 73, 6 Geo. IV. c. 120, s. 40, are removable under the provisions of the Act of 1877, s. 9, provided they are not under £25 in value, the freedom from this restriction being accorded to those actions only which are raised under s. 8 of the Act of 1877.

3. *Removal on the Ground of Contingency.*—When an action in the Sheriff Court stands in such a relation to an action in the Court of

Session, that, if both were pending in the same Court, they would be conjoined, it may be removed to the Court of Session. The party desirous of this course lays before the Lord Ordinary, or the Division before which the Court of Session process is pending, a certified copy of the process in the Sheriff Court; and if the Division or the Lord Ordinary are satisfied that there is contingency between the processes, warrant is granted for the transmission of the Sheriff Court process (31 & 32 Vict. c. 100, s. 74). The decision of the Division or of the Lord Ordinary is final at that stage; but if refused, the motion for transmission may be renewed at any subsequent stage of the cause (*ib.* s. 75). See CONJOINING OF ACTIONS.

REVIEW WHERE APPEAL INCOMPETENT.—An extracted decree cannot be appealed against, nor can an unextracted one if six months have elapsed from its date. In these cases, as also where extract is unnecessary to enforce the decree, or where it is issued too soon to permit of appeal, the mode of review is by suspension, or reduction, in the Court of Session. See REVIEW; SUSPENSION; REDUCTION.

[*Appeal in the Small Debt Court, Debts Recovery Court, and against decisions pronounced in proceedings having reference to Entailed Estates, to Ecclesiastical Buildings and Glebes, to the Service of Heirs, to Judicial Factors, and, generally, wherever in special actions it differs from the forms here given, is treated of with reference to these subjects.*]

Appeal to High Court of Justiciary.—Appeal on case stated is one of the four modes of reviewing, in the Supreme Court, the proceedings in inferior Courts. (For the other three modes of review, see ADVOCATION TO COURT OF JUSTICIARY; APPEAL TO CIRCUIT COURT; SUSPENSION.) No appeal from a decision of the High Court, whether sitting in Edinburgh or on Circuit, is competent (Hume, ii. 504–8; Alison, ii. 677, 678; Macdonald, 532).

Appeals on cases stated may be made to the High Court in Edinburgh by either party in any criminal case, as defined by the Summary Procedure Act, 1864, s. 28, against any decision on a matter of law. The party applies directly or by his agent to the judge, within three days of the judgment or sentence, to state the facts, his decision, and the question of law (38 & 39 Vict. c. 62, ss. 3, 7).

The application to the judge to state a case may be in this form:—

[*Place and date*].—I hereby require you to state and sign a case, setting forth the facts and the grounds of the foregoing determination [*or* judgment, *or* conviction], for the opinion thereon of the High Court of Justiciary.

(Signed) *A. B.*, Complainer [*or* Respondent].
or C. D., Agent for *A. B.*, Complainer [*or* Respondent].

When the party is abroad, his agent cannot demand a case, unless he has a mandate (*Williamson*, 3 White, 20). Such appeals may now be taken in Revenue cases (44 & 45 Vict. c. 33, s. 11; *Schultze*, 2 White, 449).

Such appeal must raise a question of law (*Gair*, 4 Coup. 305). (On the distinction between a question of law and one of fact, see *M'Adam*, 1876, 3 Coup. 223; *Black*, 1875, 3 Coup. 209; *Grant*, 1876, 3 Coup. 282; *Henderson*, 1876, 3 R. 623.) A question of law includes a question whether the facts proved entitled the judge to convict (*Campbell*, 3 Coup. 291). The case may be asked for, although review is excluded by the special Statute in question (38 & 39 Vict. c. 62, s. 3). Caution or consignation of the sum fixed by the judge must be made within three days, and the

appellant must pay clerk's fee for drawing the case (*ib.* subsec. 1). An objection to an appeal on such ground must be stated before the merits are entered upon (*Thom*, 1 White, 248).

Where one of the three days is Sunday, it is not a *dies non*; and if the last day is a Sunday, application must be made on or before that day (*M'Vean*, 1896, 33 S. L. R. 267), but caution may be found on the Monday (*Hutton*, 5 Coup. 274). The clerk must prepare the case in five days, and its terms are settled by the judge (38 & 39 Vict. c. 62, s. 1, subsecs. 2, 3, 4). The judge should state, not the evidence, but the facts found proved by him (*Sinclair*, 1 White, 337; *Falconer*, 1893, 1 Adam, 96). The appellant must, within three days of issue, send a copy and a notice of appeal to the respondent, and send the case to the Justiciary Clerk, with certificate of notice to the respondent (38 & 39 Vict. c. 62, s. 1, subsec. 5; *Gairns*, 1 White, 521).

The certificate of notice does not require to be probative or tested. It should be written on the principal case, and may be in this form:—

[*Place and date*].—I hereby certify that I this day gave notice of appeal in writing, together with a copy of this case, to *A. B.*, the respondent, by delivering the same to him personally at [*or* by posting the same addressed to him, *or* by leaving the same addressed to him at].

(Signed) *C. D.*, Appellant.
[*or E. F.*, Agent for the Appellant.]

The case is laid before a High Court judge, who may liberate *ad interim*, and sist execution with or without caution (38 & 39 Vict. c. 62, s. 1, subsecs. 6, 7). The case is heard by the High Court, which may affirm, reverse, or remit, with opinion, or make other orders, and deal with costs, or send back the case for amendment (*ib.*, subsec. 8; *Dunlop*, 2 White, 115). There may be a remit for additional evidence (*Nelson*, 5 Coup. 514). It is only a determined cause that can be dealt with on case stated (*Leishman*, 3 Coup. 482). In some cases remit may be made to amend the judgment (*ib.*).

A frivolous demand for a case may be refused, the judge giving certificate of refusal on demand. But he cannot refuse to state a case to the public prosecutor, nor require caution from him (38 & 39 Vict. c. 62, s. 4). A case may be refused if the proceedings are not criminal (*Couper*, 2 White, 393), or raise no point of law (*Ross*, 3 White, 63), or if no operative judgment has been given (*Torrance*, 3 White, 254).

When a case is refused, written application may be made within three days to High Court for an order on the judge and the other party to show cause why a case should not be stated, the certificate being produced with the application (38 & 39 Vict. c. 62, s. 5, and Schedule C). A High Court judge may order intimation to the inferior judge and the other party, and thereafter dispose of the matter summarily (*ib.* and Schedule B).

If a case is taken, it excludes other modes of review (*ib.* s. 9). But an application for a case may be withdrawn, at least up to the time of signature (*Kay*, 3 Coup. 305). The case cannot be withdrawn, to the effect of making other forms of review competent, after it has been laid before a judge of the High Court, and a deliverance pronounced (*Walker*, 1895, 32 S. L. R. 624).

In order to found an appeal, any party to a cause may require the Sheriff, or Sheriff-Substitute, where the cause depends before him, or the Clerk of Court, where the cause depends before any other inferior judge, to take and preserve a note of any objections to the admissibility of evidence sustained or repelled by such Sheriff, Sheriff-Substitute, or other

inferior judge. Any such note made by a Clerk of Court shall be authenticated as correct by the inferior judge (*ib.* s. 6).

An appeal is incompetent which is founded on an objection which ought properly to have been stated in the inferior Court. All objections as to matters of procedure are of this nature. Such are questions as to the reception and rejection of evidence, as to citation, designation of the accused, and the like. These objections require to have been recorded, as well as stated in the inferior Court, before an appeal can be based upon them.

An appellant sentenced to imprisonment must appear personally, and if he do not appear, or if the appeal be dismissed, warrant is granted to reincarcerate (38 & 39 Vict. c. 62, s. 10) (Macdonald, 537; Moncreiff, *Review in Crim. Cases*, 190; Anderson, *Crim. Law*, 270).

Expenses.—Sitting as a Court of Appeal, the High Court of Justiciary may, in absence of express statutory regulation, award expenses in both the High Court and the inferior Court, or in the High Court alone, or may modify or refuse expenses. No inferior judge who shall state and sign a case under the Summary Prosecutions Appeals Act, 1875, shall be liable in any costs in respect or by reason of such appeal against his determination (s. 3, subsec. 11).

Since 1872 the general practice of the Court has been to modify the expenses, generally to £7, 7s., with £1, 1s. for dues of extract, without saying whether they are expenses in both the superior and inferior Courts. Full expenses in the High Court have since 1872 been given only in exceptional cases.

In complaints under the Summary Procedure Act, 1864, for a statutory penalty, where the Statute founded on does not sanction, expressly or by implication (*Ross*, 1869, 1 Coup. 343), an award of expenses, no expenses in the inferior Court (*Nimmo*, 1872, 10 M. 477 and 482) shall be awarded to or against a public prosecutor (Summary Procedure Act, 1864, s. 22).

Where the Statute founded on authorises costs to be given against an accused person, the Court may award costs to either party (*Walker*, 1873, 2 Coup. 460; *Todrick*, 1891, 3 White, 28).

Where the Statute founded on authorised expenses being awarded against a party appealing against conviction, and made no provision for awarding expenses against the prosecutor-respondent, the Court awarded expenses against the prosecutor in both Courts (*Christie*, 1853, 1 Irv. 293).

The Summary Prosecutions Appeals Act, s. 3, subsec. 9, empowers the superior Court to make such order in relation to the costs of the appeal as they shall see fit. In the practice of the High Court in cases under this Act, the Court have awarded expenses in both Courts as costs of the appeal (*Walker* v. *Linton*, H. C., Edinburgh, 24 Oct. 1892: *Fairfoul* v. *Somerville*, H. C., Edinburgh, 25 Oct. 1895; *Lang* v. *Wilson*, H. C., Edinburgh, 7 Feb. 1896; *Wilson* v. *Mackenzie*, H. C., Edinburgh, 29 Feb. 1896).

As to appeal on bail, see Bail. See Criminal Prosecution.

Appeal to House of Lords.—The House of Lords is the ultimate Court of Appeal for the three kingdoms. In disposing of appeals from the Scottish Courts, it is bound to apply, and does apply, the law of Scotland. But it is an imperial tribunal, and in applying principles of law that are common to the jurisprudence of the three countries, its

decisions are binding in Scotland, although pronounced in an English or Irish litigation (*Virtue*, 1873, 1 R. 285).

Competency of Appeal.—Appeal is competent from the decisions of the Inner House of the Court of Session, but not from the judgment of a Lord Ordinary which has not been submitted to review (48 Geo. III. c. 151, s. 15). Appeal is also competent from decisions of the Teind Court (*Minister of Kirkden*, 1784, Mor. 7479; *Minister of Prestonkirk*, 1808, Mor. Stipend Apx. 6, note; 48 Geo. III. c. 138, s. 4), from judgments pronounced by the Court in the exercise of its Bill Chamber jurisdiction (*Fleming*, 1839, Macl. & Rob. App. 54; *Black*, 1893, 21 R. 41; 1894, 21 R. (H. L.) 72), and in Exchequer cases (19 & 20 Vict. c. 56, s. 20), but not in Debts Recovery cases (30 & 31 Vict. c. 96, s. 12). There is no appeal against decisions of the Registration Appeal Court (31 & 32 Vict. c. 48, s. 22), or of the Lands Valuation Appeal Court (30 & 31 Vict. c. 80, s. 8). Nor is there any appeal from the High Court of Justiciary (*Mackintosh*, 1876, 3 R. (H. L.) 34; Criminal Procedure Act, 1887, s. 72). Appeal is competent, however, from the decisions of the Court of Session in the exercise of its criminal jurisdiction (*Colquhoun*, 1784, 2 Pat. Ap. 626). There is no appeal against the verdict of a jury in civil cases, but interlocutors allowing or refusing bills of exceptions may be appealed (55 Geo. III. c. 42, s. 7). Interlocutors granting or refusing a new trial after discussion upon a rule are not appealable (s. 6). Interlocutors applying the verdict of a jury are appealable (s. 9). When a Lord Ordinary tries issues of consent without a jury, the judgment of the Division upon the law is appealable (13 & 14 Vict. c. 36, s. 47).

Every final judgment of the Inner House is appealable (unless appeal is excluded by Statute), but appeal against interlocutory judgments is competent only in cases in which there is a difference of opinion among the judges, or, if they are unanimous, with leave of the Court (48 Geo. III. c. 151, s. 15). If a dilatory defence, leading to the dismissal of the action, is sustained, leave is not required (6 Geo. IV. c. 120. s. 5). When an appeal is taken against an interlocutory judgment, the counsel who sign the petition of appeal, or two of the counsel for the appellant in the Court below, must certify either that leave has been given, or that the judgment was not unanimous (Standing Order of the House of Lords, 1876, No. 9).

Leave to Appeal.—Leave is obtained, in cases where it is necessary, upon petition presented to the Court pronouncing the judgment appealed against. In granting or refusing leave to appeal, the Court has an absolute discretion, and no rule of universal application can be formulated. The leading consideration is to prevent, if it be possible, two appeals in the same case (*Edinburgh Northern Tramways Co.*, 1891, 18 R. 1152). If the Court has had difficulty, or the judges have decided upon different grounds, leave will be more readily given; and where a reversal of the interlocutor appealed against would conclude the cause, or where the disadvantages to the appellant from compelling him to exhaust the case in the Court of Session outweigh those which the respondent would suffer from delay, leave will in general be granted. But leave will rarely be given to appeal upon questions of title, relevancy, or procedure. The leading cases in which leave has been granted or refused are noted in Mackay, *Manual of Practice*, 580.

Time allowed for Appeal.—By Standing Order 1, it is ordained that, *except where otherwise provided by Statute*, no petition of appeal shall be received unless lodged within a year from the date of the judgment appealed from, provision being made for indulgence in the case of persons under

incapacity, imprisoned, or out of the United Kingdom. The time within which appeals from the Court of Session may be presented is, however, regulated by the Act 6 Geo. IV. c. 120, s. 25, which provides:—"The decrees or orders of the Court of Session shall be final, and not subject to be complained of by appeal to the House of Lords, unless the petition of appeal shall be lodged with the Clerk of Parliament, or clerk assistant, within two years from the day of signing the last interlocutor appealed from, or before the end of fourteen days, to be accounted from and after the first day of the session or meeting of Parliament for the dispatch of public business next ensuing the said two years: provided always that when the person or persons entitled to appeal shall be out of the kingdom of Great Britain and Ireland, it shall be competent for him or them to enter an appeal at any time within five years from the date of the last interlocutor, if he or they shall remain abroad so long, or within two years from the time of coming into Great Britain or Ireland: the time allowed to such person or persons for lodging his or their appeal in no case, on account of mere absence, exceeding the foresaid space of five years, together with the space that may elapse before the end of the fourteenth day from and after the session or meeting of Parliament next after the expiration of the said five years: and in case the person or persons so entitled to appeal shall be under the age of twenty-one years, or *non compos mentis*, it shall be competent for them, or their heirs or representatives, where no appeal has been previously entered on this behalf, to enter an appeal at any time within two years after full age or coming of sound mind, or after the death of the persons so disqualified, and the opening of the succession to the heir, or before the end of fourteen days after the first day of the session or meeting of Parliament next ensuing the said two years." It is doubtful whether these provisions apply to judgments of the Teind Court, and it is thought that appeals against such judgments should be presented within a year, as provided by the Standing Order (48 Geo. III. c. 138, s. 4). Appeal against an interlocutor allowing or refusing a bill of exceptions must be taken within fourteen days, if Parliament is sitting, or, if not, within eight days after the commencement of the next session, and a copy of the exceptions, certified by one of the Clerks of Session, must be attached to the petition of appeal (55 Geo. III. c. 42, s. 7). Appeal against the judgment of the Division reviewing that of the Lord Ordinary upon issues tried by him without a jury, must be taken within the same time (13 & 14 Vict. c. 36, s. 47). A judgment of the Inner House, granting or refusing decree of *cessio bonorum* upon appeal from the Sheriff, is appealable to the House of Lords within ten days, if Parliament is sitting, or, if not, within six days after the commencement of the next ensuing session (6 & 7 Will. IV. c. 56, s. 19; 43 & 44 Vict. c. 34, s. 9 (4)).

Findings in Fact.—Where there has been proof in an inferior Court, the judgment of the Court of Session on appeal must distinguish by separate findings the facts held proved and the law held applicable to the case. The latter findings only are appealable to the House of Lords (6 Geo. IV. c. 120, s. 40). The House accordingly has no concern with proof led in the Sheriff Court (*Mackay*, 1881, 8 R. (H. L.) 37). As to what are findings in fact, and what are findings in law, when mixed findings have been pronounced, see *Shepherd*, 1881, 9 R. (H. L.) 1; *Fleming*, 1886, 13 R. (H. L.) 43. Where it can be shown that the Court of Session has not exhausted the issue before it, and that there are material questions of fact left undetermined, a remit will be made to the Court below to pronounce findings upon these questions, but the omission can only be shown by reference to the judgment and the record, not to the proof (*Mackay, ut supra; Gilroy*, 1892,

20 R. (H. L.) 1). In one Whole Court case where the judges were much divided in opinion, and the facts held proved were not properly discriminated from the law in the interlocutor, though it was clear from the opinions of the majority what were the facts held proved by them, the House proceeded to judgment without putting parties to the trouble and expense of a remit to have a proper separation made (*Caird*, 1887, 14 R. (H. L.) 37). Where a proof has been taken in the Court of Session, and the Lord Ordinary and the Court concur in their view of the facts established by the evidence, their decision, so far as proceeding upon matter of fact, will not be lightly interfered with by the House of Lords. It is necessary to show that some cardinal fact has been overlooked, and that the judgment is clearly erroneous (*M'Intyre Brothers*, 1893, 20 R. (H. L.) 49; *Rivon*, 1893, 20 R. (H. L.) 53). In the Court below, English or Irish law must be proved by evidence as matter of fact; but if the case goes on appeal to the House of Lords, the House, as the *commune forum* of the three countries, may disregard the evidence led, or even, if no evidence has been led, proceed of its own knowledge to apply the law appealed to (*Cooper*, 1888, 15 R. (H. L.) 21). When the opinion of an English or Irish Court has been obtained, upon case stated, for the purposes of a litigation in a Court in Scotland, the House may adopt or reject the opinion according as the same appears to be well founded or not (Law Ascertainment Facilities Act, 1859, s. 4).

Procedure in Appeals.—The Standing Orders and Directions by which procedure before the House of Lords is now regulated are printed at length in Burness & Co.'s *Parliament House Book*, and Skinner's *Court of Session and Sheriff Court Annual*, published yearly. Appeal is taken by the presentation to the House of a petition praying that the interlocutor or interlocutors set forth in the Schedule appended to the petition be reviewed before Her Majesty the Queen in her Court of Parliament, and be reversed, varied, or altered, or that the petitioner may have such other relief in the premises as may seem meet. The petition also prays that the respondent be ordered to lodge such printed case as may be necessary in answer to the appeal, and that service of the order upon his solicitors may be deemed good service. (For form, see Appendix to Standing Orders). The petition and relative schedule must be signed by two counsel who have attended in the Court below, or purpose attending as counsel at the hearing of the appeal. They must also certify that they conceive the case to be proper for appeal (Standing Order 2). The appeal must be printed on parchment (quarto size), and two clear days' notice of intention to present the appeal, together with a correct copy of it, must be served upon the respondent or his solicitor prior to presentation. A certificate that such service has been made must be endorsed by the appellant's solicitor, or his clerk, upon the appeal. It is usual and convenient to deliver to the respondent's agent at least five additional printed copies of the appeal. The appeal, and four printed paper copies thereof, may then be lodged in the Parliament Office; and if the House be sitting, or, if not, then at the next ensuing meeting of the House, the appeal will be presented, and an order made requiring the respondent to lodge his printed case in answer to the appeal. The order will be issued to the appellant's agent for service, and must be returned, along with an affidavit of due service endorsed thereon, to the Parliament Office within the time fixed by Standing Orders 5 and 7 (*infra*), unless within that time all of the respondents have lodged their printed cases. In default, the appeal stands dismissed (Standing Order 3). The affidavit must be sworn before a Justice of the Peace. Service is effected by delivery to the respondent or his agent of a copy of the order, the

original being at the same time shown to him. It may be made by the agent or his clerk. The order of service, which is granted as a matter of course, stops execution of the judgment appealed against, and all further procedure in the case in the Court below, even although leave to appeal has been refused by the Court of Session (Order, 1709: 48 Geo. III. c. 151, s. 17; *Edinburgh Northern Tramways Co.*, 1891, 19 R. 24). Should the respondent desire to enforce his decree after the order of service has been issued, or obtain interim possession, he must apply for leave by petition to the Court whose judgment is under appeal (see EXECUTION (INTERIM) PENDING APPEAL). But as nothing short of an order of service stops execution, the appellant cannot refuse to pay the taxed amount of the respondent's expenses in the Court of Session, if these have been awarded, on the ground that he is contemplating an appeal. It is usual, however, in such circumstances, for the respondent's agent to grant an undertaking to repay the amount should the judgment be reversed upon that point. If an order of service is desired upon the day of presentation of the appeal, for the purpose of stopping execution, the appeal must be lodged in the Parliament Office not later than one o'clock on that day, accompanied by a letter from the agent, stating that the order is desired for the purpose of staying execution. The order of service and affidavit, along with the appellant's case and relative appendix, must be lodged in the Parliament Office within eight weeks from the date of presentation of the appeal (Standing Order 5). If such period expires during recess, it is extended to the third sitting day of the next ensuing meeting of the House (Standing Order 7). The time for lodging papers may be further extended upon petition showing reasonable cause (Form, Appendix C).

SECURITY FOR COSTS.—The appellant must give security for costs by granting his own recognizance, or that of a satisfactory substitute, for £500, and by either lodging a bond by two sufficient sureties for £200, or paying that sum into the Security Fund Account of the House of Lords. Each appellant, if there be more than one, must grant a recognizance. The sufficiency of the substitute and sureties must be certified by the appellant's agent (Form of Certificate, Appendix A), and notice of their names and information as to their means must be given by him to the respondent's agent. The sufficiency of the sureties is determined by the Clerk of the Parliaments. If satisfactory security is not found, or if the £200 are not paid into the Security Fund Account within a week from the issue of the bond and recognizance, the appeal will stand dismissed. The sum consigned is available *pro tanto* in meeting the respondent's costs, should these be awarded to him: if not, it is repaid to the appellant.

ENTERING APPEARANCE FOR RESPONDENT—APPEAL COMMITTEE.—The solicitors of the respondents who purpose lodging printed cases in answer to the appeal, attend at the Parliament Office for the purpose of ascertaining the due execution of the recognizance and bond, and entering their names in the Appearance Book. Only solicitors who have so entered appearance are entitled to notice of the meeting of the Appeal Committee of the House. The Appeal Committee consists of the Lord Chancellor and the Law Lords—three of them being a quorum; but there is usually a full attendance. Any objection to the competency of the appeal is stated to this body, and is practically determined by it, although, in point of form, it reports the result of its deliberations to the House. The Committee may allow an appeal to proceed even although leave to appeal has been refused by the Court of Session (*Orr Ewing's Trs.*, 1885, 13 R. (H. L.) 1; *Mann*, 1892, 20 R. (H. L.) 7). If the respondent is to maintain that the appeal

is incompetent, he presents a petition to the House praying that it be refused. If the question raised is one of difficulty or general importance, the Committee may reserve the matter for the House (*Mackintosh*, 1876, 3 R. (H. L.) 34). The debate before the Appeal Committee is conducted by the solicitors of the parties, and counsel are not heard unless in very exceptional circumstances (Macqueen, *Appellate Jurisdiction*, 33; Denison & Scott, *Appeal Practice*, 28).

Lodging Prints.—The appellant must, within the time fixed by Standing Orders 5 and 7 above narrated, lodge his printed case and relative appendix. Cross appeals must be lodged within the same time (Standing Order 6). The case must contain a printed copy of the record, as authenticated by the Lord Ordinary, together with a supplement, containing an account, without argument or statement of other facts, of the steps which have been taken in the cause since the record was completed, and contain also copies of the interlocutors, or parts of interlocutors, complained of. Each party must also lay before the House a copy of the case presented by him in the Court of Session, if any such case was presented there, with a short summary of any additional reasons upon which he means to insist; and if no such case was presented in the Court of Session, each party must set forth in his case the reasons upon which he founds his argument, as shortly and succinctly as possible (Standing Order 5). The cases upon each side are signed by one or more counsel who have attended in the Court below, or purpose attending at the hearing of the appeal. The appellant's appendix consists of such documents, or parts thereof, used in evidence in the court below as may be necessary for the argument in support of the appeal. The printed matter used in the Court below must, so far as available, be utilised for the appeal, so as to save unnecessary printing. The appendix may be used in argument by either party. It is the duty of the appellant to furnish the respondent with a list of the documents which he proposes to print, and in due course with a proof print of the appendix. The respondent may print any additional documents used in evidence in the Court below upon which he desires to found, and, when printed, they must be paged consecutively with the appellant's appendix, with a view to being bound up along with it. Each party is, in the first instance, liable in the expense of his own print. The case and relative appendices must be printed quarto size, and be lettered down the margin. The case should contain, in the forefront, a reference to the report of the decision in the Court below, and be indented and marked for facility of reference. It is desirable to submit the prints in proof to the clerks in the Judicial Office. A respondent can only be heard at the bar upon lodging a printed case. If it is not lodged within the time specified in the order of service (*i.e.* the time fixed by Standing Orders 5 and 7), the appellant may have the case set down for hearing *ex parte*: but the respondent may thereafter lodge his printed case, and this puts him in the same position as if his prints had been timeously lodged. Should he not do so, however, until the case is actually put out for hearing, he requires leave of the House before he can lodge his case and be heard. Where several parties are called as respondents to an appeal, they are required, where possible, to join in one case in answer. Where they do not, the respondents, after the first who lodges his case in answer, must apply, by petition to the House, for leave to appear separately, and must state good reasons in support of their desire. Each party must lodge in the Parliament Office thirty copies of his case and appendix; each must also send to the other ten copies of his case; and thereafter the appellant must lodge, for the use of the House, ten bound volumes con-

taining the whole printed matter upon each side, the respondent supplying him with the additional copies of his case and appendix necessary to enable him to do so. The prints should be bound up in the following order:—(1) Petition of Appeal; (2) Appellant's case; (3) Respondent's case or cases; (4) Appendix containing the whole documents founded on upon each side, paged consecutively. These bound volumes should be lodged by the appellant's agent immediately after the respondent's case is delivered.

Setting down Cause for Hearing.—As soon as the printed cases of all parties and the appendix have been lodged, it is optional for either side to set down the cause for hearing, but it is obligatory upon the appellant, upon the lodgment of his printed case and appendix, to set down the cause for hearing within the time limited by Standing Order 5 (*ex parte* as to those respondents who have not already lodged printed cases, upon proof, by affidavit, of the due service of the order of service upon the respondents or their solicitors). A respondent who has lodged his printed case is at liberty to set down the cause for hearing on the first sitting day after the expiration of the time limited by the Standing Order for lodging printed cases. The cause will then be ripe for hearing, and will take its position on the effective cause list. A copy of the record, duly certified by the Clerk of Court, must be lodged with the Purse-Bearer of the Lord Chancellor a few days before the hearing of the appeal. Subject to special direction by the House, the originals of documents contained in the record do not require to be produced at the bar. At the hearing of the cause the appellant's case is opened by his leading counsel, who is, or may be, followed by the appellant's other counsel on the same side; thereafter the respondent's case is opened by his leading counsel, who may be followed by the other counsel with him. One of the appellant's counsel has the right of reply. The judgment will not be reversed merely because of the absence of the respondent: the appellant must show that it is wrong.

Death or Bankruptcy of a Party.—Provision is made by Standing Order 8 for revival of the appeal in the case of abatement or defect by reason of the death or bankruptcy of a party. Supplementary cases must be lodged by the party or parties reviving the appeal.

Pauper Appeals.—Petitions for leave to sue *in formâ pauperis* must be lodged for presentation within one week from the date of presentation of the petition of appeal to the House. In default, the petition will stand dismissed, unless the usual security for costs is found within the time limited by the Standing Orders. Forms of pauper petitions and of affidavits and certificates of poverty can be obtained from the Judicial Department. In pursuance of the Appeal (*Formâ Pauperis*) Act, 1893, appellants praying for leave to sue *in formâ pauperis* are required to establish, to the satisfaction of the Appeal Committee, a *primâ facie* case for the appeal; they are also required to lodge in the Judicial Department, as soon as possible after the presentation of the petition, a copy of the proceedings in the Courts below, together with references to the reports, if any, of the cause. When a pauper appellant is awarded costs, the fees of the House are now disallowed, and also the fees of counsel, but the solicitor may get his costs out of pocket, with a reasonable allowance to cover office expenses, including clerks, etc. A person who sues for declarator of a public right (*e.g.* of fishing or right-of-way) will not be allowed to prosecute an appeal *in formâ pauperis* (*Bowie*, 1887, 15 R. (H. L.) 114).

Costs.—Forms of Bills of Costs in appeal cases may be obtained at the office for the sale of printed papers, House of Lords. The costs of the appeal are taxed by the Taxing Officer of the House. See Expenses.

Petition to apply Judgment.—After judgment is pronounced in the appeal, it is very frequently necessary to apply to the Court of Session by petition to apply the judgment. An authenticated copy of the judgment must be produced along with the petition. However little remains to be done, even although it be only to get decree for certified costs (*Ferrie*, 1853, 15 D. 766; *Catton*, 1872, 9 S. L. R. 546), a petition must be presented. The House frequently remits the case to the Court of Session, "to do therein as shall be just and consistent with this judgment"; but even when there is no remit, if anything remains to be done, a petition is the competent and proper course (*Anderson*, 1859, 21 D. 723). But where, by the judgment of the House, a case was remitted to the Court of Session, and the parties thereafter compromised the action, the Court applied the judgment upon presentation and in terms of a joint minute (*Smith-Cunninghame*, 1873, 11 M. 955). Where the House simply affirms the judgment and dismisses the appeal, a petition to apply the judgment is unnecessary (*Ricketts*, 1861, 23 D. 1014; *Peters*, 1893, 20 R. 924). Decree for payment of costs is given under the remit, and it does not matter that the process has been concluded by extract of the final decree. The expenses of the petition to apply the judgment were, according to former practice, not given to the successful party, unless there was opposition (*Dunnet*, 1839, 1 D. 689). But the rule is now altered, and expenses are allowed when the petition is necessary (*D. of Hamilton*, 1872, 9 S. L. R. 304; *Catton, ut supra; Ligertwood*, 1874, 1 R. 1122). Where the petition asks for more than the Court grants, and the respondent's appearance is necessary to oppose it, expenses are not given (*Howden*, 1868, 7 M. 79; *Peters, ut supra*).

[See Ersk. i. 3. 24, iv. 3. 2 *et seq.*; Macqueen, *Appellate Jurisdiction*; Denison & Scott, *Appeal Practice*; Mackay, *Manual of Practice*, 579; Coldstream, *Procedure*, 243; Spink, *Handbook of Procedure*, 198: for forms, see Standing Orders and Directions before referred to, and *Juridical Styles*, iii. 733.]

For the constitution and history of the House of Lords as an appellate tribunal, see Lords, House of.

Appeal to Quarter Sessions.—Justices of the Peace, assembled in General or Quarter Sessions, are invested with appellate jurisdiction over the proceedings of justices in Special or Petty Sessions. This jurisdiction is regulated by the Scots Act, 1661, c. 38, and a few special Acts framed on English models, *e.g.* Licensing (Scotland) Act, 1828, ss. 14 and 25; Theatres Act, 1843, s. 20; Railway Clauses Consolidation (Scotland) Act, 1845, s. 151; Revenue, Customs, Excise, and other Acts imposing Excise penalties (*Hunter*, 1883, 5 Coup. 354). The appeal to Quarter Sessions allowed by the Game Acts is abrogated along with the jurisdiction of justices under those Statutes (40 & 41 Vict. c. 28, s. 10).

1. *Use in Practice.*—This mode of appeal, unless its effect is restricted by the special Act, sets aside the whole previous proceedings except the complaint, allows a re-trial, and permits review of the judgment on every ground (*Mackenzie*, 1891, 2 White, 589). It appears to be competent in all prosecutions before justices, either at common law or under Statutes which prescribe no particular method of review, although this latter point is not free from doubt (*Pirrie*, 1867, 5 Irv. 433). In prosecutions under Statutes which expressly direct appeal to Quarter Sessions, the appellant, who is aggrieved by a judgment *on the merits*, must, in the absence of a sufficient reason for departing from the statutory

procedure, go to that Court in the first instance (*Craigie*, 1826, 4 S. 447; 2 W. & S. 642; *Alexander*, 1828, 7 S. 117; *Campbell*, 1848, 10 D. 655; *Caledonian Ruy. Co.*, 1869, 1 Coup. 193; *Anderson*, 1872, 2 Coup. 225). If he objects to the judgment as erroneous in point of law, or as fundamentally null through flagrant illegality or injustice, he has the remedies explained in APPEAL TO CIRCUIT COURT, Part I. par. 2, except in prosecutions before justices under the Revenue Acts. In cases under these Statutes, besides appeal to Quarter Sessions and appeal on a case stated, he has an appeal to the Court of Exchequer (now the Court of Session) in respect of errors appearing on the face of the proceedings (19 & 20 Vict. c. 56, s. 17; *Dodsworth*, 1886, 14 R. 238); but suspension is entirely excluded (7 & 8 Geo. IV. c. 53, s. 79; *Sharp*, 1861, 23 D. 1015; *Lazenby*, 1874, 3 Coup. 23; *Mackenzie*, 1891, 2 White, 589).

2. *APPELLANT.* — Either party considering himself aggrieved by a judgment, whether of conviction or absolvitor, may appeal (7 & 8 Geo. IV. c. 53, s. 82; 9 Geo. IV. c. 58, s. 25; 6 & 7 Vict. c. 68, s. 20; 8 & 9 Vict. c. 33, s. 151). At a general meeting for granting or *renewing* certificates for licence, if a justice of the peace, or the proprietor or occupier of a house for which a certificate has been applied, is dissatisfied with any proceeding of the justices or burgh magistrates in granting, refusing, or otherwise disposing of such application, he may appeal therefrom to next Quarter Sessions for the county (9 Geo. IV. c. 58, s. 14; *Sneddon*, 1854, 17 D. 72; *Proctor*, 1845, 17 D. 197); but no appeal lies against any proceeding in refusing an application for a *new* certificate (39 & 40 Vict. c. 26, s. 5).

3. *COURT TO WHICH APPEAL TAKEN.* — An appeal is taken to the next General Quarter Sessions of the Peace for the county within which the justices pronounced the judgment appealed from. These Sessions are held at the head burgh of the shire (*Earl of Home*, 1741, Mor. 7602), upon the first Tuesdays of May, August, and March, and the last Tuesday of October (1661, c. 38). In Revenue prosecutions, twenty clear days at least must intervene between the judgment and the Sessions (4 & 5 Will. IV. c. 51, s. 23).

4. *TIME OF TAKING APPEAL.*—An appeal is taken within the period prescribed by the special Act, calculated from the date of judgment, *e.g.* in an application for certificate for licence, *ten days* (9 Geo. IV. c. 58, s. 14); in a licensing prosecution, *eight days* (*ib.* s. 25); in a Revenue prosecution, *immediately*, while the justices are sitting (7 & 8 Geo. IV. c. 53, s. 83; *Sumner*, 1878, 5 R. 863); and under the Railway Clauses Act, *four months* (8 & 9 Vict. c. 33, s. 151).

5. *MANNER OF TAKING APPEAL.*—Within the statutory period, the appellant lodges with the Clerk of Court a written appeal. If not timeously lodged, the appeal cannot be heard by the Sessions (*Her. of Avondale*, 1864, 3 M. 263). A minute of appeal written upon the principal complaint in open Court, and authenticated by the Clerk, may suffice (*Robertson*, 1869, 1 Coup. 348). The following is an example of an appeal against the refusal of an application for the renewal of a certificate for licence:—

Inverness, 23rd April 1891.

Unto the Honourable Her Majesty's Justices of the Peace for Inverness-shire in Quarter Sessions assembled,

The Appeal of James Dewar, licensed grocer, 6 Church Street, , Inverness-shire, Appellant,

Humbly sheweth,

That at a general meeting for granting or renewing certificates for the sale of excise-

able liquors, held by Her Majesty's Justices of the Peace for Inverness-shire at , Inverness-shire, on 21st April 1891, the Justices therein assembled were pleased to refuse the application of the appellant for the renewal of a certificate for licence for a dealer in groceries and provisions, at the shop 6 Church Street, , in the parish of , Inverness-shire, of which he is the proprietor and occupier: That the appellant has held a certificate for licence for the sale of exciseable liquors at the said shop for twenty years, and during that period no complaint has been made against him: That at the said Court objection was taken [*here state the objection to the application, and ground of refusal*]: That the following Justices of the Peace took part in this proceeding, namely [*names and designations of Justices present*]: That the appellant is dissatisfied with the proceeding of the said Justices in refusing his application, and appeals therefrom to the next Quarter Sessions of the Peace for Inverness-shire:

May it therefore please your Honours to recall the judgment appealed from, and to grant to the appellant a renewal of the foresaid certificate for licence held by him; or to do otherwise in the premises as to your Honours shall seem just.

According to Justice, etc.

(Signed) JAMES DEWAR.

This form may be adapted to suit an appeal in a prosecution by modifying the instance, narrative, and prayer, and adding reasons of appeal where necessary (8 & 9 Vict. c. 33, s. 151; *Robertson*, 1860, 3 Irv. 607).

6. *CAUTION AND CONSIGNATION.*—The appellant, at the time of entering his appeal, is usually required to lodge with the Clerk of Court a bond of caution that he will abide the appeal, and pay costs. Its terms are regulated by the special Act. This provision does not apply to a justice appealing from a proceeding at a Licensing Court (*Proctor*, 1854, 17 D. 197). In a Revenue case the appellant does not find caution, but deposits the penalty and costs within *three days* after judgment in the hands of the Revenue officers, with whom goods seized are allowed to remain until the appeal is disposed of (7 & 8 Geo. IV. c. 53, s. 83). In a licensing prosecution, in addition to finding caution, the appellant deposits the penalty and costs forthwith in the hands of the Clerk of Court (25 & 26 Vict. c. 35, s. 33).

7. *SERVICE.*—The appellant, within the statutory time, intimates the appeal to the adverse party, and also to the justices of whose proceeding or judgment he complains (*M'Conochie*, 1848, unreported; *Proctor*, 1854, 17 D. 197). Intimation is made by serving the adverse party with a copy of the appeal, and by posting a written notice to each justice in a registered envelope. In a Revenue prosecution the appellant further delivers to the adverse party, personally or at his place of abode, *seven* clear days at least before the hearing, a notice of the time and place when and where the appeal is to be heard (4 & 5 Vict. c. 20, s. 30). Intimation under the Railway Clauses Act is given *ten* days before the hearing (8 & 9 Vict. c. 33, s. 151). Service is proved as explained in APPEAL TO CIRCUIT COURT, Part I. par. 12.

8. *INTERIM LIBERATION.*—Liberation on caution is sought by a petition to the High Court of Justiciary (*Pirrie*, 1867, 5 Irv. 433). The justices cannot liberate unless authorised by the special Act. The party liberated must appear *personally* at the hearing, otherwise the appeal will be dismissed, and he himself re-incarcerated (38 & 39 Vict. c. 62, s. 10).

9. *WITHDRAWING APPEAL.*—The appellant may withdraw the appeal after he has given notice and found caution; but if he allows it to proceed and be dismissed for non-appearance, it is doubtful whether he can then present a bill of suspension (*M'Gregor*, 1854, 1 Irv. 579; *Robertson*, 1869, 1 Coup. 348; *Dorward*, 1870, 1 Coup. 392).

10. *CITATION OF WITNESSES.*—If the witnesses examined at the

original trial will not attend voluntarily before the Quarter Sessions, a petition may be presented in the following form:—

Inverness, 11*th February* 1896.

Unto the Honourable Her Majesty's Justices of the Peace for Inverness-shire,

The Petition of Charles Esson, solicitor, Inverness, Procurator-Fiscal of the Justice of Peace Court for Inverness-shire,

Humbly sheweth,

That at a Court of Her Majesty's Justices of the Peace for Inverness-shire, held at Inverness, Inverness-shire, on 11th December 1895, Alexander Grant and Charles Riach, Esquires, two of Her Majesty's Justices of the Peace for Inverness-shire, were pleased to pronounce judgment of absolvitor in the complaint, at the petitioner's instance, against William Smith, licensed grocer, 4 High Street, , Inverness-shire: That, considering himself aggrieved by the said judgment, the petitioner appealed therefrom to the Justices assembled at the next Quarter Sessions held for Inverness-shire, and his appeal will be heard at the General Quarter Sessions of the Peace for Inverness-shire, to be held at Inverness, on 3rd March 1896:

May it therefore please your Honours to grant warrant to cite the witnesses and havers for both parties for all diets in the said appeal, whose names appear in the record as having been examined or tendered for examination at the hearing of said complaint.

According to Justice, etc.

(Signed) Charles Esson, *P. F.*

The warrant of citation is as follows:—

Inverness, 11*th February* 1896.

The Clerk of Court grants warrant to officers of Court to cite witnesses and havers for both parties for all diets in the appeal, as craved.

(Signed) Charles Graham, *Clerk of the Peace.*

11. *Hearing and Judgment.*—Three justices constitute a quorum in Quarter Sessions, except in counties where a larger number is fixed by standing regulations. Two may, however, suffice (*Reid*, 1730, Mor. 7636). On assembling, they elect a chairman, who is limited to one vote. Objections to competency having been disposed of (see Appeal to Circuit Court, Part I. par. 16), the justices hear and finally adjudge the appeal, re-trying the case exactly as if they were a Court of original jurisdiction (*Mackenzie*, 1891, 2 White, 589). The procedure is regulated by the Summary Jurisdiction (Scotland) Act (27 & 28 Vict. c. 33, s. 2, "Court"). If necessary for the explication of their appellate jurisdiction, they may direct the proof to be led before them *de novo* (*Anderson*, 1868, 1 Coup. 18); in which event the whole evidence adduced before the Petty Sessions is brought forward, and the witnesses re-examined (*Allice*, 1863, 1 M. 406; *Muckersie*, 1874, 3 Coup. 54; *Wilson*, 1878, 5 R. 1097). Interlocutors of Quarter Sessions *prior* to final judgment are not appealable (*List*, 1867, 5 Irv. 559). In Revenue appeals, the justices are empowered, if they think fit, *before pronouncing judgment*, to obtain for their guidance the opinion and direction of the Court of Session, coming in place of the Court of Exchequer (7 & 8 Geo. IV. c. 53, s. 84; *Sumner*, 1878, 5 R. 863; *Steele*, 1879, 7 R. 192). On a case being stated to that Court, an opinion and direction is given, of which a certified copy is laid before the Quarter Sessions, who pronounce judgment accordingly. The justices may adjourn the hearing to the next Quarter Sessions (1661, c. 38; 4 & 5 Will. IV. c. 51, s. 23). They are entitled to award expenses, but not against the Crown (*White*, 1862, 1 M. 72; *Allice*, 1863, 1 M. 406; *Beattie*, 1866, 5 M. 191; *Gilroys*, 1866, 5 M. 656). Their determination of the appeal is conclusive on the merits (*Purdie*, 1863, 4 Irv. 447); but if they have acted oppressively, maliciously, or illegally, exceeded their jurisdiction, or refused to exercise it, their *final* judgment may be reviewed by a bill of suspension, or an action of reduction, or (where the special Act allows it, *e.g.* 25 & 26 Vict. c. 35, ss. 33 and 34) an

appeal to the Circuit Court, or, in Revenue cases, an appeal to the Court of Session as Court of Exchequer (*Sneddon*, 1854, 17 D. 72; *Proctor*, 1854, 17 D. 197; *Allice*, 1863, 1 M. 406; *M'Donald*, 1864, 2 M. 407; *Her. of Avondale*, 1864, 3 M. 263; *Walker*, 1865, 4 M. 268; *Robertson*, 1869, 1 Coup. 348; *Murray*, 1872, 2 Coup. 284; *Lazenby*, 1874, 3 Coup. 23; *Muckersie*, 1874, 3 Coup. 54; *Wilson*, 1878, 5 R. 1097). In the event of an appeal being intimated after the Quarter Sessions have finally disposed of a case, execution ought not to be enforced until that appeal is decided (*Meldrum*, 1746, Mor. 7637; *Campbell*, 1848, 10 D. 655).

Appeal to Sheriff-Principal from Sheriff-Substitute.—The right of appeal in the Sheriff Court from the Sheriff-Substitute to the Sheriff is regulated by the Sheriff Courts (Scotland) Act, 1876 (39 & 40 Vict. c. 70). Unlike the case of the Supreme Courts, to which, at common law, there is always an appeal, unless it is prohibited, there is no appeal to the principal Sheriff except where it is expressly permitted. Section 27 of the Act of 1876 enumerates the appeals which, and which alone, are competent. They are:—

1. *Appeal against a Final Judgment.*—By s. 3 of the Act of 1876, "final judgment" is defined as meaning "a judgment or interlocutor, which, either by itself, or taken along with a previous interlocutor or interlocutors, disposes of the whole subject-matter of the case, or of the competition between the parties in a process of competition, although judgment shall not have been pronounced on all the questions of law or fact raised therein, and although expenses, if found due, have not been taxed, modified, or decerned for." The subject-matter of a cause includes the question of expenses, and until that has been decided the judgment is not final, and cannot be appealed (*Greenock Parochial Board*, 1877, 4 R. 737; *Russell*, 1877, 5 R. 22; *Malcolm*, 1877, 5 R. 22), and where the question of expenses had been settled extra-judicially, the Court of Session refused to allow an appeal, on the ground that it had not been settled by the interlocutor appealed against, even though the respondent waived all objections to the competency (*Govs. of Strichen Endowments*, 1891, 19 R. 79). If the question of expenses has been expressly reserved, there is no final judgment till it has been disposed of (Greenock case, *ut supra*): and where it had been reserved and thereafter decided, it is not the decision on the merits, but the subsequent one on the expenses, that is the final judgment (*Baird*, 1882, 9 R. 970). It is not, however, necessary that the expenses should have been taxed, modified, or decerned for, and supplementary interlocutors doing any of these things are not final in the sense of the section; and, except on the ground of incompetency (*Macgillivray*, 1891, 19 R. 103), such interlocutors cannot be appealed against if, for any reason, the final judgment in the cause has become unappealable (*Tennents*, 1881, 8 R. 824). It is not necessary that all the questions of fact or law in the case should have been decided, provided the decision leaves it unnecessary, if well founded, to decide anything further, in order to completely dispose of the case. Hence a judgment sustaining a preliminary plea is final (*Whyte*, 1861, 24 D. 102). So also is a decree by default (*Robb*, 1877, 14 S. L. R. 473: but see *Morrison*, 1871, 9 M. 902, and *Smith*, 1881, 18 S. L. R. 563). Interlocutors which do not dispose of the whole subject-matter are not final (*e.g. Shirra*, 1873, 11 M. 660: *Gordon*, 1874, 1 R. 1081; *Davidson*, 1891, 18 R. 884: *Brotherston*, 1892, 20 R. 1; see also *Adam*, 1883, 10 R. 670: *Ross*, 1884, 12 R. 26).

2. *Appeals are Competent against the following Interlocutory Judgments:—*

(1) *Interlocutors granting or refusing interdict, interim, or final.*

An interim interdict, though appealed against, is binding until it is recalled (39 & 40 Vict. c. 70, s. 31).

(2) (a) *Interlocutor granting interim decree for money.*

This does not include interim awards of expenses (*Notman*, 1872, 9 S. L. R. 292). An order for the payment, to one party, of money consigned by another is an interim decree for money, and appealable (*Baird*, 1874, 2 R. 25; *Sinclair*, 1884, 11 R. 413); but an interim order to consign is not appealable (*Maxton*, 1886, 13 R. 912).

(b) *Interlocutor making an order* ad factum præstandum.

(c) *Interlocutor sisting an action.*

(3) *Interlocutor* (a) *allowing proof.*

Where there are two separate interlocutors, one allowing proof, and the other fixing a diet or assigning a new one for it, it is the interlocutor allowing the proof that is appealable (*Murphy*, 1866, 4 M. 444). If proof is allowed of new, the order is appealable (*Kinnes*, 1881, 8 R. 386).

(b) *Refusing proof.*

E.g. An interlocutor assuming as proved a fact which is not admitted.

(c) *Limiting the mode of proof.*

As, for instance, where the Sheriff refuses to allow proof *prout de jure*, but allows it *habili modo*. Merely disallowing evidence as inadmissible during the course of a proof, would not come into this category; and a Sheriff may always, without challenge, make an order for proof to lie *in retentis*, with a view to the preservation of evidence (39 & 40 Vict. c. 70, s. 31).

(4) Finally, the Sheriff-Substitute, either of his own accord, or on the motion of a party, may grant leave to appeal against any interlocutor he has pronounced.

Motion for leave must be made within the time allowed for appeal against an interlocutory judgment (39 & 40 Vict. c. 70, s. 28; *Smellie*, 1888, 4 S. L. Rev. 178; compare *Duff*, 1881, 9 R. 17). The time allowed in which an appeal, where competent, may be taken, is, in all cases, seven days from the date of the interlocutor or judgment (39 & 40 Vict. c. 70, s. 28), and provided it shall not have been sooner extracted or implemented, a final judgment may be appealed against any time within a month of its date (*ib.* s. 33). The time allowed runs from the date of signing the interlocutor (*Cleland*, 1849, 11 D. 601); and if signed out of the sheriffdom, from the date of the interlocutor being received at its proper Court (39 & 40 Vict. c. 70, s. 50).

The mode of appealing is by writing on the margin, or at the end of the interlocutor sheet containing the interlocutor or judgment appealed against, that "the pursuer [or defender, or other party] appeals to the Sheriff." This note is signed by the appellant or his agent, and bears the date of signature. Where the Sheriff Clerk has not the interlocutor sheet in his hands, the note is made, signed, and noted as aforesaid, on a separate paper, to which is prefixed the name of the cause and the date of the interlocutor appealed against, and having annexed a certificate by the Sheriff Clerk that he had not the interlocutor sheet. When appeal has been thus made, the Sheriff Clerk at once transmits the process to the Sheriff (*ib.* s. 28).

If both parties concur in asking the Sheriff to dispose of the action without argument, oral or written, he may do so if he thinks fit (*ib.* s. 28 (2)); otherwise he either fixes a diet for hearing the parties orally, or he orders a reclaiming petition and answers to be lodged within prescribed times, but he cannot do both (*ib.* s. 28 (1)). These times he can prorogate once on cause shown (16 & 17 Vict. c. 80, s. 6). Reclaiming petitions and answers must be drawn without quotation from the interlocutors, notes thereto, proof, or process, except where indispensable (39 & 40 Vict. c. 70, s. 30).

The effect of the appeal is to submit to the review of the Sheriff, not only the particular interlocutor appealed against, but all interlocutors pronounced in the cause, whether these interlocutors were, at the time of being pronounced, competent to be appealed against or not. These interlocutors may be brought under review at the instance not only of the appellant, but of every other party appearing in the appeal, thus doing away with the necessity for counter-appeals (*ib.* s. 29). It is competent to the Sheriff, on appeal, to open the record when it appears to him not to have been properly made up, or to allow further proof (*ib.* s. 28 (3)); and the provisions of s. 24, as to amendment of record, apply to appeals before the Sheriff, as well as to actions before the Sheriff-Substitute. See AMENDMENT OF RECORD. Finally, appeal once taken, the appellant is not at liberty to abandon it without the Sheriff's leave; and any other party in the cause is entitled to insist in the appeal, as if it had been taken by himself (*ib.* s. 29; *King*, 1880, 17 S. L. R. 583).

Having due regard to the interest of the parties as they may be affected by the decision of the Sheriff on appeal, the Sheriff-Substitute, or the Sheriff, has power to make any order for the preservation of evidence; to regulate all matters relating to the interim possession, or to the preservation of any property to which the action relates; or to make any order as to the sale of such property where it is perishable. An appeal does not prevent the immediate execution of a warrant of sequestration for rent, or a warrant to take inventories, or place effects in custody *ad interim*, or other warrants of interim preservation (*ib.* s. 31).

The Sheriff's interlocutor must dispose of the question of expenses (*Macdonald*, 1880, 7 R. 574, 17 S. L. R. 392).—[Dove Wilson, *Sheriff Court Practice*, 310, 321.]

Appearance, Entering: Court of Session.—Appearance may be entered for the defender in an action on the day of calling, or on either of the two days following (A. S. 14 Oct. 1868, s. 11), by marking the date "ALT. *C. D.* [*name of defender's counsel*], To see *E. F.* [*name of defender's agent*]." No minute or note of appearance is required; intimation to the clerk at the Register House by the agent, that he enters appearance for his client, and giving the name of counsel, is sufficient. When appearance is entered for one of several defenders, the agent is entitled to borrow the process; but if another agent enters appearance for another defender, the first must, on receipt of a letter from the second agent, return the process on or before the seventh day after his entry of appearance, if there are two defenders, and on or before the fourth day, if there are more than two defenders (A. S. 11 July 1828, s. 32).

A party appearing is not entitled to object to the regularity of the execution or service as against himself (31 & 32 Vict. c. 100, s. 21); and after appearance for a defender with his authority, the decree, though in

absence, if not recalled within ten days, upon the lapse of sixty days after the expiry of a charge upon it, not brought under review by suspension, is entitled to the privileges of a decree *in foro*; and if the decree be one on which a charge is not competent, it becomes final after the lapse of twenty years from its date, unless before that time it shall have been lawfully recalled or brought under review by suspension or reduction (31 & 32 Vict. c. 100, s. 24).

Where a defender does not enter appearance within the authorised time, the cause may be enrolled either in the Roll of Undefended Causes or in the Lord Ordinary's Motion Roll for decree in absence (31 & 32 Vict. c. 100, s. 22). Where there are several defenders and one only defends, the cause must be enrolled as ordained by this section, so that decree in absence may be taken against those who do not defend (*Duke of Devonshire*, 1873, 1 R. 45). Where appearance was not timeously entered, and the cause had been enrolled for decree in absence, defences were allowed to be put in at the bar (*Macfarlane*, 1878, unreported; see Mackay, *Manual*, 211, note).

[See Shand, *Practice*, 280, 285; Mackay, *Practice*, i. 415–17; *Manual*, 210; Coldstream, *Procedure*, 15; Balfour, *Handbook of Practice*, 32.]

Appearance, Entering: Sheriff Court.—A defender signifies his intention of defending an action by entering appearance. This he does by lodging with the Sheriff Clerk, within the time allowed him to do so, namely the *inducia* of citation, a notice as follows:—

In the Sheriff Court of *shire, at* ,

In the action *A. B.* [*design him*] against *C. D.* [*design him*], *C. D.*, defender, enters appearance to defend said action. (Signed) *C. D.*, Defender.
[*or*] *E.*, Agent for Defender.

(39 & 40 Vict. c. 70, Sch. B (Sheriff Courts (Scotland) Act, 1876).) Sec. 14 of the Act of 1876 provides that if this be not done before the expiration of the *inducia*, "the Sheriff shall, on the motion of the pursuer, grant decree in absence . . ." in which case the defender's remedy is by reponing. No provision is made for the case of notice of appearance being offered after the expiry of the *inducia*, but before decree in absence is pronounced; but the difficulty may be got over by the pursuer consenting to the appearance on being paid the expenses occasioned by the delay (see Dove Wilson, *Sheriff Court Practice*, 126, 127).

Appearance may be withdrawn at any time up to the lodging of defences, by minute signed by the defender or his agent, with the effect of leaving the defender in the position of not having entered appearance; and in such a case the defender may be reponed against decree in absence, just as in the ordinary case (*Gray*, 1856, 18 D. 628).

See Absence, Decree in.

Appellant.—The name given to the party by whom an appeal is made. The other party to the appeal is called the Respondent.

Appendix to Libel.—See Libel; Indictment; Inventory.

Appointment, Power of.—A power of appointment is a power given in a deed to some person, either the granter or another, in virtue of which he may dispose of the property to which it refers, or appoint the proportions in which it is to be divided among those to whom it is destined. Where the granter of the deed reserves to himself a liferent of the property with power to dispose of the fee, the right which he retains is equivalent to a fee (*Baillie*, 23 Feb. 1809, F. C.; *Weddell*, 3 Feb. 1849, Scot. Exchcq. Rep.). But where he constitutes a liferent in another, and gives him even a most general power of disposal of the fee, the right constituted is not equivalent to a fee (*Miller*, 12 S. 31; *Morris*, 1853, 15 D. 716, 18 D. (H. L.) 43, 27 Jur. 546; *Alves*, 1861, 23 D. 712; *Weddell*, *ut supra*). The appointee under such a deed takes as the heir of the granter of the power (*Weddell*, *ut supra*).

A father has at common law the right to apportion a provision given to his children as a class (Ersk. iii. 8. 49; *Edmonston*, 1706, Mor. 3219, 13002; *Campbell*, 1738, 5 Br. Sup. 651, 683, Mor. 13004); but it is very usual in marriage contracts to give or reserve such a power of apportionment to the father over the provision which is destined to the children of the marriage. Where such a power is given, it takes the place of the common-law right, and must be exercised according to the terms of the deed; but a reserved power is more favourably construed than one given by a third party (see *Mackie*, 1885, 12 R. 1230). The power may be given to the spouses to be exercised by them jointly, and in such a case an exercise of it by the husband, concurred in after his death by the wife, will be upheld (*Wilson*, 1761, Mor. 13006). A power is frequently given to the wife, to be exercised by her if her husband predecease her without making an appointment. If there is only one child, or if all the children except one predecease the father, he has no power of appointment, but the whole provision goes to the surviving child (see *Brodie*, 1840, 3 D. 39, per Lord Moncreiff). Where one child predeceases the father leaving issue, the principle *si sine liberis decesserit* comes into operation, and the father is entitled to appoint a share to the issue (*Wood*, 1789, Mor. 13043). It is doubtful, however, if he has power to apportion that share among them (see Menzies, *Lectures*, 443). Formerly, the entire exclusion of any one of the objects of the power invalidated the whole appointment (*Watson*, 1837, 15 S. 586; *Campbell*, 1878, 5 R. 961): and there are cases in which it has been held that where any one share was inadequate or illusory, the appointment must be set aside, and the provision equally divided (see *Marder*, 1853, 15 D. 633); but now, by 37 & 38 Vict. c. 37, s. 1, no appointment, made after the date of the Act, is invalid on the ground that an object of the power has been altogether excluded. Where an appointment is made with conditions adjected which are not authorised by the power, the conditions fly off, and the appointee takes the provision unconditionally (*Wallace*, 1891, 18 R. 921; *Macdonald*, 1875, 2 R. (H. L.) 125); but where the power authorises the imposition of conditions or limitations, it is competent for the appointer to restrict the provision to a liferent, with power to dispose of the fee (*Wallace*, *ut supra*; *Lennock*, 1880, 8 R. 14). Where the appointer acts *ultra vires* in making the appointment, *e.g.* in appointing to persons who are not objects of the power, the appointment is bad, and the provision falls to be equally divided (*Gillon*, 1890, 17 R. 435; *Baikie*, 1862, 24 D. 589). If, however, a liferent is given to a daughter (an object of the power) and the fee to her children (who are not objects), her consent to the arrangement will make the appointment valid (*Mackie*, 1885, 12 R. 1230; *Smith Cunninghame*, 1872, 10 M. (H. L.) 39; *White*,

1813, 1 Ves. and B. 399). It is competent for a father to give the whole fund to one child, under burden of provisions to the others (*Campbell*, 1738, 5 Br. Sup. 651, 683; Mor. 13004).

A power of appointment need not be exercised once for all, but may be exercised from time to time, as the exigencies of the family may require (*Smith Cunninghame, ut supra*). A father may delegate his power of appointment; but if the delegates refuse to act, the Court will not interfere, and the apportionment is in equal shares (*Campbell*, 1738, 5 Br. Sup. 651, 683). The right to appoint is not lost by divorce (*M'Leod*, 1841, 3 D. 1288; 5 Bell's *App.* 210; *Macalister*, 1854, 26 Sc. Jur. 597). A power of appointment may be validly exercised by will (*Hyslop*, 1834, 12 S. 413; *Mackie*, 1885, 12 R. 1230; *Dalgleish*, 1893, 20 R. 904; *Clark*, 1894, 21 R. 546); and a holograph will, valid by the law of Scotland, though not by that of England, exercised in England by a domiciled Englishwoman, has been held to be an effectual exercise of a power of appointment under a Scottish trust deed (*Kennion*, 1880, 7 R. 570). But a fund over which he has a power of appointment is not *in mobilibus* of the appointer, and the appointment of an executor to distribute his estate does not imply the exercise of the power (*Mackenzie*, 1874, 1 R. 1050; *Bowie*, 1889, 16 R. 983). The deed in exercise of the power need not recite it (*Dalgleish, ut supra*), but it must at least be possible that the granter could exercise it, and intended to do so (*Lord Advocate* v. *Methven*, 1893, 20 R. 429). A deed making an appointment may be revoked, although it has been communicated to the appointees (*Sivright*, 1824, 2 S. 643), unless it has been delivered, and titles made up under it (*Murray*, 1872, 10 M. 778).

Where a power of appointment is not exercised, the provision, if it is destined to a definite class, such as the children of a marriage, falls to be divided in equal shares among the objects of the power (*Oliphant*, 1793, Mor. 6603; *Hill*, 1874, 2 R. 68); but if it is destined to an indefinite class, such as "relations" or "charities," or if its destination is entirely dependent upon the appointer, it reverts, failing appointment, to the granter's estate (*Robbie*, 1893, 20 R. 358; *Pursell*, 1865, 3 M. (H. L.) 59). Where the fund falls to be equally divided among children, a posthumous child is entitled to a share (*Oliphant, ut supra*).

Where a power of appointment is given to a particular trustee or trustees, in terms which imply a *delectus personæ* on the part of the truster, that power cannot be exercised by trustees who have been assumed by the original trustees, or by a judicial factor appointed by the Court (*Hill, infra*, see *Simson*, 1883, 10 R. 540; *Howden*, 1895, 23 R. 113). Where a trustee had been given power to apportion a sum of money among a family of children, and had made certain unequal payments to the children, but, after assuming another trustee, had become insane, it was held that the remainder of the fund fell to be divided in such proportions as to make the payments to all the children equal (*Hill*, 1874, 2 R. 68). Where a sum of money is given to trustees for distribution among objects to be selected by them, and they fail to make the selection, the fund reverts to the truster's representatives, unless it appear from the deed that there was no *delectus personæ* in the nomination of trustees (*Robbie*, 1893, 20 R. 358). The selection of the objects may be made by the trustee in his testamentary settlement (*Copinger*, 1877, 11 I. R. Eq. 429).—[Ersk. iii. 8. 49; Bell, *Prin.* ss. 1971, 1988; M'Laren on *Wills and Succession*, 1086; Fraser on *Husband and Wife*, 1365; Bell, *Conveyancing*, 901.] See Entail; Marriage Contract; Provisions to Children.

Appointment of Trustees by the Court.—The Court has power, both at common law and by Statute, to appoint new trustees in any case where the trust seems in danger through the failure of the trustees by death or otherwise. By 30 & 31 Vict. c. 97, s. 12 (1867 Act), it is provided that when trustees cannot be assumed under any trust deed, or when a sole trustee has become insane or incapable of acting by reason of physical or mental disability, the Court may, on the application of any party having interest in the trust estate, and after intimation and inquiry, appoint a trustee or trustees under such trust deed, with all the powers incident to that office. The section further provides for the completion of title to the trust estate by the trustee so appointed. Trustees have been appointed under this section where one trustee predeceased the truster, and the other died without assuming new trustees (*Zoller*, 1868, 6 M. 577); and where all the trustees nominated predeceased the truster (*Graham*, 1868, 6 M. 958; see *Blackwood*, 1894, 1 S. L. T. No. 631). The Court will not appoint on an English trust, although the trust estate consists in part of heritable estate in Scotland (*Brockie*, 1875, 2 R. 923). Nor will the Court appoint where there are persons in existence who have power to do so. For example, where all the trustees nominated under a marriage contract fail, the spouses retain their right to nominate other trustees (*Newlands*, 1882, 9 R. 1104; *Wilson*, 1864, 2 M. 1304). But a surviving spouse has only power to appoint *quoad* his or her own share of the estate (*Malcolm*, 1895, 22 R. 968; *Welsh's Trustees*, 1871, 10 M. 16). The Court will not appoint new trustees on the petition of the beneficiaries so long as there is a trustee who can exercise his right to assume (see *Higginbotham* [1892], 3 Ch. 132). The section applies to non-gratuitous trusts (*Royal Bank*, 1893, 20 R. 741). Trustees appointed by the Court have not power to assume new trustees unless that power is specially conferred on them by the Court (s. 13). Where money has been left for charitable purposes, but the testator has neglected to provide the machinery necessary for carrying out his intentions, the Court will intervene to prevent them from being frustrated. In such a case they may appoint trustees to hold the fund, and provide for the appointment of managers to carry out the administration (see *Presbytery of Deer*, 1867, 6 M. 940: *Magistrates of Dundee*, 1861, 3 Macq. 134, 23 D. 493). The Entail (Scotland) Act of 1882 (45 & 46 Vict. c. 53, s. 23, subsec. 4) provides for the appointment by the Court, in certain circumstances, of trustees, not less than three in number, to hold, for behoof of the heirs of entail, the price of entailed lands sold under the Act. These trustees are entitled to such remuneration as the Court may fix: and the Court is given power to accept the resignation of any of them, or to remove them, or to appoint new or additional trustees (subsec. 5). Trustees appointed under this Act, or under the Trusts Act of 1867, appear to be entitled to take advantage of the provision in the Judicial Factors Act of 1889 (s. 18), by which testamentary trustees are empowered to put the administration of their trust under the superintendence of the Accountant of Court (see 52 & 53 Vict. c. 39, s. 6). In special circumstances, *e.g.* where a girl, fourteen years old, suing *in forma pauperis*, obtained a sum of money as damages, the Court will appoint a trustee to hold the money for her behoof (*Sharp*, 1885, 12 R. 574). See TRUSTEE.

Appointment to Confess or Deny.—In the Sheriff Court, either after the closing of record or sooner, if he think fit, the Sheriff may order both parties or either of them to confess or deny in writing such statements in the record as he may specify: or he may order

them to attend personally for examination by himself or by a commissioner appointed by him. If the party fails to comply with such an order, he is held confessed to such extent as the Sheriff thinks just (Act of Sederunt, 10 July 1839, ss. 66 & 67). The power is little used, and generally unnecessary (Dove Wilson, *Sheriff Court Practice*, 247).

Apportionment Acts.—At common law, where a person entitled to draw rents, or to receive an annuity or termly payment, predeceased a term of payment, his executors received no portion of the rent or instalment due at that term (Bell, *Com.* ii. 8). This hardship was dealt with by 4 & 5 Will. IV. c. 22, which has been superseded by the Apportionment Act, 1870 (33 & 34 Vict. c. 35). This Act provides that "all rents, annuities, dividends, and other periodical payments in the nature of income, shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." It follows that the executor now receives a portion of the rents, etc., due at the succeeding day of payment proportional to the time the deceased lived during the currency of the term. The apportioned part cannot be recovered until the whole sum of which it is a part falls due; but then the executor is entitled to recover his portion by all remedies which would have been competent to the deceased (had he survived) for the recovery of the whole. With this exception: that in the case of rent the whole rents shall be levied by the heir or proprietor, who thereby becomes responsible to the executor for his share (*Lennox*, 1893, 21 R. 77). Before so accounting, the heir may pay out of the rent collected all burdens which properly fall to be paid out of such rent (*Paul*, 1864, 2 M. (H. L.) 1; *Learmonth*, 1878, 5 R. 548). The Act does not apply to sums made payable under policies of assurance; nor to payment of the Ann to the widow and children of deceased clergymen, in terms of 1672, c. 13 (*Latta*, 1877, 5 R. 266); nor does it exclude special agreement that no apportionment shall take place. So, in a question between buyer and seller of shares, it is the universal custom of the Stock Exchange (and so a term of the contract) that the price includes accruing dividend.

The Statute operates only in favour of executors, and puts on them no corresponding liability to disburse funds paid to the deceased in respect of a debt not yet due. Accordingly, where the deceased has received rents in advance, the executor cannot be called on to refund any portion of such rent. Take, *e.g.*, the case of an arable farm, with entry to the house and pasture at Whitsunday 1895, and to arable land at Martinmas 1895: then rent, being due in respect of the crop, is legally payable one-half at Whitsunday 1896, after the crop is sowed; one-half at Martinmas 1896, after the crop is reaped. Where rent has been paid forehand, *i.e.* at Martinmas 1895, before the crop in respect of which it is payable has been sowed, and the deceased died in March 1896, his executor would not only retain the rent received at Martinmas 1895, but would receive an apportioned part of the rent payable at Whitsunday 1896.

So also, where the conventional term of payment was postponed, and the deceased survived the legal, but died before the conventional term, the executor was held entitled to recover, at the conventional term, rents accruing at the date of death; the land being treated as a rent-earning subject, the rent accruing in terms of the Act from day to day from the date of entry, and being apportioned in respect of time.—[See *Campbell*,

1849, 11 D. 1426; *Blaikie*, 1849, 11 D. 1456.] See HEIR AND EXECUTOR: LEASE; ANNUITY.

Appraisement.—The valuing of poinded goods.—See POINDING.

Appraiser.—A person who values or appraises property of any description, or any interest therein, for or in expectation of gain or reward (46 Geo. III. c. 43, s. 4). He must, under a penalty of £50, take out an annual Excise licence, the duty on which is £2 (8 & 9 Vict. c. 76, s. 1). Licensed auctioneers (46 Geo. III. c. 43, s. 7; 8 & 9 Vict. c. 76, s. 1) and house-agents (24 & 25 Vict. c. 21, s. 11) may act as appraisers without additional licence, and licensed appraisers may act as house agents (24 & 25 Vict. c. 21, s. 13). An appraiser must, under a penalty of £50, write out his appraisement or valuation on duly stamped material within fourteen days after making it, and persons receiving an unstamped appraisement or valuation incur a penalty of £20 (54 & 55 Vict. c. 39, s. 24). Certain appraisements or valuations are, however, exempted from stamp duty, *e.g.* such as are made for the information of one party only, or for the purpose of ascertaining inventory, or estate, or legacy or succession duty (54 & 55 Vict. c. 39, Sch.).

Apprehension.—See MALICIOUS PROSECUTION.

Apprehension of a Criminal.—The legal process by which the person of one charged with having committed a criminal offence is secured and detained until he is brought before a magistrate for examination, or before a Court for trial.

1. *APPREHENDING WITHOUT WRITTEN WARRANT.* — In sanctioning apprehension without a written warrant, the law carefully provides that, on the one hand, the liberty of the lieges shall not be endangered by indiscriminate arrest, and, on the other hand, the escape of criminals shall not be facilitated by a too strict adherence to form. *A Police Constable* or other officer of the law, *acting within the jurisdiction* for which he is appointed (*Leask*, 1893, 31 S. L. R. 30), may in the following cases apprehend without a written warrant—(1) where he sees a man committing a high crime and offence (*e.g.* murder, murderous assault, robbery, serious theft, etc.), or finds a man in possession of stolen goods for which he cannot account, and where, without such instantaneous stretch of authority, there is a probability of the criminal escaping (Hume, ii. 75, 76; Alison, ii. 117; Interpretation Act, 1889, s. 28); (2) where he is informed by a credible eye-witness, or by an injured party, immediately after the occurrence, that a man, known by sight to the informer, has committed a high crime and offence, and that there is a similar risk of his escape (*ib.*); (3) where he sees a man committing a breach of the peace, or an outrage, or threatening immediate violence, and where, without instant restraint of the offender, there is danger of his doing injury to himself or others (Hume, ii. 76; *M'Vey*, 1856, 2 Irv. 429); (4) where he sees a man committing a contravention of an Act of Parliament which, in such circumstances, authorises a constable or other person to apprehend the offender without a warrant, *e.g.* Night Poaching Act, 1828, s. 2; Salmon Fisheries (Scotland) Act, 1828, s. 11; Game (Scotland) Act, 1832, s. 2; Cruelty to Animals (Scotland) Act, 1850, s. 6; Coinage Offences

Act, 1861, s. 31; Trespass (Scotland) Act, 1865, s. 4; Salmon Fisheries (Scotland) Act, 1868, s. 29; Habitual Criminals Act, 1869, s. 3; Prevention of Crimes Act, 1871, s. 7; Pawnbrokers Act, 1872, s. 49; Roads, etc., Act, 1878, s. 124; Prevention of Cruelty to Children Act, 1894, s. 4; and (5) where a general or local Police Act confers authority to take offenders into custody without a warrant, *e.g.* Police (Scotland) Act, 1857, s. 12, and Burgh Police (Scotland) Act, 1892, ss. 86 and 467. *A Magistrate, or even a Private Citizen*, has generally the same power as a constable in this matter (Hume, ii. 75, 76; Alison, ii. 116, 119); but apprehension of criminals is now left to police officers. If the person accused has taken refuge in a house, a constable in pursuit of him will inform the inmates of his office and the charge against the accused, and demand admittance. If refused, he may then force the door (Hume, ii. 76). A private citizen, who pursues a criminal, cannot break open doors, and can only watch the house until a constable arrives (Macdonald, 253). Apprehension without a written warrant is but a *temporary detention* in custody. A formal warrant ought invariably to be obtained prior to examination or trial (*Jameson*, 1849, 1 J. Shaw, 238; *M'Vey*, 1856, 2 Irv. 429; *Stevenson*, 1857, 2 Irv. 592).

2. *Apprehension for Examination.*—When a man is charged with a crime too serious to be tried summarily, the prosecutor applies for a warrant to apprehend and bring him before a magistrate *for examination.* Any magistrate may, in virtue of his commission for the preservation of the peace, grant warrant to apprehend for examination, within the territory of his jurisdiction, a person charged with any crime, although it be one of that degree which he has not cognisance of to the effect of trial and punishment (Hume, ii. 77; Alison, ii. 120). A written application is not indispensable (Hume, ii. 77; Alison, ii. 121), but it is customary and proper to present a petition or information. The charge may be set forth as in Schedule A annexed to the Criminal Procedure (Scotland) Act, 1887 (50 & 51 Vict. c. 35, s. 16). It is not essential, except in certain statutory charges, that the applicant should depone to the truth of his petition, or produce a signed information (Hume, ii. 77; Alison, ii. 121). The public prosecutor never emits a preliminary oath, even where the proceedings are founded upon an Act which prescribes one (*Neil*, 1834; Bell's *Notes*, 120). The petition ought to be dated, but the omission may be supplied otherwise (*M'Leod*, 1835, 13 S. 1153; *Crawford*, 1838, 2 Swin. 200). The following is the form of this petition :—

Inverness, 18*th December* 1895.

Unto the Honourable the Sheriff of Inverness-shire,

The Petition of , Procurator-Fiscal of Inverness-shire, for the public interest,

Humbly sheweth,

That, from information which the petitioner has received against , labourer, 238 High Street, Inverness, it appears that on Tuesday, 17th December 1895, in the shop 68 High Street, Inverness, occupied by , draper, he did steal a shawl; and he has been previously convicted of dishonest appropriation of property:

May it therefore please your Lordship to grant warrant to officers of Court and assistants to search for and apprehend the said , in order to his being brought before you for examination respecting the premises; also to grant warrant to cite witnesses to be precognosced in the premises; and thereafter to do in the case as to your Lordship shall seem meet.

According to Justice, etc.

(Signed) , *P. F.*

Upon this petition a warrant is written. It contains six important parts—(*a*) place of signing; (*b*) date of signing; (*c*) style, quality, and county of magistrate, *e.g.* "one of Her Majesty's Justices of the Peace for "; (*d*) as full identification as is at the moment possible of the

person meant to be apprehended, by name and designation or other description; (*e*) specification of the crime with which the accused is charged, or (in an emergency) a general statement that he is to answer to such crimes as shall be laid to his charge; and (*f*) signature of magistrate (Hume, ii. 78; Alison, ii. 122). Most of these particulars are, in practice, supplied by reference to the petition upon which the warrant is written. The only indispensable requisite is the magistrate's signature (*ib.*). The warrant may be addressed generally to officers of Court, or to a named officer, or even to a private citizen (Hume, ii. 78). The name of the person to be apprehended, *if unknown*, will be omitted, but the warrant must contain expressly, or by reference to the petition, a description sufficient to distinguish him from all others (Alison, ii. 123). It is, however, illegal to issue a general warrant to apprehend all persons suspected of a certain crime, or to order a general search for stolen goods (Hume, ii. 78). The following is the usual form of warrant:—

Inverness, 18*th December* 1895.

The Sheriff-Substitute having considered the foregoing petition, grants warrant to search for and apprehend the said , and bring him for examination; and also to cite witnesses, as craved.

(Signed)

3. *Apprehension for Trial.*—When the charge is of such a nature that it may be tried in a summary manner, the prosecutor, except in proceedings under Statutes which direct citation, presents a complaint craving warrant to apprehend the accused and bring him before the Court to answer to the charge. See Criminal Prosecution (Summary Procedure). The warrant under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, is in these terms:—

Inverness, 18*th December* 1895.

The Sheriff-Substitute grants warrant to officers of Court to search for and apprehend , respondent, and, if necessary for that purpose, to open any shut or lockfast places, and to bring him before the Sheriff of , to answer to the foregoing complaint, within the Sheriff Court-house at ; and in the meantime to detain him in a police station-house or other convenient place; and also to cite witnesses and havers for both parties for all diets in the cause.

(Signed)

(27 & 28 Vict. c. 53, ss. 6 and 8, and Schedule D; 55 & 56 Vict. c. 55, ss. 463, 510, and Schedule vii.) This warrant must be signed by a judge (27 & 28 Vict. c. 53, s. 8, and Schedule D). When the special Act directs citation, a warrant to apprehend in the first instance cannot be granted (*Smith*, 1848, Ark. 508). If that Statute declares that the charge must be made on the oath of a credible witness, or, while directing citation, authorises apprehension when the magistrate has reason to suspect from information upon oath that the party is likely to abscond (*e.g.* Game (Scotland) Act, 1832, s. 11), such an oath must precede the issuing of the warrant (*Smith, ut supra*; *Simpson*, 1851, 54 Sc. Jur. 141; *Morris*, 1867, 5 Irv. 529; *Blyth*, 1853, 1 Irv. 235; *Murray*, 1872, 11 M. 147). It is preferable that such preliminary oath should be emitted before the magistrate who signs the warrant (*Blyth, supra*); but it may be sworn before a justice of the peace or burgh magistrate, although the prosecution is to be before a Sheriff (44 & 45 Vict. c. 33, s. 9 (2)). One justice of the peace may sign the warrant, unless the Statute expressly requires more than one (27 & 28 Vict. c. 53, s. 21; *M'Leod*, 1835, 13 S. 1153; *M'Creadie*, 1862, 4 Irv. 176). Warrant to cite witnesses and havers for both parties should always be granted (*Cockburn*, 1854, 1 Irv. 492).

4. *Procedure at Apprehension.*—The apprehension is carried out by similar procedure, whether the officer has a written warrant or not. If a warrant has been granted, he must have it in his possession (Hume, ii. 80); but a temporary detention until the warrant arrives seems to be competent, when the criminal is likely to abscond (*M'Hattie*, 1882, 3 White, 289). Should the accused person have taken refuge in a house, the officer proceeds as described in par. 1, *supra*. He must take care that the place of apprehension is within the bounds for which he acts (Hume, ii. 78),—more particularly if he has *no* warrant (*Leask*, 1893, 3 S. L. R. 30),—and also within the bounds for which the warrant runs (Hume, ii. 78). For the mode of execution outside these bounds, see Backing a Warrant. The officer briefly acquaints his prisoner with the charge against him, or the substance of the warrant (if any). He will show the warrant, if asked, but must upon no account part with it (Hume, ii. 79). Unless required by the special Act of Parliament founded upon, it is not necessary, although advisable, to deliver to the accused a copy of the petition or complaint and warrant (*Ayton*, 1836, 1 Swin. 78; *Mackean*, 1848, 1 J. Shaw, 132; *Chapman*, 1850, 1 J. Shaw, 466; *Bisset*, 1855, 2 Irv. 68). Apprehension on Sunday is competent only on a charge of a criminal character (*Maitland*, 1861, 24 D. 193). After reading or stating the charge, the officer cautions the accused that he need not say anything with reference to it, but that if he does so it will be written down, and may be used as evidence against him. Prolonged interrogation by police officers is objectionable; but any voluntary statement made by the accused with reference to the charge is admissible as evidence, and should be noted in writing at the time (*Smith*, 1888, 1 White, 600; *Laing*, 1871, 2 Coup. 23; *Gracie*, 1884, 11 R. (J. C.) 22; *Simpson*, 1889, 2 White, 298). The officer may take his prisoner to a police station-house, or other suitable place of detention, if that course is rendered necessary by the lateness of the hour, the distance from the magistrate, or other true and sufficient cause; otherwise he must bring him with all convenient speed before a magistrate, for examination or trial, according to the terms of the warrant (Hume, ii. 80; Alison, ii. 129; *Crawford*, 1856, 2 Irv. 511; *Maitland*, 1861, 24 D. 193). Detention for a lengthened period without satisfactory explanation is illegal (*M'Donald*, 1851, 1 Stuart, 129).

5. *Legal Advice.*—Immediately on apprehension upon a warrant *for examination* on a criminal charge, the prisoner is entitled to have intimation sent to any qualified law agent, whom he may choose, that his professional assistance is required, and that the prisoner is to be taken to a certain place for examination (50 & 51 Vict. c. 35, s. 17). The agent is entitled to be present at the examination, and may demand a private interview with the prisoner previous to it (*ib.*). The magistrate may delay the examination for a period not exceeding forty-eight hours from the arrest, to allow time for the attendance of the agent (*ib.*). These statutory provisions do not apply to apprehension upon a warrant *for trial*, but they ought to be adopted in such cases so far as possible. On the same principle, the officer who apprehends a young person or a married woman should always inform the parents or husband. An interpreter ought to be procured in the case of a foreigner.

6. *Warning Notice.*—A warrant is not in practice enforced in every case by the immediate apprehension of the accused person. It seems to be competent to deliver a copy of the petition or complaint and warrant to him, and to inform him, either verbally or by a written notice, of the time and place of his examination or trial, warning him

that if he does not attend then and there, he will be apprehended under the warrant (*Parr*, 1879, 4 Coup. 252; *Spowart*, 1895, 1 Adam, 539). In Parr's case the procedure was vitiated by the circumstance that no warrant had been obtained, and no notice given to the accused of the charge against him. If the person attends, he is apprehended under the warrant when he is brought up for examination or trial; if he fails to appear, he is apprehended in the usual way. This course spares a respectable person the indignity of detention in custody, saves the *inducia* of citation, and obviates the cost of citing witnesses until after the accused has pleaded not guilty. It ought only to be employed, however, in petty offences, and where the accused is law-abiding and respectable. Youthful offenders should never be unnecessarily detained in custody, and this mode is specially useful in dealing with them. See CRIMINAL PROSECUTION.

Apprehension on Civil Diligence. — See CIVIL IMPRISONMENT.

Apprentice.—An apprentice is one who engages to serve a master for a determinate number of years, on condition that the master instruct him in the knowledge of his trade or handicraft. The contract between master and apprentice, though it include a contract to work for hire, is primarily a contract to teach and to learn a certain trade or handicraft (*Frame*, 1836, 14 S. 914, per L. Jeffrey; affd. 1839, M'L. & R. 595). The contract can only be constituted by writing (*Murray*, 1863, 4 Irv. 466, per L. J. C. Inglis), and the instrument in which the contract is embodied is termed an indenture. It is not binding unless it be probative or followed by *rei interventus* (*Rymer*, 1781, Mor. 5726; *Neil*, Hume, 20, 1807). If a premium or consideration is paid to the master for taking an apprentice, the full sum to be paid must be set forth in the indenture, otherwise the persons who are parties to the contract are liable in a penalty, and the contract is null and void (33 & 34 Vict. c. 97, s. 40). The indenture must be stamped. Where no premium is paid the duty is 2s. 6d; but in any other case, for every £5 of premium or fractional part thereof the duty is 5s. (33 & 34 Vict. c. 97, ss. 39, 40). Indentures for sea service are not liable to stamp duty (17 & 18 Vict. c. 104, s. 143). If the apprentice be a pupil, his father, as his administrator-at-law, or the pupil's tutor signs the indenture. If the apprentice be a minor *pubes*, the minor's father, if he be alive, or the minor's curator, if he has any, must be parties to the indenture: but they only give their consent, and the minor expressly undertakes the obligations of the indenture. Lord Fraser is of opinion that a minor with curators or a father living cannot enter into a contract of indenture, without consent (Fraser, *Master and Servant*, 13; *Low*, 14 Nov. 1797, Hume, 422; but see *Heddel*, 5 June 1810, F. C., and *Stevenson*, 1872, 10 M. 919). The minor may competently enter into a contract of indenture, if his father be dead, or if he have no curators (Ersk. i. 7. 62). In some trades the age of apprentices is regulated. Colliers' apprentices must be at least ten, sea apprentices at least twelve, and chimney sweepers' sixteen (3 & 4 Vict. c. 85; 17 & 18 Vict. c. 104; 27 & 28 Vict. c. 37). In the contract of indenture a cautioner is usually taken bound for the fulfilment of the apprentice's duties, he is liable for the apprentice's fraud as well as fault, and he is liable even although the apprentice is not bound by the indenture (*Stevenson*, 1872, 10 M. 919).

An apprentice must enter his master's service and remain there. He

must be obedient, diligent, and respectful. Dismissal is justifiable for repeated insolence, gross disrespect, and disobedience, repeated absence without leave, and gross neglect of business. Misconduct must be continued and repeated, and the apprentice must be corrected and remonstrated with, before dismissal is resorted to (Fraser on *Master and Servant*, 351–353). If he desert or is dismissed for improper conduct, an apprentice cannot demand the return of any part of the premium paid, or refuse payment of the whole of it (*Cuff*, 1818, 5 Price, 297). An apprentice who enlists without the consent of his master can be reclaimed (*Wright*, 1742, Mor. 586; *Stewart*, 1778, Mor. 587, note); but the master must follow the procedure laid down in the Army Act, 1881 (44 & 45 Vict. c. 58, s. 96, 144 (2), Schedule 1). The principal duty of a master is to instruct the apprentice in his calling, either himself, or by an experienced deputy (*Gardner*, 1775, Mor. 593). An apprentice is entitled to be taught the whole of his calling; and to teach him one particular part of the trade is insufficient (*Lyle*, 1863, 2 M. 115). A master may not ask an apprentice to work at another business than his trade (*Peter*, 1818, 2 Mur. 28; *Chicsely*, 1665, Mor. 9150; *Watson*, 1826, 5 S. 3). Corporal punishment in moderation may be administered to an apprentice (Ersk. i. 7. 62; *Forbes*, 1708, 4 Sup. 708; *Wight*, 1884, 11 R. 217, per L. Young); but it is questionable whether this would be recognised except in the case of very young persons. Excessive chastisement will liberate the apprentice from his indenture (*Smart*, 1794, Hume, 18). A master cannot assign the indenture without the apprentice's consent (*Edinburgh Glasshouse Company*, 1789, Mor. 597). If a master violate the indenture by neglecting to teach his apprentice, by treating him cruelly, or by rendering it impossible to carry out the contract, the apprentice is entitled to damages, and may leave his service (*Smart, ut supra*; *Lyle*, 1864, 2 M. 115).

By the Employers and Workmen Act, 1875 (48 & 49 Vict. c. 90), in case of disputes between master and apprentice, provision is made for dealing therewith in the Small Debt Court (s. 14). But this provision only applies to apprentices for whom no premium is paid, or where the premium, if any, does not exceed £25, and to apprentices in the business of a workman (not a domestic or menial servant), being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour (s. 12). The Court under this Act has the following powers:—(1) It may make an order directing the apprentice to perform his duties under the apprenticeship. (2) If it rescinds the instrument of apprenticeship, it may, if it thinks fit to do so, order the whole or any part of the premium paid on the binding of the apprentice to be repaid. (3) Where an order is made directing the apprentice to perform his duties under the apprenticeship, the Court, if satisfied that the apprentice has failed to comply therewith, may order him to be imprisoned for a period not exceeding fourteen days (ss. 5, 6).

When the stipulated period of apprenticeship is at an end, the apprentice is entitled to his discharge, and the master writes upon the indenture a discharge. The indenture may be dissolved by consent, death of either of the parties, or the master's sequestration. Where the apprentice binds himself to a firm, he must fulfil his indenture with any of the partners who survive (*Ragans*, 1837, 10 Sc. Jur. 90), except where the death of a partner operates as a dissolution of the firm (*Hocy*, 1867, 5 M. 814; *Tasker*, 1861, 30 L. J. Ex. 207). Though the apprentice dies, the master is not bound to repay any portion of the apprentice fee previously paid, or to abstain from claiming a portion unpaid (*Shepherd*, 1760, Mor. 589). If the master dies

or becomes bankrupt, or deserts his business, the apprentice has a claim for a return of a proportion of the fee paid (*Cutler*, 1711, Mor. 583).

INDENTURE BETWEEN A TRADESMAN AND HIS APPRENTICE.

It is *contracted*, *agreed*, and *ended*, between *A.*, of the first part, and *B.*, with the advice and consent of *C.*, his father, and the said *C.*, for himself and as cautioner, and otherwise bound in manner underwritten, of the second part, in manner following: That is to say, the said *B.*, with advice and consent foresaid, hereby binds himself apprentice to the said *A.* in his art and craft of , and that for the space of six years next from and after the date of these presents; and the said *B.* binds and obliges himself that he shall, during the said space, be a faithful and obedient apprentice to his said master, and that he shall not reveal his master's secrets, or conceal his skaith, but shall acquaint him therewith, and prevent the same to the utmost of his power; and that he shall not absent himself from his said service without leave obtained from his master; and that if he fails in punctual attendance, he shall serve two days, after the expiration of the term herein specified (in the same station in which he serves while it lasts), for each day's absence during that time: And the said *C.* hereby *binds* and *obliges* himself, conjunctly and severally with the said apprentice, for his lawful and obedient service during the space and in the terms foresaid, and for his fulfilling the whole obligations incumbent on him under this indenture: And the said apprentice *binds* and *obliges* himself to free, relieve, and skaithless keep his said cautioner of all cost, skaith, damage, and expense which he may sustain in consequence of his said cautionary obligation: And the said *C.* further *binds* and *obliges* himself, his heirs, executors, and successors, to furnish the said *B.* with work-tools, and with sufficient lodging, bedding, food, and washing during the whole space of his apprenticeship: *For which causes*, and in consideration of the sum of £ sterling, paid by the said *C.* in name of apprentice fee, with the said *B.*, whereof the said *A.* acknowledges the receipt, and exoners and discharges all concerned, the said *A.* *binds* and *obliges* himself to teach and instruct his said apprentice in his art and craft of , and in so far as he knows and practises the same himself; and that he shall not conceal from him any part thereof, but shall do his utmost diligence to cause him learn the same, in so far as he is capable. And, finally, the parties bind and oblige themselves, their heirs and executors, to implement the premises to each other, under the penalty of £50 sterling, to be paid by the party failing to the party observing or willing to observe the same, over and above performance; and both parties consent to the registration hereof for preservation and execution.—In witness whereof, etc.

[Ersk. i. 7. 62, iii. 3. 16: Bankt. i. 58; Bell, *Prin.* ss. 2185, 181, note; M. Bell, *Conveyancing*, 360; Menzies, *Conveyancing*, 388; Fraser, *Master and Servant*, 335; Chisholm, *Barclay's Digest*, *s.v.* "Apprentice." For English law, see Manley Smith on *Master and Servant*. See *Juridical Styles*, ii. 215.]

Apprentice to Law Agent.—See LAW AGENT.

Appretiation.—See APPRAISEMENT.

Apprising.—See ADJUDICATION FOR DEBT.

Approbate and Reprobate.—See ELECTION.

Approbatory and improbatory Articles.—See REDUCTION; ABIDING BY.

Appropriation of Indefinite Payments.—See PAYMENTS (INDEFINITE).

Appropriation, Dishonest—of Property.—This is a sufficient description, in a charge of previous conviction of any crime, of dishonest character in an indictment (Crim. Proc. Act, 1887, s. 63).

Apud acta—"In the course of procedure."—This expression refers to orders judicially pronounced in the presence of parties, and which require peremptory obedience. Thus in a criminal case, if it is thought inconvenient or unsuitable to proceed with the case, the Court may adjourn the trial to another day, which is specified in the deliverance, and intimated *apud acta* to the parties, witnesses, and assizers. This intimation is sufficient to require their attendance without further citation. So, too, if an adjournment of a proof or other proceeding is made by the Court, and the parties and witnesses are convened to attend, this is called a citation *apud acta* (Hume, ii. 275; Trayner, *Latin Maxims*).

Aquæductus, or watergang, is a prædial rural servitude, by which the owner of the dominant tenement has the right to lead water through the servient tenement by pipes, canals, or other means. In a wider sense, the word *aquæductus* is used to include (1) the servitude of dam or dam-head, by which the owner of a dominant tenement has the right of erecting and keeping dam-dikes or weirs, in whole or in part, on the servient tenement; and (2) the servitude of outfall (*aquæ educendæ*), by which the owner of a dominant may, in an artificial or unnatural way, send down water on to a servient tenement. While the owner of the dominant tenement uses these servitudes, or any of them, he is bound to keep the pipes, dam-dykes, or other works in proper repair, and he has a right of access to the servient tenement for that purpose (*Tennant's Trs.*, 2 S. L. T. Nos. 88 and 158; *Preston's Trs.*, 1859, 22 D. 366). The owner of the dominant tenement is entitled to the full enjoyment of his rights of servitude, but not to extend them (*Scouler*, 1828, 7 S. 344); and he must use them in the way which may be least inconvenient to the proprietor of the servient tenement, who may make any repairs on the aquæducts or other works on his tenement, provided such alterations do not lessen or interfere with the rights of the proprietor of the dominant tenement (*Robertson*, Mor. 12799). The dominant owner may renounce and abandon the use of his servitude; but if he do so, he is bound to prevent any injury being thereby done to the servient tenement (*Bridges*, 1873, 11 M. 588). These servitudes may be constituted (1) by express grant; (2) by grant implied in favour of a purchaser, where a portion of a subject has been sold (*Blantyre*, 1848, 10 D. 509; *Cochrane*, 1861, 4 Macq. 117; (3) by prescription (*Falkland*, Mor. 10916); (4) by acquiescence (*Stirling*, 1829, 8 S. 131).—[Ersk. ii. 9. 13; Stair, ii. 7. 8 and 12; Bell, *Prin.* s. 1012; Rankine on *Land Ownership*, 500.] See SERVITUDE.

Aquæhaustus.—*Aquæhaustus*, or watering, is a prædial rural servitude, by which the owner of the dominant tenement has a right to water cattle at a stream, well, or loch situated in the servient tenement, or to take away water for that or other domestic purposes. It involves a right of access to take the water away, or a right to bring cattle to the water. The rights of the dominant proprietor will be limited strictly to the amount of water required for the purposes of the servitude (*Melville*, 1842, 4 D. 1231); and the proprietor of the servient tenement may use water for his own cattle

or domestic needs, so long as he leaves enough to satisfy the rights of the dominant proprietor (*Donaldson*, 1877, 14 S. L. R. 587). The dominant owner may prevent pollution (*Dumfries Commissioners*, 1874, 1 R. 775), and may clean and repair a well (*Preston's Trs.*, 1859, 22 D. 366). He must use his right "civiliter" subject to the convenience of the owner of the servient tenement. Thus, where there is a right of watering cattle at a stream, the proprietor will not be prevented from covering parts of it, so long as an open space sufficient for the purposes of the servitude is left (*Beveridge*, 18 Nov. 1808, F. C.). If the stream or well from which the water has to be taken should dry up, the right of servitude would pass away; but it would revive if the supply of water should return. This servitude may be constituted in the same ways as the servitude of ACQUÆDUCTUS (*q.v.*). It is necessary, however, that a person claiming the servitude should be in right of the dominant tenement, even if his title be only that of feuar. An inhabitant, as such, cannot claim a servitude of this kind (*Mackay*, 1849, 12 D. 132; but see *Smith*, 1880, 7 R. (H. L.), 28 L. R. 5 App. Ca. 489). Use may prove that such a right of servitude has been constituted, but the right cannot be constituted by use (*Macnab*, 1889, 17 R. 397).—[Stair, ii. 7. 11; Bell, *Prin.* ss. 987, 1011; Ersk. ii. 9. 13; Rankine on *Land Ownership*, 499.] See SERVITUDE; WELL.

Aquilian Law.—The *Lex Aquilia*, a *plebiscitum* of uncertain date, but undoubtedly belonging to the earlier period of the Republic, is the basis of the Roman law of damage to property. In accordance with the character of early law, the *Lex Aquilia* did not itself lay down a general rule that an owner, whose property was wilfully or negligently damaged, could claim compensation. It merely provided for reparation for certain particular acts or cases of damage. The first chapter enacted that if a man unlawfully killed the slave or quadruped of another, he should be bound to pay to the owner the highest value of such slave or quadruped within the year immediately preceding. The third chapter enacted that if a man unlawfully damaged corporeal property belonging to another, he must pay to the owner the highest value of such property within the month immediately preceding. The manner in which the damages were assessed obviously imported a penal element into the law, and, accordingly, the Aquilian action could not be brought against the heirs of the delinquent. It was necessary, also, that the damage should have been caused directly by the act of the delinquent, and should have resulted in injury to a definite corporeal thing. In all cases of damage, however, to which the law did not apply, the edict of the prætor or the later jurisprudence of the Empire supplied analogus remedies by means of *actiones utiles*, or even *actiones in factum*. Actions of the latter kind were granted, for example, where there was not, properly speaking, any damage to a thing, but where the owner was deprived of a thing in a way tantamount to a destruction of it, as where A. throws B.'s ring into the sea. So the *Lex* only gave an action to the owner of the property damaged, not to a person who had some other interest in it, and who suffered loss by the damage done to it. In the later law, however, a *bonæ fidei* possessor, *usufructuarius*, *usuarius*, mortgagee, and other persons having interest, might competently bring an action for reparation. In this manner, working mainly by way of analogy, the *Lex Aquilia* was extended, and the law regulating compensation for *damnum injuria datum* was completed. The gradual development, under the name of *interpretatio*, of the Roman law of damage to property, whereby the elaborate system of

principles and doctrines forming the Justinianian law of reparation was evolved from the particular enactments of the *Lex Aquilia*, is very remarkable (*Inst.* iv. 3; *Dig.* 9. 2; Cod. iii. 35). [The Roman law of damage to property is fully discussed in a commentary on The Title of the Digest, "*Ad Legem Aquiliam*" (ix. 2), by Grueber; Clarendon Press, Oxford, 1886.]

Arage.—A term used to signify services by horses, or carriage by horses, due by a tenant to his landlord.

Arbiter is a person voluntarily chosen by parties to decide a dispute or difference finally between them. There is practically no limitation to the kind of dispute which may be so referred. Nor is there any practical restriction as to the persons who may competently act as arbiter, or, in the case of more than one arbiter being appointed, as oversman. Balfour, indeed, states (*Practicks*, folio ed., 1754, 412) that "all persounis that ar not forbidden be the law, may be arbiteris; sic as all fremen, not beand under the hand or power of ane uther; and it is requirit that he quha sall be arbiter be of gude brute and fame"; and in enumerating those who may not be arbiters, though chosen by consent of both the parties, he specifies "bondmen or slaves," women, "ony persoun wod or furious," or "alluterlie deif or dumb," and minors. But there are now no bondmen or slaves in Scotland. As to women, there seems to be no reason to doubt that a woman, whether married or not, may competently act as arbiter, if parties choose to select her for the office (Bankt. *Inst.* i. 23. 14 (p. 455); Bell on *Arbitration*, 2nd ed., 1877, p. 128). The "wod and furious" are obviously ineligible. The "alluterlie deif or dumb," though not perhaps necessarily disqualified from acting as arbiters, are unlikely in practice to be selected for that office. It was decided in the year 1582 (*Gordon*, Mor. 8915) that a minor may competently act as arbiter; but the abstract question seems to be of slight practical importance. The office of arbiter being of an honorary character, an arbiter has no legal claim to be remunerated, apart from previous stipulation with the parties (*Kennedy*, Jan. 20, 1819, F. C., and *Paterson*, Feb. 19, 1819, reported in note to *Kennedy*; *Henderson*, 1867, 5 M. 628; More, *Notes*, G lv.; Bell on *Arbitration*, 312 *et seq.*).

By referring a disputed matter to arbitration, the parties exclude themselves from the ordinary jurisdiction of the Courts of Law in regard to the merits of the dispute. "The parties have chosen their own judge; and so far as his decision has been honestly given, they must submit to it, whether it be according to law or not" (per Lord Watson in *Holmes Oil Co.*, 1891, 18 R. (H. L.) 52, at 55). "I never heard that it was *ultra vires* of an arbiter to form a wrong opinion" (per Lord Glenlee in *Spearman*, 1828, 6 S. 645). This should be carefully borne in mind by those who intend to go to arbitration. The powers and duties of an arbiter, as regards the conduct of the reference, and the acceptance or rejection of evidence, are dealt with under ARBITRATION (*q.v.*). His duty is to duly inform his mind upon the matter, by such methods as he considers most suitable, and to dispense even-handed justice to the parties to the best of his ability. Upon no account must he proceed beyond the scope of the submission. An arbiter may be disqualified from acting by any circumstance tending to bias his mind, and to prevent him from dispensing equal justice to both parties, *e.g.* if he has a patrimonial interest in the matter, adverse to that of one of the parties, and favourable to that of the other.

Such an interest would disqualify him, though it was unknown to both parties at the date of submission; it was his duty to disclose it, before accepting office; and *a fortiori* if known to the party in whose favour the interest tended, and unknown to the other. Again, it has been held incompetent for a person to act as arbiter, after he has been examined as a witness for one of the parties (*Dickson*, 1870, 8 M. 566). An arbiter who identifies himself with one of the parties, by taking an active interest in the prosecution of his claim, will be held disqualified (*M'Dougall*, 1894, 22 R. 71). But it is no bar to a person acting as arbiter that he is, in the knowledge of both the parties-submitters, in the employment of one of the parties, *e.g.* as engineer or architect, or in some other official position. Such cases are familiar in practice, and in the reported decisions (Bell on *Arbitration*, 130; *Phipps*, 1843, 5 D. 1025; *Mackenzie*, 1861, 24 D. 251; *Trowsdale*, 1864, 2 M. 1334; *Trowsdale*, 1865, 4 M. 31). An advocate is not disqualified from continuing to act as arbiter by his promotion to the Bench (*Fisher*, 1844, 6 D. 1286). That case contains certain *obiter dicta* adverse to judges taking up arbitrations, though there is no law against this. It appears from an old case (*Montrose*, 1639, Mor. 14155) that one party may competently constitute the other as arbiter in the dispute between them, but the case is not likely to recur in practice. Any objection to the competency of an arbiter, or to his conduct in the arbitration, or to the competency or propriety of the proceedings, must be timeously stated,-otherwise it will be rejected (*Johnston*, 1817, 5 Dow, 247; *Drew*, 1855, 2 Macq. 1). An arbiter who has accepted office is bound to go on with the matter, and issue his award, unless he can show good and sufficient reasons for declining to act. He is not entitled to renounce capriciously (*Marshall*, 1853, 15 D. 603; Ersk. *Inst.* iv. 3. 30; Bankt. iv. 45. 133). Lord Cunninghame, in Marshall's case, observed (at p. 606): "What shall be deemed a sufficient cause must clearly depend on the specialties of each particular case, and the Court will not probably scan the objections" (of the arbiter) "critically when they occur, as the leaning of the law must be always to liberate a conscientious man from a duty which he feels, on reasons satisfactory to himself, that he cannot discharge with propriety." The Court of Session alone, and no inferior Court, has jurisdiction to compel a recalcitrant arbiter to proceed with his task (*Forbes*, 1886, 13 R. 465). Unless in exceptional circumstances, the appropriate procedure in such a case is by way of action in the Outer House, and not by a summary petition addressed to the *nobile officium* of one of the Divisions of the Court (*Watson*, 1895, 22 R. 362). The latter course, however, may apparently be competent in certain circumstances. "I do not say that a summary petition to compel arbiters to proceed in a submission is, on the face of it and necessarily, an incompetent proceeding. It may quite well be that, when some specific duty is plainly and immediately incumbent on an arbiter, the Court may be asked by summary petition to order him to do it; and the mere fact that an ordinary action would lie for the same purpose, would not necessarily exclude the competency of the application" (per L. P. Robertson in *Watson*, *ut supra*, at p. 366).

An arbiter appointed to assess the pecuniary amount due by one party to the other is entitled, and in certain cases it may be his duty, to separate the items in his award in such a way as to make clear what part of his award applies to each of the items included in it; so that the Court, if the matter be brought before it, and there is reason to think that in respect of any particular item the award cannot stand, as being *ultra fines* or other-

wise, may reduce the offending item, and sustain the rest of the award (see *Dumbarton Water Commrs.*, 1884, 12 R. 115, per L. P. Inglis, at p. 120). Or, when questions of law are raised before such an arbiter, he may pronounce alternative findings, to meet the various views of the law which may be taken, and to enable the Court, when it has decided the legal question, to give effect, in the light of that decision, to the finding of the arbiter upon the question of amount. (This course is exemplified in *Ayr Harbour Trs.*, 1883, 10 R. (H. L.) 85; *Nisbet Hamilton*, 1886, 13 R. 710; *Lord Blantyre*, 1888, 15 R. (H. L.) 56; *Fleming*, 1895, 23 R. 98.) See ARBITRATION; AWARD; OVERSMAN.

Arbiter, in Roman Law.—In Roman law, an *arbiter*, as opposed to a *judex*, was a judge who had power to pronounce a decision according to the principles of *bona fides* and as might seem fit in the particular circumstances of the case. From the distinction between *judex* and *arbiter*, there arose the division of actions into *judicia* and *arbitria*. Either a single *arbiter* might sit, or several *arbitri* might be associated together. *Arbitri* might be appointed by a magistrate, or they might act under a private agreement between the parties to a dispute (*arbitri ex compromisso*). Instances of matters submitted to *arbitri* may be found in *Dig.* 10. 1. 2. 3, the division of common property; *Dig.* 5. 1. 53, the settlement of accounts; *Dig.* 8. 2. 11, a dispute as to the height of a neighbour's house.

The expression *arbitrium boni viri*, or *arbitratus boni viri*, is frequently used to denote a standard of fair judgment—in other words, in the sense "as a good man would judge fit." The dealing of a usufructuary with the subject of usufruct (*Dig.* 7. 1. 13. 6); the punishment of a slave (*Dig.* 47. 10. 17. 5); the compensation for damage done to property (*Dig.* 17. 2. 76), are examples of the very diverse subjects to which this standard of proper conduct or fair judgment was in use to be applied. In cases of doubt whether the standard had been conformed to, the most ready test naturally was to subject the matter to the decision of a good man, who should take account of all the circumstances.

An important application of the principle is in sale, in which the price of the subject sold was frequently left to be determined by a third party. An agreement that the price should be fixed by the valuation of a third party, who must be named (Cod. iv. 38. 15), was effectual if he actually fixed a price; but if such third party could not, or did not, make a valuation, the agreement to sell was avoided (*Inst.* iii. 23. 1). The principle of the Roman law, that the price may be left to the decision of an arbiter, has been adopted in Scotland (*e.g. Earl Selkirk*, 1778, Mor. 627). The law of Scotland, indeed, goes further than the Roman law (*Dig.* 18. 1. 35. 1; Cod. iv. 38. 13), and allows the amount of the price to be referred to one of the contracting parties.—[Stair, i. 14. 1; Ersk. iii. 3. 4; Bell, *Prin.* s. 92; *Lavaggi*, 1872, 10 M. 312. See Pothier on *Sale*, s. 24 *et seq.*; and Sale of Goods Act, 1893, 56 & 57 Vict. c. 71. ss. 8, 9.]

Arbitrary Punishment.—Certain crimes are punishable by a fixed or determinate punishment; in others the judge may impose an arbitrary or discretionary penalty. In the case of a capital offence the judge has no discretion: he must pronounce a determinate sentence—that of death. Mitigation of this sentence can be effected only by the exercise of the royal prerogative of pardon.

The judge may also be bound by Statute to impose a certain penalty as the punishment of the statutory offence. Where the common or Statute law permits the imposition of an arbitrary punishment, the judge has the widest discretionary powers as to the extent of this. The gravity of the offence and the character of the criminal determine the severity of the sentence. It may range from a mere reprimand to penal servitude for life. But it can never extend to capital punishment.

The tendency of modern times has been to mitigate the severity of punishment for crime. Under our former law, not only murderers, but also habitual thieves, heretics, and those convicted of what were then described as "high and atrocious crimes," were punished capitally. Now, the punishment of death is limited to treason, murder, and attempts to murder, under 10 Geo. IV. c. 38 (50 & 51 Vict. c. 35, s. 56). The punishments of scourging, torturing, standing in the pillory, being set in the stocks, in the jugs, or on the cuck-stool, being transported beyond seas or banished from Scotland, are now almost entirely unknown. In addition to the punishment of death, crime may now be punished by penal servitude, which was substituted for transportation by 20 & 21 Vict. c. 3, and 27 & 28 Vict. c. 47. Penal servitude may be for life, or for any period not less than three years (54 & 55 Vict. c. 69, s. 1). Imprisonment, with or without hard labour and solitary confinement, is another form of punishment for crime. In a few cases imprisonment may be for four years, but sentence for a longer period than two years may seldom be pronounced. The punishment of whipping is sometimes imposed, either in addition to imprisonment or by itself.

Trifling offences are usually punished by the exaction of a fine. The punishment of juvenile offenders may proceed under 17 & 18 Vict. c. 86, and 23 & 24 Vict. c. 105, which empower magistrates to pronounce a sentence of whipping, or under 29 & 30 Vict. c. 117, which authorises the seclusion in a reformatory of boys convicted of serious offences. The Acts regulating the municipal government of large cities, such as Edinburgh and Glasgow, and General Police Acts, such as the General Police and Improvement (Scotland) Act, 1862 (25 & 26 Vict. c. 101), and the Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. c. 55), set forth a list of offences which may be tried summarily in the local Courts. These Statutes also declare the penalty proper to each offence: but, while the judge may not legally impose a penalty in excess of the statutory one, he has, in virtue of the Summary Jurisdiction (Scotland) Act, 1881 (44 & 45 Vict. c. 33, s. 6), large powers of mitigating these penalties.—[Hume, ii. 481; Alison, ii. 664; Macdonald, 17; Anderson, *Crim. Law*, 3. 9.] See ADMONITION; PUNISHMENT.

Arbitration.—Arbitration is the voluntary and contractual submission by parties of any matter or matters in dispute between them to the amicable and final decision of a person or persons in whom they repose confidence. The practice of arbitration is undoubtedly of great antiquity, and in Scotland has for centuries bulked largely in the active business-life of the country. There is practically no limitation to the nature or class of questions which may be referred. The reference may be made by formal or informal writing, and apparently, in small and unimportant matters, even verbally (*Ferrie*, 1824, 3 S. 113; *Otto*, 1871, 9 M. 660). But, as regards the last class, "it may probably be said with truth, that the chief practical instruction derivable from the books, with respect to verbal sub-

missions and awards, is little else than this: that they ought, in prudence, to be avoided altogether" (Bell on *Arbitration*, 2nd ed., 1877, 57). Informal references are of constant occurrence in the busy life of the mercantile world. In such cases it is not necessary to have a regular deed of submission, nor a stamped decree; a mere letter, neither holograph nor tested, has been held to be a valid and sufficient award (*Dykes*, 1869, 7 M. 357). Similarly, an opinion of counsel, though neither holograph nor tested, is binding upon the parties who have agreed to submit a question to him as referee (*Fraser*, 1850, 7 Bell's *App.* 171).

Deed of submission.—The formal reference is constituted by a contract to refer, which is called the deed of submission. It contains, in the first place, a clause defining—and this ought to be done with special care and accuracy—the nature and scope of the question which is referred to the amicable decision, final sentence, and decree-arbitral to be pronounced by the arbiter or arbiters chosen by the parties, whose names should be stated, and upon whom is usually conferred the power to appoint an oversman, whose decision, in the event of the arbiters differing in opinion, shall be final. Sometimes, however, the oversman is named by the parties themselves. Where no oversman was named in the submission, and no power given to the arbiters to name one, it was held that the proceedings would prove abortive if the arbiters differed in opinion, unless the parties consented to a nomination (*Merry & Cuninghame*, 1860, 22 D. 1148; affd. 1863, 1 M. (H. L.) 14). But the Arbitration (Scotland) Act, 1894 (57 & 58 Vict. c. 13), provides (s. 4) that "unless the agreement to refer shall otherwise provide, arbiters shall have power to name an oversman on whom the reference shall be devolved in the event of their differing in opinion. Should the arbiters fail to agree in the nomination of an oversman, the Court" [which means (s. 6) "any Sheriff having jurisdiction, or any Lord Ordinary of the Court of Session"] "may, on the application of any party to the agreement, appoint an oversman. The decision of such oversman, whether he has been named by the arbiters or appointed by the Court, shall be final." The deed of submission next sets forth the powers of the arbiters to receive claims, to take such probation as they may think necessary, by writ, witnesses, or oath of a party, to decern for expenses, and so forth. When power to award expenses is not expressly conferred upon an arbiter, it has been decided that he has, by implication, such a right (*Ferrier*, 1843, 5 D. 456; 1845, 4 Bell's *App.* 161). An arbiter has no power to assess damages, unless he is empowered to do so expressly (*Mackay*, 1893, 20 R. 1093, and cases there cited). The deed of submission next specifies the time within which, subject to prorogation, the decree-arbitral is to be pronounced. When the time is left blank in the deed, it has been held that it is limited to a year and day (*E. of Dunmore*, 1829, 7 S. 595; but see Ersk. iv. 3. 29; Bell on *Arbitration*, 179, note 3). A power to prorogate should be inserted in the deed. Without power, express or implied, an arbiter cannot prorogate the submission (Bell on *Arbitration*, 177; *Govans*, 1859, 21 D. 403). The parties may prorogate it, either expressly, or impliedly by acting and pleading under it after expiry of the term specified (*Paul*, 1867, 5 M. 613). After the submission has expired, no decree-arbitral can be issued, and this has been decided even in a case when the arbiter had come to his decision, and issued notes of his proposed award, prior to the expiry (*Lang*, 1855, 2 Macq. 93). The next clause in the deed of submission is that by which the parties bind themselves, under a stipulated penalty, to implement the award. Provisions usually follow to the effect that the submission shall continue in force, in the event of either

party's death, against his heirs and representatives; and that, in case no final decree-arbitral shall follow on the submission, any probation which may have been taken in it shall be held and received as legal, in any further submission by the parties. The former of these provisions is important, because, at common law, and in the absence of any stipulation to the contrary, a submission generally falls by the death of either of the parties-submitters (Ersk. *Inst.* iv. 3, 29; Bell on *Arbitration*, 299). But this general rule does not apply when one of the parties to the submission is a trust, though one or more of the original trustees may have died before decree is pronounced, nor where the reference is purely executorial of a contract, *e.g.* in regard to fixing the price in a contract of sale (*Alexander's Trs.*, 1883, 10 R. 1189; *E. of Selkirk*, 1778, Mor. 727, *l.c.*; *Caledonian Ruy. Co.*, 1860, 3 Macq. 808). Lastly, the deed of submission should bear the consent of parties to registration, for preservation and execution, of the deed itself, and of the prorogations and decree or decrees-arbitral to follow thereon, in order that they may be the warrant, if necessary, for summary diligence. The last portion of the clause is important, for if the consent to registration is not made to extend to the decree, no diligence can be done upon it, because an arbiter has no jurisdiction, and the power to enforce the decree by diligence depends entirely upon the consent of parties to its registration (Ersk. *Inst.* iv. 3. 31; Bell on *Arbitration*, 358).

Ancillary submissions.—It is very common in practice to insert, in contracts of various sorts, a clause referring to arbitration—frequently to the arbitration of the engineer, architect, or other official of one of the contracting parties—the decision of claims or disputes arising in the execution of, or in connection with, the contract. The books are full of cases where such clauses have been pleaded as excluding the merits of the dispute from the consideration of the Court, and the point has been argued, in reference to each particular clause which has been brought before the Court, whether the words import a reference purely executorial of the contract, *i.e.* confined to matters arising within the period of its duration, or are intended to be conceived in a wider sense, and to embrace questions arising out of the contract after it has, strictly speaking, been completed. The distinction between these two classes of reference depends upon a close attention to the words of the clause in each particular case, and the decisions on the subject are not entirely easy to reconcile with one another. A distinct illustration of the wider class is found in *Mackay* (1883, 10 R. 1046). Lord Rutherfurd Clark there observed (p. 1050): "The contracting parties may create a tribunal for settling differences which may occur in the course of executing the works, and which has no other function. But, of course, they may do more, and extend it to the decision of any claim which may arise out of the contract. In this sense the reference is not less executorial of the contract than when it is confined to the settlement of questions which may arise during the execution of the works." The more limited class of clause, where the reference has been held to be merely executorial of the contract, in the narrower sense indicated by Lord Rutherfurd Clark, is exemplified in the cases of *Pearson*, 1859, 21 D. 419; *M'Cord*, 1861, 24 D. 75; *Tough*, 1872, 11 M. 236; *Kirkwood*, 1877, 5 R. 79; *Saville Street Foundry Co.*, 1883, 10 R. 821; and *Beattie*, 1883, 10 R. 1094. In the last of these cases, Lord President Inglis, in distinguishing the clause then under consideration from that which was considered in *Mackay* (*ut supra*), said (p. 1096): "I really hope there will be an end to cases of this class. A very little care in the choice of

language will prevent all ambiguity. Let parties only distinctly express themselves so as to mean that the reference is to cover every kind of claim arising out of the contract, and the Court cannot interfere. On the other hand, if they will use language like that in the clause here, let them clearly understand that it is now settled law that such a clause covers only questions which arise during the execution of the contract." The words are salutary, and appear to have been of some effect, though similar clauses have since occasionally been the subject of litigation, *e.g. M'Alpine*, 1889, 17 R. 113; *Mackay*, 1893, 20 R. 1093.

Reference to arbiter unnamed.—Until recently, the general rule of Scots law was that an agreement to refer future disputes or differences, if and when they shall arise, to an arbiter or arbiters unnamed, or to a person merely designed as the holder for the time being of a particular office, were ineffectual, subject only to an exception where the agreement to refer (Bell on *Arbitration*, 87) "does not contemplate the decision of proper disputes between the parties, but the adjustment of some condition, or the liquidating of some obligation, contained in the contract of which such agreement to submit forms a part." Examples of the rule may be found in *Buchanan*, 1799, Mor. 14593; *Tancred, Arrol, & Co.*, 1890, 17 R. (H. L.) 31; especially per L. Watson, 36; *Ramsay*, 1884, 11 R. 527; *Gilmour*, 1891, 18 R. 1219; cp. also *Hamlyn & Co.*, 1894, 21 R. (H. L.) 21. Examples of the exception to the rule are *Lord Advocate*, 1891, 18 R. 397, and *Merry* v. *Cuninghame*, 1859, 21 D. 1337. But the law was altered by the Arbitration (Scotland) Act, 1894 (57 & 58 Vict. c. 13), which provides (s. 1) that "from and after the passing of this Act, an agreement to refer to arbitration shall not be invalid or ineffectual by reason of the reference being to a person not named, or to a person to be named by another person, or to a person merely described as the holder for the time being of any office or appointment."

Procedure in submissions is subject to no fixed rules, and necessarily varies very much, according to the nature of the questions submitted, and the means of knowledge possessed by the arbiter in regard thereto. In formal and important arbitrations it is usual to appoint a clerk, who is responsible for the process, and frequently acts as legal assessor or adviser of the tribunal. Written pleadings, by way of a claim and answers, or in such other form as may be appropriate to the circumstances, are ordered and lodged, and a record is made up upon these pleadings. Parties are then heard, or such evidence is led as the arbiter may order, or the parties offer. But in all cases the arbiter has very wide powers of discretion as to the procedure to be adopted, and as to the extent and mode of proof or other inquiry, if any, which he may consider necessary. This is especially the case where the question in dispute is a purely practical one, *e.g.* the valuation of farm stock, and the arbiter has been selected by the parties as a person of reputed skill and knowledge in regard to the matter in hand. In such cases the arbiter is clearly entitled to control and limit the extent and nature of the proof, and even to decide the matter without proof at all, though evidence may be tendered by one or both of the parties, so long as, by inspection or otherwise, he takes proper means of informing his mind, so as to pronounce a just determination. An arbiter is entitled, if he considers it necessary for his own proper information, to require and obtain assistance from a man of skill, *e.g.* an engineer or a valuator, or to consult counsel (*Caledonian Rwy. Co.*, 1860, 3 Macq. 808; Bell on *Arbitration*, 223 and following). "An arbiter is not bound in all cases to receive evidence, whether it will have any effect on his mind or not" (per Lord Chancellor Eldon in *Johnston*, 1817, 5 Dow, 247, 264). On the other hand, the refusal by an arbiter to

receive proof where proof is necessary, may amount to such misconduct of the case, and want of fair dealing, as will invalidate the award; for "by the great principle of eternal justice . . . it is impossible that an award should stand, where the arbitrator heard one party, and refused to hear the other" (per Lord Chancellor Eldon, in *Sharpe*, 1815, 3 Dow, 102, 107). The nature and limits of the discretion which an arbiter may exercise in this matter will be further commented on in dealing with the grounds upon which a decree-arbitral may be reduced by the Courts of Law. The books abound in decisions relating to the matter. Many of these were apparently decided upon specialties, but others contain valuable expositions of the general principles which regulate the subject. Among the best known and most instructive cases are the following, viz. *Sharpe, ut supra*: *Johnston, ut supra*; *Colquhoun*, 1825, 3 S. 424; *Spearman*, 1828, 6 S. 645: *Alston*, 1839, 2 D. 248; *Macdonald*, 1843, 6 D, 186: *Mowbray*, 1848, 10 D. 1102; *Mitchell*, 1848, 10 D. 1297; *Miller*, 1855, 17 D. 689; *Ledingham*, 1859, 22 D. 245; *Holmes Oil Co.*, 1891, 18 R. (H. L.) 52.

Decree-arbitral.—The decree-arbitral, sometimes called the AWARD (*q.v.*), commences by narrating the submission, and the procedure which has followed on it, including, where such is the case, the difference of opinion between the arbiters, and their devolution of the submission upon the oversman (Ersk. *Inst.* iv. 3. 29; *Gordon*, 1716, Mor. 655; *Gardner*, 1773, Mor. 659); and then the arbiter, or oversman, as the case may be, states that, being well and ripely advised, and having God and a good conscience before his eyes, he gives forth his final sentence and decree-arbitral in the terms stated, and he finds and decerns accordingly. It is thought that an arbiter may, if he finds it expedient to do so, issue an interim award, or interim awards, before the stage arrives at which his final award is to be pronounced (Bell on *Arbitration*, 263; *Edin. & Glasgow Ry. Co.*, 1840, 2 D. 486). An express power to issue such awards is sometimes contained in the deed of submission. They are inherently subject to recall or alteration by the final award. Even when an interim award is intended to stand unaltered by the final award, it is probably better, and more regular, to refer specially to it in the final award, and expressly reaffirm it. When the interim award is to be recalled or altered, that must be clearly expressed in the final award; and in all cases where an interim award has been pronounced, great care must be taken, in expressing the final award, to avoid all risk of ambiguity or repugnancy, which might otherwise arise. An arbiter is not bound, before issuing his award, to submit proposed findings, or the draft award, to the parties; but it is very common in practice to do so, and to allow parties, if so advised, to lodge representations, and approval of such a course has been indicated by the Court (*Baxter*, 1836, 14 S. 549; *M'Callum*, 1826, 2 W. and S. 344). An arbiter may competently recall and cancel his award, though it has been formally executed and signed, provided it has not been issued to the parties, nor put upon record, and that the submission still subsists. Questions of nicety sometimes arise as to the point of time at which an award can be said to have been issued to the parties, *e.g.* when it has reached the hands of the clerk to the reference, but has not been actually delivered by him to the parties (*Macrae*, 1885, 13 R. 265; *Gray & Woodrop*, 1831, 5 W. & S. 305; *M'Quaker*, 1859, 21 D. 794). A valid award, issued and delivered, is binding upon the heirs and successors of the parties (Bell on *Arbitration*, 262).

Reduction of decree-arbitral.—The reduction of a decree-arbitral, if it has been honestly pronounced, and if the arbiter has not proceeded *ultra fines compromissi*, is no easy matter. Prior to the year 1695, such decrees

appear to have been subject to review upon their merits by the Courts of Law in this country, so that they were liable to be set aside if, in the opinion of the Court, the arbiter had erred in fact or in law, though his decree had been pronounced in perfect honesty, and without exceeding, in any degree, the scope of the submission to him. This is not now law. By the 25th enactment of the "Articles of Regulation concerning the Session, dated the 29th day of April 1695," and recorded in the Books of Council and Session on 2nd November in that year, it was declared "that for the cutting off of groundless and expensive pleas and processes in time coming, the Lords of Session sustain no reduction of any decreet-arbitral that shall be pronounced hereafter upon a subscribed submission, at the instance of either of the parties' submitters, upon any cause or reason whatsoever, unless that of corruption, bribery, or falsehood, to be alleged against the judges-arbitrators who pronounced the same." These "Articles of Regulation" were made in pursuance of the Statute 1693, c. 34, which authorised the issuing of a royal commission for the regulation of judicatories, the commissioners being empowered to make such orders, acts, and constitutions as they should think just. The commissioners accordingly framed the "Articles of Regulation," which have prefixed to them a deliverance by King William III., dated at Kensington on 25th April 1695, by which His Majesty "approves and ordains the same to be put to execution, and to have full force, strength, and effect, conform to the late Act of Parliament made thereanent; and ordains the same, together with this approbation, both superscribed by his royal hand, to be recorded in the Books of Secret Council and Session, and thereafter published and printed, that none pretend ignorance." The Articles of Regulation are thus of statutory force. The three grounds upon which, in accordance with their terms, decrees following upon written submissions may be set aside, are "corruption," "bribery," and "falsehood." In *Adams* (1890, 18 R. (H. L.) 1), a deathblow was struck at the use of the phrase "constructive corruption," as a supposed ground of reduction. The phrase, which is said to have originated with Lord Thurlow, had crept into use in Scotland, but the learned Lords in Adams' case repudiated, once for all, as a ground for the reduction of a decree-arbitral, any other than actual "corruption," in the ordinary sense and meaning of the word. Lord Bramwell (at p. 10) observed, in regard to the words "constructive corruption": "I think that that and similar expressions are only used by persons who have a desire to bring about a certain result, and do not know how to do so by the use of ordinary and intelligible expressions." Lord Watson, in the same case, examined (p. 9) the decisions which were alleged to depend upon "constructive corruption," and indicated the true ground of judgment in each instance. Thus, the well-known case of *Alexander* (1869, 7 M. 492) really proceeded, not upon "corruption," nor upon the Act of Regulations at all, but upon excess of jurisdiction by the arbiter; while in *Mitchell* (1848, 10 D. 1297) the true principle of the judgment was that the arbiter, in refusing to allow to one of the parties an opportunity of leading evidence, and in proceeding to decide upon the evidence of one side alone, had "violated the principles of justice, and that justice could not be done between the parties without setting aside his award." It is important to remember that, apart altogether from the three grounds of reduction specified in the Act of Regulation, decrees-arbitral are liable to reduction, if the arbiter has exceeded his jurisdiction and wandered *ultra fines compromissi*; or if, in the course of the arbitration, he has been guilty of misconduct in disregarding "any one of the express conditions contained in the contract of submission, or any one of those important conditions

which the law implies in every submission" (per Lord Watson in *Adams, ut supra*, at p. 8; see also *Sharpe*, 1815, 3 Dow, 102; *Holmes Oil Co.*, 1891, 18 R. (H. L.) 52). In other words, a decree-arbitral will not be reduced merely because the Court differs in opinion from the arbiter upon the merits, whether as regards fact or law, of the dispute submitted for his decision. Upon those matters the arbiter is the judge chosen by the parties, and his decree is final, and he is entitled, as has already been explained, to a very wide measure of discretion as to the manner in which the proceedings are to be conducted, and a due knowledge of the whole case is to be brought to his mind. But the decree will be set aside wherever it can be shown that the arbiter has been guilty of corruption, bribery, or falsehood, in the blunt and ordinary signification of these words, or that he has gone beyond the scope of the submission, or that he has violated either any of the conditions expressed in the submission, or the essential principles of justice and even-handed dealing between parties which the common law holds to be implied in every submission. It is well settled law that, when parties "have agreed to refer their differences to arbitration . . . you cannot set aside the award simply because you think it wrong. The parties have agreed that it shall not be subject to the ordinary modes of appeal, and that it shall be final; and that is, in nine cases out of ten, the very object which they mean to attain by submitting their differences to arbitration" (per Lord Chancellor Halsbury in *Holmes Oil Co., ut supra*, at p. 53). But it must be observed that the jurisdiction of the Court is not wholly, and to all effects, ousted by a reference to arbitration. "It deprives the Court of jurisdiction to inquire into and decide the merits of the case, while it leaves the Court free to entertain the suit, and to pronounce a decree in conformity with the award of the arbiter. Should the arbitration, from any cause, prove abortive, the full jurisdiction of the Court will revive, to the effect of enabling it to hear and determine the action upon its merits. When a binding reference is pleaded *in limine*, the proper course to take is either to refer the question in dispute to the arbiter named, or to stay procedure until it has been settled by arbitration. The latter course was adopted in *Caledonian Rwy. Co.* v. *Greenock & Wemyss Bay Rwy. Co.* (10 M. 892), where the reference was to arbiters unnamed, but had been confirmed by Statute. I cite that case, not as establishing, but as illustrating the rule of procedure, which was in force long before its date" (Lord Watson in *Hamlyn & Co.*, 1894, 21 R. (H. L.) 21, at p. 25). (See also *Levy & Co.*, 1883, 10 R. 1134.)

Partial reduction of an award is competent, when the matter in which the arbiter has exceeded his jurisdiction is separable from the other matters upon which he has decided, and if it is plain that the decision of the former did not influence the rest of his award. Otherwise, the award, as a whole, must fall, if the arbiter has, to any extent, proceeded *ultra fines compromissi* (*Grosat*, 1739, Mor. 626; *Kidd*, 19 June 1810, F. C.: *Reid*, 1826, 5 S. 140; *Napier*, 1844, 7 D. 166). "When a decree-arbitral has been pronounced, including incompetent matter, the object of the decisions has been only to correct what was wrong, if the decree can stand after such correction" (*Laing*, 1846, 9 D. 70, per L. J. C. Hope, at p. 74). But a decree-arbitral is void if the arbiter has therein awarded, beyond his authority, anything to the prejudice of one of the parties, which cannot be severed from what he has lawfully awarded within the scope of his authority (*Caledonian Rwy. Co.*, 1860, 3 Macq. 808, per L. C. Westbury, at p. 863).

An arbiter or oversman may competently be examined as a witness, in an action to enforce or to set aside his award, and may be questioned as to

what passed before him in the proceedings previous to the issuing of his award, and as to the matters which were presented to him for his consideration, so as to ascertain whether he took into account any matter which was not properly within his jurisdiction under the reference. But it is not competent to question him as to what passed in his own mind when exercising his discretionary power as to the matters submitted to him (*D. of Buccleuch*, 1872, L. R. 5 E. and I. App. 418; *Glasgow City & District Rwy. Co.*, 1886, 13 R. 609).

Statutory arbitrations.—Provision for arbitration is made by a great number and variety of Acts of Parliament, for the settlement of claims or disputes arising within their scope. It would be unprofitable to attempt to treat of these in detail. The Statutes in regard to arbitrations between masters and workmen are dealt with by Fraser (*Master and Servant*, 3rd ed., 395 *et seq.*). Arbitration is also provided for by Statute in the case of Industrial and Provident Societies, Friendly and Building Societies (see Pratt's *Law of Friendly Societies*, 12th ed.), in many of the Acts relating to the regulations, rights, and duties of railway companies (see Ferguson's *Railway Rights and Duties*), in the Companies Acts, and very many others. But the statutory arbitrations which are of most frequent occurrence, and bulk most largely in practice, are those conducted under the machinery provided by the Lands Clauses (Scotland) Act, 1845, which is adopted by and embodied in the Railways Clauses (Scotland) Act, 1845, and is now commonly incorporated in the various private Acts promoted by railway companies and others who require to take lands and heritages compulsorily. The procedure in these arbitrations is usually conducted in a formal manner: a clerk is appointed, a record made up, and a proof led, frequently at great length. It is usual for the oversman to sit along with the arbiters to hear the evidence. The witnesses are generally, and should always be, put upon oath. The duty of the tribunal is confined to assessing compensation. Questions of legal title are for the Court to decide (*Alexander*, 1869, 7 M. 492; and see ARBITER, *supra*). It is competent to apply to the Court for interdict *ab ante* against the arbiters proceeding to entertain the whole, or any specific part of, the claim; and interdict will be granted, if it can be demonstrated, on the face of the claim, that it is, in whole or in part, clearly untenable or non-existent, or that the arbiters are called upon to exercise powers which they do not possess. In *Glasgow & S. W. Rwy. Co.* v. *Caledonian Rwy. Co.* (1871, 44 Sc. Jur. 29), Lord Neaves observed, p. 31: "It is very often inexpedient to interdict an arbiter before he acts. But it is a perfectly competent form of procedure, and one which the Court will adopt, to save the parties unnecessary expense and litigation, wherever, as in the present case, it appears plain on the face of the matter that the arbiter has no such power as that which he is called on to exercise." This statement was quoted with approval by Lord President Inglis in *Dumbarton Water Commrs.* (1884, 12 R. 115. See also *Caledonian Rwy. Co.*, 1879, 17 S. L. R. 192; *Clyde Navigation Trs.*, 1883, 10 R. 910; *Glasgow District Subway Co.*, 1895, 23 R. 81). When promoters of an undertaking enter upon ground compulsorily taken by them before the amount of compensation due to the owner has been assessed, he is entitled to interest at five per cent. upon the amount ultimately found due to him, from the date of such entry (*West Highland Rwy. Co.*, 1894, 21 R. 576).

Judicial reference is the submission to the final decision of an arbiter of matter in dispute between parties in an action pending in Court. Such reference may be made at any stage during the dependence

of an action. The submission is constituted by joint minute of parties, which is revocable by either (*Reid*, 1841, 3 D. 1102) until the Court interpones authority to it, after which it cannot be recalled except by consent of both parties. The powers and duties of a judicial referee are in general the same as those of an ordinary arbiter. A judicial reference is a "subscribed submission," and the award following upon it is therefore protected by the Act of Regulations from review by the Court on matters of fact or law which fall within the reference (*Mackenzie*, 1840, 3 D. 318; *Rogerson*, 1885, 12 R. 583). When the referee's award is issued, it is lodged in the process, and the authority of the Court is interponed to it. In a case where the authority of the Court had not been interponed either to the minute of judicial reference, or to the award, and the action, for lack of procedure in it, was dismissed, it was held that the reference and award fell with the action, and that the award could not therefore be enforced (*Gillon*, 1859, 21 D. 243).

The Court of Session Act, 1850 (13 & 14 Vict. c. 36), contains a clause (s. 50) intended to "extend the benefits of arbitration" by way of procedure, "in any cause before the Court of Session in which an issue is to be tried," before an arbiter or arbiters, sitting as a jury, subject to the right of taking exceptions, as in jury trials, and obtaining a new trial upon the ground of such exceptions, but not in respect of the verdict of the arbiter or arbiters being against evidence, or upon any other ground implying miscarriage on the part of the "jury" alone. But there does not seem to be any instance on record of resort being had to this mode of procedure (Mackay, *Manual*, 323).

When parties to an action in Court have virtually constituted an inferior judge an arbiter between them, the superior Court cannot competently review his interlocutor, which is practically an award or decree-arbitral (*Dykes*, 1869, 7 M. 603).

[On the subject of arbitration generally, see Bell on *Arbitration*, 2nd ed., 1877; Ersk. *Inst.* iv. 3. 29, i. 2. 2; Stair, *Inst.* iv. 3. 1, iv. 2. 18; Bankt. *Inst.* i. 23. 7–20; Mackay, *Manual*, 279 *et seq.*, 414, 450, 649; M. Bell, *Conveyancing*, 3rd ed., 366–87; Deas, *Law of Railways*.] See also ARBITER; AWARD; OVERSMAN.

Arles.—See EARNEST.

Armiger; Scutifer; Esquire.—Originally the term denoted a personal attendant of a knight. The esquire was a youth of birth, and an aspirant for knighthood. The term is now used merely as a name of worship. It is not a name of dignity.

The following are entitled to be called esquires:—

1. All the sons of peers and lords of Parliament, during the lives of their fathers, and the younger sons of such peers, etc., after their father's deaths; the eldest sons of the younger sons of peers, and their eldest sons in perpetual succession.
2. Noblemen of other nations.
3. The eldest (and perhaps all) sons of baronets.
4. The eldest sons of knights.
5. Esquires of the Bath, and their eldest sons.
6. Members of the Bar.
7. Provosts of burghs while in office; J.P.'s while on the commission.

8. Persons filling any superior office under the Crown.
9. Persons styled esquires by the sovereign in their patents, commissions, or appointments.
10. Attorneys in colonies where the department of counsel and attorney are united (Burke, *Peerage*, art. "Precedency").

The members of all the learned professions claim to be esquires in virtue of their being members of these professions. In unofficial practice, the title is commonly bestowed on all otherwise untitled gentlemen.

Armistice.—Any agreement for the suspension of hostilities short of a general truce or peace. A commanding officer is presumed to have the power to make such agreements delegated to him by the sovereign (see Halleck, *International Law*, ii. 311).

Armorial Bearings; Armorial Ensigns; Arms; Coat Armorial; Coat of Arms; Heraldic Cognizances.—Originally the distinctive devices worn by warriors on or over their armour, on their banners, horse-clothing, etc.

At an early date, the nature, composition, marshalling, and right to wear such devices were reduced to accordance with rules, and became indicative of the rank, descent, family alliances, territorial dominion, feudal tenure, office, etc., of the bearer of them; and at the same time rights to exclusive and undisturbed use of these devices became recognised.

"I define arms," says Nisbet (ch. ii.): "hereditary marks of honour, regularly composed, of certain tinctures and figures, granted or authorised by sovereigns for distinguishing, differencing, and illustrating persons, families, and communities. These marks of honour being represented upon shields, surcoats, banners, pennons, and other military instruments, and ensigns . . . are now called arms, coats of arms, and armorial ensigns. . . . The three principal ends of arms are (1) to distinguish the noble from the ignoble, the worthy from the unworthy; (2) to difference the branches and cadets of one and the same family: (3) to illustrate persons, families, and communities with ensigns of noble descent, and other additaments of honour within and without the shield."

Armorial ensigns include (1) the shield, with the bearer's heraldic devices on it, and (2) the crest on its wreath, and (3) the motto or mottoes. They include also several additaments of honour—supporters, garter, badges, etc., should the bearer of the arms have a right to any of these. He is entitled also to display, above the shield and below the crest and wreath, a helmet befitting his degree, and if he is a peer, his proper coronet. Ladies' armorial cognizances, the Queen's alone excepted, have neither crest, motto, nor helmet.

The power of granting arms is part of the royal prerogative (per L. Robertson in *M'Donnell*, 1846, 4 S. 371), and is still exercised by the sovereign, in special cases, and in granting those honourable augmentations and additaments which can be bestowed by the sovereign alone. But the granting, differencing, and registering of arms in ordinary have been conferred by sundry Statutes on Lyon King of Arms (1593, c. 125 (c. 127 in Sma' Acts), 1672, c. 47 (c. 21 S. A.), 30 Vict. c. 17. See Kames, *Law Tracts, Courts*, 2nd ed., 211; *Report of Commissioners of H. of C. on Office of Lord Lyon*, 1822). In virtue of these Acts, no person possessing a

hereditary right to arms may exercise it, unless the arms have been registered by him, or one of his ancestors, in the Lyon Register: no cadet is entitled to wear his ancestor's arms without a congruent difference assigned to him by the Lyon; no person may assume or use arms to which he has no ancestral right, without the authority of the sovereign or Lyon King.

With Lyon resides the original jurisdiction in the granting of arms. And in the case of an ordinary application for a grant of arms, his exercise of his power to grant or not to grant, and his selection of the armorial bearings, marks of cadency, or other differences, which he assigns in the event of his granting the application, are discretionary and ministerial (*Cuninghame*, 1849, 11 D. 1139). If his decision involves no infringement of right, the Court of Session will entertain no appeal or reduction of his decree (*M'Donnell, ut supra*).

A provision is common, in wills and deeds of entail, requiring the heir under the deed to assume and use the name and arms of the maker of the deed. How far it is competent to provide that one who is not the heir shall assume arms which, by the laws of arms, are the natural hereditary cognizances of the heir, is doubtful (Seton, 370 *et seq.*); and the provision might possibly be held to be sufficiently complied with were the heir able to show that he had made an unsuccessful application to the Lyon for the authority requisite to bear the prescribed arms legally. There seems nothing in the case to oblige the Lyon to waive his discretion to grant or refuse the application. In the case of *Moir of Leckie* (1794, Mor. 15537), in which the Court upheld the entailer's provision that the heirs of the entail should assume the name and arms of Moir of Leckie, there was no heir outside of the entail who could dispute their right to such arms.

Where it was discovered that the entailer, who had made such a proviso, had no arms, the Court ordered the heirs to obtain from Lyon, "arms of that description, descendible to the heirs of entail" (*ib.*).

The manner and extent to which the heir must carry out the directions of the deed in assuming arms, are dependent solely on the terms of the deed, and follow rules similar to those governing the assumption of the ancestor's name. When the husband of a female heir was obliged by the entail to "assume, use, bear, and constantly retain" the entailer's "surname and arms," he was found to have satisfied these conditions by prefixing the entailer's surname to his own, and placing the entailer's arms in the second and third quarters of a quartered coat in which his own arms occupied quarters one and four (*Hunter*, 1882, 9 R. 492).

Arms once granted, whether by the sovereign, the Lyon, or Parliament, are the exclusive property of the grantee, and as such are protected to him (*Cuninghame, ut supra*).

It is an infringement of the rights of the owner of a coat of arms, and is a real injury to him, if another person assumes it. "By the civil law, he who bears and uses another man's arms to his prejudice, *ad in ejus scandalum et ignominium*, is to be punished arbitrarily at the discretion of the judge; but he who usurps his prince's arms, loses his head, and his goods are confiscated" (Sir G. Mackenzie, *Science of Heraldry, treated as a part of the Civil Law and Law of Nations*, 12). "Real injuries are committed by hindering a man to use what is his own . . . by arresting his goods unjustly, by wearing in contempt what belongs to another man as a mark of honour" (Sir G. Mackenzie, *Laws and Customs of Scotland in matters Criminal*, i. 30. 3). "Real injuries are committed by doing

whatever may hurt one's person . . . or may affect his honour or dignity, as assuming a coat of arms or any mark of distinction proper to another . . . and the offence is punished arbitrarily by the Judge Ordinary, according to the circumstances attending it, either by fine or imprisonment" (Ersk. iv. 4. 81; see also Seton, p. 19).

The original jurisdiction to punish for contraventions of the law of arms, or for redress of wrong in a matter of arms, or in a competition as to right to arms, resides in the Lyon Court, and appeal from his decision lies to the Court of Session (*Procurator-Fiscal of the Lyon Court*, 1778, Mor. 7656, *per cur.* in *M'Donnell, ut supra*). But if the arms claimed have been already granted by the Lyon, and decree pronounced by him, the claimant must seek his remedy in an action of reduction (*ib.*).

Popular actions being unknown to our law, no appeal or reduction of a grant by Lyon will be heard save at the instance of a competitor claiming the arms in question (*M'Donnell, ut supra*).

The validity of a patent of a coat armorial granted by Lyon must be challenged in the regular way, before it can competently be called in question as a side issue in a declarator of irritancy on the ground of contravention of a condition of an entail (*Hunter, ut supra*).

The Court of Session will inquire whether Lyon has differenced an applicant's shield with a true mark of cadency where the provisions of an Act of Parliament required it, but it will not prescribe the mark of cadency which he is to adopt (*Cuninghame, ut supra*). See Lyon Court.

Unauthorised assumption and use of arms creates no right or property in them; it is a statutory offence, rendering the user liable to a fine of £100 Scots, and the escheat of all articles on which the arms appear (1672, c. 49). See Lyon Court.

The presumption *omnia antiqua rite acta esse* operates, however, as regards the fine and escheat, in favour of the wearers of arms which they cannot prove to have been registered, if the arms were in use by their ancestors earlier than the earliest extant register of arms (*Procurator-Fiscal of the Lyon Court*, 1778, Mor. 7656). But it does not absolve them from registering these arms under the Act of 1672 (*ib.*).

By the Licensing Acts, a sum of two guineas is payable annually by persons who display armorial bearings on a carriage. One guinea is leviable if the arms, though not placed on a carriage of any sort, are used or worn in any other way. These taxes are exigible irrespective of the wearer's right to the arms he uses, or whether the crest, or coat alone, or the whole atchievement, is displayed; and payment of the tax neither creates nor proves any right to the arms in respect of which the payment is made.

Armorial Ensigns of the United Kingdom of Great Britain (and Ireland).—See Flag; Seals.

Army.—Before the institution of a standing army, Military law existed only in time of war. On the outbreak of war, articles of war were issued by the Crown or the Commander-in-Chief, under authority from the Crown, given in his commission. The Bill of Rights (1 Will. & Mary, sess. ii. c. 2) declared the institution of a standing army in time of peace without the consent of Parliament to be illegal. In 1689 the first Mutiny Act

(1 Will. & Mary, c. 5) was passed, the preamble of which expressly declared "that the raising or keeping of a standing army within the kingdom, in time of peace, unless it be with consent of Parliament, is against law," and these words have now been transferred into the annual Act which brings the Army Act into force. From 1689 to 1878, with the exception of short periods, annual Mutiny Acts were passed. Till 1712 the Mutiny Acts did not extend to the Queen's dominions abroad; but in that year power was given to the Crown to make articles of war for the regulation of the army in Her Majesty's dominions beyond the seas in time of peace. In 1803 the Mutiny Act and statutory Articles of War were extended to the army within or without the Crown's dominions (43 Geo. III. c. 20). In 1879 the Army Discipline and Regulation Act (42 & 43 Vict. c. 33) was passed, consolidating the provisions of the Mutiny Act and Articles of War made under the authority of that Act. This Act was repealed and re-enacted with certain amendments, by the Army Act of 1881 (44 & 45 Vict. c. 58), which, in order to become effective, requires to be brought into operation annually by a separate Act. The annual Act specifies the number of troops to be maintained for the current year, and introduces any amendments which may be necessary in the principal Act.

The Army Act, Queen's Regulations, and Army Orders form the code of Military law by which the army is governed. Part I. of the Act deals with discipline, including crimes, punishments, and courts-martial; Parts II. and III. with regulation, including enlistment, billeting, and impressment of carriages; and Part IV. with miscellaneous provisions, including pay, exemptions, offences in respect of forces, evidence and jurisdiction. The Royal Marines have now been made subject to the Act except when on the books of a Queen's ship. The discipline of troops embarked as passengers in any of Her Majesty's ships is regulated by an Order in Council of 6th Feb. 1882. Soldiers can be tried and punished for offences against the ordinary criminal law as if they were civilians. A soldier while in the service cannot change his domicile or his parish of settlement. If he marries without the consent of the military authorities, his wife will not be provided for by those authorities, nor can he be punished for deserting or neglecting to maintain his wife or family; but special provision has been made to compel him to maintain his wife and family or illegitimate child, and a certain sum may be deducted from his pay for that purpose (Army Act, s. 145). Certain restrictions are imposed upon a soldier's creditors; these, however, do not affect the soldier's private property, but only his person, pay, or military equipment (Army Act, s. 144). An officer or soldier cannot legally charge or assign his pay or pension. An officer or soldier on actual military service is entitled to make, as to his moveable estate, a nuncupative will. Officers are not required to pay licence duty for any servant who is a soldier and who is employed in accordance with the regulations of the service. Officers on full pay are exempt from serving on juries, and they are prohibited from joining the directorate of any public or private company, without the consent of the Commander-in-Chief (Queen's Regulations, s. 6, par. 10). Officers and soldiers, if on the roll, are entitled to vote at parliamentary elections, and, if themselves elected, to attend the House of Commons.—[See *Manual of Military Law* (War Office, 1894); Clode, *Military Forces of the Crown*; Pratt, *Military Law*; Tovey, *Military Law*; Stephen, *Commentaries*, ii. 612; Dicey, *The Constitution*.] See Billeting; Commission; Courts-Martial; Desertion; Enlistment; Furlough; Impressment of Carriages; Military Lands Act; Militia; Volunteers; Yeomanry.

Arrangement, Deed of.—See Deed of Arrangement; Sequestration.

Arrest.—See Apprehension of Criminal.

Arrest on Civil Diligence.—See Civil Imprisonment.

Arrestee.—The person in whose hands an arrestment is used.—See Arrestment.

Arrestment and Furthcoming.—*Nature of Arrestment.*—The diligence of arrestment is defined by Erskine (ii. 6. 2.) as the "command of a judge, by which he who is debtor in a moveable obligation to the arrester's debtor, is prohibited to make payment of his debt or perform his obligation, till the debt due to the arrester who uses the diligence be paid or secured." There are three parties to an arrestment, viz. the arrester who lays on the arrestment, the arrestee in whose hands the arrestment is used, and the common debtor, likewise called the principal debtor, who is debtor to the arrester and creditor of the arrestee.

The diligence is of two kinds, according to the grounds on which it proceeds.

1. When the debt is liquid, arrestment is made in execution.

2. When the debt is future or contingent, or is that of a claimant whose *jus crediti* is not yet established by decree, arrestment is made in security.

The former diligence is an attachment of moveables or of a pecuniary fund for satisfaction of the debt; the latter is an attachment till security shall be found that, in the event of the arrester's debt being liquidated, the fund or moveables arrested shall be made furthcoming to satisfy it. Whether the arrestment be in execution or in security, the arrester's right is only made real when decree of furthcoming is pronounced.

Warrant.—The warrant to arrest is the authority either of the Court of Session or of an inferior judge. When of the Court of Session, it proceeds—

1. On a warrant contained in letters of horning. A charge need not be given on these letters in order to render arrestment competent (*Weir*, 2 Feb. 1814, F. C.).

2. On special letters, which may be obtained from the Court by bill, the creditor exhibiting his ground of debt, which must be liquid, though it need not be registered. When a foreigner procures these letters, they must, to be competent, bear the concurrence of a mandatary (*Johnston*, 23 Jan. 1813, F. C.).

3. By arrestment on the dependence. By sec. 16 of the Personal Diligence Act, 1838 (1 & 2 Vict. c. 114), warrants to arrest may be inserted in the will of summonses before the Court of Session, and, by the Sheriff Court Act of 1853, in petitions before the Sheriff Court. (See also Sheriff Court Act of 1876, Schedule A).

4. By the Personal Diligence Act of 1838, warrants of arrestment may be inserted in extracts of decrees of both the Supreme and the Sheriff Courts. The Act of Sederunt of 1839, regulating procedure in the Sheriff Court, authorises the Clerk to issue precepts of arrestment on production of

a petition with pecuniary conclusions; and by Act of Sederunt, as well as by sec. 19 of the Personal Diligence Act, any warrant or precept of arrestment granted by any Sheriff may be executed within the territory of any other Sheriff on being indorsed by the Sheriff Clerk of such other sheriffdom (see s. 18 and ss. 153–6 of the A. S.); and the precept of arrestment may be issued by the Clerk at any time till the process has ceased to depend before the Sheriff.

Arrestment on the dependence is competent even after the case has been appealed to the House of Lords (*Johnston*, 23 Jan. 1813, F. C.). When the defender is resident abroad, the summons must be preceded by an arrestment *ad jurisdictionem fundandam* to render arrestment on the dependence competent (*Bertrams*, 6 Mar. 1821, F. C.).

By sec. 17 of the Personal Diligence Act of 1838, arrestment on the dependence is competent before executing the warrant of citation, provided the latter shall be executed against the defender within twenty days after the date of the execution of the arrestment, and the summons called in Court within twenty days after the diet of compearance; or, when the expiry of twenty days after the diet of compearance falls within Vacation, or previous to the first calling day, in the session next ensuing, provided the summons be called on the first calling day next thereafter; and if the warrant of citation shall not be executed, and the summons called as stated, the arrestment shall be null, without prejudice to the validity of any subsequent arrestments. This enactment has been extended to the Sheriff Court by A. S. 1839, s. 154.

Arrestments on the dependence are incompetent if the summons contain no pecuniary conclusions, as in purely declaratory consistorial or recissory actions. The summons must conclude for money presently due, not for a debt future or contingent, unless the debtor be *vergens ad inopiam* or *in meditatione fugæ*, in which cases the arrestment should proceed by bill, to give the defender an opportunity of answering before his funds are arrested (*Symington*, 1875, 3 R. 205; *Burns*, 1879, 7 R. 355; *James*, 1886, 13 R. 1153). Arrestments have been sustained in practice, when used on the dependence of a summons of divorce which contained conclusions for accounting to the pursuer for his or her rights as the injured spouse. The arrestment covers expenses of process and interest on the principal sum sued for (*May*, 1825, 4 S. 79; *M'Donald*, 1825, 3 S. 344); but not the expenses of the arrestment itself (*Symington*, *ut supra*).

Application by bill for letters of arrestment must be made "(1) where no warrant to arrest has been inserted in the summons; and (2) though a warrant has been inserted, where arrestment has not been used before citation; or where there has been no citation within twenty days from the date of execution of the arrestment, or where the summons has not been called within twenty days of the diet of compearance or the first calling day in the session next ensuing; when the expiry of the last-mentioned twenty days falls in Vacation, the Personal Diligence Act, 1838, provides that the arrestment shall be null, without prejudice to the validity of any subsequent arrestment duly executed in virtue of said warrant (s. 17). Perhaps, under the saving clause at the end of this section, it might still be competent to arrest on the dependence of a summons containing a warrant: but as this has not been decided, it would be safer in these cases also to proceed by bill and letters" (Mackay, *Manual*, 19). (3) Arrestment in security upon a liquid document of debt before the term of payment, on the ground that the debtor is *vergens ad inopiam*.

Arrestments may be executed in the hands of a person furth of

Scotland, by delivery of a schedule of arrestment at the office of Edictal Citations (Personal Diligence Act, 1838, s. 18). Under the Sheriff Court Act, 1876, s. 12 (5), an arrestment shall be ineffectual when the schedule of arrestment shall not have been personally served on the arrestee, unless a copy of such schedule shall also be sent to the arrestee at his last known place of abode through the post by the officer serving the same, who shall certify in his execution that he has done so, stating the address to which the copy has been sent. The warrant to arrest is executed by leaving in the arrestee's hands, if within Scotland, a schedule or short copy, and returning an execution, either indorsed on the warrant or separately, bearing that his arrestment was duly executed. If the arrestee is furth of Scotland, the arrestment is executed by delivery of a schedule at the office of Edictal Citations at Edinburgh; but in such case the arrestee is not interpelled from paying to the common debtor, unless he, or those having authority to act for him, were previously in the knowledge of the arrestment having been used (*Leslie*, 6 S. 165; 19 & 20 Vict. c. 91, s. 1). But justifiable ignorance on the part of the arrestee may excuse him even if he be in Scotland. Thus the arrestee, before the arrestment, remitted to his agent a sum to pay a debt due at the place where the agent resided, and thereafter left home. An arrestment was used at his dwelling-house. The agent thereafter paid the debt, and it was held that the arrestee, who was ignorant of the arrestment till too late to stop the payment, was not liable in second payment (*Laidlaw*, 1838, 16 S. 367, affd. 2 Rob. App. 490). An arrestment executed neither personally against the arrestee nor at his dwelling-house, but only at the counting-house of a company of which he was a partner, was held inept (*Sharp*, 1822, 1 S. 314). The execution is null unless the messenger and the witness sign it, and are named and described in it (1681, c. 5). The copy delivered to the arrestee must be signed by the messenger, and bear the date of the execution and the name and description of the witness (1693, c. 12). But this Statute, while prescribing these requisites, does not contain any express declaration of nullity. Arrestment being a diligence, the omission of anything essential in the execution, the incorrect description of the debt, or the omission of the requisites of the above Act (1681, c. 5), will be fatal (Bell, *Prin.* s. 2277). An erroneous execution may be replaced by a correct one before being produced in judgment (*May*, 1825, 4 S. 79). Warrant to arrest a ship was granted on summary petition to the Inner House in special circumstances, the circumstances being that a bottomry bond had been granted over a vessel by the master, that the bond was not paid, and that the holder was proceeding to raise action upon it against the master. The vessel had put into Leith, and the bondholder, being unable in the circumstances to arrest it on the dependence, and being apprehensive that it might be removed beyond the jurisdiction, presented the petition (*Lucovich*, 12 R. 1090).

Subjects Arrestable.—All moveable goods belonging to the common debtor in the possession of third parties may be arrested. Household furniture, however, in the occupation of a third party as tenant of a furnished house rented from the common debtor, has been treated as an exception to this general rule. All moveable debts due to the common debtor, whether pure or conditional, are also arrestable, as also are the following:—Arrears of rent or interest; claims in respect of moveable subjects, though their validity or extent may depend on the issue of a suit, seeing they are transmissible by voluntary assignation; ships, by an ordinary warrant of arrestment (*Clark*, 15 D. 750). The arrestment is made by fixing the copy to the main mast

if the ship is masted, and chalking above it the royal initials. If it is not masted, the copy is fixed to the stern. The arrestment was held good though the debtor's name did not appear on the register (*Bell*, 1 M. 183). Arrestment used by the private creditor of the part-owner of a ship authorises detention of the ship till security is granted to the extent of the debtor's interest (*M'Aulay*, 6 March 1821, F. C.). Shares of ships (*Lucovich, ut supra*), and shares in companies (*Borjesson*, 5 R. (H. L.) 215), are arrestable. A beneficiary's interest in a trust estate, if moveable, may be arrested in the hands of the trustees, though the estate itself consists of land or other heritable property, and is not turned into money (*Learmont*, 4 M. 540). Arrestment of a trust fund must be made in the hands of a quorum of trustees (*Black*, 8 S. 367). All bonds on which seisin has not been taken, and which have therefore not been made properly heritable, are arrestable. This was so held for lessening the expense of diligence to creditors; but the rule applies only to contracts and obligations, and does not cover adjudications, wadsets, or other personal rights to land which are not debts proper (1644, c. 41, revived 1661, c. 51; *Stewart*, Mor. 705; *Lockhart*, Mor. 701). Where the bond is moveable, or when it is heritable, but is incomplete through no seisin having been taken, an arrestment will carry the whole capital sum, the past interest, and all future interest until payment. But where the bond is heritable, perfected by seisin, the capital sum is not touched by the arrestment, which only secures the interest which is already due, or which has become current at the time of the laying-on of the arrestment. A bond due to a wife was held not attached by an arrestment, which was held to have secured only the past and current interest (*Clunies' Crs.*, Mor. 713). The price of heritable subjects vested in trustees for behoof of creditors (*Grierson*, 1780, Mor. 759), or for behoof of legatees, may be arrested (*Douglas*, 1796, Mor. 16213). Past-due interest upon an alimentary debt by him at whose expense the aliment was supplied; ministers' stipends (*Hale*, 1736, Mor. 711; *Learmouth*, 20 D. 418); the salary of a professor (*Laidlaw*, 1801, Mor. Arrestment, App. No. 4); of an extractor of the Court of Session (*Miller*, 11 July 1827, 5 S. 926); of the rector of an academy (*Murray*, 11 S. 599); of a pursuivant-at-arms (*Moinet*, 11 S. 348); a clerk's salary in municipal offices (*M'Intyre*, 11 S. 658), are arrestable. The Court will consider the circumstances of the common debtor, and, while sustaining the arrestment, may do so under reservation of a reasonable aliment. As to army and navy pay, see 47 Geo. III. c. 25, s. 4; 19 & 20 Vict. c. 79, s. 149. Arrears due to officers in the army are arrestable (*Brodie*, 1715, Mor. 709), but not half pay. Macers' fees (*Cunningham*, 3 B. S. 393); the dues payable to the principal keepers of the Parliament House (*Holiday*, 1773, Mor. 729); conditional debts, for the condition after it is purified acts *retro* to the date of the ground of debt (Ersk. iii. 6. 8; *Marshall*, 10 D. 328); contents of a policy of insurance during the life of the party insured. If he dies before another premium falls due, the arrestment is effectual; but it is not settled what is the effect of the arrestment after another premium has fallen due (*Strachan*, 13 S. 954; *Bankhardt's Trs.*, 9 M. 443). The rule that the arrestee must have possession of the subject arrested when the arrestment is laid on, suffers exception in the case of an insurance broker, premiums being arrestable by the insurer's creditors in the hands of the broker, though he has not, in fact, received them (*Pitcairn*, 7 Feb. 1809, F. C.). Rents and interest so far as current only are arrestable, because what falls due afterwards is accounted future debt; but an arrestment used between Martinmas and Whitsunday in the hands of a tenant affects not only the past-due rent, but that which does not become payable till Whitsunday, for its term is current, because it

has begun to run as from Martinmas, and therefore it is accounted a present debt (*Livingston*, 1795, Mor. 769). This principle applies in regard to all termly payments, however short (*Smith & Kinnear*, 9 D. 1344). But arrestment on the term day will not affect the half-year's rent then ensuing, that day being considered as the last day of the preceding term (*Wright*, 1802, Mor. 15919; *Pindar*, 1824, 3 S. 69). Where the conventional term of payment is postponed beyond the legal term, the arrestment of rents is regulated by the latter (*Handyside*, 15 Jan. 1813, F. C.). When annuities due to widows are arrestable, there is no current term, because whether any annuity shall fall due to her at the next term after the arrestment depends on her surviving that term. But the arrestment was sustained where the widow actually survived the next term (*Corse*, 1705, Mor. 767).

All debts in which the debtor is personally bound are arrestable. But arrestment cannot attach debts whereof the term of payment has not yet come, "for it is presumable that the debtor has got the term of payment postponed, from a view that he may in the intermediate time have a free administration of his whole estate, and thereby raise a fund sufficient for the payment of his debts" (Ersk. iii. 6. 10). But if the debtor be *vergens ad inopiam*, arrestment for security may be used on a future debt (*L. Pitmedden*, 1678, Mor. 813). It may also proceed when the debtor is *in meditatione fugæ*, or when there are other special circumstances calling for the exercise of the Court's discretion (*Smith*, 6 R. 1107; *Burns*, 7 R. 355). Future or contingent annuities may be arrested (*Macdonald*, 15 Jan. 1811, F. C.; Bell, *Com.* i. 338; ii. 73).

Subjects not Arrestable. — Bills and promissory notes, which pass from hand to hand like money, are not arrestable (Bell, *Com.* ii. 71, 72; *More*, 1766, Mor. 12259). Sums destined by the granter for a special purpose cannot by arrestment be inverted, contrary to the granter's intention, to any other use (*Baillie*, 1674, Mor. 703; *Wight's Trs.*, 3 D. 243; *Mags. of Dundee*, 1 M. 701). Upon this ground, alimentary rights for the personal subsistence of the grantee thereof are not arrestable (*Urquhart*, 1738, Mor. 10403; *Harvey*, 2 D. 1095; *Smith*, 17 D. 778). But the person who has furnished the alimony may arrest the past-due interest: and the fund, in so far as it is in excess of a fair aliment, is available to other creditors (*Livingstone*, 14 R. 43). Annuities to ministers' widows and sums to their children under the Statutes establishing the Widows' Fund (19 Geo. III. c. 20, s. 78). Annuities due to the widows under this Statute cannot be assigned before the term of payment (*Mackenzie*, 1791, Mor. 10413); but annuities under the Schoolmasters' Widows' Fund are arrestable (*Irvine*, 7 S. 317; but see 9 & 10 Vict. c. 226). Servants' wages are not arrestable (see 1 Vict. c. 41, s. 7, whereby the wages of labourers and manufacturers, so far as necessary for their subsistence, were declared not arrestable; and 8 & 9 Vict. c. 39, whereby all arrestments of wages on the dependence of small debt summons are illegal).

By 33 & 34 Vict. c. 63, wages of all labourers, farm-servants, manufacturers, artificers, and workpeople, are free from any arrestment, except in so far as they exceed twenty shillings a week, or unless the diligence is used in virtue of decree for aliment, rates or taxes, and sets forth the nature of the debt (*M'Murchy*, 15 R. 375). Pensions granted by the Crown, because they are alimentary (A. S. 11 June 1613; Bell, *Com.* i. 128), and salaries annexed to Crown offices, and to all offices in so far as they amount to no more than a reasonable allowance for the decent

support of those who are named to them, also being alimentary, are not arrestable.

Future debts, *i.e.* debts not due by the arrestee till after the execution of arrestment, are not arrestable. Claims which depend on the issue of a suit are not considered as future debts, and therefore they are arrestable: for the sentence, when pronounced, goes back to the period at which the claim was first founded (*Wardrop*, 1744, Mor. 4860).

An obligation *ad factum prastandum* is not arrestable (*Blackwood*, 1702, Mor. 689; *Ross*, 1712, Mor. 690). Arrestments can only attach a debtor's interest *tantum et tale* as it stands in him (*Chambers' Trs.*, 5 R. (H. L.) 151).

In whose Hands Arrestment may be made.—The subjects to be arrested must not be in the hands of the common debtor. They must be in the possession of one indebted to the common debtor. A leading principle in this connection is that the arrestment must not be used in the hands of one indebted to the common debtor's debtor (Bell, *Prin.* s. 2276). Any one who is bound to account to the common debtor, as a trustee or a judicial factor, is one in whose hands arrestment can be used; and arrestment is competent in a trustee's hand although the estate be heritable, provided the common debtor's interest in the trust fund be moveable (*Learmont*, 4 M. 540; *Chambers' Trs.*, 5 R. (H. L.) 151). Arrestment is not to be used in the hands of a pupil or an idiot, but in the hands of his tutors and curators (Ersk. iii. 6. 4). An arrestment was held inept which was used in the hands of two out of six trustees, a majority of the trustees having been declared to be a quorum (*Black*, 8 S. 367). "It is usual to serve schedules of arrestment on all the trustees; and this form, whether necessary or not, ought to be observed, as the most effectual means of interpelling the trustees from paying to the beneficiary" (M'Laren on *Wills*, 851).

Arrestment may, however, be used in the hands of a minor. If the person in whose hands arrestments would be used have committed the general management of his affairs to commissioners, arrestments may be used in their hands, but not in the hands of a mere factor or steward, who is debtor to his employer, but not to the common debtor (*Campbell*, 1752, Mor. 742). By sec. 3 of the Mercantile Law Amendment Act, 1856, a seller of goods was permitted to arrest the same while in his own hands or possession, but this is repealed by the Schedule of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71). See the substituted provisions in secs. 38 to 43 of the Act.

Arrestments may be used in the hands of corporations as well as of individuals; in the case of incorporated joint-stock companies, by using them in the hands of the treasurer or manager, or in the hands of the managers and directors (see *Macdonald*, 9 R. 211): in the case of companies registered under the Companies Acts, by arresting in the company's hands at their registered office (Companies Act, 1862, s. 62): in the case of railway companies, in the same way at the principal office, or in the hands of the secretary, or, if there be no secretary, of one of the directors.

Arrestment in the hands of the agent of a branch bank was found inept (Ersk. iii. 6. 5). But, as a general rule, a beneficiary under a trust who has raised an action against the trustees for payment of money alleged to be due to him under the trust, is not entitled to use arrestments on the dependence, so as to prevent the trust funds coming into the hands of the trustees.

Goods cannot be arrested in the hands of a servant, clerk, or steward of

the common debtor; but where the common debtor had placed the goods in the hands of his law agent, and had gone abroad *animo remanendi*, they were held arrestable, though not removed from the client's house (*Brown*, 13 D. 149). Arrestments in the hands of law agents of the proceeds of a bond due to a client were sustained (*Telford's Exr.*, 4 M. 369). Funds consigned in Court may be arrested in the clerk's hands, but only subject to the orders of the Court (*Pollock*, 6 D. 1297). When the Court had granted special warrant to a party to uplift a sum consigned in bank upon a petition to that effect, an arrestment by an agent in the process in the hands of the bank of a part of this sum was held incompetent (*Rennie*, 10 D. 223). Arrestments of the landlord's furniture in the hands of the tenant of the house is incompetent (*Davidson*, 1784, Mor. 761). Arrestment may be used in the hands of one employed to recover payment of bills, or to sell goods, or to recover money, for he is under obligation to do diligence and to account (Bell, *Com.* ii. 74). When goods have been appropriated to a specific purpose in the hands of another, or where they have been consigned to an agent for the benefit of others, to whom notice is given so as to complete their right, arrestment is incompetent. And where goods were consigned with instructions to pay certain creditors named, who agreed to accept payment, the arrestment was bad (*Stalker*, 1759, Mor. 745). An arrestment is ineffectual if the arrestee is not in actual possession of the funds, *e.g.* a consignee before the goods have come into his hands, or a factor who has sold and delivered goods but not received payment (Bell, *Com.* ii. 75). When one has not the custody or possession of the goods, although he may have complete power over them, an arrestment in his hands will be bad. But the arrestment will be sustained if the goods are in the possession of his servant as his mere hand (*Hunter*, 1733, Mor. 736).

Effect of Arrestment.—Arrestments interpel the arrestee from making payment to the common debtor, but arrestment on the dependence of an action is personal to the arrestee, and his heir requires to be interpelled by another arrestment, otherwise he may with safety pay to his creditor. But an arrestment continues to affect the subject after the death of the arrestee, and a furthcoming may be raised upon it against the heir while he holds the fund, and an arrestment after the arrestee's death in the hands of the heir is postponed to one which had been used in the hands of the ancestor (*E. Aberdeen*, 1738, Mor. 775). Arrestments continue in force after the death of the common debtor, but an arrester before the death who had not obtained decree of furthcoming was postponed to a creditor who, after the death, had confirmed the debt arrested as executor-creditor to the deceased (*Carmichael*, 1742, Mor. 2791; *Wilson*, 1823, 2 S. 383). But an arrestment before the debtor's death is preferable to a later arrestment also before the debtor's death, though the latter be followed by the first decree of furthcoming, and likewise to an assignation not intimated during the debtor's life (Bell, *Com.* ii. 72). An arrestment for a Crown debt transfers to the Crown, preferably to all other creditors, all right to and interest in the arrested fund competent to the Crown debtor, to such extent as may be requisite to satisfy and pay the entire debt due to the Crown, including interest and expenses, and the arrestee may pay without furthcoming (19 & 20 Vict. c. 56, s. 30). An arrestment subsists after the death of the arrester, who arrests for his heirs as well as for himself. The arrestment subjects the arrestee to a claim for the value of the arrested fund if he part with it, but it does not entitle the creditor to vindicate it from third parties who have acquired it *bonâ fide*. Arrestment used on the dependence remains in force after a decree of absolvitor where an appeal has been taken

to the House of Lords (*Countess of Haddington*, 1822, 1 S. 362). But the Court there recalled on equitable considerations arrestments used after the decree of absolvitor. Wherever a decree is suspended, arrestments on it may be loosed though laid on before the suspension (*White*, 1741, Mor. 802). A trustee, after arrestments have been used in his hands, is not entitled to make advances to the truster (*Bank of Scotland*, 1826, 4 S. 811). When arrestment to found jurisdiction has been used, and the foreign owner has thereby been made a party to the process, the arrestment is spent, and the arrestee is no longer, as in a question with the arrester, under any obligation to retain in his hands the moveables which the arrestment affected (*North*, 17 R. (H. L.) 60). It has been held that a single arrestment is not a sufficient ground for raising a multiplepoinding, and that the proper remedy of the arrestee is a suspension of a threatened charge (*Mitchell*, 8 M. 154; but see *Dill*, 12 R. 404). As to arrestments in bankruptcy, see BANKRUPTCY, and the Bankruptcy (Scotland) Act, 1856 s. 12.

BREACH OF ARRESTMENT.—If the arrestee, nothwithstanding the arrestment, make payment or delivery to the common debtor, he will be liable to pay the debt over again to the arrester, and is liable criminally for breach of arrestment. In *Inglis* (5 M. 320), a breach of arrestment was held to be not quite parallel with a breach of interdict, but might still be treated as a contempt of Court.

FURTHCOMING.—An arrestment is only inchoate diligence. Though it is not merely prohibitory like an inhibition, yet it is a step of diligence which, to be completed, requires a furthcoming, which is an action raised by the arrester against the arrestee to have him ordained to make the subject or debt arrested furthcoming. It is competent both in the Court of Session and in the inferior Courts. A furthcoming may be raised in any Sheriff Court to whose jurisdiction the arrestee is subject, although the common debtor may not reside within such jurisdiction (Sheriff Court Act, 1876, s. 47; Small Debt Act, 1838, s. 9; Debts Recovery Act, 1867, s. 6). The common debtor as well as the arrestee must be called as defender, and the grounds of action are (1) the debt due by the common debtor to the arrester, (2) the arrestment, and (3) the debt due by the arrestee to the common debtor. The conclusions are that the arrestee and common debtor for his interest should be ordained to make furthcoming, payment, and delivery of the sum owing by the arrestee to the common debtor, and arrested in his hands by the pursuer, or of so much thereof as will pay the debt and the expenses of the arrestment. There may be a conclusion for warrant to sell arrested goods, and to apply the proceeds in extinction of the debt. The expenses of the furthcoming cannot be made good out of the arrested subjects (*May*, 1825, 4 S. 76), but the pursuer gets decree therefor against the common debtor. The pursuer may, however, obtain decree against the arrestee for the expenses occasioned by his opposition. The sum recovered from the arrestee includes the original debt, interest from the date of arrestment, and the expenses of constituting the debt and arresting.

The pursuer must have as his title a decree or other liquid ground of debt (*Cunninghame*, 15 S. 687). Both the arrestee and the common debtor may lodge defences, as well as any person having an interest in the subjects arrested. The arrestee is not allowed to dispute the debt due by the common debtor to the arrester (*Houston*, 11 D. 1490), but he may plead the invalidity of the arrestment, or that no subjects have been arrested in his hands, or that the common debtor has not been duly called. He

may, in short, plead every defence against the arrester which he could have pleaded against the common debtor. He has an interest to see that the common debtor has been made a party to the proceedings, and may plead that the debt in respect of which the arrestment proceeded was not duly constituted against the common debtor, on the ground of the latter not being subject to the jurisdiction of the Court (*Smith*, 5 S. 7). "The arrestee may refer the existence of the debt to the common debtor's oath, unless he is bankrupt or the arrester's right is founded on an intimated assignation" (Mackay, *Manual*, 381). The arrestee may deny that he is indebted to the common debtor, and, according to Erskine, may refer this defence to the common debtor's oath, which will be effectual against the arrester (Ersk. iii. 6. 16). The common debtor may defend on the ground that the arrestment is invalid or that he is not indebted to the arrester. The procedure in a furthcoming is the same as in an ordinary action. Decree completes the arrester's right to the subjects arrested, and excludes all co-creditors from poinding them afterwards. The decree, whatever the nature of the subject arrested may be, is a judicial assignation to the arrester of that subject even before the sentence is carried into execution (Ersk. iii. 6. 17).

Competition of Arrestments.—Preference is given to the first in date, even though the difference be of hours only, provided the precise hours are marked in the executions. But where two arrestments were used on the same day, and the execution of one bore that it had been laid on between six and eight p.m., and the execution of the other did not specify any hour, the former was, in the absence of proof, preferred (*Hertz*, 37 Sc. Jur. 365). If the prior arrester, however, neglects to prosecute his diligence for such a time as may reasonably infer the abandoning of it, he loses his preference, and a subsequent arrester who has obtained decree of furthcoming will be preferred. Three years was held not to be such *mora* as inferred abandonment (*Lister*, 1787, Mor. 824). Preference is given to arrestments in the order of priority "whether the arrestment be on the dependence, or on a decree, or for debts not yet due, or on debts already payable, provided dependency shall have been closed, or the debt have become payable before the issue of the competition" (Ersk. *Prin.* iii. 6. 9).

Competition between Arresters and Assignees.—An assignation granted by the common debtor, and completed by intimation before arrestment, is preferable to the arrestment, because the intimated assignation divests the common debtor; but where the arrestment is used before intimation, the arrester is preferred to the assignee, because the arrestment renders the subject arrested litigious, after which it cannot be affected by any voluntary deed of the debtor (Ersk. iii. 6. 19). If the intimation is of even date with the arrestment, they are to be preferred *pari passu* if the hour in which they were respectively used do not appear.

Recall and Restriction of Arrestments.—The Lord Ordinary before whom any summons containing warrant to arrest shall be enrolled, or before whom any action, on the dependence whereof letters of arrestment have been executed, has been enrolled, and the Lord Ordinary on the Bills in vacation, on petition duly intimated to the pursuer (to which petition answers may be ordered) may recall or restrict such arrestment on caution or without caution, and dispose of the question of expenses, and his judgment shall be subject to the review of the Inner House by a reclaiming note lodged within ten days (Personal Diligence Act, 1838, s. 20). By sec. 21 of the same Statute, the Sheriff from whose books a warrant of arrestment has been issued, on petition duly intimated to the creditor, may recall or

restrict such arrestment on caution or without caution, provided that the Sheriff shall allow answers to be given in to the said petition, and shall proceed with the further disposal of the cause in the same manner as in summary causes, and his judgment shall be subject to review in the Court of Session. The arrestment may be recalled on caution or without caution. The caution may guarantee that the subjects attached in the hands of the arrestee shall be made furthcoming, or that the debt sued for, with interest and expenses, shall be paid if found due. When the arrestments are loosed, the arrestee may safely pay to his creditor. This remedy is probably available only to the common debtor. The arrestee, it is thought, has no right to it, his remedy being to await and defend the action of furthcoming. In *Vincent* (5 R. 43), the petitioner, on the averment that arrestments had been wrongously laid on, the goods arrested having been sold and delivered to him by the common debtor before the date of the arrestments, petitioned for their recall. The respondent averred that the sale founded on was not *bonâ fide*, but was simulated with the object of defeating his diligence. It was held that the question truly being whether the arrestments were valid or not, could not be tried in a petition for recall, but only in an action of furthcoming. The Lord President observed: "The petition contains allegations of fraud, and involves a proof at large. Such a question can only be tried in the furthcoming, which is the appropriate action for deciding all such questions. In an application of this kind we must be able to say that arrestments should never have been used at all, or else to say that they should be recalled on caution being found. We cannot allow a proof."

The Personal Diligence Act of 1838 requires that the petition for recall be duly intimated to the pursuer, but in special circumstances intimation may be dispensed with (*Mellis*, 1872, 9 S. L. R. 630). Arrestments may be recalled by a letter under the hand of the arresting creditor, and cannot afterwards be revived so as to compete with a second arrestment (*Ewing, May & Co.*, Dec. 1813, F. C.). A third party is not entitled to obtain recall of arrestments on the dependence of an action, on the ground that the subjects alleged to have been arrested truly belonged to him. If the fund arrested belong to the common debtor, then the arrestments are valid, and ought not to be recalled. But if the fund belong to the petitioner, then the arrestments in no way affect him, and there is therefore no need to recall them, for they do not touch the fund. A petition for recall of arrestments always assumes that they have been well laid on, so as to attach certain specific debts, or the debts generally which the arrestee may owe to the common debtor, and the Court is prayed to interfere as a Court of Equity to prevent an oppressive use being made of the arrestments (*Brand*, 20 R. 29). In *Buchanan* (9 R. 926), Lord Rutherfurd-Clark expressed the opinion that the word "enrolled," under the 20th section of the Personal Diligence Act, 1838, above referred to, implied that defences in an ordinary action must be lodged before the petition can be presented. In the same case the Court disapproved of the making up of an independent record on a separate petition, holding that the proper course was to make a motion in the cause.

A petition for recall of arrestments may competently be presented to the Inner House (*Matthew*, 21 D. 18), even when the process depends before a Lord Ordinary, for the Act of 1838 in conferring power on the Lord Ordinary to recall arrestments did not deprive the Inner House of the jurisdiction previously possessed by it (*Hart*, 3 M. 336). In cases of great urgency, the Court may be moved to recall arrestments before defences are lodged. When arrestments are recalled, expenses must either be obtained

or reserved; and when an interlocutor was pronounced recalling the diligence and allowing extract, without disposing of or reserving the question of expenses, it was held incompetent to move for expenses either in the petition or in the relative action (*Dobbie*, 10 M. 810). When arrestments are rightly laid on, the expenses of using the arrestments do not enter into the expenses of the original action. Each party must bear his own expenses in getting the arrestments out of the way. When the defender tenders the sum decerned for and the expenses of the action, that must be accepted as a satisfaction of the decree. The arresting creditor is not bound to discharge the arrestments voluntarily, or to grant a letter which will entitle the arrestee to pay or hand over the sum arrested, and is not liable in the expenses of the proceedings which the defender may have to take for that purpose (*Roy*, 18 R. 717). The matter of the expenses of a petition for recall is in the discretion of the Court. The Court recalled arrestments of a ship to the effect of allowing the ship to sail, upon the petitioner, who was a mortgagee in possession, consigning a sum sufficient to cover the claim of the arrester as a surrogatum for the ship (*Stewart*, 10 R. 382). In *M'Phedron* (16 R. 45), the Court recalled arrestments of a ship, and prohibited further arrestments, on the petitioners finding caution or consigning a certain sum. As to loosing of arrestments under the Small Debt Act, see 1 Vict. c. 41, s. 8; and under the Debts Recovery Act, see 30 & 31 Vict. c. 96, s. 5. The Court of Session may loose arrestments laid on by an inferior Court (*Drummond*, 12 S. 454). A cautioner in a general loosing of arrestments, being a cautioner *judicatum solvi*, is entitled to the privileges of an ordinary cautioner, and may plead that the claim of the arrester against the common debtor is not well founded (*MacDougall's Tr.*, 3 M. 68). Mackay, *Manual*, 577, gives the following cases illustrating the grounds which will justify the recall of arrestments:—*Hamilton*, 12 D. 745; *Neilson*, 24 D. 956; *Cullen*, 24 D. 1280; *Macfarlane*, 40 Sc. Jur. 189; *Macdonald's Trs.*, 9 S. L. R. 72; *Wilson*, 3 R. 18; *Symington*, 3 R. 205.

Wrongous use of Arrestments.—As a party is entitled to raise an action to recover payment of a debt, so he is entitled to use arrestments for the same end. A party complaining of the arrestments as illegal cannot recover damages unless he show that the arrester acted maliciously and without probable cause. As arrestments are obtained without special averments in support of the application for them, damages are not due unless the diligence is irregular, or has been used maliciously and without probable cause; whereas in the case of a warrant for the use of particular diligence, such as interdict, requiring special averment in the application for a warrant, it is enough to show that the diligence was wrongful or illegal, without showing that it was exercised maliciously and without probable cause (*Wolthekker*, 1 M. 211; *Kennedy*, 5 R. 302). Damages may be recovered whether the arrestment be on the dependence, or in execution, or to found jurisdiction. If an arrestment is used without warrant, or if the warrant be used against the wrong person, the complainer may recover damages without showing malice and want of probable cause, or even special damage, seeing he has sustained a legal wrong.

Prescription of Arrestments.—Arrestments for sums not exceeding £12 prescribe in three months unless from time to time renewed (1 Vict. c. 41, s. 6, extended by 16 & 17 Vict. c. 80, s. 26). In all other arrestments the period is three years. The period was originally five years, the Statute 1669, c. 9, providing that any arrestment "already used upon the ground aforesaid shall prescribe within five years of the date hereof, and

that all arrestments used or to be used upon dependence of actions shall likewise prescribe within five years after sentence is obtained in the said actions, if the said arrestments be not pursued or insisted in within that time." By the Personal Diligence Act, 1838, s. 22, the period was reduced to three years.

The necessity for "pursuing or insisting on" arrestments within the three years received forcible illustration in the case of *Jameson* (14 R. 643). This period is reckoned from the date of using arrestment, in the case of arrestments in execution, and from the date of the decree in the action, when raised on the dependence of such action.

Arrestment *jurisdictionis fundandæ causâ.*—The general principle of the law is *actor sequitur forum rei*, but a foreigner may be subjected to the jurisdiction of the Supreme Court by the use of arrestments *ad fundandam jurisdictionem*. By the Sheriff Courts Act, 1877, s. 8 (4), the Sheriff's jurisdiction is extended to any action against a foreigner, provided (1) that such action would be competent in the Court against a Scotsman subject to the jurisdiction thereof, and (2) that a ship or other vessel belonging to such foreigner, or of which he is part owner or master, shall have been arrested within the sheriffdom.

The Court thus expressed itself in *Cameron* (16 S. 907): "It is not necessary to inquire on what principle the custom is founded of arresting moveables to found jurisdiction against their owner, being a foreigner. It is plainly in opposition to the general doctrine both of the Roman law and modern jurisprudence, both of which admit the maxim, '*actor sequitur forum rei*.' It was borrowed in Scotland from the law of Holland, where, as Voet observes, it had been introduced contrary to principle, from views of expediency, and for the encouragement of commerce."

The arrestment may be by warrant of the Sheriff, or by letters passing the Signet on a warrant from the Bill Chamber. The arrestment should be used before the action is raised. It is not enough that it be executed before defences are lodged (L. Watson in *North*, 17 R. (H. L.) 60, explaining *Walls' Trs.*, 15 R. 359).

It was in one case held enough to sustain the arrestment that there was *primâ facie* evidence of funds in the hands of the arrestee; and a preliminary defence, that it would be found on investigation that there were no funds, was not sustained, because there was not such *primâ facie* evidence (*Douglas*, 9 S. 856). But where the defender pleaded no jurisdiction, because at the date of the arrestment the arrestees were not debtors to the defender, the Court allowed a proof, which disclosed that at the date of the arrestment the balance on an accounting was in favour of the arrestees. The Court sustained the plea of no jurisdiction, although the pursuers maintained that it was enough that at the date of the arrestment there was a relationship between the defender and the arrestees, which made the latter liable to an accounting, even though ultimately it should be found that there was a debit balance against the defender. Lord M'Laren thus expressed himself: "I know of no decision which has gone the length of excluding inquiry into the state of the cash account between the parties for the purpose of seeing whether there are funds subject to arrestment" (*Napier*, 19 R. 412; see also *Baines*, 6 R. 846).

For the purpose of founding jurisdiction, it seems to be immaterial how small the sum arrested may be. £1, 8s. 6d. was held enough in *Shaw* (7 M. 449), and a contingent claim against a bankrupt estate, or

an interest in that estate, will suffice to found jurisdiction (*Lindsay*, 22 D. 571): but if there are no assets in the hands of the trustee on the bankrupt estate against whom the defenders had a contingent claim, the plea of no jurisdiction will be sustained (*Wyper*, 4 R. 444).

The point of time to ascertain whether anything has been arrested is the date of citation upon the summons. If at that date there is a valid arrestment against the defender, and the summons is duly served, the action has commenced, and the jurisdiction of the Court over the defender in that suit is fully constituted. When he has been competently brought into Court, he cannot thereafter escape from its jurisdiction by reason of circumstances supervening which, had they originally existed, would have exempted him from its process (*North*, 17 R. (H. L.) 60). The subjects arrested must be capable of attachment by diligence in execution, and so the arrestment of books and documents of no mercantile value will not found jurisdiction (*Trowsdale's Tr.* 9 M. 88). If jurisdiction be once founded, the decree is not limited in the action to the sum or effects arrested. They will ground a petitory action to any amount, however great (*Kirkpatrick*, 16 S. 1200; *Lindsay*, 22 D. 571; 3 Macq. 107).

An arrestment against a foreign firm of John Hare & Co. was held competently laid on in said firm-name alone, but an arrestment of funds not due by the arrestee but by a firm of which the arrestee was a partner, was held to be bad (*Parnell*, 16 R. 917); and similarly arrestment of funds not due to the common debtor but to a partnership of which he is a member is bad.

An arrestment of funds as belonging to the executors-nominate of a deceased foreigner not confirmed by these executors was held to be inept as the ground of a decree of constitution and payment against the executors (*Houston*, 1824, 2 S. 672, affd. 1 W. & S. 199). The mode of proceeding against the funds of a deceased debtor whose executors are foreigners is to arrest to found jurisdiction, and then to raise an action concluding for decree *cognitionis causa tantum*. On this ground of debt the creditor may be confirmed executor-creditor (*Ashton*, 1773, Mor. 4835). Arrestments against executors-nominate unconfirmed are ineffectual unless the property arrested has been specially bequeathed to them, such bequest being considered a special assignation within the meaning of the Act 1690, c. 26 (*Innerarity*, 2 D. 813). When a foreign executor has confirmed in Scotland, arrestment of executry funds gives jurisdiction, but not otherwise. The executor being confirmed in this country is *quoad* the funds a Scotch executor (*M'Morine*, 7 D. 270). But the Court may refuse to entertain proceedings in this country against a foreign executor where proceedings here would be attended with inconvenience (*Tulloch*, 8 D. 657). Where a person resident in England intromitted with a Scotch executry estate, the arrestment of private funds in Scotland was held sufficient to found jurisdiction against her in a question between her and beneficiaries claiming a share of the executry estate (*Macadam*, 11 M. 860). On the death of a defender against whom jurisdiction had been founded by arrestment, arrestments must be used of new to found jurisdiction against his executor if resident abroad (*Cameron*, 16 S. 907). So where an action of transference was raised against the two executors-nominate of a deceased Englishman who had neither heritable nor moveable property in Scotland and both executors resided abroad, although one of them had heritable estate in Scotland, it was held that the Court had no jurisdiction (*Mackenzie*, 6 M. 932). A ship can be arrested to found jurisdiction against a part owner, but not after it has left port (*Carlberg*, 5 R. 188, affd. H. L. 215). After the defender has been subjected to the jurisdiction of the Court by arrestment,

the pursuer, if he wishes to arrest in security, must arrest on the dependence of the action or by separate letters, as otherwise the arrestee may pay away the funds arrested to found jurisdiction (*North*, 17 R. (H. L.) 60). An arrestment to found jurisdiction is of no avail to any one except to him who has used it (*Cameron*, 16 S. 907), and if another action has to be raised there must be a new arrestment. As arrestment founds jurisdiction against the arrestee only in the particular action for the purpose of which it is used, if in such an action new pursuers are introduced by amendment or otherwise, the plea of no jurisdiction will be sustained (*Anderson*, 10 M. 217). See JURISDICTION; RECONVENTION; ACTOR SEQUITUR FORUM REI.

Arrestment, Wrongful.—See ARRESTMENT; DILIGENCE, WRONGFUL USE OF.

Arrhæ, Arræ, or **Arrabo.**—The word, which occurs in the texts in each of these different forms, appears to be of Phœnician origin, and is employed in Roman law to denote anything, *e.g.* a ring, given to bind a bargain (cp. "earnest," "arles," "erles-penny"). *Arrhæ* was merely a proof of the contract having been finally concluded; but it appears to have been so common that both Gaius and Justinian deem it necessary to warn their readers against supposing that *arrhæ* was essential to the existence of a binding contract (*Inst.* iii. 23, pr.; *Dig.* 18. 1. 35, pr.). The *arrhæ*, unless where it was given in part-payment of the purchase money, had to be restored on the fulfilment of the bargain, and indeed could be recovered by legal action (*Dig.* 19. 1. 11. 6). In sales accompanied by a LEX COMMISSORIA (*q.v.*), or forfeiture clause, the buyer, in case he made default, forfeited to the seller what he had given as earnest (*Dig.* 18. 3. 6). Justinian enacted that when *arrhæ* was given to secure the making of a purchase (*super faciendâ emptione*), the buyer, if he refused to fulfil the bargain, should forfeit the *arrhæ*; the seller, if he refused, should repay the *arrhæ*, and as much again; and this, whether the contract was intended to be in writing or not, and though no special agreement had been made as to what was to be done with the *arrhæ* (Cod. iv. 21. 17. 2). It is scarcely possible to harmonise these provisions in all points with the passage in *Inst.* iii. 23, pr., and opinions differ as to whether the enactment in the Code refers to an actually completed contract, or whether it refers to a case where negotiations for a sale are still pending (cp. Pothier on *Sale*, ss. 507 *et seq.*; Savigny, *Oblig.* s. 79; Benjamin on *Sale*, 177). The Scots institutional writers assign the same functions to *arrhæ* as did the classical jurists (Stair, i. 14. 3; Ersk. iii. 3. 5 *et seq.*, in which passage the relation of the Scots law of earnest to the Roman law of *arrhæ* is fully discussed; see also Bell, *Prin.* s. 173; and as to forfeiture of earnest, *Howe*, 1884, 27 Ch. Div. 89, in which case the relation of the Roman law principles to the law of England is discussed). See EARNEST.

Arriage and Carriage.—An expression used to denote services which tenants or feuars were bound to render to their landlords or superiors (Stair, ii. 4. 7; Ersk. ii. 6. 42). See FEU.

Arrogation.—See ADROGATION.

Arson.—A term of the criminal law of England,—the malicious and wilful burning of the house or outhouse of another man. Wilful fire-raising is the corresponding offence in the criminal law of Scotland. At one time the crime was capital in both countries. By the Act 24 & 25 Vict. c. 99, arson is punishable, as a felony, by penal servitude or imprisonment.—[Stephen, *Com.*, 12th ed., iv. 85, "Fire-raising."]

Art and Part.—See Actor or Art and Part.

Articled Clerk.—This expression is not used in Scotland. The Scotch equivalent is, Apprentice to a Law Agent. See Law Agent.

Articles improbatory and approbatory.—See Reduction; Abiding by.

Articles, Committee of, Lords of the.—This subject, which forms an important chapter in the parliamentary history of Scotland, can only be treated in outline. The first Scottish Parliament, expressly so called, was held by John Baliol at Scone in 1292. From that period down to the Union, the representatives of the Estates (clergy, barons, and burgesses till 1594; then prelates, greater and lesser barons, and burgesses down to the Revolution; later, nobles or greater barons, lesser barons, and burgesses only) sat and deliberated in one House: but from 1367 onwards, their proceedings began to be controlled by committees, which formed a kind of Upper House, and which soon took permanent shape in the Committee, or Lords of the Articles. The duty of this committee was to consider "articles" presented to it, "materis concerning the trew religion and the common weill," and "sutis, complaintis, and grieffes qualifeit in articles," and to prepare measures to be submitted to the whole House. As the kings usually influenced the election and controlled the proceedings of the Lords of the Articles, a royal veto on legislation in the modern sense was rendered practically unnecessary. In 1367, when a committee of this kind is mentioned for the first time, certain members of each estate were elected "to hold parliament," and leave of absence was given to the others. In 1369 and 1371, committees were elected to prepare business for the General Council, and in 1424 a committee was elected to consider "articles presented by the king" (James IV.). From 1467 to 1690 the number of the committee varied from three of each of the three estates to twelve of each of the four classes above named, along with eight officers of State; but the burgesses often had fewest representatives, until an Act of 1587 required an equal representation of each estate.

Besides the sole initiative in legislation, the Lords of the Articles possessed certain judicial and executive functions. Thus, in 1524, under James V., they chose certain lords as members of the King's Secret Council; in 1535 they are empowered to pass Statutes with the force of Acts of Parliament: in 1542 they receive full legislative power; in 1581 they are empowered to make laws on certain articles; in 1593 they and King James VI. enact a Statute; and an Act of 1594 requires four of each estate to meet twenty days before Parliament, in order to consider and present articles to the Lords, while the king might present them at any time.

In 1606 the king is dissuaded by his Secret Council at Perth from presenting a proposed Act to the Lords of the Articles; and from a petition presented the same year by Glasgow to the Secret Council at Edinburgh, it appears that the Lords of the Articles had suspended the ratification of the burgh's ancient liberties.

An Act of Charles I. in 1633 requires the clergy to elect eight of the nobility on the Articles, the nobility to elect eight of the clergy, and the elected clerics and nobles to elect eight barons and eight burgesses, while eight officers of State are to be nominated by the king. The royal control of the Lords of the Articles culminates in 1639, when, in violation of the Act last cited, the king's commissioner nominates eight noblemen as members; but this proceeding, so characteristic of a Stuart monarch, is at once denounced as *ultra vires*. In 1640 the Act of 1594 is repealed; all grievances and other matters are now to be presented in open Parliament: and the same year it is enacted that Parliament may choose Committees of Articles or not as it pleases, that each estate elect its own members, and that the committees treat only of matters previously laid before Parliament and remitted to them for report. But this triumph of liberty is short-lived. Under Charles II., in 1663, the Act of 1633 is re-enacted, the old abuses are revived, and vacancies in the Articles caused by death are filled up by the king's commissioner, *e.g.* in 1672 and 1686. The Revolution of 1689 witnesses the final crisis. Amid great excitement, the Committee of the Articles is declared a national grievance. King William, by way of compromise, proposes that the committee consist of members elected by their own estates, besides the usual officers of State, and that Parliament be not debarred from considering matters rejected by the Lords of the Articles. But the Opposition carries an amendment that the officers of State be not members unless elected, with the result that the Act is vetoed by the king's commissioner. But next year the king yields. The Act of 1690 repeals that of 1663; the permanent and autocratic Lords of the Articles are abolished; the Estates may choose their own committees from time to time, an equal number from each estate; they may dispose of business without the intervention of any committee; and while the officers of State may attend such committees, they are no longer allowed to vote. Thus tardily in Scotland were the constitutional liberties of Parliament successfully vindicated.

[J. Hill Burton, *History of Scotland*; The Scottish Acts; Register of the Privy Council, etc.]

Articles of Association.—See COMPANY.

Articles of Roup.—The conditions of a sale by auction when embodied in a formal deed. At the sale, a minute of exposure and preference is appended and signed by the respective bidders (or at least the highest bidder), and by the judge of the roup, who is usually the AUCTIONEER (*q.v.*) The articles need not be stamped, but the minute should bear an agreement stamp. If either articles or minute contains a clause of registration, a deed-stamp is required. Articles of roup subscribed by the exposer, with the relative minute subscribed by the preferred bidder, are essential where the subject exposed requires writing to constitute a contract of sale, as in the case of heritage (*Aberdein*, 1867, 5 M. 726; see also *Shiell*, 1874, 1 R. 1083). They are also usual where the subject of sale is important, *e.g.* a ship: but many sales by auction

may be carried through in Scotland under verbal or unsigned conditions, which in England require writing, or one of its equivalents, under the Statute of Frauds or the Sale of Goods Act, 1893, s. 4. In a sale of land or other heritage by auction, the articles usually provide that the purchaser shall be obliged within a specified period to grant bond for the price offered, with a sufficient cautioner; and that upon failure not only will the purchaser's interest be forfeited, but the exposer may hold the subjects himself, or may devolve the purchase upon the immediately preceding offerer, who in that event will be obliged to find caution in like manner within a specified period from the date of the devolution: and so on among the whole preceding offerers. Where, by oversight, the purchaser had allowed the period for offering a bond with security to elapse, and intimation of devolution had been made by the exposer to the preceding bidder, the latter was preferred in a question with the highest bidder (*Hannay*, 1788, Mor. 14194). But in another case, differing only from the preceding in that the exposer had not intimated any devolution, the highest bidder, notwithstanding his failure timeously to offer security, was preferred to the preceding bidder (*Walker*, 1787, Mor. 14193). The party in default, besides forfeiting the purchase, is liable to the exposer in damages, the measure of which is the difference between the price agreed on and the price to be got at a new sale; but where the articles provide a specific penalty, the damages will be limited to the penalty (*Johnstone's Trs.*, 19 Jan. 1819, F. C.). Where no sufficient caution is offered within the time specified, the party in default is not entitled to a further period in respect of a preceding offer made by himself (*Davidson*, 19 Jan., 1815, F. C.). A condition in articles of roup of heritage, that purchasers shall be held to have satisfied themselves as to the sufficiency of the exposer's title, and as to the extent of ground and other particulars, will cover an alleged misdescription leading to the non-disclosure of restrictions upon building. In such a case the risk of error is with the purchaser (*Wood*, 1886, 13 R. 1006). The same was held where a purchaser of heritage alleged that, since the sale, he had discovered that a small part of the subjects belonged to himself (*Morton*, 1877, 5 R. 83). Where heritable subjects are exposed for sale under the burdens contained in the title deeds, and the purchaser has an opportunity of examining the title, he is not entitled to repudiate the sale on the ground of an alleged burden disclosed by the title (*Davidson*, 1881, 8 R. 990. See also *Murray*, 26 Jan. 1815, F. C.; *Young*, 1849, 11 D. 1482). In the articles of roup of *pro indiviso* property sold under the orders of Court, it is competent to reserve a power to the *pro indiviso* proprietors to bid at the sale (*Thom*, 1875, 3 R. 161). See AUCTION OR ROUP.

Articles of War.—See ARMY.

Artillery and Rifle Ranges.—The Artillery and Rifle Ranges Act, 1885 (48 & 49 Vict. c. 36), has been repealed, except s. 3, by the Military Lands Act, 1892 (55 & 56 Vict. c. 43). The Ranges Act, 1891 (54 & 55 Vict. c. 54), has also been repealed by the Military Lands Act, 1892, except s. 11, so far as that section relates to the acquisition of land under the Defence Act, 1842, and the Acts amending the same. See MILITARY LANDS ACT, 1892.

Artizans and Labourers' Dwellings.—Artizans and Labourers' Dwellings Act, 31 & 32 Vict. c. 130; Artizans and Labourers' Dwellings Act, 42 & 43 Vict. c. 64; Artizans and Labourers' Dwellings Act, 43 Vict. c. 8; Artizans' Dwellings Act, 45 & 46 Vict. c. 54. See HOUSING OF THE WORKING CLASSES.

Ascendants.—The ascendants of a person for the purposes of heritable succession are his father, and those of his relatives who are his direct ancestors, or are connected with him through his father. In the legal order of succession to heritage, ascendants take after descendants and collaterals. They take in this order—1st, father of defunct; 2nd, father's brothers and their issue, and, failing brothers and their issue, sisters of father and their issue; 3rd, the defunct father's father. The relatives of a defunct through his mother are not among his ascendants for this purpose (Ersk. iii. 8. 9; M'Laren on *Wills*, 3rd ed., 71, 119). See SUCCESSION.

Asleep.—See WAKENING; ADMISSIONS AND CONFESSIONS.

Asleep: Criminal Law.—It is a good defence against a charge of crime that the accused was asleep when he did the act (Macdonald, 13; *Fraser*, 4 Coup. 70). But this must be given notice of as a special defence (Macdonald, 424).

Taking advantage of a woman asleep to have connection with her is a crime (Macdonald, 168; *Sweenie*, 3 Irv. 109; *Palmer*, 4 Irv. 227; *Thomson*, 2 Coup. 346).

Assassination.—Hume says that "in our practice assassination seems not to have been understood, in the strict and most proper sense, of murder committed for hire, and in the quarrel of another; but, more generally, as of any murder done *per insidias et industriam*, or by deliberate lying in wait" (i. 288). The Act 1681, c. 15, made the crime of assassination punishable as treason where the victim had been assassinated on account of service rendered by him to the King or the Church. This Statute further provided that it was treason even to maintain or assert the lawfulness of killing any one for serving King or Church. The Act of 1681 was repealed by 7 Anne, c. 21, s. 7, which provided that assassination and certain other crimes which were declared to be treason by particular Statutes in Scotland, should be dealt with as ordinary capital offences. Erskine (iv. 4. 45) states that "the capital punishment which is annexed to the bare endeavour or attempt to assassinate, though death should not follow, was introduced by the Canon Law, 6to Decretal v. 4. 1, s. 2." Mackenzie also contends (ii. 8. 5) that, where poison is the means employed, attempt to kill is capital. Hume, however, is clearly of opinion (i. 180, 181) that, by our common law, attempt to murder is punishable only by an arbitrary sentence. See ATTEMPT TO MURDER; MURDER.

Assault is criminal attack on the person. It is not necessary that injury be inflicted. An attack by spitting or throwing dirt is an assault (*Cairns*, 1 Swin. 597). It is not necessary that the act done should take

effect, if in its nature it is an assault. Firing at another person, or aiming a blow at him, is an assault, although the shot does not strike him, or the blow fall short or be evaded (*Stewart*, 2 Sc. Jur. 32; *Mar*, Bell's *Notes*, 89). There are also indirect cases, such as hounding a dog on a person, or striking his horse to cause it to run off (*Keay*, 1 Swin. 543), or violently stopping a horse that is being ridden or driven (*Kennedy*, 1 Irv. 533). A very bad assault may be committed by a slight act, such as pushing a person off a train, or down a stair or precipice (*Leys*, 2 Swin. 337). Assault may be committed by violent menace, say with a fire-arm (*Dewar*, 1 Br. 233), although the assailant do not draw the trigger (Alison, i. 175; Macdonald, 153), or cock the weapon (see *Mar*, *ut supra*). If the weapon be not loaded, the offence is still assault, unless the person attacked knew the fact (Hume, i. 443; Macdonald, 153; *Morrison*, 1 Br. 394). Threatening gestures producing alarm of injury constitute assault even without threats by word (*Irving*, Bell's *Notes*, 88), but words alone are not enough.

There must be intent against the person. Injury caused by carelessness or an act of mischief is not assault (*Irving*, Bell's *Notes*, 88; *Keay*, 1 Swin. 543; *Roy*, Bell's *Notes*, 88).

Provocation by words will not justify, it will only palliate assault (Hume, i. 333; Alison, i. 176; Macdonald, 154). Blows justify, if the retaliation is not excessive (Hume, i. 334, 335; Macdonald, 154). Extraordinary provocation would be required to vindicate assault on a wife (*Burnet*, Bell's *Notes*, 91). Cruel ill-usage by a parent might excuse assault by son or daughter (*Dow*, Bell's *Notes*, 87; *M'Anally*, 1 Swin. 210). Provocation must be recent (Hume, i. 336; Alison, i. 178, 179; Macdonald, 155), but a libel published several days before is pleadable (*Cameron*, 5 Deas & Anderson, 257). Verbal provocation must have been very recent, probably at least on same day (Hume, i. 336; Macdonald, 155; *Stewart*, 1 Swin. 540), but a series of provocative wrongs may justify reference to the earlier ones although beyond one day (Hume, i. 336; Macdonald, 155).

Assault may be aggravated by the *intent*, as intent to kill or do grievous injury (Hume, i. 328, 329; Macdonald, 156; *Brown* or *Graham*, Syme, 152; *Loughton*, Bell's *Notes*, 88); intent to ravish (Hume, i. 308, 309; Alison, i. 184–7; Macdonald, 156); [It is doubtful whether this applies in case of a child where no violence was used, but only persuasion (*M'Arthur*, Shaw, 211); but if there be an attempt to have connection, then that is an assault in such a case (*Buchan*, Bell's *Notes*, 84);] intent to gratify lewdness on women, or young persons of either sex (*Thomson* or *Walker*, *Borrowman*, Bell's *Notes*, 86; *Galloway*, Bell's *Notes*, 85; *Johnston*, 2 Br. 261, note; *Philip*, 2 Irv. 243; *Thomson*, 2 Coup. 346); intent to abduct (Hume, i. 329; Macdonald, 156); intent to rob (Hume, i. 329; Alison, i. 188; Macdonald, 157); to intimidate employers or workmen, or the like (Hume, i. 329; Alison, i. 188–93; Macdonald, 157; *Ewing*, Shaw, 64); to extort confession (*Findlater* and *M'Dougall*, 2 Swin. 527); to rescue prisoners (*M'Lellan*, 1 Br. 478).

The following are aggravations in the *mode*:—1. With fire-arms (Alison, i. 179–81; Macdonald, 157), which may be unloaded, if the person believed the weapon to be loaded. Threat is sufficient, without pointing at the person (*Morrison*, 1 Br. 394).

2. Stabbing or cutting (*Affleck*, 1 Br. 354; *Hagan*, 1 Irv. 342).

3. Throwing acids (*Fitchie*, 2 Irv. 485; *Fitzherbert*, 3 Irv. 63).

Assaults by any of these modes with intent to seriously injure, are capital offences (10 Geo. IV. c. 38, ss. 1, 2).

Aggravations from the *extent of the injury* are: danger to life, serious injury to the person, mutilation or disfiguration, fracture, effusion of blood

(Hume, i. 330, 331; Alison, i. 195, 196; Macdonald, 158; *Brown*, 1 Br. 230): communication of venereal disease (*Mack*, 3 Irv. 310).

It is an aggravation if the character of the assault tends to expose the person to great danger (*Thom*, 3 Coup. 332).

Assaults in presence of, or in the domain of, the sovereign, or in the Supreme Courts of Justice, are aggravated (Hume, i. 326, 327, 405; Macdonald, 158).

It is an aggravation if the assault is on the person in his own premises, especially if he is sought there for the purpose (Hume, i. 318; Alison, i. 196, 197; Macdonald, 159; *Williamson*, 1 Irv. 244).

Assaults on parents (Macdonald, 159; *Aloes*, 5 Deas & Anderson, 147; *Beatson*, 1 Swin. 254), on young children, and especially by a parent, on a child by person in charge of it, and especially if indecently (*Brown*, 2 Br. 261), on a wife, on a pregnant woman, on an infirm person, on a clergyman, (*Williamson*, 1 Irv. 244), on a judge (Hume, i. 245), on a magistrate on duty (Hume, i. 329, note (*a*); Alison, i. 193, 194: *Falconer*, Ark. 242; *Nicolson*, Ark. 268), or in reference to official conduct (Alison, i. 194–201, 573, 574: *Duncan*, Syme, 280; *Irving*, Bell's *Notes*, 88), on an officer or Privy Councillor of Crown (Hume, i. 327), or an officer of law because of duty done (Hume, i. 329, note (*a*): Alison, i. 194, 195; see Macdonald, 160, and cases there, as to what constitutes "officer of the law"), on soldiers aiding civil power (*Nicolson*, Ark. 264), on a prisoner by officer in charge (*Findlater*, 2 Swin. 527; see Macdonald, 159, 160, *passim*). Where the aggravation is created by the quality of the sufferer, it must have been known to the offender (*Alexander*, 1 Br. 28; *M'Lellan*, 1 Br. 478).

It is an aggravation of any act of assault that the offender has been previously convicted of any crime inferring personal violence (Crim. Proc. Act, 1887, s. 64).

Assault, Civil Liability for.—Assault, being the malicious use of violence against the person of another, entitles the injured party to a civil action of damages, on the ground that the party committing the assault has been a wilful wrong-doer. An action will lie not only where actual physical hurt has been inflicted, but where an assault has been only technically committed, and the person of the assaulted has not been touched (*M'Laren*, 1859, 21 D. 183; *Hyslop*, 1816, 1 Mur. 22). Throwing a missile, pointing fire-arms (*Tullis*, 1834, 13 S. 698), or threatening to strike at one within reach (*Stephens*, 1830, 4 C. & P. 349), and riding at a foot-passenger, are assaults, although there has been no contact with the body of the assaulted (*Ewing*, 1851, 14 D. 314), unless it appear that the aggressor did not intend to carry out his act (*Tuberville*, 1660, 1 Mod. Rep. 3). On the other hand, where the wrongful intention is against one person, but the violence takes effect on another, the one injured has also an action of damages (*James*, 1832, 5 C. & P. 372). Where there is no wrongful intention, there is no action of damages for assault, although there may be one founded on negligence.

Justification of the use of force may be instructed in various ways. A party to a dangerous game, having consented to the use of force, has no action for injuries received in the course of it (*Stanley*, 1891, L. R. 1 Q. B. 86); while a passer-by, not having consented, has (*Reid*, 1885, 12 R. 1129). A doctor making a medical examination is not acting wrongfully if he has the consent of the examined, or has proper legal authority (*Latter*, 1881, 50 L. J. Q. B. 448). Again, a person is entitled to use force in

self-defence, and in defence of his property, so long as the force is not unreasonably greater than is required for protection (*Dowie*, 1 S. App. 125, 30 May 1817, F. C.; *Oakes*, 1837, 2 M. & W. 791). It is doubtful whether force may be used to eject a trespasser whose offence is merely civil and trivial, but the necessary force may be used to eject a criminal trespasser (*Bell*, 1870, 7 S. L. R. 267). The same rule applies to the case of the removal of a passenger from a public conveyance (*Highland Rwy. Co.*, 1878, 5 R. 887; *Apthorpe*, 1882, 10 R. 344; *North Eastern Rwy. Co.*, 1866, 5 Irv. (J. C.) 237), or from a private place, on account of refusal to comply with a legal condition attached to the contract of admission (*Wallace*, 1885, 12 R. 710). Authority to use force is also enjoyed by a ship-captain. He may restrain passengers for the safety of others on board, and confine sailors for disobedience. He may even chastise apprentices, and a Court of justice will not review his judgment so as to determine whether he was right or wrong in inflicting chastisement, provided always that his act is truly of that character, and not an act of cruelty for his own gratification under cover of his character as captain (*Wight*, 1883, 11 R. 217, 222). At one time masters generally had the power to chastise apprentices (*Forbes*, 1708, 4 Brown's Sup. 708), but this would not now be allowed. Schoolmasters, however, who are in a sense *in loco parentis* to the children, and who must maintain order and discipline, are entitled to chastise in moderation (*Muckarsie*, 1848, 11 D. 4), and are not liable although permanent injury may result (*Scorgie*, 1883, 10 R. 610). But a dangerous instrument must not be used, nor a delicate part of the body struck (*Ewart*, 1882, 10 R. 163).

The justification attaching to self-defence does not cover blows given in response to verbal provocation (*Falconer*, 1837, 15 S. 891), though provocation is an element for consideration in estimating damages (*Thom*, 13 S. 1129; *Anderson*, 1835, 13 S. 1130).—[Addison on *Torts*; Glegg on *Reparation*.]

Assembly, General.—See Church Courts.

Assent, Royal.—See Royal Assent.

Assessment.—See Rating.

Assessor, County.—For the purpose of preparing annually the valuation roll of the lands and heritages within a county, under the Valuation Act, 1854 (17 & 18 Vict. c. 91, s. 3), the County Council may appoint an assessor or assessors, who (under 20 & 21 Vict. c. 58, s. 1) may be an officer of Inland Revenue, to conduct the valuation. If the assessor appointed be an officer of Inland Revenue, the consent of the Treasury is required (Local Government (Scotland) Act, 1889 (52 & 53 Vict. c. 50, s. 83, subsec. 4)). The assessor must be paid a reasonable salary by the County Council, who may make regulations as to his duties; but if he be an officer of Inland Revenue, the approval of the Treasury is required to the salary and regulations (Local Government (Scotland) Act, 1889, s. 83, subsec. 1, 4, 6). The county assessor cannot be a county councillor (Local Government (Scotland) Act, 1889, s. 83, subsec. 3), and he cannot be a

sheriff clerk, county clerk, collector of poor rates, factor for heritable property, land agent in the county (48 & 49 Vict. c. 16, s. 11); but the County Council may appoint an assessor (not being an officer of Inland Revenue) to be collector of the consolidated rates (Local Government (Scotland) Act, 1889, s. 83). By the County Voters Act, 1861 (24 & 25 Vict. c. 83, s. 13), the assessor is disqualified from voting or taking part in any parliamentary election for the county. Before entering upon the duties of his office, the assessor must make a declaration *de fideli administratione* (17 & 18 Vict. c. 91, s. 3). Under the Valuation Acts the assessor's duty is annually to ascertain and assess the yearly rent or value of the several lands and heritages within the county, other than the lands and heritages of railway and canal companies (17 & 18 Vict. c. 91, s. 3). See ASSESSOR FOR RAILWAYS. The county assessor has nothing to do with questions of rating and taxation: his duty is to make up a roll of lands and heritages according to the Statute (*Blyth Hall's Trs.*, 1883, 10 R. 659, per Lord Lee, at 661). It is incompetent to bring a declarator that it is an assessor's duty to value in a certain way (*Adamson*, 1863, 1 M. 974, 988). If the assessor appeal in the face of repeated and express decisions in regard to valuations, an opinion has been expressed that he may be found liable in expenses (*Forbes Irvine*, 1893, 20 R. 626). For assessor's duties under the Valuation Acts, see RATING (VALUATION). By 24 & 25 Vict. c. 83, s. 7, the County Council must appoint the valuation assessors, or one of them, registration assessor. Under the County Voters Act (24 & 25 Vict. c. 83), amended by the Registration (Scotland) Act, 1885 (47 & 48 Vict. c. 16), the assessor has the duty laid upon him of preparing the register of parliamentary electors. He must prepare and mark the register according to the provisions of the Local Government (Scotland) Act, 1889, s. 28, in regard to electors for the County Council. A supplementary register must also be prepared of persons, other than parliamentary electors, entitled to vote in an election for a County Council (52 & 53 Vict. c. 50, s. 28 (2). The register must be made up in accordance with the provisions of the Local Government (Scotland) Act, 1894, s. 12 (1).—[Armour on *Rating*, 22.]

Assessor of Railways and Canals.—An official appointed by the Crown, whose primary duty it is to make up valuations and valuation rolls of lands and heritages belonging to or leased by railway and canal companies, and forming part of the undertakings of such companies (17 & 18 Vict. c. 91, s. 20). He is charged with the same duty in regard to water companies and gas companies, or any other companies having continuous lands and heritages liable to be assessed in more than one parish, county, or burgh where such companies desire to have their undertakings valued by him (s. 23): and the word company occurring in the sections of the Valuation Acts, which define his duties, falls to be read as including corporation, burgh commissioners, trustees, or local authority (57 & 58 Vict. c. 36, s. 7).

His remuneration, and that of the clerks and other officers he may employ, subject to the sanction of the Treasury (Act of 1854, s. 20), is paid by the Treasury, but defrayed by the railway and other companies which appear in his roll (s. 29). He must make a declaration of fidelity before entering on office, and is removeable at Her Majesty's pleasure. An appeal lies from his valuation to the Lord Ordinary on the Bills, or, if the lands and heritages of the company concerned are all in one county, to the Sheriff of that county (ss. 24, 25).

It is his duty to transmit the valuation rolls annually made up by him to the Register House. He has power to call for books and evidence (s. 26), and may be called upon to explain the grounds of his valuation to any person having interest (30 & 31 Vict c. 80, s. 6). As to the principles on which his valuation is carried out, see under RATING (VALUATION) and RAILWAYS. The Acts by which his powers and duties are defined are, 17 & 18 Vict. c. 91, ss. 20–29 (1854); 30 & 31 Vict. c. 80 (1867); 50 & 51 Vict. c. 51 (1887); and 57 & 58 Vict. c. 36 (1894).

Assessor (to a Judge).—A person called in, on account of his skill, to assist a Court in trying a question needing technical or scientific knowledge. In early times he was summoned because possessed of exceptional knowledge in the law (see Stair, iii. 5. 25: Bankt. iv. 6. 16; Hume, ii. pp. 15, 29, 31).

1. By the Supreme Court of Judicature Act, 1891 (54 & 55 Vict. c. 53, s. 3), the House of Lords may call in assessors to aid them in hearing and determining Admiralty actions; and by 30 & 31 Vict. c. 114, s. 73, and 39 & 40 Vict. c. 28, s. 8, the High Court of Admiralty in Ireland, and the Recorders of Cork and Belfast, are entitled to invoke the assistance of nautical assessors. County Court judges are enabled to appoint two assessors in Admiralty cases by 31 & 32 Vict. c. 7, s. 10: and in any maritime cause, by 32 & 33 Vict. c. 51, s. 6. Following the practice of the Court of Admiralty in England, the High Court and Court of Appeal are in use to summon assessors in cases dealing with navigation or seamanship.

2. The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), authorises the employment of one or more assessors in inquiries (1) as to shipping casualties (two being necessary where the cancellation of a certificate is involved), s. 466; (2) as to the conduct of a certificated officer, s. 471; (3) in appeals from judgments on these matters, s. 475. (4) Courts of Survey consist of a judge with two assessors, s. 487. (5) In salvage disputes, any Court to whom the matter is referred may call in a person conversant with maritime affairs as assessor, s. 548; and (6) in appeals from the decision of a pilotage authority, the judge sits with an assessor of nautical and pilotage authority, s. 610 (2).

3. By the Nautical Assessors (Scotland) Act, 1894 (57 & 58 Vict. c. 40), the Court of Session and the Sheriff Court, and the House of Lords in Scottish appeals, may, and if either party requires them, shall, summon assessors in all actions relating to any maritime matter.

4. Under the Judicature Act, 1873 (36 & 37 Vict. c. 66, s. 56), and 40 & 41 Vict. c. 57, s. 59, the High Court and Court of Appeal in England and Ireland may invoke the aid of one or more assessors in any cause before them.

5. The Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57, ss. 28 and 101), empowers the High Court in England, and the Court of Session, to try any action for infringement or revocation of a patent with the assistance of a specially qualified assessor.

6. Upon the trial of any action under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42, s. 6), in the County Court or Sheriff Court without a jury, one or more assessors may be appointed to ascertain the amount of compensation.

7. Coroners, under the Regulation of Railways Act, 1871 (34 & 35 Vict. c. 78, s. 34), have power to request the appointment of an assessor on inquiries under that Act.

8. By the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59, s. 14),

provision is made for the attendance of such number of the archbishops and bishops as may be determined on, as assessors of the Judicial Committee of the Privy Council, in the hearing of ecclesiastical cases.

9. Assessors are appointed to the Dean of Guild Courts in Edinburgh, Glasgow, Dundee, Perth, and Greenock. In some of the larger towns assessors are appointed to assist magistrates in the Police Courts. Where there is no special appointment, the clerk acts, when necessary, as assessor both in the Dean of Guild and Police Courts. In all cases the assessor's duties are confined to assisting, by means of his superior knowledge, in the deliberations of the Court.

Assets.—Properly a term of English law (from French *assez*, Latin *satis*), meaning "goods enough to discharge that burden which is cast upon the executor or heir in satisfying the debts and legacies of the testator or ancestor" (Tomlins). It is now in common use in Scots law, and is applied in the most general sense to the entire property and rights of a person, corporation, or company, or of a partnership, bankrupt, or trust estate. The word does not occur in the Bankrupt Acts, where "estate" is chiefly used. It occurs in the Companies Acts, 1856 & 1862, where, in a winding up, the liability of past and present shareholders for calls, and of directors or others for misfeasance, is described as a liability "to contribute to the assets of the company" (Act 1856, ss. 61–63; Act 1862, ss. 38, 75, 90, 134, 165). Assets are directed to be collected and applied in discharge of the company's liabilities and the costs of winding up, and for the adjustment of the rights of the contributories among themselves (Act 1862, ss. 95, 98, 102, 133, 144). Surplus assets are to be distributed "amongst the parties entitled thereto" (Act 1862, s. 109). Surplus assets mean assets remaining over after discharging debts and costs of liquidation, and are applied in repayment to shareholders according to their preferences (if any) of paid-up capital, and thereafter for distribution of any further surplus among the whole shareholders in proportion to their holdings in the company (*Birch*, 1889, 14 App. Cas. 525). But effect will be given to special stipulations (if any) contained in the company's constitution. See COMPANY.

Assignation.—An assignation is defined by Erskine (iii. 5. 1) as "a written deed of conveyance by the proprietor to another of any subject not properly feudal." Thus heritable rights when they are not perfected by seisin, or when they require no seisin,—as servitudes, reversions, patronages, etc.,—corporeal moveables, debts, and, generally, all incorporeal rights, may be transferred by assignation. The term is also applied to the transfer of property or rights which takes place in certain cases by operation of law, as, for example, by decree in a furthcoming, or by certain acts which are held equivalent to a written conveyance, such as indorsation of a bill of exchange.

Form of Deed.—With reference to the form of the deed, a variety of styles applicable to the conveyance of different subjects will be found in the *Juridical Styles*, vol. ii. pp. 671 *et seq.* The granter is termed the *cedent*, the receiver the *assignee*, and sometimes the *cessionary*. In the old style the assignee was made mandatary and procurator *in rem suam*, the cedent "making and constituting" the assignee "his lawful cessioner and assignee in and to" the subject, and "surrogating and substituting" him in and to the cedent's full right and place in the premises. In later practice the deed frequently

assumed the form of a direct conveyance, and the cedent "assigned, conveyed, disponed, and made over" the subject to and in favour of the assignee. But words directly importing assignation or conveyance are not indispensable; any words giving authority or directions which, if fairly carried out, will operate a transference, are sufficient to effect an assignation (Bell, *Prin.* 1461; *Carter*, 1862, 24 D. 925). The Transmission of Moveable Property Act, 1862 (25 & 26 Vict. c. 85), introduced a form of assignation which may be used by any party in right of a personal bond, or of a conveyance of moveable estate, and a form which may be written on the bond or conveyance itself. The words "bond" and "conveyance" are defined to include "personal bonds for payment or performance, bonds of caution, bonds of guarantee, bonds of relief, bonds and assignations in security of every kind, decrees of any Court, policies of assurance of any assurance company or association in Scotland, whether held by parties resident in Scotland or elsewhere, protests of bills or promissory notes, dispositions, assignations, or other conveyances of moveable or personal property or effects, assignations, translations, and retrocessions, and also probative extracts of all such deeds from the books of any competent Court"; and the words "moveable estate" are defined to include "all personal debts and obligations, and moveable or personal property or effects of every kind." The form simply states the consideration, and assigns the bond or other deed described. It is registrable in the books of any Court, in terms of any clause of registration contained in the bond or conveyance so assigned. When the assignee assigns the right to a third party, the deed is termed a "translation"; when he reassigns it to the cedent, it is termed a "retrocession." When the term "assignation" is used in the above Act, it includes "translations and retrocessions, and probative extracts thereof." Forms of translations and retrocessions will be found in the *Juridical Styles*, vol. ii. pp. 718 *et seq.*

The following may be taken as an example of the modern form of assignation in cases to which the statutory form is inapplicable or inappropriate:—

ASSIGNATION OF A LEGACY.

I, *A. B.*, considering that by his trust disposition and settlement dated , *C.* directed his trustees to make payment to me at the first term of Whitsunday or Martinmas occurring after his death of a legacy of £ sterling, with the interest thereof at the rate of five per centum per annum from said term till payment; and that *D.* has made payment to me of the sum of £ , being the amount of said legacy, with the interest due thereon, in consideration of my granting these presents in manner underwritten: Therefore I have assigned, as I do hereby assign, convey, and make over to the said *D.*, his executors and assignees whomsoever, the foresaid sum of £ sterling, with interest thereof at the rate of five per centum per annum from the term of , being the term immediately following the death of the said *C.*, and in time coming during the non-payment thereof, together with the said trust disposition and settlement itself, in so far as the same relates to the sums hereby assigned, and my whole right, title, and interest in the premises, with power to him to ask, crave, and uplift the sums hereby assigned, and upon payment to grant discharges or conveyances thereof, either in whole or in part, and generally to do every other thing concerning the premises which I might have done myself before granting hereof: which assignation above written I bind and oblige myself and my heirs, executors, and representatives whomsoever, jointly and severally, without the necessity of discussing them in their order, to warrant to the said *D.* and his foresaids, from all facts and deeds done, or to be done, by me in prejudice thereof [*where absolute warrandice is intended, the deed will run: "to warrant to the said D., etc., at all hands and against all mortals as law will."*]

Intimation.—When property or rights are transferred by assignation, intimation to the holder of the property or debtor in the obligation is necessary to complete the transfer. The most formal method of intimation is proper notarial intimation, attested by notarial instrument. The Act of

1862, while saving any form then in use, provided that an assignation should be validly intimated (1) by a notary delivering a certified copy in presence of two witnesses, the evidence of which is a certificate to that effect in statutory form; and (2) by the holder of the assignation, or any one authorised by him, transmitting a copy, certified as correct, to the person to whom intimation is to be made, a written acknowledgment of the receipt of the copy being evidence of intimation. But neither regular notarial intimation, nor intimation in the statutory form, are solemnities, and the law accepts in certain cases other forms of notice, or evidences of notice, which are regarded as equivalent. Thus it is sufficient if there be judicial intimation, such as a charge upon a bond against a common debtor at the instance of the assignee, or a citation of a common debtor by an assignee in an action for payment. The registration in the Register of Sasines of a heritable bond, or bond and disposition in security, granted by one not feudally vested, has been held sufficient intimation of the conveyance of a personal right in the lands (*Paul*, 1835, 13 S. 818; *Edmund*, 1855, 18 D. 47, affd. 3 Macq. 118; Ersk. iii. 5, 6). But registration in the Books of Council and Session has no such effect (*Tod's Trs.*, 1867, 7 M. 1100). So also, any act of the debtor undertaking to pay, or corroborating the debt, is sufficient. Thus it is sufficient if the debtor is a party to the assignation, or if he acknowledge the assignee's right by letter, or pay interest or part of the principal to the assignee, or if he accept a draft in favour of the assignee for the sum in a bond, or even if such a draft be presented and protested. Mere private knowledge, though it may put the debtor in bad faith in a question with the assignee, is not equivalent to intimation, and is of no avail in a competition with other properly completed assignations, legal or voluntary (Bell, *Com.*, M'L. ed., ii. 17).

When the debtor is out of Scotland, intimation is made edictally upon letters obtained in the Bill Chamber (6 Geo. IV. c. 120, s. 51; 1 & 2 Vict. c. 118; A. S. 11 July 1828, 24 Dec. 1838). When there is more than one debtor, intimation must be made to each; and intimation to a firm should be made to all the partners, unless there is a regularly appointed manager; and the fact that the assignee was *de facto* manager of the firm has been held not equipollent to intimation to the firm (*Hill*, 1846, 8 D. 472). Intimation to one of two trustees who held the trust funds, and practically administered the trust, has been held sufficient (*Jameson*, 1887, 14 R. 643). In the case of an incorporated joint-stock bank, intimation should be made to the manager at the head office, and also to the agent of the branch where the money is, if it is lying at a branch. Intimation may be made to companies incorporated under the Companies Acts by delivering it or posting it in a prepaid letter addressed to the company at their registered office (Companies Act, 1862 (25 & 26 Vict. c. 89, s. 62)). A corresponding provision is contained in The Companies Clauses Act (8 & 9 Vict. c. 17), s. 137; The Lands Clauses Act (8 & 9 Vict. c. 19), s. 128; and The Railway Clauses Act (8 & 9 Vict. c. 33), s. 130.

Transfer without Deed.—While assignation is the appropriate deed for the transfer of moveables and incorporeal rights where writing is necessary, writing is not in all cases required. Thus (1) moveables corporeal, and certain classes of debts to which the right runs with the voucher (as bank bills and notes, and bills payable to the bearer and bills blank indorsed), are transferred, in the way either of sale or security, by mere delivery. In these cases delivery, with the intention to pass the property or create the security, is sufficient without any writing. But where moveables are in such a position that actual delivery cannot be made, as, for example, in the hands of a third

party, then writing and intimation is necessary; and in certain cases, such as ships, writing is necessary on account of the title by which they are in law held and transferred (with respect to the transfer of ships or shares in ships, see Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, ss. 24–30)). (2) There are certain cases in which a deed of assignation is unnecessary, because the law recognises an equivalent. Thus the obligation contained in a bill of exchange or promissory note passes by indorsation. The acceptance of a bill, and, when the drawer has funds available for the payment thereof, the presentation of a bill, is equivalent to a duly intimated assignation—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61, s. 53 (2)). Again, the indorsation and delivery of a bill of lading, by custom of merchants, passes the property of the goods which it represents (*Lickbarrow*, 1794, 5 T. R. 683); and the assignation thus effected may be either an absolute transfer of the property, a conditional transfer, a mortgage or a pledge, according to the intention of the parties (*Sewell*, 1884, L. R. 10 A. C. 74). So also, where goods are represented by a document of title, the transfer of the document, coupled with intimation, completes the assignation. The expression "document of title" is defined by the Factors Act, 1889, and by the Sale of Goods Act, 1893, to include "any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business, as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of the document to transfer or receive the goods thereby represented. The Factors Act, 1890 (53 & 54 Vict. c. 40, s. 1); The Factors Act 1889 (52 & 53 Vict. c. 45, s. 4); Sale of Goods Act, 1893 (56 & 57 Vict. c. 71, s. 62). The Factors Act also provides that, for its purposes, the transfer of a document of title may be by indorsement, or, where the document is by custom or by its express terms transferable, by delivery, or makes the goods deliverable to the bearer, then by delivery. In the case of bills of exchange and bills of lading, indorsation and transfer of the document is a complete assignation of the rights represented by the document, without any intimation. In the case of other documents of title, intimation of the transfer is necessary to complete the right of the transferee (*Connal & Co.*, 1868, 6 M. 1095, L. J. C. Inglis, 1110).

Assignations requiring no Intimation.—While intimation is requisite for the completion of the transfer of property or rights conveyed by an assignation, in the sense of a deed of conveyance, there are certain assignations in the secondary sense, *i.e.* transfers of property from one person to another, which require no intimation. The cases of bills of exchange and bills of lading have already been noticed. The rule in these cases is founded upon the law merchant, and has its origin in the convenience of traders. There is another class of assignations which require no intimation, namely, legal or judicial assignations, these being in themselves public. Thus the act and warrant of a trustee in a sequestration vests in him the moveable estate and effects of the bankrupt, as if actual possession had been obtained or intimation made (Bankruptcy Act, 1856 (19 & 20 Vict. c. 79, s. 102)). So also a decree of adjudication, although no seisin had followed upon it, was held preferable to a subsequent arrestment (L. J. Clerk, 23 Feb. 1671, Mor. 2766). But legal assignations, although preferable in a competition, without intimation do not put the debtor in the obligation in bad faith; and a debtor who, without knowledge of the legal assignation, pays to the original creditor, will not be liable in a second payment.

Effect of Assignation.—The effect of a completed assignation is to put the

assignee in the cedent's place, so that (1) every right competent to the cedent is competent to the assignee, and (2) every defence competent against the cedent is competent against the assignee. This rule is usually expressed in the maxim, *Assignatus utitur jure auctoris*. The assignee may sue or do diligence either in his own name, or in that of the cedent, if he be alive. But he cannot execute in his own name diligence issued in the name of the cedent (*Stewart*, 1745, Mor. 3689). To the general rule, however, as to the effect of assignations, there are certain exceptions to be noted. Where the defence competent against the cedent can only be established by reference to his oath, such reference is incompetent after assignation (*Campbell*, 1860, 23 D. 159), unless (1) the subject conveyed has been rendered litigious before intimation, as, for example, by an action brought by the debtor against the cedent (*Somerville*, 1673, Mor. 8325), or (2) the assignation be gratuitous or in trust for the cedent. Again, the nature of the original contract under which the obligation assigned arises, may be such as to bar the debtor from pleading against an assignee a defence pleadable against the cedent. An example of the application of this principle will be found in *Merchant Banking Co. of London* (L. R. 5 Ch. D. 205). There vendors of steel rails, who had issued to the purchasers warrants for the goods deliverable to the purchaser, or assigns by indorsement which were, by usage of trade and the intention of the parties, meant to be transferable to holders for value free from any vendor's lien, were held not entitled to plead vendor's lien for unpaid purchase money against third parties to whom the warrants had been indorsed in pledge by the purchasers (see also *Agra & Masterman's Bank*, ex p. *Asiatic Banking Corporation*, L. R. 2 Ch. App. 391; in re *Blakeley Ordnance Co.*, L. R. 3 Ch. App. 154; *Well*, L. R. 5 Q. B. 642; *Crouch*, L. R. 8 Q. B. 374). By the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 47, it is enacted that "where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien, or retention, or stoppage *in transitu*, is defeated; and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien, or retention, or stoppage *in transitu*, can only be exercised subject to the rights of the transferee." The rule that exceptions grounded on latent trusts or equities in favour of third parties, though pleadable against the cedent, will not be effectual against onerous assignees (recognised in *Redfearn*, 1813, Mor. App. Pers. & Real, 3: 1 Dow, 50; 5 Pat. 707), is not an exception to the rule, *Assignatus utitur jure auctoris*, but a case to which the rule does not apply (*Scottish Widows' Fund*, 1876, 3 R. 1078, per L. P. Inglis, 1082). But such exceptions are good against the trustee in a sequestration, for he takes the subject *tantum et tale* as it stood in the bankrupt (*Dingwall*, 1822, 1 S. 463; *Gordon*, 1824, 2 S. 675; *Fleeming*, 1868, 6 M. (H. L.) 113; *Graeme's Tr.*, 1888, 15 R. 691).

Warrandice.—Assignation of a debt implies warrandice that the debt is due and the title to assign good, but not that the debtor is solvent (Ersk. ii. 3. 25; *Riddell*, 1707, Mor. 16616; *Ferrier*, 1828, 6 S. 818; *Sinclair*, 1829, 7 S. 401; *Reid*, 1879, 6 R. 1007).

Assignation of Contracts.—While rights acquired by contract are assignable, contracts involving mutual obligations cannot be assigned. Thus, when A. enters into a contract of sale with B., he cannot assign that contract to C. to the effect of giving C. a right to perform the contract and sue for the price (*Boulton*, 1857, 2 H & N. 564; *Robson & Sharpe*, 1831,

2 B. & A. 303; *The Family Endowment Society*, 1870, L. R. 5 Ch. App. 118; *Grierson, Oldham, & Co. Lim.*, 1895, 22 R. 812). And it is not inconsistent with this rule that a party to a contract which does not involve *delectus personæ* may perform it by the hand of another, the obligations and rights of action under the contract remaining in his own person (*The British Waggon Co. and the Parkgate Waggon Co.*, 1880, L. R. 5 Q. B. D. 149; *The West Stockton Iron Co.*, 1880, 7 R. 1055; *Johnston & Reay*, 1881, 8 R. 437; see also, for illustration of this principle, *Fleming*, 1859, 21 D. 548, 4 Macq. 167; *Tully*, 1891, 19 R. 65; *Blumer & Co. and Ellis & Sons*, 1874, 1 R. 379; *Tinnevelly Sugar Refining Co. Lim.*, 1894, 21 R. 1009). An exception to this rule exists under Statute in the case of bills of lading. By the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), "every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property of the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to him and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

Conflict of Laws.—It is outwith the scope of this article to deal with questions of conflict of laws arising in connection with assignations of moveables and incorporeal rights, but reference may be made to *Strachan*, 1835, 13 S. 954; *Donaldson*, 1855, 17 D. 1053; *Connal & Co.*, 1868, 6 M. 1095; *Scottish Provident Institution*, 1888, 16 R. 112; Bell, *Com.* ii. 18; Foote, *International Law*, 2nd ed., 247, 251; Story, *Conflict of Laws*, ss. 392, 395; Bar, *International Law*, Gillespie's ed., 602–3, and note T.; *Williams*, L. R. 38 Ch. D. 388, 15 App. Ca. 267).

It remains briefly to notice certain rules applicable to the assignation of special kinds of property.

Assignations of Patents, Designs, and Trade Marks are directed to be recorded in the respective Registers of Patents, Designs, and Trade Marks, and these registers are *primâ facie* evidence of the matters inserted in them (Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57, ss. 23, 55, and 78)). See Patents, Designs, Trade Marks.

Reference has already been made to the statutory provisions with respect to the transfer of ships and shares in ships (see *ante*).

Shares in Companies incorporated under the Companies Acts are to be transferred in manner provided by the regulations of the company (Companies Act, 1862, 25 & 26 Vict. c. 89, s. 22, and Schedule I. Table A (8)—(16)).

In the *Assignation of Leases*, where these are assignable, intimation to the landlord is not sufficient to complete the right in a question with third parties, although sufficient in a question with the landlord. Possession, natural or civil, is necessary. Thus, when the cedent is in actual possession, the assignee must complete his right by actual possession; when the cedent has sublet, the assignee may complete his right by intimation to the subtenant. It was for a long time a subject of controversy whether, in the case of leases not burdened with a sublease, actual possession was necessary, or whether an equivalent might not be effected by the assignee granting a sublease to the cedent. The result of the cases is to establish the rule as above stated (Rankine on *Leases*, 175–80, and cases there cited). For the law as to assignability of leases, see Lease.

Leases of thirty-one years and upwards, recorded under the Registration of Long Leases Act, 1857 (20 & 21 Vict. c. 26), may be assigned in the form provided by the Schedule to the Act, and the recording of such an

assignation effectually vests the assignee in the rights of the granter of the assignation (s. 3). Such leases may also be assigned in security of borrowed money, annuities, or provisions to wives or children, or in security of cash credits or other debts in the form provided in the Schedule (s. 4). The holder of the security, in addition to his power of sale, may, in default of payment of principal or interest for six months, enter into possession under warrant of the Sheriff; but unless and until he so enter into possession, he is not liable to the landlord in any of the obligations and prestations of the lease (s. 6). Assignations of such leases are preferable, in competition, according to the date of recording (s. 12).

Heritable securities may be transferred by assignation in the form prescribed by sec. 124 of the Titles to Land Consolidation Act, 1868 (31 & 32 Vict. c. 101), and the title is completed by recording the assignation in the appropriate Register of Sasines.

[Stair, iii. 1, and Note BB; Ersk. iii. 5; Bell, *Com.* v. chap. 2, sec. 1; Bell, *Prin.* chap. ix.; Ersk. *Prin.* iii. 5; Anson, *Contract*, part iii. chap. 2; Addison, *Contracts*, 203.]

See Heritable Securities.

Assignation of Rents.—In a formal disposition of heritage, whether absolute or in security, there is always a clause assigning rents. The statutory form of the clause of assignation of rents applicable to an absolute conveyance of heritage is: "And I" (*i.e.* the disponer) "assign the rents" (31 & 32 Vict. c. 101, s. 5, and Schedule (B)); and such a clause, unless it is specially qualified, is "held to import an assignation to the rents to become due for the possession following the term of entry, according to the legal and not the conventional terms, unless in the case of fore-hand rents, in which case it shall be held to import an assignation to the rents payable at the conventional terms subsequent to the date of entry" (see 31 & 32 Vict. c. 101, s. 8). The statutory form of the clause of rents applicable to a bond and disposition in security is also: "I assign the rents" (31 & 32 Vict. c. 101, s. 118, and Schedule (FF), No. 1); and by sec. 119 of the Act of 1868 it is declared that a clause in this form "shall be held to import an assignation to the creditor and his representatives *in mobilibus* or his heirs, as the case may be, and to his assignees, to the rents to become due or payable from and after the date from which interest on the sum in the security commences to run, in the fuller form generally in use prior to the 30th day of September 1847, including therein a power to the creditor and his foresaids to insure all buildings against loss by fire, and, on default in payment, to enter into possession of the lands disponed in security, and to uplift the rents thereof, or to uplift the rents thereof if the lands are not disponed in security, and to make all necessary repairs on the buildings, subject to accounting to the debtor for any balance of rents actually recovered beyond what is necessary for payment to such creditor and his foresaids of the sums, principal, interest, and penalty, due to him or them under such security, and of all expenses incurred by him or them in reference to such possession, including the expenses of management, insurance, and repairs." The subject of assignation to rents will be fully dealt with under the articles on the Feu-Charter and on the Bond and Disposition in Security.

Assignation of Writs.—As there is in a formal disposition of heritage, whether absolute or in security, a clause of assignation of rents, so

there is a clause of assignation of writs. The statutory form of a clause of assignation to writs applicable to a disposition of a fee of property already created is: "I" (*i.e.* the disponer) "assign the writs, and have delivered the same according to inventory": and such a clause, unless it is specially qualified, imports "an absolute and unconditional assignation to such writs and evidents, and to all open procuratories, clauses, and precepts, if any, and as the case may be, therein contained, and to all unrecorded conveyances to which the disponer has right" (31 & 32 Vict. c. 101, s. 5, and Schedule (B), and s. 8). This form is not adapted to an original feu-right, in which the clause of assignation of writs may run thus: "And I assign the writs, but to the effect only of maintaining and defending the right of said B." (*i.e.* the disponee) "and his foresaids in the subjects hereby disponed; and for that purpose I oblige myself and my foresaids to make the same, to the extent of a legal progress, furthcoming to the said B. and his foresaids, at their expense, on all necessary occasions, and that on a receipt and obligation to redeliver the same within a reasonable time and under a suitable penalty" (*Juridical Styles*, i. 12. 29; *Hendry's Styles*, 17).

In the bond and disposition in security in the form of Schedule (FF) of the Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101, s. 118), there is a clause of assignation to writs in this form: "I assign the writs"; and by sec. 119 of that Act it is declared that the clause of assignation of writs in the form given in the schedule just mentioned "shall be held to import an assignation to the creditor and his foresaids to writs and evidents to the same effect as in the fuller form generally in use in a bond and disposition in security, with power of sale prior to the thirtieth day of September 1847." The subject of assignation of writs will be treated in detail under the articles FEU-CHARTER and BOND AND DISPOSITION IN SECURITY.

Assignatus utitur jure auctoris.—This legal maxim expresses the general rule applicable in the transfer of obligations, that the assignee acquires no higher right than his cedent, and that all exceptions pleadable by the debtor in the obligation against the cedent are pleadable against the assignee. It is no exception to this rule, that collateral obligations or latent trusts which might have been enforceable against the cedent by third parties, are not enforceable against the assignee, because these are not part of, but extraneous to, the right assigned (Bell, *Com.*, M'L.'s ed., i. 302; *Scottish Widows' Fund*, 1876, 3 R. 1078, per L. P. Inglis, at 1082). The only real exception to the rule occurs in the case of negotiable instruments, the *bonâ fide* holder of such instruments having a good title, notwithstanding defects in the title of the transferer (*Dixon*, 3 Macq. 1, per L. Cranworth, at 16: *Crouch*, L. R. 8 Q. B. 380; *Mangles*, 3 H. L. C. 735: *Graham*, 8 Eq. 36).

The maxim is also employed, with reference to the transfer of property generally, as expressive of the rule that no one can give a better title than he himself has, *Nemo plus juris ad alium transferre potest quam ipse habet* (*Dig.* 50. 17. 54). To the doctrine thus widely expressed there are certain exceptions to be noted. For example, one who has obtained property by fraud may give a good title to a *bonâ fide* purchaser (see cases cited, Bell, *Prin.* 13 A, note *c*). But this exception is rather apparent than real, as a fraudulent contract is not void, but only voidable, and accordingly, until it is set aside, there is a good title to transfer. Again, there is the large class of cases provided for by the Factors Acts (now consolidated in the Factors Act, 1889 (52 & 53

Vict. c. 45), and Factors (Scotland) Act, 1890 (53 & 54 Vict. c. 40)), in which persons in the possession of goods, or of documents of title to goods, are held to be able to confer a good title by way of sale or pledge for value. The rule in these cases proceeds upon the theory of implied authority. So also the purchaser of goods, to whom a document of title (see Factors Act, 1889—52 & 53 Vict. c. 45, s. 1; Sale of Goods Act, 1893—56 & 57 Vict. c. 71, s. 62, (1)) has been transferred, may transfer such document to a person who takes it in good faith and for valuable consideration, so as to defeat the unpaid seller's right of lien or stoppage *in transitu* (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71, s. 47). See ASSIGNATION.

Assignee.—The person in whose favour an assignation is granted.—See ASSIGNATION.

Assisting.—See ACTOR OR ART AND PART. It is a crime by Statute to assist a prisoner of war to escape (52 Geo. III. c. 156); and also at common law (*ib.* s. 4; Hume, i. 527; Macdonald, 239, 240).

Assize.—In the Criminal Law of Scotland, assize means the jury called for the trial of prisoners at a sitting of a criminal Court. In England, and sometimes in Scotland, the word assize is used to mean the sittings of a criminal Court. See JURY.

Assoilzie.—To assoilzie is to acquit the defender in an action, or to find an accused not guilty. See ACTION; DECREE.

Assumed Trustees.—Assumed trustees, being only liable for their own acts and intromissions, are not personally liable for the administration of their predecessors, except in so far as they have acquiesced in or homologated it; but they are bound to give an account of the intromissions of their predecessors, so far as these have not been audited and discharged (*Somerville*, 1854, 17 D. 151). They may incur liability as partners of a trading company, although there is no executed transfer of the shares to their name (*Bell*, 1879, 6 R. 548, 6 R. (H. L.) 55). They are not entitled to exercise a discretionary power (*e.g.* in the apportionment of the fund) conferred on the original trustees (*Hill*, 1874, 2 R. 68). They may, however, apply to the Court for authority to exercise such a power, and the Court will be guided in granting or refusing the authority according as there is or is not a *delectus personæ* and intention in the deed to intrust the power to a particular person (see *Hill, ut supra*; *Robbie*, 1893, 20 R. 358; *Simson*, 1883, 10 R. 540; *Howden*, 1895, 23 R. 113).—[M'Laren on *Wills and Succession*, 1124.] See ASSUMPTION OF TRUSTEES; TRUSTEES.

Assumption of Thirds.—Assumption of thirds, or assignation out of thirds of benefices, was a method of providing stipends to the Protestant ministers, commenced in 1561. After the Reformation, difficulty was experienced in obtaining the means of support for the new ministry. To remedy this state of matters, on a petition by the ministers to the Queen

and Privy Council, an Act of Privy Council, of 22 Dec. 1561, ordered that a fourth part of the revenue of the whole benefices of the kingdom should be employed partly in maintaining the reformed clergy, and partly in support of the queen; and if this was not sufficient, then a third was to be taken. By another Act of Council, 15 Feb. 1561–62, a third of the revenue was ordered to be collected and applied to these purposes. There was much delay in obtaining rentals, and further difficulty was caused by the queen having granted gratuitous discharges. On 10 Oct. 1564, the Council declared the queen's discharges inoperative, and the Act 1567, c. 10, provides that the whole thirds should be paid to the ministers, notwithstanding any discharge thereof granted by the queen. One of these gratuitous discharges is contained in a letter, of 16 May 1565, by the queen, amongst the Roxburgh MSS. [Hist. MS. Comm. 14 Report, Part iii. 30], by which the queen, for "pity and commiseration" to the Convent of "Senis" (Sciennes), Edinburgh, remits the third due from their benefices to the Crown, and discharges all collectors from troubling them.

Stipends were modified out of the thirds by a Commission known as the Commission of Plat, from 1573 till 1606, when bishops were restored.—[*Acts of Council* v. *Benefices*; *Acts of Parliament* v. *Thirds*, Connell, i. 90, ii. 25: Elliot, 7–9.] See TEINDS.

Assumption of Trustees.—Prior to the Trusts Act of 1861 (24 & 25 Vict. c. 84), it was not possible for trustees to assume new trustees, unless a special power to that effect had been given to them in the trust deed. By that Act a power to assume new trustees is read into every deed by which gratuitous trustees are appointed, unless the contrary be expressed in the deed (see *Allan*, 1878, 5 R. 576; *Munro*, 1887, 14 R. 574). The power of assumption may be exercised by a majority or quorum of the trustees, but due notice must be given to all the trustees (*Wyse*, 1881, 8 R. 983) who are available to act (*Malcolm*, 1895, 22 R. 968). The Court will only listen to the objections of a minority "upon allegations of corruption or impropriety or such like" (*Neilson*, 1885, 12 R. 670; see *Foggo*, 1893, 20 R. 273). Persons nominated as executors who are unable to distribute the estate at once, and who have therefore to hold it for some time, are in the position of trustees, and have power to assume (*Ainslie*, 1886, 14 R. 209). Where a trustee becomes insane or incapable of acting by reason of physical or mental disability, or by continuous absence from the United Kingdom for a period of six calendar months or upwards (see *Malcolm*, 1895, 22 R. 973, per Lord Kinnear), the remaining trustee or trustees may execute a deed of assumption under s. 11 of the 1867 Act (30 & 31 Vict. c. 97). But in this case, if the signature of a quorum is not available, the consent of the Court must be obtained on the application either of the acting trustee or trustees, or of one or more of the beneficiaries under the trust. A trustee-nominate, who does not wish to accept office, may act, where it is necessary to make a quorum, to the effect of assuming new trustees, without incurring any further liability in the administration of the trust (*Blain*, 1836, 14 S. 361; *Millar*, 1837, 2 S. & M'L. 889, per Lord Brougham). A sole trustee who wishes to resign may do so after assuming new trustees with the consent of the beneficiaries under the trust who are of full age and capable of acting at the time (1867 Act, s. 10). Trustees appointed by the Court have not power to assume new trustees unless such power is expressly conferred on them by the Court (1867 Act, s. 13).

FORM OF DEED OF ASSUMPTION is provided in Schedule B of the 1867 Act:—

I, *A. B.* [*or* we, *A. B.* and *C. D.*], the accepting and surviving [*or* remaining] trustee [*or* trustees, *or* a majority and quorum of the accepting and surviving trustees], acting under a trust disposition and deed of settlement [*or other deed*] granted by *E. F.* in favour of , dated the day of [*if recorded, specify register and date of recording*], do hereby assume *G. H.* [*or G. H.* and *I. K.*] as a trustee [*or* trustees] under the said trust disposition and settlement [*or other deed*]; and I [*or* we] dispone and convey to myself [*or* ourselves] and the said *G. H.* [*or G. H.* and *I. K.*], as trustees under the said trust disposition and settlement [*or other deed*], and the survivors or survivor, and the heirs of the last survivor, the majority, while more than two are acting, being a quorum, All and Sundry the whole estate and effects, heritable and moveable, real and personal, of every description, or wherever situated, at present belonging to or under my [*or* our] control as trustees [*or* surviving trustees, *or otherwise as the case may be*], under the said trust disposition and settlement, together with the whole vouchers, titles, and instructions thereof. [*Then may follow, if wished, special conveyances of heritable or personal property, with the usual clauses of a conveyance applicable to such property, and as the case may require.*] And we consent to registration hereof for preservation, and also in the General or Particular [*or* Burgh] Register of Sasines for publication.—In witness whereof [*testing clause in the usual form.*]

"A deed of assumption so executed, in addition to a general conveyance of the trust estate, may contain a special conveyance of heritable property; and in such case may, with the necessary warrant of registration thereon, be recorded in the Register of Sasines, and when so recorded shall be effectual as a conveyance of the heritable property belonging to the trust estate, so far as specially conveyed, in favour of the existing trustees and the trustees so to be assumed; and such deed of assumption shall also be effectual as an assignation in favour of such existing and assumed trustees of the whole personal property belonging to the trust estate" (1867 Act, s. 11).—[M'Laren on *Wills and Succession*, 1124; Howden on *Trusts*, 123; Menzies on *Trustees*, s. 43.] See ASSUMED TRUSTEES; TRUST; TRUSTEE.

Assurance. — See INSURANCE; ACCIDENT INSURANCE; FIRE INSURANCE; LIFE INSURANCE; MARITIME INSURANCE, etc.

Assurance, Married Women's Policies of, (Scotland) Act, 1880.—See JUS MARITI.

Assythment.—This was the sum of money payable by a homicide to certain relatives of the deceased, a survival of the custom of paying blood-money in order to escape the blood-feud (Kames, *Law Tracts*, vol. ii. art. i.). By ancient custom, it was payable after the guilt of the accused had been ascertained, and possibly also if the accused had been outlawed for non-appearance by the Criminal Court. If the panel suffered the punishment due to his crime, no claim for assythment arose; but if he had been found guilty only of culpable homicide, or if he escaped execution by an act of indemnity or through the prerogative of the sovereign, he had to appease the vengeance of the injured relatives by making this money payment. So well recognised was this claim on the part of the relatives, that the Royal prerogative could not deal with it, and the Statute law provided that no remission of sentence should be allowed in Court unless upon evidence that it had been satisfied. To obtain remission, the panel produced *littera pacis* or "letters of slains," signed by the four principal branches of the

kindred of the deceased, bearing receipt of the assythment, discharging the panel of all action, civil or criminal, at their instance, and requesting the king to grant a remission. In practice, however, there came to be accepted, instead of the letters, surety for payment of such a sum as might afterwards be awarded. This sum, in strict procedure, fell to be ascertained by the Court of Exchequer, but where the relatives themselves were prosecutors in the Justiciary Court, that Court was accustomed to ascertain and award assythment. Assythment could also be recovered in the Court of Session by civil action (*Mackay*, 1767, Mor. 12541). It is not clear from the authorities who were entitled to sue for assythment, or in what proportions it was distributed among the relatives. The title was said to be in the next-of-kin, but a widow, uncle, and brother could all sue together, and if the nearest kin refused to sue, the more remote might. In the distribution of the money, the widow shared along with the issue, the heir along with the other children, and the immediate issue excluded their descendants. The action for assythment has been long in disuse, and is not to be confounded with the existing civil action of damages for personal injuries (*Horn*, 1878, 5 R. 1055). Crime was necessary to found an action of assythment. Negligence, personal or vicarious, suffices for an action of damages (*Eisten*, 1870, 8 M. 980).—[Balfour, *Practicks*, 516; Bankt. i. 246; Hume, i. 284, ii. 124; Stair, i. 9. 5; Ersk. iv. 4. 105; Bell, *Prin.* s. 2029.]

Astriction.—The binding of lands to a mill under the prædial servitude (or pseudo-servitude) of thirlage, now almost in disuse. "To astrict" and "to thirl" are here synonymous terms: but "thirlage" is used to denote the general character of the obligation, while "astriction" is used to describe the constituting of the obligation in a particular case. Thus thirlage consists in the astriction of specified lands to a specified mill, at which the occupants of these lands are bound to have their victual ground. Astriction involves (1) payment to the owner or tenant of the mill of a duty called multures, payable in kind and calculated according to the quantity of victual to be ground, but almost always considerably in excess of the competition value of the services rendered; (2) payments to the miller's servants, known as sequels—knaveship bannock, lock or gowpen; (3) services in keeping up the mill-house, dam-dykes, and water-gaits (aqueducts), and in bringing home the mill-stones. The precise extent of all these services depended partly on the terms in which the obligation was constituted, and partly on usage. If the right of thirlage is questioned, the remedy of the proprietor or tenant of the mill is to bring a declarator of astriction in the Court of Session, in which it is necessary to call the owner of the lands as to which declarator is sought (*L. Wardis*, 1628, Mor. 2201: *Juridical Styles*, 3rd ed., vol. iii. p. 44). See THIRLAGE.

Astriction to the smithy of a barony seems also to have been known in Scotland (*Yeaman*, 1770, Mor. 14537).

Atheism.—Denial of the existence of the Deity. It was formerly a crime, both at common law and by Statute. The *nomen juris* which the insitutional writers apply to this offence is "blasphemy"; but the Statutes recognise a distinction between railings and cursings at divine things, with reference to which one transgression was punishable, and dispassionate denial of the Deity, which required to be persistent in order

to be criminal. The former offence is blasphemy, according to the modern conception of the term; the latter, atheism. The Act 1621, c. 21, makes the *obstinate* denial of God, or of any of the persons of the blessed Trinity, a capital offence, and the Act 1695, c. 11, declares that an *obstinate* offender is one who has been convicted thrice of an offence under the Act 1621, or of the denial of the authority of the Holy Scriptures of the Old and New Testaments, or the providence of God in the government of the world. By the Act of 1695 the penalty of such a conviction was death. These Statutes were both repealed by 53 Geo. III. c. 160, s. 3, and, at common law, no prosecution on the charge of atheism would now be undertaken. The Act 6 Geo. IV. c. 47, amended by 7 Will. IV. c. 5, restricts the punishment of blasphemy to fine or imprisonment, or both. The sale of blasphemous or atheistic works may be tried summarily (*Finlay*, 1843, 1 Broun, 648, note); or, on indictment (*Robinson*, 1843, 1 Broun, 590, 643; *Paterson*, 1843, 1 Broun, 629). Formerly, a person who did not believe in a God or a future state was inadmissible as a witness (*Henry*, 1842, 1 Broun, 221; Dickson on *Evidence*, s. 1557). This ground of exclusion must now be held to be obsolete, because, by the Oaths Act, 1888 (51 & 52 Vict. c. 46), any person objecting to be sworn, and stating, as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, may make a solemn affirmation, in the form given in the Act, instead of taking an oath, in all places and for all purposes where an oath is or shall be required by law.—[Hume, i. 568; Alison, ii. 437; Ersk. iv. 2. 23, iv. 4. 16; Bankt. ii. 645; Chisholm, *Barclay's Digest*, *voce* "Atheism."] See AFFIRMATION; BLASPHEMY; OATH.

Attainder.—Corruption of the blood, and part of the punishment of treason. A person who is attainted forfeits all his honours and dignities. Further, he cannot succeed to any ancestor, and the immediate superior takes as escheat all estate to which, but for the attainder, the attainted would have succeeded. The heirs of an attainted person cannot inherit from him, nor can any one take a succession where his right to succeed depends on his relationship to one who has been attainted. If a person who possesses an estate upon apparency is attainted, the Crown at once takes the whole feudal right to the estate, and not merely the interest of the apparent heir (*E. of Perth*, 1871, 9. M. (H. L.) 83). Corruption of blood can be removed only by Act of Parliament. Attainder is part of the punishment of treason under the treason law of England, which was extended to Scotland by 7 Anne, c. 21. By the Act 33 & 34 Vict. c. 23, attainder does not now follow on a conviction of treason or felony in England. This Act, however, does not extend to Scotland.—[Hume, i. 549; Alison, i. 623; Macdonald, 231; Anderson, *Crim. Law*, 33; Bankt. ii. 261; Stair, iii. 3. 37; Ersk. ii. 3. 16, iv. 4. 24; Swin. *Abridg. voce* "Treason"; Bell, *Prin.* s. 1645.] See FORFEITURE; TREASON.

Attempt to commit Crime.—At common law, prior to 1887, it was competent to charge a person with attempting to commit an indictable crime. The Criminal Procedure (Scotland) Act, 1887 (50 & 51 Vict. c. 35), is declaratory of the common law in this respect, and, in addition, enables a conviction for an attempt to be obtained under an indictment charging a completed crime. Sec. 61 of the Act of 1887 provides that "attempt to commit any indictable crime shall itself be an indictable

crime, and under an indictment which charges a completed crime, the person accused may be lawfully convicted of an attempt to commit such crime; and under an indictment charging an attempt, the person accused may be convicted of such attempt although the evidence be sufficient to prove the completion of the crime said to have been attempted; and under an indictment which charges a crime which imports personal injury inflicted by the person accused, resulting in death or serious injury to the person, the person accused may be lawfuly convicted of the assault or other injurious act, and may also be lawfully convicted of the aggravation that such assault or other injurious act was committed with intent to commit such crime." What amounts to an attempt is always a question of circumstances. It is unnecessary that actual harm has ensued, provided there has been "an inchoate act of execution of the meditated deed." Remote acts of preparation for the commission of crime are not punishable; the preparatory acts, to amount to attempt to commit crime, must be connected with, and lead up to, the final act of perpetration (Hume, i. 26).

Attempt to Murder. — 1. *At Common Law.* — A person may competently be charged, at common law, with attempt to murder. It is immaterial whether the attempt has been made by direct violence, or by administering or attempting to administer poison, or by the employment of such indirect means of attack as cutting a rope or placing a spring-gun (*Alcorn*, 1827, Syme, 221; *Tumbleson*, 1863, 4 Irv. 426). The intent to murder is held to be proved when the injury done shows utter recklessness as to the life of the victim; or, if no injury has been done, where the accused has done all he could to inflict serious injury, as where he points a pistol, but it misses fire, or the bullet does not hit its object. The intent is also presumed if poisoned food or drink is placed where it is likely to be partaken of (*Williamson*, 1863, 6 Sc. Jur. 40). Similarly, the crime is completed when A. hands poison to B. to be administered to C., whether B. is an accomplice of A. or is not (*Tumbleson*, *ut supra*). The 61st sec. of the Criminal Procedure (Scotland) Act, 1887 (50 & 51 Vict. c. 35), also makes it competent to charge attempt to murder as a substantive offence. The institutional writers are divided in opinion as to whether or not attempt to murder is punishable capitally at common law. See Assassination. The authorities adduced by Hume, however, clearly establish that no higher penalty than an arbitrary sentence can follow on conviction of this crime.

2. *By Statute.*—By the Act 10 Geo. iv. c. 38, attempt to murder is made a capital crime. The Statute, however, specially provides that if it appears at the trial that, under the circumstances of the case, if death had ensued, the act or acts done would not have amounted to murder, the offender shall not be subject to capital punishment. The Act does not say whether this is to be decided by the judge or the jury. It is thought that it would be left to the jury (Macdonald, 146). Under the Act (ss. 1, 2) it is a capital offence wilfully, maliciously, and unlawfully to do any of the following acts:—

1. Shooting at any of Her Majesty's subjects.

2. Presenting, pointing, or levelling any kind of loaded fire-arms at any of Her Majesty's subjects, and attempting to discharge the same at or against his or their person or persons. With reference to these offences by the use of fire-arms, it is to be noted—

(1) That no special intent is required by the Act. Hence, where there was proof of shooting, but only with intent to do "bodily harm," this was held a good conviction (*Duncan*, 1845, 2 Broun, 455; *Robertson*, 1833, Bell's *Notes*, 67; *Blair*, 1836, Bell's *Notes*, 68; *Burn & Others*, 1842, 1 Broun, 1).

(2) That "loaded" does not necessarily mean "charged with powder and lead"; powder and paper-wadding is enough (*Blackwood*, 1853, 1 Irv. 223).

(3) That injury need not have been inflicted.

3. Stabbing or cutting any of Her Majesty's subjects, with intent to murder, maim, disfigure, disable, or to do some other grievous bodily harm.

4. With like intent, administering, or causing to be administered to, or taken by, any of Her Majesty's subjects, any deadly poison, or other noxious or destructive subject or thing. As to these offences, it is to be observed that the injury must be actually done—the stab inflicted, or the poison taken.

5. Attempting to suffocate any of Her Majesty's subjects, with intent to murder or disable, or to do some other grievous bodily harm.

6. With like intent, attempting to strangle any of Her Majesty's subjects.

7. With like intent, attempting to drown any of Her Majesty's subjects.

As to these offences, it is to be noted—

(1) That injury need not have been inflicted.

(2) That the intent must be plainly shown.

8. Throwing at, or otherwise applying to any of Her Majesty's subjects, any sulphuric acid or other corrosive substance calculated to injure the human frame, with intent, in so doing, to murder, or to maim, disfigure, or disable, or to do some other grievous bodily harm, and where, in consequence, any of Her Majesty's subjects shall be maimed, disfigured, or disabled, or receive some other grievous bodily harm.

As to this offence, it is to be noted—

(1) That injury must have been done.

(2) That it must be serious or grievous injury.

(3) That the actual victim need not have been the person for whom the injury was intended. (For authorities, see ACIDS, THROWING.)

It would probably be left to the jury to determine what amounts to "maiming, disfiguring, etc.," in the sense of the Statute (*Wood*, 1836, 1 Swin. 283).

The Statute applies only to offences against Her Majesty's subjects: aliens are not included. It is, however, unnecessary to set forth explicitly in the indictment that the injured person is a British subject. It is sufficient if he is so designed that it may naturally be inferred that he is a British subject (*Davidson*, 1882, 4 Coup. 600).—[Hume, i. 26; Alison, i. 163; Macdonald, 144; Anderson, *Crim. Law*, 74.] See MURDER.

Attendance at School.—See EDUCATION.

Attestor—"Attestor in the Bill Chamber."—An attestor in the Bill Chamber is one who attests the sufficiency of a cautioner. The Clerk of the Bills, who is responsible for the reputed solvency of cautioners in the Bill Chamber, may, for his security, require attestors of the solvency of cautioners, and if the attestors are persons of unquestionable credit, it liberates the Clerk (Stair, iv. 52. 25). The attestor is bound as a cautioner

for the cautioner, and is liable *subsidiarie* for him (A. S., 27 December 1709). An attestor is entitled to have both the party to the action and the cautioner discussed before recourse is had upon him (Stair, iv. 52. 25; A. S., 27 December 1709; *Gillespie*, 1747, Mor. 2163; but see *Henderson*, 1824, 3 S. 90). Where an attestor becomes bankrupt during the cause, the defender may object to further procedure until a new attestor has been found. The Act of Sederunt, 11 July 1828, s. 118, does not apply to such a case (A. B. and C. D., 1836, 15 S. 158). An attestor must be certified by a justice of the peace or magistrate, to the effect that he is reputed to be in good circumstances to fulfil the bond, and such certification is proper evidence of sufficiency. The certificate should be holograph of the justice or magistrate, and endorsed on the bond of caution in the form printed on the back as issued from the office. If the certificate is on a separate paper, it must identify the bond by its date and terms (Mackay, *Manual*, 428). Such certification infers no personal responsibility, beyond the knowledge and belief of the justice of the peace or magistrate that the fact certified is true. So that if the attestor thereafter becomes bankrupt, the certifier is not liable (Beveridge on *Bill Chamber*, 33 App. 44). The Clerk of the Bills is entitled to refuse the certificate of a justice of the peace as to an attestor, if he has reason to believe that he is not reliable (*Simpson*, 1860, 22 D. 679).

Style of Attestation.

I, *A.*, do hereby not only certify and attest the sufficiency of the within designed *B.*, as cautioner in the manner within expressed, but also bind and oblige myself, my heirs, executors, and successors, as cautioner and surety *subsidiarie* along with him, to the within designed *C.*, in manner within specified; [declaring that, before any proceedings are taken against me or my foresaids, for payment of any of the said sums, all manner of legal diligence shall be used against *B.* and *C.*]; and I consent that this attestation be recorded along with the within bond, in terms of the clause of registration therein contained, and to the effect within mentioned.—In witness whereof.

Attestation by a J.P. or Magistrate.

I, *N.*, one of Her Majesty's Justices of Peace for the county of *T.* (or one of the Magistrates of the city of *G.*), hereby certify that *A.* and *B.*, the within designed cautioner and attestor, are habit and repute responsible for the obligation contained in the within bond. (Signed) , *J.P.* or *Magistrate.*

Attorney.—An attorney is a person appointed by another to act, in his place, or to represent him for a certain purpose. See MANDATE; AGENCY; PROXY. The name of attorney was introduced from England (Stair, ii. 3. 16). "One that is set in the turne, stead, or place of another," is the definition of Coke (Coke upon *Littleton*, 51, b); "and of these some be private, and some be publike, as attorneys-at-law." The document by which the appointment is made is called a Power, or Letter of Attorney; and this regulates the limits of the authority conferred. See POWER OF ATTORNEY; also WARRANT OF ATTORNEY.

ATTORNEY-AT-LAW.—This name has never been applied in Scotland to any class of legal practitioners. "Law agent," is the Scotch generic name for all such practitioners, except members of the Faculty of Advocates.

ATTORNEY TO TAKE SASINE.—In the ceremony of giving sasine the person who appeared to take symbolical delivery on behalf of the grantee was called his attorney or procurator; the person acting for the superior being called his BAILIE (*q.v.*).—[Menzies, *Conveyancing Lectures*, 571; Bell, *Conveyancing*, 653.] See INFEFTMENT; SASINE.

Auction or Roup.—A public sale by competition among bidders or offerers. The word "auction" suggests an increase by each bidder upon the price offered by the preceding bidder, and implies that the highest bidder will be preferred to the purchase. "Roup" is a term formerly much used in Scotland and the north of England, but now fast becoming obsolete. It refers to the call or outcry of the bids by the "rouper" or auctioneer. At an auction sale, each bid is in effect a proclamation by the bidder that he is prepared to purchase at the price named by him under the conditions of sale notified before the sale commenced. A bid is generally spoken of as an offer which is accepted as regards the highest bid by the auctioneer announcing the completion of the sale in customary manner. In England this view of the principle of an auction sale is well established, and is thus stated by Lord Campbell C. J.: "The case of *Payne* (1789, 3 T. R. 148), which has been considered good law for nearly seventy years, decided that a bidding at an auction, instead of being a conditional purchase, is a mere offer; that the auctioneer is the agent of the vendor; that the assent of both parties is necessary to the contract; that this assent is signified by knocking down the hammer; and that, till then, either party may retract" (*Warlow*, 1858, 1 E. & E. 295, at 308). The power to retract a bid as an offer not yet accepted, is an application of the English doctrine of "consideration," it being held that a stipulation to keep an offer open for a specified time is void if no special consideration has been given to the offerer (*Cooke*, 1790, 3 T. R. 653). This doctrine does not apply to Scotland (*Law*, 1874, 3 R. 1192), and therefore an offer which in its terms is to be kept open for a certain period cannot be withdrawn before the period has expired (Bell, *Com.* i. 344). In sales of goods, the law of Scotland is now assimilated in this respect to that of England (Sales of Goods Acts, 1893, s. 58 (1)), but in other sales it is still an open question whether a bid may be retracted before the fall of the hammer. It is submitted that it is not competent to retract, because (1) the law of Scotland seems to have followed the Roman law in "assuming a tacit '*pactum de emendo*,' or an implied undertaking that the bid shall not be withdrawn" (see Moyle, *Sale in the Civil Law*, 167–169); (2) true principle points to a bid being an acceptance of the exposer's offer to sell, conditional upon there being no higher bid; not an offer to buy, requiring acceptance by or on behalf of the exposer. "We cannot distinguish the case of an auctioneer putting up property for sale 'without reserve' from the case of the loser of property offering a reward, or that of a railway company publishing a time-table stating the times when, and the places to which, the trains run. It has been decided that the person giving the information advertised for, or a passenger taking a ticket, may sue as upon a contract with him" (per Martin B. in *Warlow*, 1859, 1 E. & E. 309, at 316). In Scotland, ARTICLES OF ROUP (*q.v.*) formally subscribed by the exposer, and an equally formal minute of exposure subscribed by each of the bidders, are required in auction sales of heritage (*Aberdein*, 1867, 5 M. 726; see also *Shiell*, 1874, 1 R. 1083). It is clear that in such a case the articles correspond to an offer to sell, and that the sale is completed, not by the fall of the hammer, but by the conditional acceptance implied by the bidder's signature to the minute. It is, therefore, still open in Scotland, in sales of heritage, or of debts, insurance policies, shares, patents, copyrights, goodwills, or other subjects not falling within the term "goods," to view each bid as conditionally completing the contract, and not capable of being retracted. But in auction sales of "goods" the sale is "complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner," and "until such

announcement is made, any bidder may retract his bid" (Sale of Goods Act, 1893, s. 58 (2)). In England, the exposer has a like privilege of withdrawing at any time before the fall of the hammer, notwithstanding that the company has assembled and bids have been made (*Warlow*, 1859, 1 E. & E. 295, 309; *Harris*, 1873, L. R. 8 Q. B. 286); but in Scotland this rule does not necessarily apply, at least to the full extent, if, as suggested, the exposer is an offerer who has contracted to keep his offer open until the conclusion of the bidding.

A sale by sealed tender, though not an auction in the ordinary sense, has many of its incidents (*Walker*, 1813, 1 Dow 111; *Barlow*, 1858, 6 H. L. C. 556; *Waterhouse*, 1864, 1 H. & M. 636), and therefore a person officiating at the opening of the tenders and declaring the purchaser, requires an auctioneer's licence (8 & 9 Vict. c. 15, s. 4. See AUCTIONEER). In Scotland, writing is not necessary to the validity of a sale of goods (Sale of Goods Act, 1893, s. 3), and thus an auction even of a valuable subject, such as a ship, may proceed upon conditions intimated by written or printed notice or by word of mouth. In such sales where articles of roup are executed, they do not of themselves form a written contract so as to exclude parole proof of a condition added verbally by the auctioneer prior to the sale (*Christie*, 1880, 7 R. 729). In England, sec. 4 of the Sale of Goods Act, 1893 (formerly sec. 17 of the Statute of Frauds), renders writing necessary in sales of goods of the value of £10 or upwards, unless the purchaser accept and receive the goods, or part of them, into his possession, or "give something in earnest to bind the contract, or in part payment." This applies to auction sales (*Kenworthy* 1824, 2 B. & C. 945); and therefore it is usual in England for the offerers to subscribe their offers, or to pay down a deposit in part payment of the price, or to pay a specified small sum, proportionate to the amount of their offers, "to bind the bargain." It is not necessary in Scotland to read the conditions of sale if they be printed and hung up in a conspicuous place, or otherwise made accessible to intending bidders (*Hain*, 1853, 15 D. 667; *Macdonald*, 1882, 10 R. 95; *White & Co. Ltd.*, 1891, 18 R. 972). The sale must be conducted by a duly licensed AUCTIONEER (*q.v.*), who is agent of the seller for the purposes of the sale, but who is also to a certain extent the agent of the bidders. In virtue of his agency for the bidders, he is entitled to sign for them, so as in England to elide the Statute of Frauds, or the substituted provisions of the Sale of Goods Act. The authority is said to be given by the buyer bidding aloud (*Emmerson*, 1809, 2 Taunt. 38). In certain circumstances an auctioneer may become agent of a third party, in virtue of a mandate from the owner of the goods coupled with possession (*Mackenzie & Co.*, 1868, 7 M. 27). The function of an auctioneer as "judge of the roup" ceases with the sale itself, and he is not entitled to decide as to the *bona fides* of a bid where the question does not emerge until after the sale (*Strachan*, 1884, 11 R. 756).

At an auction sale both exposer and bidders must act in *bonâ fide*. In England, the practice of owners buying-in their own goods, or employing persons to bid for them, was described by Lord Mansfield as "a fraud upon the sale and upon the public." "The basis of all dealing ought," he said, "to be good faith; that could never be the case if the owner might secretly and privately enhance the price by a person employed for that purpose. Such a practice was never openly avowed; if allowed, no one would bid. The disallowing it is no hardship upon the owner; for if he is unwilling his goods should go at an under price, he may order them to be set up at his own price, and not lower, or he might have it inserted in the conditions

of sale that he himself might bid once in the course of the sale" (*Boswell*, 1776, 1 Cowp. 395, at 396, 397). Of the alternatives here suggested, that of an upset price is general in Scotland, while that of a reserved bid is usual in England. In Scotland, where an upset price is fixed, it may be inserted in the articles of roup or in the conditions or advertisements of sale, or it may be announced verbally before the sale begins. If no upset price is specified, and there is no special reservation in the articles or conditions, the sale is understood to be at the pleasure of the company, and without reserve. It is therefore illegal for the auctioneer to bid or buy-in on behalf of the exposer (*Cree*, 1 Dec. 1810, F. C.); or for the exposer, whether proprietor or holding in trust, to bid for himself (*Faulds*, 1859, 21 D. 587; *York Buildings Co.*, 1795, 8 Brown's H. L. R. 42); or to employ another to bid on his behalf (*Anderson*, 16 Dec. 1814, F. C.). But when the subject of sale is trust property, one of several beneficiaries may bid (*Shiell*, 1874, 1 R. 1083); and the opinion has been expressed that if, without fraud, a trustee becomes the purchaser of trust property, the sale can only be set aside by a beneficiary under the trust (per L. P. Inglis, 1 R., at p. 1089). In England, "puffers" (*i.e.* "persons appointed to bid on the part of the owner") are illegal at common law, but in equity a seller might formerly employ one person to bid, without expressly intimating his intention to do so (see 19 Geo. III. c. 56, s. 12). So far as sales of land are concerned, this was altered by the Sale of Land by Auction Act, 1867 (30 & 31 Vict. c. 48), which makes "puffers" illegal alike in Courts of Law and of equity in any case where the sale is intimated to be without reserve (ss. 4, 5). This Act also provides that the particulars or conditions of a sale of land must state "whether such land will be sold without reserve or subject to a reserved price, or whether a right to bid is reserved" (s. 5); and that where a right to bid is reserved, "it shall be lawful for the seller, or any one person on his behalf, to bid in such manner as he may think proper" (s. 6). By the Sale of Goods Act, 1893, similar conditions are imposed in regard to auction sales of goods (s. 58); and as the last-mentioned Act applies to the United Kingdom, a reserved bid has thus come to have statutory recognition in Scotland, where it was previously almost unknown. There is nothing in the common law of Scotland to render a reserved bid illegal, provided it is duly announced before the commencement of the sale; but such a bid is so opposed to Scottish usage, that few bidders are likely to offer. It is therefore improbable that even the express statutory sanction now given to a reserved bid will supersede or impair the previous Scottish method of an upset price. The words "upset price" were introduced into sec. 58 of the Sale of Goods Act in the process of adapting the Bill to Scotland. In England, choses in action, such as bills of exchange, policies of insurance, annuities, and other actionable debts, and incorporeal personal property, such as shares, patents, copyrights, trade marks, and goodwills, neither fall under the Sale of Land by Auction Act, 1867, nor the Sale of Goods Act, 1893, and so, in an auction sale of these, it may be doubted if there is anything to prevent the seller employing a puffer without announcing the fact. In Scotland, the common law renders puffing illegal in all auction sales, and therefore statutory aid is unnecessary. The rule as to good faith is not confined to the exposer: it is equally applicable to the bidders, and it is therefore illegal on their part to use any undue means to prevent fair competition. Thus a combination among buyers to refrain from bidding, and to share the advantage among themselves, will invalidate a sale where the subject is knocked down to one of the number, and it may further subject the parties to heavy damages in favour of the exposer (*Murray*,

1783, Mor. 9567). On the same principle, it is unlawful for a person intending to bid, to give money to others to induce them to refrain from bidding (*Aitchison*, 1783, Mor. 9567). Under the Sale of Goods Act, 1893, each lot put up for sale by auction is *primâ facie* deemed to be the subject of a separate contract of sale (s. 58 (1)). The common-law rule is the same (*Emmerson*, 1809, 2 Taunt. 38; *Couston, Thomson, & Co.*, 1872, 10 M. (H. L.) 74), and will apply to sales not falling within the Statute. See SALE; AUCTIONEER.

Auctioneer.—The person by whom an auction sale is conducted. He is a species of agent resembling in some respects a broker (see *Wilkes*, 1795, 2 H. Bl. 555), and in other respects a factor, but he differs from both broker and factor in that he sells only and does not buy; that he sells publicly and not privately; that he may sell heritable as well as moveable property; and that he requires a licence. "There is no contract with the auctioneer: he is only an agent between the buyer and seller" (per L. Mansfield in *Bexwell*, 1776, 1 Cowp. 395, at 397; see also *Ferrier*, 1865, 3 M. 561: *Renwick*, 1875, 2 R. 855). An auctioneer is not responsible as seller, in the sense of a local Police Act, of articles of food unfit for human consumption (*Walker*, 1892, 20 R. (J. C.) 1). "It is true that an auctioneer sells in the sense that his professional services are employed to operate sales by constituting the relation of buyer and seller between those who employ him and those who resort to his auction mart and bid. But his duties are confined to ascertaining and announcing the highest bidder for the goods or property put up for competition, and he is no more the seller than he is the owner of such goods or property" (per L. Young, 20 R. (J. C.), at 4). The duty upon an auctioneer's licence is £10 (8 & 9 Vict. c. 15, s. 2), and the penalty for acting without licence is £100 (8 & 9 Vict. c. 15, s. 4). Certain persons, however, are exempted from duty, *e.g.* persons selling under the Small Debts Act in Scotland (8 & 9 Vict. c. 15, s. 5), or selling fish where first landed upon the sea-shore (33 & 34 Vict. c. 32, s. 5). Revenue and certain other officials are also exempted from licence duty when selling, in virtue of their office (Comrs. of In. Rev., Coll. Ins. par. 197). A licensed auctioneer may act as an appraiser or house-agent without taking out an additional licence in either of these capacities (46 Geo. III. c. 43, s. 7; 24 & 25 Vict. c. 21, s. 13). In addition to holding a licence, an auctioneer is required, under a penalty of £20, to exhibit his full Christian name, surname, and residence in large letters on a ticket or board affixed or suspended in a conspicuous part of the room or place where the auction is held (8 & 9 Vict. c. 15, s. 7). In Scotland, an auctioneer is required, under a penalty of £50, to give at least three days' written notice to the collector of taxes of the district, of the date upon which it is proposed to begin an auction sale, and of the name, surname, and residence of the person whose goods are to be sold (43 & 44 Vict. c. 19, s. 97, sub-ss. 9, 10). Any person officiating at the opening of two or more sealed tenders, where the bidders are or might be present, and declaring the highest bidder to be the purchaser, is held by the Inland Revenue to be an auctioneer in the sense of 8 & 9 Vict. c. 15, s. 4, and such person must therefore be licensed (Comrs. of In. Rev., Coll. Ins. par. 195). See AUCTION OR ROUP.

Auctor in rem suam—"One who acts for his own behoof."—No person who holds a fiduciary position, *e.g.* as tutor, trustee, or judicial

factor, can be *auctor in rem suam*. That is to say, "whenever it can be shown that a trustee has so arranged matters as to obtain an advantage, either in money or in money's worth, to himself personally, through the execution of the trust, he will not be permitted to retain it, but will be compelled to make it over to his constituent" (*Huntingdon Copper Co.*, 1877, 4 R. 294, 5 R. (H. L.) 1). He cannot make any contract between himself, or a firm in which he is a partner, and the trust estate, even though he can show that it was the best bargain possible. He may not "enter into engagements in which he has, or can have, a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound to protect" (per L. Cranworth in *Aberdeen Ry. Co.*, 1854, 1 Macq. 461). He is thus precluded from purchasing the trust estate (*York Buildings Co.*, 1795, 3 Pat. 378; *Thorburn*, 1853, 15 D. 845; *Gillies*, 1846, 8 D. 487); or taking a lease of it (*Attorney-General*, 1810, 17 Ves. 491; see *Montgomerie*, 1895, 22 R. 465); or selling to the trust estate (*Aberdeen Ry. Co., ut supra*). But such contracts are voidable, not void, and the right to challenge them may be lost by *mora* or acquiescence (*Buckner*, 1887, 14 R. 1006; *Fraser*, 1847, 9 D. 415; *Robertson*, 1834, 12 S. 875). It is illegal for trustees to lend trust funds to one of their number (*Perston*, 1863, 1 M. 245, see *Croskery*, 1890, 17 R. 700), even where he is the liferenter of the whole fund (*Ritchie*, 1888, 15 R. 1086). An agent is distinguished from a trustee in this respect—he may contract with his client, but he must do so openly, fairly, and without disguise, otherwise the contract may be set aside (*Watt*, 1877, 4 R. 601, 5 R. (H. L.) 9; *Rutherford*, 1891, 18 R. 1061). Any gain accruing to the trust fund through its investment goes to the beneficiaries, and not to the trustee. If the investment is *ultra vires*, and results in a loss, the trustee must make it good; but if it results in gain, the profit goes to the beneficiaries (*Torrie*, 1832, 10 S. 597; *Cochrane*, 1855, 17 D. 321; *Laird*, 1855, 17 D. 984; *Grant*, 1869, 8 M. 77). A trustee who is a law agent, if he acts either by himself or by his firm as agent for the trust, is not entitled to make any professional charges beyond his actual outlay (*Home*, 1841, 2 Rob. App. 384; *Gray*, 1856, 19 D. 1; *Mitchell*, 1878, 5 R. 1124). This rule applies to the case of a trustee for creditors (*Lauder*, 1859, 21 D. 1353); a judical factor (*Flowerdew*, 1854, 17 D. 263); or a *curator bonis* (*Kennedy*, 1860, 22 D. 567). It does not apply to the case of a *curator ad litem*, who, being appointed to look after his ward's interest in a particular suit, is entitled to charge for his trouble (*Rennie*, 1849, 11 D. 1201; *Pirie*, 1851, 13 D. 841). The rule may be overcome by the truster, who may in the deed empower his trustees to appoint one of their number agent, and pay him a suitable remuneration (*Goodsir*, 1858, 20 D. 1141). The beneficiaries, also, may either expressly or by implication sanction the employment and payment of a trustee as agent (*Ommanney*, 1854, 16 D. 721; *Dixon*, 1863, 2 M. 61; *Scott*, 1868, 6 M. 753; see *Aitken*, 1871, 9 M. 756).—[M'Laren on *Wills and Succession*, 884; Thoms on *Judicial Factors*, 85; Howden on *Trusts*, 37; Menzies on *Trustees*, s. 451.] See CURATOR; JUDICIAL FACTOR; TRUSTEE; TUTOR.

Auditor of the Court of Session.—An officer appointed by the Crown to tax expenses found due by the Court. The first appointment to this office was made by the Court of Session (Act of Sederunt, 6 Feb. 1806), in consequence of suggestions contained in a report on the subject of fees prepared by a Committee of the Society of Writers to the Signet, and presented to the Court with a view to obtaining certain altera-

tions and improvements on the mode of stating accounts of expenses. Prior to the appointment of an Auditor, the expenses of process were dealt with by the judges, and were usually modified at a round sum, without taxation of items. The committee, in their report, directed attention to the inconvenience to agents, and the serious loss to successful litigants, which were often caused by this system; and they suggested the "appointment of a similar officer to that known in all the English Courts under the name of Taxer of Costs," and the preparation of a table of detailed charges for the different steps of procedure. The appointment was, at first, of a temporary character, the institution of the office having, apparently, been regarded as an experiment; but its value was speedily recognised, and the office took its place, without further judicial sanction, as an important part of the machinery of the Court. It does not appear that any formal step was taken to put the office on a proper footing until, by the Act of 1821 (1 & 2 Geo. IV. c. 31, s. 32), it was declared permanent, and the right of appointment was vested in the Crown. It was also provided by that Act that the person to be appointed to the office should hold the same *ad vitam aut culpam*, that he should have practised for not less than three years as a Writer to the Signet, or a member of the Incorporation of Solicitors before the Supreme Courts in Scotland, and that he should not, under pain of deprivation of office, practise as an agent before the Court. Power was also given to appoint two Auditors (one for each Division of the Court), if the Lord President and the Lord Justice-Clerk should certify that, in their opinion, such additional appointment was necessary; and the Court was empowered, in that event, to regulate by Act of Sederunt the manner in which the business should be performed and the fees divided. The Court is also authorised by that Act to appoint an interim Auditor (who may continue to act as an agent), in the event of the auditor being unable to discharge his duties by reason of temporary indisposition or absence.

When the office was instituted, the Court did not fix the fees to be received by the Auditor, but reserved to itself the power of fixing the amount in any case where the parties failed to agree. The indefinite character of this regulation could not have been satisfactory either to the Auditor or the agents, and was probably due to the temporary character of the original appointment. In 1810 it was considered expedient to make the fees the subject of a legislative enactment, which is contained in the Act 50 Geo. III. c. 112, s. 48, and the relative Schedule appended to the Act. The fees then fixed formed the sole remuneration of the Auditor until the office was put on salary by the Act of 1838 (1 & 2 Vict. c. 118, s. 24). The salary was fixed at £700 per annum, with office accommodation, and, in 1854, an allowance of £150 per annum for a clerk was made by Treasury Minute. The Act of 1838 also appointed a new table of fees on a considerably lower scale than those fixed in 1810, and directed these to be paid into the Fee Fund along with other Court dues.

The official duty of the Auditor is to tax the accounts remitted to him by the Court, which are principally accounts of expenses found due in litigated causes, but are also, to a considerable extent, accounts for non-contentious procedure. The Auditor is further required to tax all business accounts which are sued for by agents, or which enter into questions of accounting between litigants.

The reports of the Auditor, except in the case of decrees in absence, require to be approved by the Court. Either party, if dissatisfied with the taxation, may lodge a note of objections to the report, which are heard and

disposed of summarily by the Division of the Court or the Lord Ordinary before whom the cause depends.

The Auditor is allowed, by the terms of his appointment, to tax any accounts which may be referred to him extrajudicially, and a large amount of business of this description is submitted to him. The growth of this class of business in recent years shows that the public and the legal profession appreciate the facilities thus afforded for having their accounts adjusted by a person of experience and official authority at a moderate expense, and it cannot be doubted that much trouble and litigation are avoided in this way. In this respect agents as well as clients have an advantage which is not enjoyed by the same class in England, as the Taxing Masters there require judicial authority before taxing any bill of costs, whether as between party and party or between agent and client,—an authority which is only given on special application in each case, and the cost of which forms a sensible addition to the expense of extrajudicial taxation. The Auditor also taxes extrajudicially, on remits from the Accountant of Court, the business accounts which fall within his department; and under the 38th sec. of the Railway Companies (Scotland) Act, 1867, he is empowered, on the application of either party concerned, to tax the expenses of arbitrations under the Lands Clauses Consolidation (Scotland) Act, 1845, or any Act incorporating the same. A considerable number of accounts is received from these two sources.

The value and efficiency of the Auditor's office has been repeatedly acknowledged by the Court, and its importance was duly recognised by the Law Courts Commission, 1868–70, who approved of the Auditor undertaking extrajudicial business.

In the Sheriff Courts thoughout Scotland, Auditors are appointed by the Sheriffs, and hold office during their pleasure, with duties corresponding generally, as regards their various counties, to those discharged by the Auditor of the Court of Session; these duties are regulated by AA. S. 10 July 1839, ss. 105–9, and 4 Dec. 1878. The Auditor may be either an agent or the Sheriff Clerk, where not prevented by his commission: if an agent, the account in any action in which he may be interested is remitted to another to tax. There is no restriction on his engaging in private practice. In Glasgow there are two Auditors—one appointed by the Sheriff to tax accounts remitted by him, with permission to undertake extrajudicial audits as well; and the other appointed by the Faculty of Procurators, for purely extrajudicial business voluntarily remitted to him by the parties interested.

Augmentation.—A process raised in the Teind Court by the minister of a parish against the titular and heritors, for the purpose of obtaining an increase to his stipend. The process of augmentation, in one form or another, has been in use since the Reformation. The stipends of the Reformed clergy were at first uncertain and inadequate, which led to the appointment of a Commission to award stipends out of the thirds of benefices. See ASSUMPTION OF THIRDS. This continued from 1561 to 1606. A new Commission was appointed by the Act 1617, c. 3, to award stipend out of teinds (see TEINDS). The minimum stipend was fixed at 5 chalders, or 500 merks (£27, 15s. $6\frac{8}{12}$d.). The leading subsequent Acts will be found cited in the subjoined form of summons.

The process is brought before the Court of Teinds by a summons of augmentation, modification, and locality. It proceeds before the Court of

Teinds (four Inner House judges and the Lord Ordinary on Teinds forming a quorum) till the modification is disposed of, when the cause is remitted to the Lord Ordinary to prepare a scheme of locality. See LOCALITY. The action is applicable only to parishes where the stipend is derived from teinds, and must not be raised before the expiry of twenty years from the date of last augmentation, as required by "the Teinds Act, 1808" (48 Geo. III. c. 138), s. 2. For cases prematurely raised, see Connell, i. 417–18. The augmentation usually draws back to the date of the summons, but when delay has occurred, a more recent date was fixed (see cases noted, Elliot (*Teind Court Procedure*, 49). The summons, as in other Teind actions, must be signed only by the Teind Clerk.

SUMMONS OF AUGMENTATION, MODIFICATION, AND LOCALITY.

VICTORIA, &c.—Whereas it is humbly meant and shewn to us by our lovite, the Rev. [*name and surname*], Minister of the Gospel, of the parish of , in the presbytery of , and county of : That by several Acts of Parliament, and particularly by the Acts 1633, cc. 17 and 19, and 1690, c. 30, power was granted to the persons therein named, Commissioners for Plantation of Kirks and Valuation of Teinds, to modify, settle, and appoint constant local stipends to each minister out of the teinds of the parish where they serve the cure, and to decide and proportion the localities thereof: That by the Act 1707, c. 9, the Lords of our Council and Session are appointed perpetual Commissioners, to judge, cognosce, and determine in all affairs and causes whatsoever which formerly pertained to the jurisdiction of the said Commissioners, conform to the rules laid down in the Acts therein recited, and particularly to grant augmentations of ministers' stipends: That by the Act 2 & 3 Vict. c. 36, s. 8, it is enacted that the Judges of the Inner House of the Court of Session, along with the Lord Ordinary in Teind causes and proceedings for the time being, shall be Lords Commissioners for Teinds, and shall constitute the Court of Commissioners for Teinds; and further provision is made regarding the said Court of Commissioners for Teinds by the Act 31 & 32 Vict. c. 100, s. 9: That the Parish of is large and populous, extending [*here state the extent of the parish and other particulars, as in last locality, so far as still applicable, and state whether any new circumstances have emerged affecting the expenses of living, and whether the duties of the minister have been increased by the opening of mines, manufactories, or works*], yet the pursuer is inadequately provided for his cure of the said parish, the stipend being small and insufficient for the support and maintenance of a minister and his family, amounting, as fixed by a decree dated the day of , only to [*state the amount awarded, and how far in money and victual respectively*], with £ sterling for communion elements, although there is sufficient free teind to afford a competent stipend and proper allowance for communion elements, as appears from the rental of the lands of the said parish to be herewith produced, and which is here held as repeated *brevitatis causa*, extending in the whole to £ , one-fifth for teind amounts to £ : That the following are the whole parties whom it is necessary to call as defenders in the present action [*here insert the names and designations of the defenders, specifying the respective characters in which they are called*]: Therefore the Lords of our Council and Session, Commissioners appointed for Plantation of Kirks and Valuation of Teinds, Ought and Should augment the foresaid stipend, and modify, settle, and appoint a constant local yearly stipend, with a competent yearly allowance for furnishing communion elements, to the pursuer and his successors in office serving the cure at the said kirk, suitable to the circumstances of the parish and the extent of the teinds thereof, and establish and proportion a locality of the same; and Decern for payment thereof to the pursuer and his successors in office against the heritors, titulars, tacksmen, and others, intromitters with the rents and teinds of the said parish, and that at the terms following, viz. the money stipend and communion elements at Whitsunday and Martinmas yearly, by equal portions, and the value of the victual in money according to the highest fiars prices of the same in the county of between Christmas and Candlemas yearly, after the separation of the crop from the ground, or as soon thereafter as the said fiars prices shall have been struck, beginning the first payment thereof at Whitsunday next for one half-year of the said money, and the other half thereof at Martinmas thereafter, and the value of the victual betwixt Christmas and Candlemas next, or as soon thereafter as the said fiars prices shall have been struck for crop and year 18 [If the summons be signeted between Michaelmas and Whitsunday, the augmentation will apply to the whole of

the ensuing crop, in which case the style will run as above; but if the summons be signeted between Whitsunday and Michaelmas, the augmentation will apply to half only of the crop of that year, and the style will be varied thus: beginning the first payment thereof at Martinmas next for the half of the money, and between Christmas and Candlemas next, or as soon thereafter as the said fiars prices shall have been struck, for the value of the victual, and that for last half of crop and year 18 ; and the next year's payments of the money at Whitsunday and Martinmas following by equal portions, and of the victual, between Christmas and Candlemas following, or as soon thereafter as the fiars prices shall have been struck for crop and year 18 ; and so forth, yearly and termly thereafter]; and so forth, yearly and termly thereafter, in all time coming; and for the greater expedition the pursuer is willing to refer the verity of the rental to the heritors' oaths *simpliciter*, instead of all further probation: and in case of any of the said defenders appearing and occasioning unnecessary expense to the pursuer in the process to follow hereon, such defender or defenders Ought and Should be Decerned and Ordained, by decree foresaid, to make payment to the pursuer of the sum of £ sterling, or of such other sum as our said Lords shall modify, as the expenses of the process to follow hereon, besides the dues of extract, conform to the foresaid Acts of Parliament, writs, libelled laws, and daily practice of Scotland used and observed in the like cases, as is alleged.—Our will is herefore, and we charge you that on sight hereof ye pass, and in our name and authority lawfully summon, warn, and charge the defenders, personally or at their respective dwelling-places, if within Scotland upon six days' warning, and if in Orkney or Shetland upon forty days' warning, and if furth of Scotland by delivering a copy hereof at the office of the Keeper of the Record of Edictal Citations at Edinburgh, in terms of the Statute and Act of Sederunt thereanent, and that upon sixty days' warning; and the tutors and curators or other guardians of such of the defenders as are minors, if they any have, for their interest, also at the said office of the Keeper of the Record of Edictal Citations, on the same *inducie* as the minors themselves, or by the notices and in the forms prescribed by the Statute 48 Geo. III. c. 138, and relative Acts of Sederunt, and that upon six weeks' warning; and all others having, or pretending to have, interest in the said matter, to compear before our said Lords Commissioners for Plantation of Kirks and Valuation of Teinds at Edinburgh, or where it may happen then to be for the time, the day of next, eighteen hundred and , in the hour of cause, with continuation of days, to answer at the instance of the pursuer in the matter libelled: That is to say, the defenders to hear and see the premises verified, and process and decree and sentence pronounced, conform to the conclusions above written, in all points, or else to allege a reasonable cause in the contrary, with certification as effeirs: According to justice, as ye shall answer to us thereupon: which to do we commit to you and each of you full power by these our letters, delivering them by you duly executed and indorsed again to the bearer.

Given under our signet at Edinburgh the day of in the year of our reign 18 .

[*To be signed by the Teind Clerk.*]

The summons proceeds at the instance of the parish minister, even although he has been laid aside and an assistant and successor has been appointed. And where an assistant raised an action, and the heritors objected, it was dismissed (Shaw, 19 Jan. 1806, F. C.). The claims of assistants have, however, been to some extent recognised when the augmentation was dealt with, as will be afterwards noticed.

The defenders to be called are the titular, the whole heritors of the parish, and the moderator and clerk of the presbytery of the bounds. The rights of patrons to present to vacant charges having been taken away by the Act 37 & 38 Vict. c. 82, abolishing patronage, it is unnecessary to call them unless they have right to lands or teinds in the parish. The moderator and clerk of presbytery must be cited and furnished with a statement of the present stipend, and the addition intended to be craved (Act 1808, s. 17). Where heritors are few in number, an acceptance of service by them or their agents is sufficient, and renders other intimations unnecessary, except those to the moderator and clerk of presbytery specially required by the Act.

The intimations, where service is not accepted, are prescribed by the

Acts of Sederunt of 5 July 1809, 12 Nov. 1825, ss. 23, 24, and 24 Feb. 1888 (Elliot, *Teind Court Procedure*, 146 *et seq.*). That by the precentor from his desk [*or* by the minister from the pulpit where there is no precentor] is to the effect "that the minister of the parish has raised a summons of augmentation of his stipend, which will be called in Court on Monday the day of next to come." The calling must be not less than six weeks after the date of the first notice, and the notice must be repeated for three several Sundays. A certificate by the precentor [*or* minister] that such public notice has been given upon three several Sundays in presence of two of the parishioners, who shall subscribe as witnesses, should be forthwith transmitted to pursuer's agent, to be produced in Court. A notice in writing, in like terms, shall also be affixed to the most patent door of the church by a messenger-at-arms or a constable on the same day when the first notice is given from the precentor's desk; and such messenger or constable shall return a certificate by himself and two witnesses (who need not be parishioners) that such notice has been affixed by him.

The intimations must also be made on three several days in the *Scotsman* and a newspaper circulating in the county or counties referred to in such notice (A. S. 1888). The first notice must appear in the newspapers six weeks before the calling (A. S. 1809).

It is sufficient citation to the moderator and clerk of the presbytery that the pursuer himself shall write to them in terms of the seventeenth section of the Statute, provided always that such letters shall be inserted in the presbytery record one month before the summons is called in Court (A. S. 1809, s. 1).

No. 1. Certificate by the Precentor [*or* Minister].

[In many cases there is no precentor, owing to the introduction of an organ into the service of the church, and in such cases the intimation is made from the pulpit by the minister of the parish or officiating clergyman. The certificate will be granted as follows:—]

I, *A.*, precentor of the parish church of [*or*, I, *B.*, minister of the parish of , there being no precentor in the parish church], hereby certify that, on three several Sundays, namely, on Sunday the day of [*this date must be not less than six weeks previous to the date of calling the summons*], Sunday the day of , and Sunday the day of , I gave notice from the precentor's desk [*or* pulpit], immediately before the congregation was dismissed from the forenoon service, that the Rev. *B.*, minister of the said parish, had raised a summons of augmentation, modification, and locality of his stipend before the Teind Court, against the titulars and tacksmen of the teinds, heritors, and liferenters, and all others having, or pretending to have, interest in the teinds of the said parish, which would be called in Court on Monday the day of next: which several intimations were made in presence of *D.* and *E.*, both parishioners of the said parish, witnesses to the premises, and hereto with me subscribing.

D., witness. *A.*, *Precentor* [or, *B.*, *Minister*].
E., witness.

No. 2. Certificate by a Messenger-at-Arms or Constable.

I, *A.*, [*design the office*], hereby certify that on the morning of Sunday the day of [*this must be the Sunday on which the first notice is given by the precentor* (or *minister*)], I affixed to the most patent door of the parish church of a notice in writing, bearing that the Rev. *B.*, minister of the said parish, had raised a summons, etc. [*as in No.* 1]. This I did in presence of *D.* and *E.*, witnesses to the premises, and hereto with me subscribing.

D., witness. *A.*, *Messenger-at-Arms* [or *Constable*].
E., witness.

No. 3. Certificate by the Presbytery Clerk.

I, *A.*, minister of the parish of , clerk of the presbytery of hereby certify that upon the day of [*this date must be at least one*

month before the date of calling the summons], there was inserted in the records of the presbytery a notice in writing, addressed by the Rev. *B.*, minister of the parish of , to the moderator and clerk of the said presbytery, bearing that he had raised a summons, etc. [*as in No.* 1]; and also intimating that his present stipend amounted to , and that he intended to crave under the said action an augmentation to the extent of .

A., Clerk of the Presbytery of .

No. 4. Form of Notice to be inserted three several days in the *Scotsman*, and also in a newspaper circulating in the county or counties in which the parish referred to in each such notice is situated [*the first advertisement in each paper must be at least six weeks before the date of calling the summons*].

Notice is hereby given that the Rev. *B.*, minister of the parish of , in the presbytery of , and county of , has raised a process of augmentation, etc. [*as in No.* 1, *including the date of calling*].

[*To be dated and signed by the minister's law agent.*]

Where there are Crown teinds in the parish, the Lord Advocate is cited as a defender, and a letter under a registered cover should be posted to the First Commissioner of Woods, Forests, and Land Revenues in Scotland, at his official address in London, intimating the raising of the action and its object. The Lord Advocate is cited thus: "The Right Honourable , our Advocate for Scotland, as acting under and in virtue of the Statute 20 & 21 Vict. c. 44, for our interest and on behalf of us and the Commissioners of our Woods, Forests, and Land Revenues."

As soon as the summons is signeted, the pursuer must lodge with the Teind Clerk (1) a note of the stipend as last awarded, and (2) a rental of the parish, distinguishing the rent of each heritor (A. S. 1809, s. 2, and A. S. 1825, s. 23).

After the summons has been called, the pursuer may at once enrol the case, to allow all concerned to see the process for fourteen days. The next enrolment is to hold the heritors confessed on the rental. This is treated so much as a matter of form that it is rarely opposed. But where objection was taken in Keith Augmentation, on 27 Oct. 1879, a date was assigned for proving the rental, and commission was granted for taking the depositions. The heritor who caused the commission to be granted, however, did not proceed with it, and was found liable in £5, 5s. of expenses (24 Nov. 1879).

When the heritors are held as confessed on the rental, they are not precluded from having it corrected in the course of making up the locality. The proven rental, however, regulates the interests of heritors when appointing a common agent. In a competition for the office, the agent who has the votes of the larger rental receives the appointment (Elliot, *Teind Court Procedure*, 67). The scheme of the proven rental prepared under the remit to the Lord Ordinary at this stage is now very much of a formality, and was dispensed with by the Court in the case of *Carmylie*, (11 June 1892), where the rental of the only heritor interested was in dispute, it being left to be adjusted in the course of the locality.

When the case is enrolled for debate, the circumstances which are specially founded on as grounds for the augmentation are stated orally to the Court (A. S. 1825, s. 24). The fall of the fiars prices has frequently been one of them, but it has not received effect. The stipends of parishes in the neighbourhood, or any other in similar circumstances, should be mentioned to the Court, which deals with each case according to its circumstances: and if an augmentation be granted, there is a remit to the Lord Ordinary to prepare a locality. When decree of modification is pronounced, it is final;

but where in absence a defender desires to be heard, he may give in a note craving a hearing, and the Court may hear parties and dispose of the same as they think fit, on payment of expenses (A. S. 1824, s. 24). The only case that has occurred since 1825 was that of *Eaglesham*, where a heritor was allowed a hearing on payment of the previous expenses (*Buchanan*, 29 Oct. 1883, 11 R. 59). The Court adhered to their former augmentation, 26 Nov. 1883.

Stipends must generally be awarded in victual (Act 1808, s. 8): but, owing to much of the teind being valued in money and surrendered, that part of the stipend is not converted into victual, and the decree of modification accordingly provides that money stipend and communion elements shall be paid one-half at Whitsunday and the other half at Martinmas of the year they fall due (Elliot, *Teind Court Procedure*, 50). See Fiars Prices.

Where the augmentation was opposed on the ground that there was no free teind, the Court have granted it on a *primâ facie* case being made out (*M'Leod*, 22 Nov. 1865, 38 Sc. Jur. 49; *Minister of Borthwick*, 17 Jan. 1876, 3 R. 61: and *Simpson*, 22 Feb. 1886, 23 S. L. R. 406). But in another case the process was sisted to enable the minister to bring an action of declarator of the invalidity of a decree of valuation (*Orr*, 19 Dec. 1866, 5 M. 195, 39 Sc. Jur. 95): and process was sisted to enable the minister to bring a declarator to try the validity of a *decimæ inclusæ* right (*Frood*, 9 Nov. 1874, 2 R. 76). In the latest case, where, according to the pursuer's view of certain calculations, there were surplus teinds, the Court granted the augmentation, reserving all questions as to the sources from which the augmentation was to be made up, and the heritors' objection thereto, and remitted to the Lord Ordinary to dispose of the claim of the pursuer for the expenses of the preliminary discussion (*Old Kilpatrick*, 15 Nov. 1895).

Where a stipend had been modified in fish, oil, and butter, with a small sum in money the Court converted the stipend into money, (*Smith*, 19 Dec. 1870, 9 M. 305). The stipends in similar circumstances are now chiefly in money.

The value of a large glebe was taken into account in the cases of *Old Deer*, 23 Nov. 1808, F. C. 10: *Wilton*, 21 Nov. 1827, F. C.: and *Blair Athole*, 20 May 1835, 7 Sc. Jur. 365. But the value of feu duties from a glebe feued-out under the Glebe Lands (Scotland) Act, 1866, are not to be taken into account in determining whether or not an augmentation should be granted (*Kilmalcolm*, 25 Oct. 1875, 3 R. 32).

A second minister established by private agreement is not entitled to an augmentation from teinds (*Marshall*, 7 July 1738, Mor. 14795: see also *Buist*, 5 June 1822, S. (Teinds) 218, as to second minister of St. Andrews).

While an assistant is not entitled to appear as pursuer, nor entitled to have a separate stipend allocated on the heritors, the Court have on several occasions recognised a claim to be heard on the augmentation (see cases noted by Connell, i. 455 *et seq.*). In the later case of *Cockburnspath*, the stipend was appointed to be paid—£125 to the minister or his *curator bonis*, and the remainder to an assistant and successor, there being a condition that the assistant "shall have the full beneficial possession and enjoyment of the manse and glebe" (*Spence*, 7 March 1832, 4 Sc. Jur. 368). Where a minister had retired, the assistant was allowed to sist himself, and the augmentation was granted under burden of half to the assistant and successor in terms of an agreement (*Minister of Forfar*, 25 Feb. 1863, 1 M. 444, 35 Sc. Jur. 270). In *Carsphairn* (13 March 1893), where also the minister had retired, the whole augmentation was awarded to the assistant,

and was appointed to be uplifted by the clerk of presbytery, or a collector appointed by the presbytery.

The claim for an increase of the allowance for communion elements is usually disposed of along with the claim for an augmentation. When the population of a parish does not exceed 2000, the Court will not allow more than £10 for communion elements; but there is no rule that where the population is between 3000 and 5000, the Court will allow £15 (*Minister of Logie*, 4 Dec. 1867, 6 M. 82, 40 Sc. Jur. 49). Where teinds are exhausted, no allowance for communion elements can be made out of stock (*Heritors of Cults*, 13 Feb. 1793); and there is no claim for repetition where the minister has failed to celebrate the communion (*Hay*, 14 July 1780, M. 14817).

The sums allowed from Exchequer towards augmenting stipends of the parochial clergy, under the Acts 50 Geo. III. c. 84, s. 1, and 5 Geo. IV. c. 72, s. 1, have all been exhausted (see STIPENDS (SMALL)).

The churches with districts attached erected into parishes *quoad sacra*, under the Act 7 & 8 Vict. c. 54, have generally no other source from which stipends can be augmented than seat rents (see PARLIAMENTARY CHURCHES AND PARISHES *QUOAD SACRA*). The Small Livings Committee of the Church annually distribute a large amount towards raising these livings: but, according to their report for 1895, there are still 306 livings under £200.

Before passing from this subject, reference must be made to the Court of Session cases, as distinct from those of the Teind Court. In town stipends generally, the funds available have been applied (see Elliot, *Teind Court Procedure*, 15). There have been a few recent instances, however, where questions have been raised in the Court of Session. In a Greenock case, after much discussion in the Court of Session and in the House of Lords, it was decided that an obligation by the magistrates to pay "a legal and competent stipend" must be construed according to the circumstances of the time, and an increase was given (see *Peters*, 9 June 1894, 21 R. 886, and authorities cited), and in *Rainie* a similar decision was given (6 June 1895, 22 R. 633). But where, in another Greenock case, the obligation was for "a stipend of £200 sterling per annum," the Court held that the obligation was qualified (*Thomson*, 17 Jan. 1896, 3 S. L. T. No. 169).

Authentication of Deeds.—See DEEDS.

Author.—A person who transmits by disposition *inter vivos* a feudal right to another is, in the law of Scotland, called the author of the person to whom the right is transmitted. The disponee is called a singular successor, because he succeeds to the subject by singular title. Thus an author differs from an ancestor, just as a disponee differs from one who has acquired a subject as heir. A disponee may take from his author by sale, gift, or adjudication (Ersk. ii. 7. 1). See ANCESTOR: SINGULAR SUCCESSOR.

Author: Authorship.—See COPYRIGHT.

Auxiliary Forces.—See MILITIA; VOLUNTEERS; YEOMANRY.

Avail of Marriage.—See CASUALTIES OF SUPERIORITY.

Aval.—An *aval* is an indorsement of a bill of exchange by a stranger to the bill. By sec. 56 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), "where a person signs a bill otherwise than as a drawer or an acceptor, he thereby incurs the liabilities of an indorser to a holder in due course." Lord Blackburn, in the case of *Walker's Trs.* (1880, 7 R. (H. L.) 85, at 91), thus describes an *aval*:—"By the custom of merchants, as modified by English law, there may also be an indorsement by a person, not a holder of the bill, who puts his name on the bill to facilitate the transfer by a holder. By the old foreign law, not in this respect entirely adopted by the English law, this might be done by what is called an *aval* (said to be an antiquated word signifying "under-writing"), either on the bill itself or on a separate paper; and if such an *aval* was given by any one, his obligation to all subsequent holders of the bill was precisely the same as that of the person to facilitate whose transfer the *aval* was given . . . The law of Scotland also gives effect to such an indorsement. Indeed, no better example of an indorsement having the effect of an *aval* for the drawer of a bill can be given than is afforded by *Macdonald* (1864, 2 M. 963), where the cashier of the Union Bank, having refused to give cash on the credit of a cheque drawn on another bank, agreed to give it on Macdonald indorsing his name on it. This was held to make Macdonald liable as indorser to the Union Bank."

[See Chalmers, *Bills of Exchange*, 190; Chitty on *Bills*, 11th ed., 186, 200; Thorburn on *Bills of Exchange Act*, 132; Pothier, *Du Contrat de Change*, i. ch. 4, art. 7; *Penny*, 1 C. M. & R. 439; *Hill*, 1 Salkeld, 133.] See Bill of Exchange.

Average.—"Average" is a word used in law in different connections; but it has special importance in relation to the law maritime. *Petty averages* refer to small charges disbursed by the ship on the particular voyage, such as certain port charges which were in use to be borne partly by the ship and partly by cargo. Change of custom has made this subject of little practical importance; but the word average in the clause in bills of lading, "with primage and average accustomed," refers to "petty averages." *An average loss* is a partial loss under a policy of insurance, while *particular average* means damage incurred by or for one part of the marine adventure, which that part must bear alone; so that in fact it is no average at all (*The Copenhagen*, 1 C. Rob. 289). The subject of particular average will be considered as part of the general law of Marine Insurance. In this article it is proposed to deal with general average, the subject to which the word was probably originally applied in law, and with which it is still principally associated.

General average is the claim which the owner of one part of a marine adventure has to contribution from another in respect of extraordinary expenditure incurred, or sacrifice made, voluntarily and reasonably, in time of peril, with a view to the safety of the whole adventure. There has been controversy in England on the question, Does the right arise from an implied contract? The weight of authority seems now to favour the view expressed by Lord Esher, that it does not so arise, but from the old Rhodian law, and has become incorporated with the law as part of the law of the ocean, and, as put by Lord Watson, is akin to the recompense awarded in salvage cases (*Burton*, 12 Q. B. D. 218; *Strang*, 14 App. Ca. 601). It has, however, been added, by more than one of those who have discussed this point, that it is of little practical moment, at this date, which view is taken.

The interests which ordinarily contribute are ship, freight, and cargo. It has been held recently that there can be no claim for average contribution proper where all the interests concerned have the same ownership, though in some cases at least underwriters may be made liable under the suing and labouring clause (*The Brigella* (1893), P. p. 189). This judgment was given in a case where ship and freight were alone interested; assuming it to be sound in principle, as the separate interests are generally separately insured, there seems little doubt the law will shortly be altered.

The sacrifice, using this word for the moment to include expenditure, must be extraordinary. It is not enough that the claimant has suffered more than in ordinary circumstances. If a ship has carried a press of sail to escape an enemy, or to avoid going on a lee shore, and has had her sails injured in consequence, or even if the ship has been damaged in defending herself and cargo against attack by a privateer, the damage is held to be an ordinary accident occurring in the course of performing the contract of affreightment (*Covington*, 2 B & P. (N. R.), 378; *Power*, 4 M. & S. 141; *Robertson*, Mor. 13431). So, where a sailing ship had an auxiliary engine, and, having been dismasted, consumed a large quantity of coal in steaming to her port of destination, this also was held not to ground a claim, as the engine had just been used to promote the adventure in the way intended, if circumstances arose, though to a greater extent than the shipowner looked for (*Wilson*, L. R. 2 Q. B. 203. See also *Harrison*, L. R. 7 Ex. 39). There must be an abnormal use or misuse of the ship's equipment or material, to give rise to a claim for contribution. How narrow the border line may be, is illustrated by the fact that a claim for general average is allowed when a steamer, through perils of the sea, and in an emergency, has to use part of her spars, or other materials, for fuel for her engines, coal having run out (*Robinson*, 2 Q. B. D. 91). There is a claim to contribution in respect of damage to the engines of a steamer, and use of coal, where the engines were worked in order to force the vessel off a place where she had stranded, because engines are intended to move vessels through the water, and not to force them off the ground (*The Bona* (1895), P. p. 125). The principle to be applied is clear; but it has been illustrated in the case of claims by ships, as its application is more difficult in such cases, from the fact that the ship is under obligation to make both expenditure and sacrifice, in order to do her part under the contract of affreightment, and it is only where the sacrifice or disbursement is extraordinary, in the sense now explained, that she can claim relief.

Jettison of cargo is the most obvious illustration of a case where cargo claims contribution. So there is a claim in respect of cargo damaged by water applied to extinguish fire on board ship, whether of other cargo or of ship (*Whitecross Co.*, 8 Q. B. D. 653). Cargo actually on fire does not receive contribution. Parts of the ship damaged to allow the water to be applied will also be made good.

The sacrifice must not only be extraordinary, but it must be real. Thus cutting away a mast which is already practically gone, does not entitle the ship to claim in general average, whatever good may result to the marine adventure from the mast being at once cut away. It was this principle that for many years led British adjusters to disallow a claim in the case already noticed, when water was used to put out fire, as they held the goods injured by the water should be treated as valueless because of the proximity of the fire. But though the sacrifice of the part must be real, this does not mean that if, *e.g.*, a ship would be lost as a whole, did she not sacrifice a part, she will therefore not be able to

claim contribution from cargo which is also saved by the sacrifice of that part. On the contrary, to ground a claim, the adventure must be *in peril*, and the sacrifice must be made to save the whole, or the parts from which contribution is claimed. The claim is in truth strongest when the danger is most imminent, and when the sacrifice alone can lessen or avoid it.

One of the most difficult cases under this head is where general average is claimed in respect of an alleged *voluntary* stranding of the ship for the common safety. If the stranding is truly voluntary, the claim is good (*Landale*, Mor. 13428; Bell, *Com.*, 7th ed., i. 635); but when stranding somewhere is inevitable, the mere fact that the exact place is to some extent selected, does not seem enough, unless it can be shown that there was a real sacrifice of ship for the whole venture. The law on this subject still requires elucidation in detail.

If the peril from which the adventure is rescued is due to the fault of those whose property is sacrificed, there is in general no claim to contribution. If goods are sacrificed which are a source of danger from inherent vice, having been shipped in improper condition; or if the bearing up for a port of refuge is due to unseaworthiness of the ship, or faulty navigation of the master, which has brought the whole venture into peril, no claim can be made. So, if extra fuel has been used owing to want of a reasonable supply of coal for the voyage. But where the other interests have agreed to run the risk which has brought about the peril, a claim can be made, *e.g.* where by the bill of lading the owners are freed from liability for the negligence of the master, and the sacrifice has been necessary because of a peril due to negligence on his part (*Strang*, 14 App. Ca. 601; *The Carron Park*, 15 P. D. 203. But see Carver on *Carriage by Sea*). Goods jettisoned because of a peril brought about by faulty navigation, can claim contribution from the owners of other goods, notwithstanding that the ship may be liable in relief (*Strang*, 14 App. Ca. 601). The fact that goods are carried at "merchants' risk" does not prevent their owners claiming contribution if they are sacrificed (*Burton*, 12 Q. B. D. 218). Deck cargo jettisoned cannot claim contribution, unless, by custom in the particular trade, deck cargoes are carried as in the coasting trade (*Wright*, 7 Q. B. D. 62). But where the shipper is owner of the whole cargo, it has been held that the shipowners must contribute for cargo carried on deck, in terms of the charter, which has been jettisoned (*Johnson*, 35 L. J. C. P. 23); and the same rule is said to apply where all the shippers have agreed to a deck cargo being carried (*Strang*, 14 App. Ca. 601).

Expenditure grounding a claim to contribution consists of extraordinary disbursements made for the safety of the whole marine adventure. Such expenditure is frequently incurred when ships are obliged to put into a port of refuge with a view to common safety. The question, What expenses are in these cases the subject of general average, and what fall to be charged against particular interests? has been the subject of serious litigation, and it cannot be said that the law is yet clear (*Attwood*, 5 Q. B. D. 286; *Svensden*, 13 Q. B. D. 69, 10 App. Ca. 404). Indeed, in the latter case, it was laid down that, in all cases of port of refuge expenses, the question whether extraordinary expenditure after the entry into a port of refuge is rightly chargeable to general average necessarily depends on the circumstances of each case (per L. J. Bowen, L. Blackburn). The expense of the ship going into the port of refuge is in all cases general average. If she makes for port in consequence of damage to herself, which is the subject of *particular average*, and which requires, in order to her repair, that the cargo should be unloaded and warehoused, the warehousing charges are

charges against cargo, and the reloading charges are charges against freight. It is also settled that the discharging charges are charged against general average, at least wherever the discharge is necessary for common safety. In *Attwood*, the Court of Appeal held that where the reason for the ship making for the port of refuge is due to a sacrifice which is itself the subject of *general average*, then the discharging, warehousing, reloading, and outward charges, all form part of the general average claim, and in practice this judgment is followed. *Attwood's* case, while to some extent adversely criticised in *Svensden*, was distinguished from that case, on the ground that the whole expenses there might be said to reasonably flow from the original general average sacrifice; while in *Svensden* the only general average act was making for the port in order to repair. It has not been settled by the House of Lords whether, in the circumstances of *Svensden's* case, the ship's outward charges leaving the port fall to be charged against freight or against general average. The Court of Appeal held them chargeable against freight. In practice this is given effect to. Wages of the crew while at a port of refuge are not, in general, allowed in general average (*De Vaux*, 4 Ad. & El. 420; but see *Attwood*, 5 Q. B. D. 286).

Extraordinary expenditure is also often incurred to defray services of various kinds rendered to rescue the marine adventure from peril, or to lessen loss on the employment of those concerned, and difficult questions arise how far the expenditure is to be treated for joint behoof, and when it becomes a special charge. The answer mainly turns on how far and how long the whole operations can be said to be part of one continuous act for the benefit of the whole venture. When the operations are for the safety of special parts, rather than part of work to relieve the whole from danger, they must be treated as special charges (*Walthew*, L. R. 5 Ex. 116). Salvage by volunteers is not, it is thought, strictly general average. *It is an essential element of a general average claim, that the sacrifice or expenditure has been deliberately made by, or on behalf of, the marine adventure, by some one acting as the agent of the different interests.*

A leading principle of general average is, that all the parties interested in the adventure for the benefit of which the loss was incurred, should be sufferers by the loss in exact proportion to the extent of their respective interests, but no further (Arnould, 2nd ed., p. 937). In giving effect to this principle, it has been laid down that, in the ordinary case, the adjustment of general average shall be made at the port of destination of the venture, because there the extent of the benefit becomes apparent. But if the voyage is, by necessity or agreement, broken up at a different place, then the adjustment will be made at that place, *e.g.* at the port of departure when the ship has had to return there (*Fletcher*, L. R. 3 C. P. 375). It seems an unsettled question how exactly the adjustment should be made when the ship has cargo on the voyage for different ports. It probably should be according to the special circumstances, so as to carry out the general principle. The law of the place of the adjustment is that by which the adjustment falls to be regulated, even where that law differs from our own (*Simonds*, 2 B. & C. 805). But in such cases it must be proved, in the action for recovery of the contribution, that the adjustment has been made up in accordance with the foreign law, and the loss must be one which, according to English law, is due to a peril insured against. In order to avoid such questions, it is usual to bind insurers to accept the foreign adjustment, if and as made up. The effect is to make the insurer liable for general average according to the foreign statement, whether, according to English law, it was due to perils insured against or not (*Robinows*, 3 R. 1134; *Harris*, L. R. 7 C. P. 481;

Mavro, L. R. 9 C. P. 595; 10 *ib.* 414; but see *Risk*, 1 Com. Ca. 244). It is also common for insurers to agree to accept an adjustment made on the York-Antwerp Rules, 1890, if so made in accordance with the contract of affreightment. These rules have been framed as quasi-international rules, to be applied in cases of general average, and differ in various respects from the British law on the subject.

The values of the contributing interests are taken, at all events in the case of sacrifice proper, at the place of adjustment, allowance being made for the damaged state of ship or cargo. So, if a jettison of cargo has given rise to a claim, and from the state of the cargo the reasonable inference is that the jettisoned cargo would also have been damaged, its value is allowed for as damaged only. It is a natural extension of the same principle, that if the sacrifice, though at the time effective, is followed by a total loss of the adventure before reaching its destination, there is no contribution. There has been no benefit and no extra loss.

On the other hand, extraordinary expenditure is allowed for, whether there is a subsequent loss or not. The disburser otherwise would be made to suffer beyond his co-adventurers. It has been maintained that in such a case there is a debt due at the place where the expenditure is incurred, and the adjustment should be there. It is easy to conceive special cases where justice would seem to require this; but in practice, when the venture reaches her port of destination, the adjustment takes place there of the whole general average claim.

In certain cases, expedients are resorted to, with the object of saving expense, which, under the head of "substituted expenses," are allowed in practice in general average, so far as, if they had not been incurred, there would have been other expense which would have been incurred and chargeable. The limits of this article do not permit of dealing with these in detail. (See Lowndes on *General Average*.)

There has been keen discussion how far freight contributes to general average. Prepaid freight contributes through the merchant, so far as his goods are by the prepayment of more value. Freight on cargo on board of course contributes. But how far does chartered freight contribute when the ship has as yet received no part of the cargo on board? Take a charter under which a ship in the United Kingdom is chartered to proceed to a foreign port and there load homewards; and liberty is given to carry cargo outwards. The ship on the outward voyage encounters perils, and there is a general average sacrifice. Does the chartered freight contribute? The answer, it is submitted, is, Yes, so far as the freight was of special value, *e.g.* in excess of current freights, and the shipowner therefore benefited. There is no doubt chartered freight would contribute if the ship was on her way to her port of loading in ballast under and to fulfil the charter, subject, of course, to the effect of the judgment in the *Brigella* (*at supra*).

The remedies which are given to a claimant of a general average contribution are twofold—(a) *a personal action against each contributory, and*, (b) *a right of lien upon the goods saved*. In the case of the ship, the second remedy can easily be made effectual (see *Huth*, 16 Q. B. D. 442–735, as to the rights and duties of master); but where the claim is by the owner of goods, there is no lien on the ship, which is not in his possession, but it is said there is a lien over the goods salved through the master. At any rate, the master is bound, in the interests of the goods, to take steps to have adjusted the average claims and liabilities, and to secure their payment, and will be liable if he neglects reasonably to do so (*Crooks*, 5

Q. B. D. 38; *Strang*, 14 App. Ca. 601). In connection with this whole subject, it must always be remembered that the shipmaster acts for behoof of, and as the agent of, the whole interests concerned.

In past times, considerable importance lay in the question how far funds could be raised by the shipmaster to meet extraordinary expenses by hypothecating or selling the cargo. This subject hardly falls to be treated under this head, while improved means of communication have deprived it of much of its interest. The master is only entitled so to raise funds in case of necessity, and he should communicate with the owner of the goods when practicable. Where the funds are raised by sale of goods, their owner has a right to require repayment of their value, taking that value, in his option, at either the sum they have realised by the sale, or their value at the port of destination. He is not bound to credit freight *pro rata itineris* (*Hopper*, 1 C. P. D. 137); and even if there is a total loss, he can, it has been held, claim repayment of the proceeds of sale of his goods, as the case falls to be dealt with on the basis of a forced loan by the goods owner, and therefore as a case of expenditure, and not one of sacrifice (*Atkinson*, 7 Exch. 567).

[See Lowndes on *General Average*; Carver on *Carriage by Sea*; Abbot's *Law of Merchant Ships and Seamen* (13th ed.); Arnould on *Marine Insurance*; Phillips on *Marine Insurance*; Tudor, *Leading Cases in Mercantile and Maritime Law*; M'Arthur on the *Contract of Marine Insurance*.] See Adjustment; Salvage: Marine Insurance.

Averment.—The statement of an alleged fact in judicial proceedings, which the party making it is prepared to prove. See Action.

Aversio.—Sale *aversione*, or *per aversionem* (Ulp. *Dig.* 18. 6. 4), is sale of a subject in the gross, or by the bulk, "without any specific statement of its exact quantity" (Trayner, *Maxims*); as, for example, a particular crop; or all the corn in a certain granary; or all the wine in one's cellar (Stair, i. 14. 7; Bankt. i. 419). See Sale.

A vinculo or **a vinculo matrimonii**—"From the bond of marriage."—This expression is used to indicate the complete severance of the bond or tie of marriage. Before the Reformation, when there was no such thing as divorce in this sense, the expression *divortium a vinculo matrimonii*, or *d. quoad vinculum*, was frequently used to describe a decree of nullity of marriage, by which the *vinculum* was declared never to have been binding. (See Pollock & Maitland, *Hist. of English Law*, 11. 391.)

Avizandum.—The term employed when the Court takes further time for the consideration of a cause, instead of pronouncing an immediate decision upon it. The Court is said to "take the case *ad avizandum*," or to "make *avizandum* of the case."

When a cause is removed from the Outer to the Inner House on a report by the Lord Ordinary, *great avizandum* is the phrase used. The A. S. 11 July 1828, s. 64, enacts "that when the Lord Ordinary, on hearing a cause, considers that it should be disposed of by the Inner House, he shall

appoint cases to be put into process before himself to be seen and interchanged, with the view of reporting the cause to the Court, which shall be lodged under the sanction contained in section 62 hereof; and when both cases so prepared are put into process, he shall make avizandum with the cause to the Court, and order the cases to be immediately boxed, and grant warrant to enrol in the Inner House rolls." This procedure is now fallen into desuetude, though it would appear that in actions of proving the tenor the Lord Ordinary makes great avizandum to the Inner House, after the summons is called and enrolled in the Outer House; and in division of commonty or runrig lands the Lord Ordinary makes great avizandum after proof (Mackay, *Manual*, 177).

Avulsio.—*Avulsio* takes place where a river violently tears away a part of one man's ground and carries it over to another man's land, where it rests (*Inst.* ii. 1. 21). The property of the ground thus separated continues in the original proprietor; but if, in process of time, it becomes firmly attached to the other man's land, and the trees carried with it strike root in the latter, then from that time the trees are acquired for the other man's land (*Inst.* ii. 1. 21). The fact that the land torn away remains distinguishable and capable of identification marks *avulsio* from ALLUVIO (*q.v.*). The Scots law in regard to *avulsio* follows the Roman law (Ersk. ii. 1. 14; Bell, *Prin.* s. 936). The doctrine applies to ground violently torn away by the sea; and probably the proprietor of the land torn away will have a right to the minerals lying underneath it in its new position (see per L. Mackenzie, in *Magistrates of Edinburgh*, 1836, 14 S. 922, at 933). See ACCESSIO.

Award.—"Award" appears to be properly an English law term, but has long been in common use in Scotland to signify the determination or decree-arbitral pronounced by an arbiter or oversman upon the matter submitted to him.—[Ersk. iv. 3. 29; Tomlins' *Law Dictionary*; Sweet's *Law Dictionary*; Wharton's *Law Lexicon*, *s.v.*] See ARBITRATION; ARBITER; OVERSMAN.

"B" Contributory and List.—See COMPANY.

Back-Bond.—A back-bond, or a back-letter, is a writ either qualifying the terms of another writ, or declaratory of the purposes for which another writ has been granted. Thus it often happens in practice that a proprietor of heritage grants a disposition of it, *ex facie* absolute, in favour of a disponee, when the object of the disponer is not to invest the disponee in the subjects conveyed permanently, but only temporarily, *e.g.* until a debt is satisfied. The true object of the granting of such an absolute disposition is set forth in a back-bond or back-letter executed by the disponee. The contents of a formal back-bond, relative to an *ex facie* absolute disposition, may be these: (1) a narrative of the disposition; (2) an acknowledgment and declaration by the disponee that the disposition was

granted in security of sums either advanced, or to be advanced, by the disponee; (3) an obligation by the disponee to denude himself of the subjects on satisfaction of the debt due by the disponer; (4) a declaration that, if the debt is not paid by a certain time, the disponee will be at liberty to enter into possession or to sell the subjects; (5) a declaration that the disponee will be bound to hold just count and reckoning with the disponer for his intromissions in virtue of the disposition, and to pay any balance which may be due on an accounting; (6) a clause of consent to registration, and (7) a testing clause (see *Juridical Styles*, vol. i. 430, vol. ii. 441). The terms "back-bond" and "back-letter" are used indiscriminately; but probably when the granter of the writ qualifying the principal deed comes under an express, as opposed to an implied, obligation to do a certain thing on the occurrence of a certain event, the term back-bond should be applied to the writ, and the term back-letter should be applied to the writ in other cases. The use of back-letters is not uncommon in connection with the granting of bonds and dispositions in security. Thus a bond and disposition in security may bear, as it usually does, that the principal sum borrowed, with interest at a certain rate, is repayable at a specified time; but the creditor, either by himself or his authorised agent, may by back-letter agree, *e.g.*, to allow the loan to subsist for a space of years, provided the interest is regularly paid at the terms mentioned in the bond, or to exact a lower rate of interest than the rate set forth in the bond (see *Juridical Styles*, vol. i. 421); and a back-letter may contain stipulations about the application of a part of the principal sum in a bond, the part being meantime not made over to the debtor (*Juridical Styles*, vol. i. 422–6). Similarly, a creditor who receives an assignation of documents of debts, or a cautioner to whom debts have been conveyed in security of his relief, may qualify the deed in his favour by a back-letter (*Juridical Styles*, vol. ii. 443–5). Again, when a bond is granted by an apparent heir to a third party, in order that the latter may lead an adjudication against the estate of the heir's ancestor, the grantee under the bond usually grants a back-bond, bearing that the bond was granted, without value, for the special purpose of leading and obtaining an adjudication of the lands, and containing an obligation to denude (*Juridical Styles*, vol. ii. 440). On title by trust bond and adjudication, see M. Bell, *Lect.* ii. 1115–6. See Absolute Disposition.

Back-Letter.—See Back-Bond.

Back-Tack.—See Wadset.

Backing a Warrant.—Backing a warrant is its indorsation by a magistrate of competent jurisdiction, authorising execution outside the bounds for which it was issued. Except as after mentioned, a warrant has no legal effect outside these bounds unless it is backed (Hume, ii. 79; Alison, ii. 124).

1. *Within Scotland.*—A warrant of the High Court of Justiciary runs throughout Scotland without backing (Hume, ii. 78). A criminal warrant granted by a *Sheriff* against a person charged with having committed a crime within his jurisdiction, is sufficient for the apprehension of the accused at any place within Scotland, without the necessity of backing or indorsation,

if executed either by a messenger-at-arms or an officer of the Court where it was issued (1 & 2 Vict. c. 119, s. 25). A warrant granted under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, or the Burgh Police (Scotland) Act, 1892, may be executed at any place within Scotland, without indorsation, either by a constable or other officer of the law, or by an officer of the Court or magistrate granting the same (27 & 28 Vict. c. 53, s. 8; *Scott*, 1866, 5 Irv. 278; 55 & 56 Vict. c. 55, s. 475). A summons, complaint, warrant, order or other process, in a prosecution under the Summary Jurisdiction Acts, at the instance of a Procurator-Fiscal, Parish Council, or School Board, may be served and executed by a police constable within the county, burgh, or police district in which the person upon whom the same is to be served or executed resides or is found (44 & 45 Vict. c. 33, s. 12). A sentence or decree for a pecuniary penalty or expenses may be enforced beyond the jurisdiction of the Court or magistrate who pronounced it, after indorsation by a competent Court or magistrate having jurisdiction within the territory where it is sought to be enforced (11 Geo. IV. and 1 Will. IV. c. 37, s. 8; 27 & 28 Vict. c. 53, s. 9; 55 & 56 Vict. c. 55, s. 475). An officer of one jurisdiction lawfully conveying a prisoner through another jurisdiction, has the powers of an officer of the latter without indorsation of his warrant (11 Geo. IV. and 1 Will. IV. c. 37, s. 6).

2. *Scotland, England, and Wales.*—A constable appointed for a border county, viz. Northumberland, Cumberland, Berwick, Roxburgh, or Dumfries, can execute without indorsation, within any of these counties, a warrant for the apprehension of a criminal accused or convicted of a crime committed in the county for which he is appointed a constable (20 & 21 Vict. c. 72, s. 11). Under the Indictable Offences Act, 1848, a warrant issued in England or Wales by a judge of a superior Court, or by a justice of the peace, may be indorsed by a Sheriff or justice of the peace in Scotland; and a warrant issued in Scotland by a judge of the High Court of Justiciary, a Sheriff, a justice of the peace, or a burgh magistrate, or a warrant issued under the Summary Jurisdiction (Scotland) Acts, may be indorsed by a justice of the peace in England or Wales. After being thus backed, the warrant may be executed within the jurisdiction of the indorsing magistrate, either by the person who brings it, or by any person to whom it was originally addressed, or by a constable or other officer of the law for the place where it is indorsed (11 & 12 Vict. c. 42, ss. 14 and 15; 27 & 28 Vict. c. 53, s. 9; 55 & 56 Vict. c. 55, s. 475). The prisoner is conveyed directly into the jurisdiction whence the warrant was issued, and taken before a magistrate there (*ib.; Sinclair*, 1890, 2 White, 481). All citations, warrants, and other process (except warrants of arrestment) issued under the Summary Jurisdiction Acts, may be reciprocally executed, after being backed, in England or Scotland (44 & 45 Vict. c. 24).

3. *Scotland and Ireland.*—Scottish warrants may be executed in Ireland, and Irish warrants in Scotland, after backing in terms of the Indictable Offences Act, 1848, *ut supra* (11 & 12 Vict. c. 42, ss. 14, 15; 12 & 13 Vict. c. 69, ss. 14, 15; 27 & 28 Vict. c. 53, s. 9; 55 & 56 Vict. c. 55, s. 475). They may also be backed in Ireland by an inspector-general, or deputy inspector-general, or (in their absence) assistant inspector-general of constabulary, or by a justice of the peace, in the form annexed to the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93, ss. 27–31; 40 & 41 Vict. c. 56, s. 77; 30 & 31 Vict. c. 19, s. 1).

4. *Scotland and Channel Islands.*—The provisions of the Indictable Offences Act, 1848, apply to the execution of Scottish warrants in the

Channel Islands, and *vice versâ* (31 & 32 Vict. c. 107, s. 4; 55 & 56 Vict. c. 55, s. 475).

5. *Scotland and British Possessions.*—See FUGITIVE OFFENDERS.

6. *Scotland and Foreign Countries.*—See EXTRADITION.

7. *Form of Backing.*—The following is the usual backing: "Whereas proof upon oath hath this day been made before me, one of Her Majesty's Justices of the Peace in and for the county of York, that the name of 'Ralph Pearson,' to the within warrant subscribed, is of the handwriting of the Sheriff-Substitute within mentioned,—I do therefore hereby authorise William Ferguson, police constable for Inverness-shire, Scotland, who bringeth to me this warrant, and all other persons to whom this warrant was originally directed, or by whom it may lawfully be executed, and also all constables and other peace officers of the said county of York, to execute the same within the said last-mentioned county. Given under my hand this ninth day of January 1896. (Signed) George Mould, *J.P.*" The officer who brings the warrant must depone or declare that it is signed by the magistrate who issued it. Other evidence is required in certain cases (11 & 12 Vict. c. 42, ss. 14, 15; 44 & 45 Vict. c. 24, s. 4). To enable the warrant to be backed *without the attendance* of an officer of the issuing Court, a declaration in the following form may be written upon it:—

I, *A. B.*, inspector of police of Inverness, in the county of Inverness, solemnly declare that the name of "Ralph Pearson," to the within warrant subscribed, is of the handwriting of the Sheriff-Substitute within mentioned. Dated at Inverness this 7th day of January 1896. (Signed) *A. B.*

(„) *C. D.*, Justice of the Peace for the County of Inverness.

It is backed by a magistrate of the place where it is to be executed, on production by an officer of that jurisdiction.

Bail.—Bail is the judicial security given, as a condition of liberation of a person accused of a crime or offence, to ensure appearance in answer to the charge.

History.—In the early history of our law, persons charged with almost any crime except murder had a right to remain at liberty on finding surety to underlie the law, or, if in custody, were liberated on such security being found; and even in cases of murder the Sheriff could take sufficient "borrows" from the manslayer to appear and answer to the charge. Some ancient Acts in the 13th and 14th centuries excluded from the privilege of bail several other crimes besides murder: and the Act of 1455, c. 49, directed that any person "suspect" of treason "shall be tane and remain in firmance." Yet, even after the passing of these Acts, caution to underlie the law was received in every case, the amount of bail to be found by the person accused being left to the discretion of the judge.

By the Act 1701, c. 6, a person accused of a crime not inferring a capital sentence, was in right to demand liberation on offering sufficient caution that he "shall appear and answer to any libel that shall be offered against him, for the crime or offence wherewith he is charged, at any time within the space of six months." The effect of this enactment therefore was, in addition to murder, to include among non-bailable offences such crimes as forgery, theft of a serious kind, or by one habit and repute, and deforcement of the officers of the revenue, at that time a capital offence. The right of the accused person in a bailable crime under this Statute was to demand liberation on bail so soon as the warrant of commitment was ready to

be enforced, and the application could be made either before or after imprisonment had been effected. The application was in writing, and could be made either to the magistrate or judge committing, or to the Commissioners of Justiciary, or other judge competent for cognition of the crime. In considering whether the crime was capital or not, the magistrate was entitled to take into consideration all the facts set forth, and not the mere name of the crime in the warrant of commitment. If the magistrate or other judge to whom the application was made, considered the crime to be one not inferring a capital sentence, and therefore bailable, he was obliged, within twenty-four hours after the petition was presented to him, to modify the amount of bail to be found, under pain of wrongous imprisonment. The discretionary power as to fixing the amount of bail to be found, vested in the magistrate or other judge prior to the Act of 1701, was removed; and it was provided that the maximum amount of bail should be: for a nobleman, six thousand merks; for a landed gentleman, three thousand merks, and for any other gentleman and burgess, one thousand merks; and three hundred merks for any other inferior person.

The sufficiency of the bail offered was, in the first instance, to be judged of by the Clerk of Court; and if he were dissatisfied with the caution offered, application could be made to the magistrate or judge granting bail, whose determination was open to review, at the instance of either party, in the Supreme Court.

The right to demand liberation on bail ceased at the commencement of the trial. If the bail-bond was in the ordinary terms "of answering to any libel for the crime," without the addition of the words, "and at all diets of Court following thereon," which seems to be more than was required by the Statute, the condition of the bond was purified, and the cautioner free, if the accused made his appearance and offered to stand his trial. In any case, whatever the terms of the bond, the cautioner's liability ceased after the jury had been charged with consideration of the case. By the Acts of 11 Geo. I. c. 26, and 39 Geo. III. c. 49, the maximum amount of bail was altered. The former of these Acts empowered the magistrate to double the former bail; and by the latter the maximum was fixed as follows:—

For a nobleman	£1200 sterling.
„ landed gentleman	600 „
„ other gentleman burgess or housholder .	300 „
and for any inferior person . . .	60 „

At these figures the maximum amount of bail remained until the Act of 1888 after mentioned. These limitations, however, applied only to cases under the Act of 1701, c. 6. The High Court of Justiciary or the Lord Advocate, in the exercise of their discretion, had the power of granting bail for crimes which were not bailable under the Act, and could fix the amount of bail at any sum which they deemed right. The maximum amounts were subject to further qualifications in cases regarding Inland Revenue officers and persons accused of sedition. By 11 Geo. IV. and 1 Will. IV. c. 66, the crime of forgery was declared in certain cases no longer to involve the penalty of death; and by 2 & 3 Will. IV. c. 123, capital sentence was abolished in all cases of forgery: but it was enacted by 5 & 6 Will. IV. c. 73, that in such cases under the last-mentioned Act as had had the punishment of death converted into transportation for life, no person should be entitled to insist upon liberation on bail. Again, by 7 Will. IV. and 1 Vict. c. 36 (Post Office Act), no person committed in Scotland charged with a high crime and offence under the Post Office Act was entitled to insist on liberation on bail; and by 11 & 12 Vict. c. 12, s. 9, treason-felony was put upon the same foot-

ing. But in all these cases the Court of Justiciary was expressly authorised to admit such persons to bail without reference to the maximums above mentioned, and liberation might also take place on such bail as the public prosecutor should agree to (*William H. Thomson*, High Court, 15 July 1871, 2 Coup. 103). By 45 Geo. III. c. 92, provision was made for liberation on bail under warrants of commitment indorsed between England and Scotland and Great Britain and Ireland; and the right was thereby conferred to demand liberation on bail from the magistrate indorsing a warrant to apprehend for a bailable crime committed in another part of the United Kingdom, in the same way as it might have been demanded from the judge who originally issued the warrant. This Statute was, however, repealed by 35 & 36 Vict. c. 63.

Present Law.—Important changes in the law were introduced by the Criminal Procedure (Scotland) Act, 1887 (50 & 51 Vict. c. 35), and by the Bail (Scotland) Act, 1888 (51 & 52 Vict. c. 36).

By the former Statute (s. 18), it is provided that any person accused of a bailable crime shall be entitled, immediately after he has been brought before a magistrate for examination on declaration, to apply to such magistrate, or to the Sheriff or his Substitute, for liberation, on his finding caution in common form to appear at any diet to which he may be cited for further examination, or in order to answer any indictment or complaint which may be served upon him. The prosecutor is entitled to be heard against any such application; and the Sheriff or other magistrate may, in his discretion, refuse such application before the accused is committed, until liberated in due course of law. When the accused is liberated on bail before commitment, it is not necessary to commit him, but it is lawful to serve him with an indictment or complaint without his having been previously committed.

By the Bail Act of 1888, the Act of 1701, under the sanction of which, for nearly 200 years, persons accused of all crimes not capital were in right to demand and insist upon liberation on bail, is repealed; and it is provided (s. 2) that all crimes except murder and treason are bailable, and any magistrate having jurisdiction to try the offence of which the accused is charged, or to commit him to prison, may at his discretion, on the application of any person who has been committed until liberation in due course of law, grant or refuse bail. Before disposing of such application, opportunity must be given to the prosecutor to be heard, and it must be disposed of by the magistrate within twenty-four hours after presentation, failing which, the accused must be liberated.

When bail has been refused before commitment, the application may be renewed after commitment (s. 3).

All statutory limitations of the amount of bail to be found are abolished (s. 4), and the magistrate admitting to bail fixes the bail at such an amount as he may consider sufficient to ensure the appearance of the person accused at all diets to which he may be cited on the charge.

(Sec. 5) Where an application for bail after commitment has been refused, or where the accused is dissatisfied with the amount of caution ordered to be found, he may appeal to the High Court of Justiciary. The prosecutor has also the right to appeal against the accused being liberated on bail, whether before or after commitment, as well as on the ground of the amount fixed being too small, and the accused cannot be liberated until the appeal is disposed of, except as provided in s. 7. Written notice of appeal must be immediately given, by the party appealing, to the opposite party. The appeal is disposed of by the High Court or any Lord Com-

missioner of Justiciary in Court, or in Chambers, after such inquiry and hearing as seems just (*Wilson*, Edinburgh, 20 June 1889, 2 White, 267, 16 R. (J. C.) 89; *Scott*, Glasgow, 27 Dec. 1890, 2 White, 570; *Sutherland*, Edinburgh, 21 Jan. 1891, 2 White 576; *D. H. Hobbs*, Edinburgh, 17 May 1893, 3 White, 487). The following unreported cases may also be referred to:—*P. F. Dornoch*, H. C., Edinburgh, 5 July 1893; *Thomas James Fraser*, H. C., Edinburgh, 31 Oct. 1893; *John and Finlay Macdonald*, H. C., Edinburgh, 31 Mar. 1894; *William Dickson*, H. C., Edinburgh, 7 Oct. 1895. In the event of the appeal by the prosecutor being refused, the Court may award expenses against the appellant (*P. F. Dumfries*, 11 June 1892).

(Sec. 6) No fees are exigible from, nor can expenses be awarded against, an accused in respect of an application for bail.

(Sec. 7) When the prosecutor appeals, the accused, if the bail fixed shall have been found by him, is liberated after seventy-two hours, or ninety-six hours if in any island in the Outer Hebrides or in the Orkney and Shetland Islands, from the time of his application being granted, unless his further detention pending consideration of the appeal be ordered by the High Court. Notice to the gaoler by telegraph from the Clerk of Court or the Crown Agent, is sufficient to justify detention until the arrival of such order in due course of post. In computing such period of hours, Sundays, public fasts, and public holidays are not included.

(Sec. 8) The power of the Lord Advocate and the High Court of Justiciary to admit to bail any person charged with any crime, including murder and treason, is preserved.

An application for bail should be in writing (*Andrew*, 20 June 1806), and should be signed by the accused himself or his agent. If it is not in writing, it cannot be founded on in after proceedings (*Arbuckle*, 3 Dow App. 160). If the judge to whom the application is made was not the judge committer, it is necessary to produce along with the application a copy of the warrant of commitment. By sec. 18 of 31 & 32 Vict. c. 95, all bail bonds must specify the domicile at which the accused may be cited for trial. On a question arising as to the sufficiency of the cautioner in the bond, the magistrate is not answerable for any delay which may occur, unless it be undue.

In the case of a peer, it is provided by the Act 6 Geo. IV. c. 66, s. 8, that he shall be entitled to apply to the Lords Commissioners of Justiciary, or to the Sheriff within whose county such peer may be incarcerated, to be admitted to bail, and that the caution to be found shall be to appear and answer to any indictment for the crime or offence charged in any Court competent to try the said crime, including therein the High Court of Parliament and the Court of the Lord High Steward, within twelve months if before the High Court of Parliament or Court of the Lord High Steward, and six months if before any Court in Scotland.

Can a Panel be liberated on Bail after his Trial has commenced?—By the Act of 1701, a person in custody "in order to trial" was entitled to demand to be admitted to bail, but his right to do so ceased when his trial commenced (*Waddell*, Glasgow Autumn Circuit, 1808). In one case (*J. Gilruth Fleming*, Dundee Circuit, January 1885), after the diet had been called, but before the panel was remitted to an assize, the Court certified the case to the High Court and ordered the panel to be detained in custody. He applied to the Sheriff-Substitute to be liberated on bail. The application was granted, there being no opposition on the part of the prosecutor. Liberation on caution has been granted by the Court even after the verdict of the jury had been returned, in consequence of a

certification to the whole Court. This, however, was not, properly speaking, bail, as the liberation granted was from custody after conviction, and not "in order to trial." The right to demand liberation on bail, as we have seen, no longer exists, and it is now in the discretion of the Court to grant or refuse bail, but the Court has never exercised its discretion in admitting a panel to bail after his trial has commenced, without the consent of the public prosecutor. The usual procedure now is, in trials lasting more than one day, and where the accused had, prior to the commencement of the trial, been liberated on bail, for the Crown counsel to consent to his remaining at liberty between the continued diets (*City of Glasgow Bank Directors*, H. C., Edinburgh, 21 Jan. 1879, 4 Coup. 161; *John Paterson*, H. C., Edinburgh, 19 May 1890: *William Stewart and Another*, H. C., Edinburgh, 13 Feb. 1894).

When is the Cautioner Discharged?—The Criminal Procedure (Scotland) Act, 1887, s. 18, provides (as before mentioned) that the accused person, when brought before a magistrate for examination on declaration, shall be entitled to apply for liberation on bail, and when admitted to bail the cautioner must bind and oblige himself, "in common form," that the accused shall appear at any diet to which he may be cited for further examination, or in order to answer any indictment or complaint which may be served upon him. Under the Bail Act of 1888, the cautioner for a person committed until liberation in due course of law, is bound to ensure the appearance of such person to answer at all diets to which he may be cited on the charge. That is, at all diets to which he may be cited prior to, and including the diet of trial. By the words "in common form," in sec. 18 of the Criminal Procedure (Scotland) Act, 1887, the period of the cautioner's liability in cases of liberation under that section is limited to the then statutory period of six months (1701 Act), but the Bail Act of 1888, while repealing the Act of 1701, does not provide a limitation of the period for which the cautioner may be bound. In practice, however, the cautioner is taken bound for six months. By 6 Geo. IV. c. 66, s. 8, as we have seen, a peer may apply to the High Court of Justiciary, or to the Sheriff of the county where he is imprisoned, for liberation on bail, and the cautioner's obligation is limited to twelve months if the accused is called on to answer the charge in Parliament or in the Court of the High Steward, and to six months if in a Scottish Court. In all cases, however, the cautioner's obligation is discharged so soon as the accused has surrendered himself at the bar of the Court and the trial has commenced. In the High Court of Justiciary, if, from any cause, the diet is continued after the jury have been charged with consideration of the case, and the panel is liberated, this is done, not in reliance on the bail-bond, but by special arrangement with Crown counsel.

Form of Application for Bail.

Unto the Honourable the Sheriff of [ ],

The Petition of [ ], presently a prisoner in the prison of [ ],

Humbly sheweth,

That on , he was committed to the prison of [ ], therein to be detained till liberated in due course of law, on a complaint at the instance of the Procurator-Fiscal of Court, charging him with the crime of [ ].

The said crime is bailable, and the petitioner is innocent of it.

May it therefore please your Lordship to grant warrant for his liberation so far as detained on said charge, on his finding bail to the satisfaction of the Clerk of Court to such amount as your Lordship shall appoint.

According to Justice.

Forms of Appeal on Petition for Bail.

I. By Petitioner against Refusal.

[*Place and date*].—The petitioner appeals the foregoing deliverance to the High Court of Justiciary. [*Signed by Petr. or Prör.*]

II. By Petitioner against Amount.

[*Place and date*].—The petitioner appeals to the High Court of Justiciary against the amount of bail fixed in the foregoing deliverance. [*Signed by Petr. or Prör.*]

III. Appeal by P.-F. against Bail and Amount.

[*Place and date*].—The Procurator-Fiscal appeals to the High Court of Justiciary against the accused being admitted to bail; or otherwise to have the amount of bail increased to such sum as the High Court of Justiciary may fix.
[*Signed by Procr.-Fiscal.*]

Form of Bail-Bond.

Sheriff Court of .

At , the day of ,
Eighteen hundred and years.
The which day compeared

and hereby judicially enact , bind , and oblige , as cautioner , and suret , acted in the Sheriff Court Books of [ ] for , at present a prisoner in the prison of , on a charge of having on :

that the said
[shall appear at all diets to which may be cited on said charge];
(If liberation before commitment under sec. 18 of Criminal Procedure (Scotland) Act, 1887, shall appear at any diet to which may be cited for further examination on said charge.)
and also that shall appear and answer any and every indictment or complaint which may be served upon with reference to the said charge, at any time and place to which shall be lawfully cited within the space of six months from the date hereof, and that under the penalty of pounds sterling. And , the said
accused, with consent and concurrence of , the said cautioner , do hereby consent and declare that all citations or other intimations in reference to the said criminal charge, or to this bond, which may be left for , the said accused, within the Sheriff Clerk's office in , shall be sufficiently and equally binding on , the said accused, and on , the said cautioner , as if delivered to , the said accused personally, which office the said accused, with consent and concurrence foresaid, do hereby sist as domicile. And we consent to the registration hereof in the said Sheriff Court Books, or others competent, for preservation, and that all necessary execution pass hereon on a charge of six days, and constitute , procurators. In witness whereof these presents (so far as not printed) written on .

[Hume, ii. 87–97; Alison, ii. 160–82; Burnet, 316–51. Also Macdonald, 275–7.] See Criminal Prosecution.

Bail: in Civil Actions.—See Cautionry (Judicial).

Bailiary, Letter of.—A letter of bailiary is the commission granted by barons, or other heritors of land infeft "*cum curiis* or entitled to

the jurisdictions of barons or other lower jurisdiction," in favour of a bailie, entitling him to hold Courts for the trial of civil and criminal cases, and otherwise exercise the baron's jurisdiction. This jurisdiction was formerly very extensive; but by the Heritable Jurisdiction Act, 1747, it was greatly restricted, and is now never exercised. It has not, however, been formally abolished.—[20 Geo. II. c. 43, ss. 17–25; Ersk. i. 4. 25–8: *Juridical Styles*, ii. 39.] See BARON.

Bailie.—1. *MAGISTRATE.*—A magistrate invested, in virtue of his office, with a certain jurisdiction, both civil and criminal, as well as with administrative powers, within the burgh for which he is appointed. Bailies in the royal and parliamentary burghs are elected under the Acts 3 & 4 Will. IV. c. 76 and 77, and in burghs of barony or regality their election is regulated to a certain extent by the Charter of Erection. These Acts provide that when any of the bailies go out at the annual retirement of one-third of the councillors, their places are to be supplied from the councillors on the third day after the election of the council by a plurality of votes, the presiding magistrate having a casting vote in cases of equality. The most recently elected bailie is generally called the junior bailie, taking rank last in point of precedence, though there is no statutory or common law providing for this other than use and wont. The bailies have jurisdiction in questions of debt and possessory questions between the inhabitants of the burgh, and are held to have as extensive a civil jurisdiction within the burgh as the Sheriff has in his territory. By the Act 1663, c. 6, provosts and bailies of royal burghs have power to value and sell ruinous houses to the highest offerer, where the proprietors refuse to rebuild or repair them. Their criminal jurisdiction extends only to petty riots: and in the royal burghs of Edinburgh, Stirling, and Perth, they have a jurisdiction in blood wits. Their criminal jurisdiction is now, however, practically limited to what are known as police offences. They have no higher administrative powers than ordinary members of the council. The senior magistrate of a burgh is generally included in the Commission of Justices of the Peace.—[Ersk. *Inst.* i. 4; Marwick, *Municipal Elections*; Campbell-Irons, *Burgh Police Act.*] See BURGH POLICE.

2. *BAILIE TO GIVE SASINE.*—The person who appeared for the superior at the ceremony of giving sasine was called his bailie.—[Menzies, *Conveyancing*, 571; M. Bell, *Conveyancing*, 653.] See INFEFTMENT: SASINE.

3. *BAILIE OF HOLYROOD; BAILIE OF THE ABBEY.*—This official has jurisdiction in all civil debts contracted within the precincts of the sanctuary (Bell, *Com.*, M'L.'s ed., ii. 464: Ross, *Lectures*, i. 334). He is appointed by the Duke of Hamilton, as Hereditary Keeper of Holyrood House. See ABBEY, RETIRAL TO.

Bairns.—In the law of succession, the Scotch word "bairns" means the children or issue of a person (*Kinloch*, Mor. 12841). So the legitim fund which is divided among the children of a deceased person is known as bairns' part of gear. A destination to the "bairns or children" of a marriage, means that the estate, whether heritable or moveable, is to be equally divided among all the children (*Brown*, Mor. 12842). If, on the other hand, the destination is to the "heirs and children," or to the "heirs and bairns," then the word "heir" is held to be the leading word in the

destination, and the heritage goes to the eldest son, and the moveable property to the other children equally (*Grant's Trs.*, 1862, 24 D. 1211). But if it be clear, from the terms of the deed, that there was an intention of equal division, then a destination to "heirs and bairns" may be interpreted to mean an equal division of heritage (*Wilson*, Mor. 12845).

[Ersk. iii. 8. s. 48; Bell, *Prin.* s. 1964; M'Laren on *Wills and Succession*, 770; Fraser on *H. & W.* 1403; Menzies, *Lectures on Conveyancing*, 675–81; Sandford, *Heritable Succession*, i. 173.] See LEGITIM; DESTINATION; HEIRS AND BAIRNS.

Bairns' Part of Gear.—See LEGITIM.

Ballot, or Secret Voting.—To vote a person into an office by privately putting balls into one or other of specially prepared compartments of a receptacle, one compartment being for those desirous of rejecting, the other for those desirous of admitting, the person for election. To vote for the election or admission of persons by writing a name privately on a piece of paper, folding it up, and putting it into some form of receptacle, where it remains, along with the other papers, until the time of election is over, when the balls, or the papers, as the case may be, are counted by some impartial authority.

BALLOT ACT.—This Act (35 & 36 Vict. c. 33) was passed in 1872, and introduced the principle of the ballot, or secret voting, into all parliamentary and municipal elections, except parliamentary elections for universities. It is now extended to County Council, Parish Council, and School Board elections. The recommendations for its introduction are contemporaneous with the agitations for parliamentary reform at the beginning of the nineteenth century, and it is stated that provisions for the application of the principle appeared in the original draft of Lord John Russell's Reform Bill of 1832. Nothing, however, was done until 1870, when it became evident from the report of Lord Hartington's Select Committee (15th March 1870), that the best way to counterbalance, or put a stop to the bribery, corruption, and intimidation that unquestionably prevailed at parliamentary and municipal elections in Great Britain, was to reorganise the method of voting, and to substitute for the old system of open voting that of secret voting, or the ballot. The Act, then, being introduced with the definite object of establishing a new system of voting, and of protecting the voter against external influences, necessarily contains provisions dealing with many subjects—abolition of public nominations, general duties of returning officers, offences at elections, personation, and expenses. The Act itself is unusual in form: it consists partly of clauses, and partly of rules and schedules: the clauses being, as it were, the legal enunciation of the principles governing the Act, and the rules and schedules the manner in which the details may be carried out. The enactments contained in the body of the Act are absolute, and must be obeyed by the voter or official exactly: while the rules and forms are merely directory, and it is sufficient if they are obeyed substantially (*Woodward*, 1875, L. R. 10 C. P. 746; *Phillips*, 1886, L. R. 17 Q. B. D. 812; see also *Thornbury*, 1866, 2 T. L. R. 484: L. R. 16 Q. B. D. 739). It is, moreover, specially provided that an election shall not be declared invalid by reason of a non-compliance with the rules, or any mistake in the use of its forms, provided that the election was conducted in accordance with the principles laid down in the body of

the Act, and that such non-compliance or mistake did not affect the result of the election (s. 13, Ballot Act).

By sec. 33, the Ballot Act was to continue in force till the 31st December 1880, unless otherwise determined by Parliament. Since that date, however, its provisions and effect have been continued by the Expiring Laws Continuance Acts, passed each year.

In this work the subject of Procedure at Elections, under the Ballot Act, is treated in the following separate articles:—

1. Parliamentary Elections, Procedure at.
2. Municipal Elections, Procedure at.
3. County Council Elections, Procedure at.
4. Parish Council Elections, Procedure at.
5. School Board Elections, Procedure at.

Parliamentary elections in universities are not conducted under the Ballot Act. See University Elections (Parliamentary), Procedure at.

Banishment.—Banishment from Scotland was at one time the appropriate punishment of certain serious crimes, such as leasing-making, subornation of perjury, writing threatening letters, etc. Only the Court of Justiciary could pronounce sentence of banishment from Scotland; but inferior Court judges could banish from a district, county, or burgh of Scotland. The sentence was, as a rule, carried out by the convict himself, he being released from prison and allowed a reasonable time within which to get out of the country. Sentence was invariably under certification of further penalties, such as death, transportation, imprisonment, or whipping, if the banished person returned to Scotland. The punishment of transportation beyond seas gradually superseded, in most cases, that of banishment; and eventually, by Sir William Rae's Act (11 Geo. iv. and 1 Will. iv. c. 37, s. 10), it was declared incompetent for any judge or magistrate to pronounce sentence of banishment forth of Scotland, or forth of any burgh or district or county of Scotland, except in those cases where, by Statute, the punishment of banishment forth of Scotland is enacted and specially provided for any specific offence. The only cases of importance answering to this description are those dealt with by the Act 1661, c. 34, as amended by 4 & 5 Will. iv. c. 28. Under these Statutes, the penalty of banishment from Scotland may be imposed on a layman who celebrates a marriage, or on any person, whether a minister of religion or not, who performs the marriage ceremony without banns having been proclaimed or a certificate of banns presented to him.—[Hume, i. 354, 384, 441, ii. 58, 133, 147, 485; Alison, ii. 63, 669: Macdonald, 199.] See Punishment; Transportation.

Bank; Banker.—A bank is properly a collection of all the ready money of some kingdom into the hands of some persons licensed thereunto by public authority. Banking in Scotland has no legal history prior to 1695. In that year the Act of the Scots Parliament (Will. iii. Parl. 1, Sess. 5) (17 July 1695) was passed, incorporating the Bank of Scotland as a joint-stock bank, with the exclusive privilege of banking for twenty-one years. The privilege was not renewed at the expiration of that period. The subscribers to the joint-stock, which amounted to twelve hundred thousand pounds Scots (equal to one hundred thousand pounds sterling), were "declared to be one body corporat and politick by the name of the Governor and Company of the Bank of Scotland." This was the first known instance in the

world of a company being established by private persons for the carrying on and management of a public bank wholly unconnected with the State, and dependent upon its own capital. The bank, for some time after its incorporation, did not receive deposits from the public, its business consisting in the circulation of its own notes upon the credit of the subscribed capital. At present, banking in Scotland is conducted by ten joint-stock banks, all of them being banks of issue, viz.: (1) the said Bank of Scotland; (2) the Royal Bank of Scotland, founded by Royal Charter dated 31st May 1727; (3) the British Linen Company, founded by Royal Charter, dated 6th July 1746; (4) the Commercial Bank of Scotland, established in 1810, and incorporated by Royal Charter 5th August 1831; (5) the National Bank of Scotland, established on 21st March 1825, in terms of a contract of copartnership, and incorporated by a Royal Charter dated the 5th day of August 1831. The remaining five banks, viz. the Union Bank of Scotland Limited, the Town and County Bank Limited, the North of Scotland Bank Limited, the Clydesdale Bank Limited, and the Caledonian Banking Company Limited, have all been constituted since the year 1825, under contracts of copartnership, and have been registered and incorporated under the Companies Acts. For over fifty years there have been no private banking firms in Scotland, among the last being the house of Sir William Forbes, J. Hunter, & Co., who amalgamated in 1838 with the Glasgow Union Banks, afterwards the Union Banks of Scotland Limited; and while the existing banks are spoken of as public joint-stock corporations, still a banker is under no legal obligation to open an account with any member of the public who may apply to him, and is, like a merchant, at liberty to choose those with whom he desires to have business connections. When the relationship of banker and customer is established, it is substantially that of debtor and creditor or of lender and borrower respectively.

The actual sum of money paid to a banker ceases to be the property of the customer (Devaynes, "*Sleech's* case," 3 Ross' L. C. 643, at p. 652); and though, in popular phraseology, money deposited with a banker on deposit receipt or account current is spoken of as the customer's money, such money belongs to the banker's creditors in the event of his bankruptcy, even where it has been paid in to be applied for a specific purpose, if such specific appropriation have not taken place (*Barned's Banking Co.*, 39 L. J. Ch. 635), either partially or completely (*Farley*, 26 L. J. Eq. 710), before that event.

Effect of Entries in Customer's Pass-Book.—The entries of the receipt of money in a customer's pass-book, duly authenticated by the bank officials, are *primâ facie* evidence against the bank. It is, however, open to the bank to show by evidence *prout de jure* that the entries contained in it are erroneous, or have been made by mistake, or that, in fact, the money was never received by the bank (*Couper's Trs.*, 1889, 16 R. 412). To this rule there is the exception, that where the customer, in the belief that the entries contained in the pass-book are correct, has altered his position for the worse, the banker is bound by the entries contained in the pass-book, and cannot subsequently set off sums afterwards paid in to the customer's credit against the entries which he erroneously represented himself as having received (*Skyring*, 4 B. & C. 281; *Shaw*, 4 B. & C. 715). On the other hand, entries in the pass-book of sums paid to the customer are *primâ facie* evidence against him where the pass-book has been in his possession, and returned to the bank without objection (*Commercial Bank*, 1860, 3 Macq. (H. L.) 643). With reference to the entries in a banker's own books, a customer is entitled to found on such entries to his credit

as evidence in his favour, while the entries to his debit are not admissible as evidence in favour of the bank (*British Linen Bank*, 1853, 15 D. 314). A different rule seems to apply in England (*Simson*, 2 B. & C. 65). For bankers' books as evidence, see BANKERS' BOOKS EVIDENCE ACT.

APPROPRIATION OF MONEY PAID TO BANKER.—In the absence of any special instructions from his customer, a banker is entitled to appropriate money paid to him in any manner he pleases, and such appropriation becomes irrevocable whenever the fact is communicated by the banker to his customer. When the payment of particular advances has been provided for in a particular way in the past, there is a presumption that payment of future advances will continue to be appropriated as before, in the absence of express notice to the customer of a contrary intention.

NAME OF ACCOUNT.—The name or heading of the account opened in a customer's name is sufficient notice to the banker of the nature of such account. Thus an account opened in the name of "John Smith, executor of William Jones," is notice to the bank that any money deposited by John Smith to the credit of that account is not his unlimited property, and falls therefore to be distinguished and treated differently from any money which he might deposit, either in his own name or, *e.g.*, as "Trustee of Robert Brown" (*Bailey*, L. R. 7, Q. B. 34, p. 41; *ex parte Kingston*, L. R. 6 Ch. Ap. 632). Where, however, money is paid into a bank on a contract that it is to be drawn out in a certain way, and payments are made in that way, the bank is free from further claims in respect of such money, no matter under what heading the account may have been opened (*The Struther's Patent Diamond Rock Co. Ltd.*, 1886, 13 R. 434). But this rule must not be confounded with that which applies to several accounts opened in one name. Where several accounts are opened by one person or set of persons under various headings, with the object that the sums paid into the respective accounts may be kept separate and distinct, the various accounts may be treated by the bank, so far as the relation of debtor and creditor between it and its customer is concerned, as being one to the effect that a debit balance in the one may be compensated by a credit balance in the other (*Pedder*, 31 L. J. C. P. 291). This rule applies equally to the case where the various accounts are kept at different branches of the same bank. Thus the bank is entitled, without notice to the customer, to transfer a credit balance at one branch in reduction or satisfaction of a debit balance at another branch (*Garnett*, L. R. 8 Ex. 10). But where testamentary trustees or executors, as such, lodge with a bank a sum of money belonging to the trust, the bank is not entitled to retain such sum in satisfaction of a debt due to it by the truster. The doctrine of compensation is in such a case inapplicable, as, so long as trust money is sufficiently identifiable, it must be preserved for behoof of those having the beneficial right to it (*Gray's Trs.*, 27 Nov. 1895, 33 S. L. R. 140).

BANKER'S DUTY TOWARDS CUSTOMER'S ACCEPTANCES.—The acceptance by a customer of a bill payable at his banker's is equivalent to an order to the banker to pay the amount of the bill to the person who can give a valid discharge for it; and as such the banker is bound to obey it, if he have funds of the acceptor in his hands (*British Linen Bank*, 1885, 12 R. 825; *Roberts*, 16 Q. B. 560; *Vagliano*, 1891, L. R. App. Ca. 107). Where the banker has funds of the acceptor in his hands, but insufficient to meet the acceptance in full, the presentation of the bill operates as an intimated assignation of such funds to the effect of transferring them from the credit of the customer to that of the holder of the bill. The efficacy of the order expressed in the words "payable at" depends upon their being authorised

by the acceptor. As the only person who can give a valid discharge for such payment is a holder in due course, the responsibility of seeing that payment is made to such person is thrown upon the banker. And while a banker who pays a cheque *bonâ fide*, and without negligence, upon an indorsement which subsequently turns out to have been forged, is protected, no such protection is afforded him in the case of bills, unless there are circumstances which preclude the customer from setting up the forgery, such as a direction from him to the banker to pay the bill, without reference to the genuineness of the indorsement, or an admission, actual or implied, of its genuineness.

When the drawer and acceptor are both customers of the bank at which the bill is domiciled, and the acceptor notifies the bank to refuse payment of it after the bank has given the drawer credit for the amount, the bank is not bound either to notify the fact to the drawer, or to apply the funds belonging to the acceptor in their hands towards the payment of the bill, but is entitled, on non-payment of it, to look to the drawer (*Crosse*, 1 M. & S. 545). So, where a banker becomes the holder of a bill accepted payable at his bank, it is sufficient to enable him to charge prior indorsers that he has ascertained from his books that there are no funds belonging to his customer in his hands (*Bailey*, 14 M. & W. 44; *Sanderson*, 2 H. Bl. 509). Where the banker is the indorser of such a bill, and pays it on presentation, it will depend on circumstances, from which his intention may be inferred, whether he is held to have paid it as the agent of his customer or on his own behalf (*Pollard*, 22 L. J. Q. B. 439). The Bills of Exchange Act provides, in the case of cheques, that the banker's authority to pay them does not cease until notice of the customer's death has actually reached him (Bills of Exchange Act, s. 75). No such provision is made in the case of bills, from which it may, perhaps, be inferred that the banker's authority to pay them ceases at the date of the customer's death, and if this be so, the banker who has paid his customer's acceptance after his death, but before notice of the fact has reached him, must look to the representatives of his customer to recoup him, on the ground that, by paying the bill, he has either become its holder in due course, or that he has done so on behalf of such representatives, and so made them holders of the bill; but he cannot, without such representatives' consent, debit the deceased's account with the amount of the acceptance (*Rodgerson*, 1 Bing, 93; *Newell*, 1 C. P. D. 496). The customer's bankruptcy operates as a revocation of his authority to the banker to pay his acceptances (ex parte *Hall* in re *Townsend*, L. R. 10 Ch. D. 615). Where a banker has paid his customer's acceptance on a signature which subsequently turns out to have been forged, it appears to be a question of circumstances whether he can recover the amount from the holder. Generally speaking, a banker who pays such an acceptance negligently cannot recover the amount from the presenter, since it is his duty to know his customer's signature; nor can he recover where, by his negligence in giving timely notice of the forgery, he has prejudiced the rights of the holder against antecedent parties to the bill. But where the banker has not been guilty of negligence, and, in addition, has given such timely notice of the forgery that the situation of the parties to the bill remains unaltered, or where the presenter of the bill makes a representation of the genuineness of the signature, innocent in intention, though untrue in fact, the banker may, it is thought, recover the amount paid from the holder; but the presenter of the bill, merely by presentation, does not guarantee the genuineness of the acceptor's signature.

Banker's Duty towards Customer's Cheques. — A banker is

bound to honour his customer's cheque if it be presented to him within banking hours, and he have funds belonging to his customer sufficient to meet it. If he fail or refuse to do so, he will be liable in damages should his customer suffer loss or damage through such failure or refusal. The banker will be excused if, between the receipt of the customer's money and the presentment of the cheque, a sufficient time have not elapsed to enable the amount received to be passed to the customer's account. Where money had been paid in at eleven o'clock, it was held that a banker could not be excused for dishonouring a cheque presented at three o'clock on the afternoon of the same day, as a sufficient time had elapsed between the paying in of the money and the presentment of the cheque to enable the banker to enter the amount paid in to the credit of his customer's account (*Marzetti*, 1 B. & A. 415; *Whittaker*, 1 C. M. & R. 744; *Roberts*, 16 Q. B. 560; *Rollin*, 14 C. B. 595).

No action will lie against the banker for dishonouring cheques where his customer's assets have been exhausted by the payment of bills accepted by his customer and made payable at the banker's, as the acceptance of such bills is sufficient authority to the banker to pay the amounts due upon them (*Kymer*, 18 L. J. Q. B. 218; and *supra*, *Banker's Duty towards Customer's Acceptances*).

A banker is not bound to honour a cheque which is, in his knowledge or reasonable belief, drawn in breach of trust, and for his benefit: as where an executor draws a cheque on the executry account in payment of a debt due by himself to the banker (*Gray*, L. R. 3 E. & I. App. Ca. 1). Where, however, a cheque so drawn is not for his own benefit, the banker is not bound to inquire whether the cheque be drawn in breach of trust or not (*Boddenham*, 21 L. J. Eq. 864; *Backhouse*, 8 Ch. D. 444; *Gray, ut supra*, and there opinion of L. Westbury). A banker is not entitled to dishonour a cheque drawn upon an executry estate, where the funds at the credit of the estate exceed the amount of the cheque, on the ground that the estate is insolvent, and that he intends to apply for the sequestration of it (*Ireland*, 1880, 8 R. 215). Where a banker has funds belonging to a customer, but insufficient in amount to meet a cheque drawn upon the account, presentation of the cheque operates as an intimated assignation on behalf of the presenter (*British Linen Co.*, 1883, 10 R. 923.). In such cases the practice is to return the cheque with the marking "insufficient funds," and to place the amount standing at the credit of the customer in a separate account bearing reference to the cheque. After this has been done, intimation of the fact is sent to the drawer, and he is also notified that the cheque must be presented again and delivered up before the balance can be paid. The bank, however, cannot refuse payment of a cheque if the presenter offer to deliver it up. But where a banker has agreed to honour his customer's cheques up to a certain amount, presentment of a cheque drawn by his customer before that limit is reached does not operate as an assignation because there is no debt due to the customer which can be assigned.

Countermand of Cheque.—The banker's authority to pay a cheque ceases on countermand of its payment by the drawer, or upon the receipt of notice of the drawer's death (Bills of Exchange Act, 1882, s. 75). The death of the drawer does not *per se* operate as a revocation of the banker's authority; and payment of a cheque by a banker subsequent to his customer's death, but before notice of the fact has reached him, will be good. A cheque granted for valuable consideration cannot, in a question with the payee, be countermanded by the drawer (*Watt's Trs.*, 1853, 16 D. 279). Where the drawer of the cheque countermands payment, the holder

may raise an action of multiplepoinding in the banker's name. Where the payee has paid it in to his bankers to reduce the amount of a balance standing against him, the bankers become holders for value, and are entitled to sue the drawer for the amount if he have countermanded payment (*M'Lean*, 1883, 11 R. (H. L.) 1). So it has been held that if the payee have paid a cheque, payment of which has been countermanded, in to his bankers, with the intention that it should be placed to his credit, it is immaterial whether a balance be standing against him or not, and the bank, as a holder for value, can sue the drawer on the cheque (*M'Lean, ut supra;* ex parte *Richdale* in re *Palmer*, L. R. 19 Ch. D. 409).

Payment of Altered Cheques.—As between a banker and his customer, an alteration in the amount of a cheque does not necessarily void the cheque. Thus a banker who pays the full amount upon a cheque, the sum in which has been increased through no fault or negligence on the part of his customer, may still debit the account of his customer with the amount for which it was originally drawn, but not for any excess which he has paid over that amount (*Hall*, 5 B. & C. 750). Where, however, the customer has been guilty of such neglect or carelessness as to have been the proximate cause (*Baxendale, infra*) of the banker's having been misled, as where the customer so negligently draws the cheque as to permit an alteration to be easily made, the banker will be entitled to debit his customer with the full amount which he has paid upon it (*Young*, 4 Bing. 253; *Halifax Union*, L. R. 10 Ex. 183; *Robarts*, L. R. 16 Q. B. 560; *Barker*, 1 Macq. 513; *Swan*, L. J. 32 Ex. 273; *Foster*, L. R. 4 C. P. 704, 712; *Arnold*, L. R. 1 C. P. D. 586; *Baxendale*, L. R. 3 Q. B. D. 525; also Wallace & M'Neil's *Banking Law*, 10).

A banker who negligently and without sufficient scrutiny pays a cheque which bears evidence of having been materially altered, or marks which would justifiably arouse suspicion in the mind of a careful business man, will not be allowed to debit his customer with the amount paid on it. Thus a banker is not entitled, without inquiry, to pay a cheque which has been torn in halves, the pieces of which have been pasted together, the presumption in such a case being that the drawer has destroyed it before issue (*Scholey*, 2 Camp. 485; *Ingham*, 28 L. J. C. P. 295). Where there has been no negligence either on the part of the customer or of the banker, the general rule of law will apply, that where one of two innocent parties must suffer from the fraud of a third person, he who has given the opportunity for the commission of the fraud must bear the loss. The *onus* of proving that an alteration in a cheque was made in such circumstances as not to vitiate it, lies with the holder (*Johnson*, 2 Stark, 313; *Henman*, 5 Bing. 183; *Knight*, 8 A. & E. 215).

Payment on Forged Signature.—A banker who pays a cheque, *bonâ fide* and without negligence, upon an indorsement which subsequently turns out to have been forged, is protected. But this protection does not extend to the case where the signature of the drawer is forged. Consequently, where a banker pays a cheque, though in *bonâ fide* and without negligence, the signature to which has been forged or adhibited without the drawer's authority, he will be liable to the drawer in repetition of the amount, unless the circumstances have been such as to preclude the drawer from setting up the forgery or want of authority. And this will be so even where the drawer has contributed to the success of the forgery, as by losing or carelessly mislaying his cheque-book (per Parke B. in *B. of Ireland*, 5 H. L. C. 389). The drawer may by his actings be barred from setting up the forgery, but mere silence, after the forgery has become known to him,

may not be a bar to his pleading the forgery. But silence, taken in conjunction with other circumstances, has been held a bar when it was the means of giving the forger time to abscond, and so prejudice the holder (*Maiklem*, 1833, 12 S. 53; *Warden*, 1863, 1 M. 402). Mere delay on the drawer's part in giving notice of the forgery will not necessarily imply adoption, nor bar him from repudiating liability, unless the holder or others have been prejudiced by his silence (*M'Kenzie*, 1881, 8 R. (H. L.) 8). If the drawer lead the bank to believe in the genuineness of his signature, till the bank have lost some opportunity of recovering on the cheque, which, had the forgery been known, it might have used, such delay will effect a sufficient alteration in the bank's position to preclude the drawer setting up the forgery. Where an opportunity is afforded the drawer of denying that his signature is genuine, and he does not do so, or asks for time to see the cheque, such conduct will, if it be the means of prejudicing the holder, as by allowing the forger to abscond, afford a relevant counter issue of the adoption of his signature to the drawer's plea that his signature had been forged (*Findlay*, 1850, 13 D. 278; *Boyd*, 1854, 17 D. 159). The mere fact of the drawer having taken no notice of a letter addressed to him, informing him of the existence of a cheque with his signature attached, will not entitle the banker to a counter issue of adoption (*Warden, ut supra*). Where intimation is given to the drawer that a cheque bearing his signature has been presented for payment, and thereafter an agent, acting on his instructions, calls on the banker, and, after examining the cheque, does not deny, or by implication admits, that the signature is genuine, the drawer will thereafter be precluded from setting up the forgery (*Brown*, 1863, 1 M. 793). Even where the drawer knows, or has good reason to suspect, that the forger has for some years previously been in the habit of forging his signature, mere delay on his part, apart from other circumstances, in giving intimation of the forgery, will not preclude him from pleading that his signature has been forged (*Urquhart*, 1872, 9 S. L. R. 508). The rule in such cases is, "that where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time" (*Pickard*, 6 A. & E. 474). By the term "wilfully," however, must be understood, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose a truth, may often have the same effect (per Parke B. in *Freeman*, 2 Wel. Hurl. & G. Ex. Rep. 654). The same principle was more broadly stated by Lord Denman: that a party who negligently or culpably stands by and allows another to contract on the faith of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he himself has assisted in deceiving (*Gregg*, 10 A. & E. 90). In the case of forgery under discussion, and probably in all cases of a similar description, these *dicta* must be received with the qualification that they apply only to the cases where the negligence or omission of the drawer to disclose the fact of the forgery has resulted in the holder's position being altered for the worse. Where a

cheque is forged, without the customer's knowledge, by one who has authority to act as his agent, and where the person whose signature is thus forged obtains a benefit thereby, he is bound to repay the bank which has honoured the cheque (*Clydesdale Bank*, 1877, 4 R. 626; referred to and distinguished in *Sinclair Moorhead*, 1880, 7 R. 874; cp. *Clydesdale Bank*, 1876, 3 R. 586).

Balance of Books and Effect of Docquet.—It is the custom of bankers once in every year to bring their books to a balance, debit their customers' accounts with the interest due on them, and carry the balance brought out to the debit or credit, as the case may be, of a new account, the interest thereafter becoming principal. The bank ledger is docquetted as correct by the customer, or by some one having his authority, and the cheques for the preceding year are delivered up. The effect of the docquet is to shift the *onus* of proving payments debited prior thereto from the bank to the customer (*British Linen Co.*, 1853, 15 D. 314). The question whether the sum debited for interest remains interest throughout the account, for which the obligants in a bond of credit or guarantee would be liable under the clause in the obligation whereby they undertake to pay interest on the sums advanced, from the date or dates of advance until payment, was decided in *Reddie* (1863, 1 M. 228), and the decision then given has been followed and approved of in a series of cases (*Gilmour*, 1880, 7 R. 734; *Ellis*, L. R. 1 Ex. D. 157; *Commercial Bank*, 1891, 18 R. 476). The rule of law on the subject was thus stated by the Lord President (Inglis) in *Reddie's* case: "The privilege of a banker to balance the account at the end of the year, and accumulate the interest with the principal, is founded on this plain ground of equity, that the interest should then be paid; and because it is not paid, the debtor becomes thenceforth debtor in the amount as a principal sum, itself bearing interest." While this is undoubtedly so, the bank is not bound to accumulate the interest with the principal on an account the holder of which has become insolvent, whether by his estates having been sequestrated, by compounding with his creditors, or by granting a trust deed for their behoof. In the event of insolvency, the bank is entitled to go back to the balance immediately preceding such event, and to charge interest from that date (*Gilmour*, *ut supra*). The mere fact of a company going into voluntary liquidation does not seem to have the same effect (*Commercial Bank*, *ut supra*; Lord Ordinary's *Opinion*).

Banker not bound to allow Overdrafts, although Customer previously allowed to Overdraw.—Where a banker has permitted his customer to overdraw his account with or without security, his having done so in the past is no bar to his refusing to continue to do so in the future. The banker may in such a case, without assigning any reason, intimate that he declines to allow any further overdrafts upon the account, and call upon the customer and his sureties (if he have any) to at once make provision for the liquidation of the debt (*Johnston*, 1858, 20 D. 790; *Ritchie*, 1886, 13 R. 866) Where a customer has been allowed to overdraw upon security, the banker is under no obligation to allow his customer to continue his overdrafts until the security is exhausted; and he may at any time, where no special period has been stipulated for, refuse to cash his customer's cheques, and call upon the sureties for repayment. The rule is, however, modified to this extent, that the banker must not act with undue harshness towards his customer, and must give him reasonable notice (*Johnston*, *ut supra*; *Smith*, 1871, L. R. 6 Q. B. 597).

Goods left for Safe Custody.—Bankers have frequently deposited

with them for safe custody boxes containing plate, jewels, deeds, and securities of various kinds, the depositor retaining the key of the box in his possession. Where the banker acts gratuitously, he is not bound to exercise more than ordinary care; and the negligence for which alone he becomes responsible is the want of such care as an ordinarily prudent man of business would take of property of similar description belonging to himself. It is not, however, necessarily sufficient to show that he is taking the same care of the articles entrusted to him as he has of his own property (*Doorman*, 2 A. & E. 256). The banker is not responsible for a theft from such boxes committed by his servant or employee, unless it can be shown that he knowingly or negligently retained a dishonest person in his service (*Giblin*, 1869, L. R. 2 P. C. App. 317). More care is required from the banker when he charges a commission (In re *United Service Co.*, Johnston's claim, L. R. 6 Ch. 212). The profit derived from keeping his customer's banking account is not, however, sufficient to constitute the banker an onerous custodier (*Giblin, ut supra*). Property deposited with a banker must be returned to the person who deposited it, and the banker cannot take notice of the claims of other persons over that property (*Leese*, L. R. 17 Eq. 224–34).

Banker entitled to retain all Unappropriated Negotiable Documents in security.—A bank has a right to retain all unappropriated negotiable instruments belonging to a customer, and in its possession, for the purpose of securing a debtor balance on a general account. In a question as to the bank's right to do so, the *onus* is on the person disputing it to show that the ordinary rule does not apply. This right of the bank may be excluded by agreement, express or implied, as where the deposit is made, and is clearly ascertained to be, for a specific purpose inconsistent with a right of lien for a general balance.

The receipt granted by a banker when a contract of deposit is made, is not a document which is conclusive evidence of the terms of the deposit. The contract may be behind the receipt altogether; and as it is a consensual contract, capable of being constituted verbally and proved by parole, the whole communications between the parties are admissible to have the true terms of the contract ascertained (*Robertson's Tr.*, 1890, 18 R. 12). See also Bank Agent.

Bank Agent.—A bank agent is in the same position as any other limited mercantile agent. See Agency. His power of binding the bank is regulated by the extent of his authority. So long, however, as he acts within the scope of the general authority conferred upon him, the bank are responsible, even should loss arise through the fraud or negligence of the agent, and that although no express command or privity of the officials at the head office of the bank is proved (*Barwick*, 1867, L. R. 2 Ex. 259). This rests upon the principle that the agent is placed in the branch bank for the purpose of the carrying on of the general business of the bank, and that he is thereby held out to the world as the accredited agent of the bank, with power to act in all matters connected with the legitimate business of banking (Bell, *Com.* i. 514).

It is within the scope of the general authority conferred upon a bank agent, to make inquiries and supply information as to the commercial credit and solvency of persons with whom customers of the bank desire to have business dealings. If such reports are made or granted for the

purpose of enabling the person to whom they relate to "obtain credit, money, goods, or postponement of payment of debt, or of any other obligation demandable from him," no liability attaches to the bank or the agent in respect thereof, unless the report be in writing and subscribed by the agent (Mercantile Law Amendment Act (19 & 20 Vict. c. 40, s. 6)). Where the written information is given falsely, fraudulently, or recklessly, or without knowledge of the actual facts, and the person to whom it is given acts on it, and suffers damage thereby, both the bank and the agent giving the information are liable in damages to the person who has been deceived (Wallace & M'Neil's *Banking Law*, 14, and cases there cited; also *Houldsworth*, 1879, 6 R. 1164; 1880, 7 R. (H. L.) 53). In cases where the information is communicated verbally to a customer by his own banker, based upon a written report received from another bank in answer to an inquiry made on behalf of the customer, who, relying upon its terms, which subsequently turn out to be untrue or misleading, acts on it, and suffers damage thereby, both the bank and the agent giving the written report are liable in damages to the customer in the same way as if the representations had been made directly to himself, on the ground that it must have been in the contemplation of the bank giving the information that it would or might be communicated to the customer of the bank on whose behalf it was sought (*Langridge*, 2 M. & W. 519; *Swift*, 1873, 8 Q. B. 244). If fraudulent representations are made by an agent concerning his customers, not for the purpose of enabling them to obtain credit, but in order to get money for the bank, such fraudulent representations may be proved by parole (*Paton*, 1895, 23 R. 38).

An agent of a bank is not infrequently the law agent or factor for other persons. If, in this latter capacity, he receives money which he ought to have placed to the credit of his constituent's account at his branch bank, but which he wrongfully appropriates for his own use, although there may be entries in the bank pass-book, and initialed by the agent, purporting to show that the money had been lodged in bank, it does not follow that, on the agent becoming bankrupt or absconding, the bank would be bound by such entries. Persons making such a claim require to prove, and the *onus* of proof is upon them, that the defaulter did in fact pay the money into the bank (*Couper's Trs.*, 1889, 16 R. 412).

It is not the universal practice for banks to insist upon their agents having cautioners bound along with them in a formal bond for the due performance of the duties of their office. Where, however, the bank have such cautioners, the utmost good faith on the part of the bank at the time of entering into the bond is necessary to render the cautioners liable (*Smith*, 1829, 7 S. 244; *Royal Bank*, 1844, 6 D. 1418; *M'Dougall & Herbertson*, 1864, 2 M. 935). Where no special supervision of the agent is stipulated for, the cautioners will not be free, merely from the fact that the bank have been negligent in their supervision of the agent, but something approaching to constructive fraud or connivance on the part of the bank with the agent's irregularities will be necessary. If the habits of an agent, arising say from drunkenness or other such cause, render him unfit to transact careful business, and this is known to his employers, if they choose to continue him in their employment for years without remonstrance or warning and without intimation to the cautioners, and loss arises through such misconduct, the cautioners, it is thought, are entitled to be freed from their obligation (see *Town and County Bank Ltd.* 1895, 11 S. L. Rev. 322, decided by the Sheriff-Substitute, and acquiesced in).

The usual obligation of the cautioner is to make good to the bank any loss arising from overdrafts sanctioned by the agent. If the agent overdraws his own account with the knowledge of the bank, the cautioners are not responsible for his overdrafts, in respect that they were truly advances by the bank to the agent, and not by the agent on behalf of the bank to a customer (*North of Scotland Bank*, 1882, 10 R. 217).

On the bankruptcy of an agent, the money, whether in specie or bank notes, entrusted to him and found in the safes or repositories of the bank, is the specific property of the bank, and does not form part of the agent's general estate for division among his creditors. This rule is not absolute; for if the agent, with the knowledge of the bank, carries on another business, and in this latter capacity receives money on behalf of his principals, on his bankruptcy it is a question of circumstances how far the bank can claim the money in the office as their specific property (*Couper's Trs., ut supra*; Bell, *Com.* i. 283, 284).

Bank Notes. — Bank notes are promissory notes issued by bankers, payable to bearer on demand, and pass from hand to hand by delivery (17 & 18 Vict. c. 83, s. 11). In Scotland the right to issue bank notes was formerly regarded as a common-law right not confined to any of the great banking corporations, but extending to individuals, whose power of issuing notes prior to the passing of 7 & 8 Vict. c. 32 (noticed *infra*), was only limited by their credit with the public and their ability to maintain their notes in circulation. Some of the companies issued notes for ten shillings, five shillings, and even for lower sums. There are instances where notes have been issued for one penny. By the Act 7 & 8 Vict. c. 32, s. 10, it is enacted "that from and after the passing of this Act, no person other than a banker, who, on the sixth day of May 1844, was lawfully issuing his own bank notes, shall make or issue bank notes in any part of the United Kingdom." This Act was followed by 8 & 9 Vict. c. 38, "to regulate the issue of bank notes in Scotland," under which, and since its date, the circulation of the Scotch bank notes has been conducted. By sec. 5 it is enacted that all bank notes to be issued or reissued in Scotland must be expressed to be, under certain specified penalties, for payment of a sum in pounds sterling, without any fractional parts of a pound. It is not lawful for any bank in Scotland to have in circulation, upon the average of a period of four weeks, a greater amount of notes than the amount of its authorised issue, *plus* the amount of the monthly average of gold and silver coin held by such bank at its head office or principal place of issue during the same period of four weeks.

By sec. 6 of 42 & 43 Vict. c. 76, it is provided that a bank of issue, registered as a limited company either before or after the passing of the Act, is not entitled to limited liability in respect of its notes. The members continue liable in respect of its notes in the same manner as if it had been registered as an unlimited company: but in case the general assets of the company are, in the event of the company being wound up, insufficient to satisfy the claims of both the note holders and the general creditors, then the members, after satisfying the remaining demands of the note holders, are liable to contribute towards payment of the debts of the general creditors a sum equal to the amount received by the note holders out of the general assets of the company. Bank notes of any of the Scotch banks, or of the Bank of England, are not a legal tender in Scotland.

Bank notes are exempt from the application of the sexennial prescription (12 Geo. II. c. 72, s. 39). But there seems no reason for holding them exempt from the long negative prescription. A bank note is a warrant for summary diligence (5 Geo. III. c. 49). The question has been raised, but not decided, whether bank notes may be poinded (*Alexander*, 10 Feb. 1826, 4 S. 439). Where a sum in a bank note has been fraudulently altered, the note, as such, is destroyed, but the issuing bank is liable to an onerous holder for its true amount.

The following table, taken from one of the latest returns, shows the amount of bank notes authorised to be issued by the several banks of issue in Scotland, and the average amount of bank notes in circulation, and of coin held during the four weeks ending 25th January 1896:—

Name and Title as set forth in Licence.	Name of the Firm.	Head Office or Principal Office of Issue.	Circulation authorised by Certificate.	Average Circulation during four Weeks ended as above.			Average Amount of Coin held during four Weeks ended as above.		
				£5 and up.	Under £5.	Total.	Gold.	Silver.	Total.
			£	£	£	£	£	£	£
Bank of Scotland .	The Governor and Coy. of the Bank of Scot.	Edinburgh	343,418	327,056	691,113	1,018,169	804,537	113,989	918,526
Royal Bank of Scot.	Royal Bank of Scot. .	Edinburgh	216,451	282,960	597,810	880,770	712,401	111,896	824,297
British Linen Co. .	British Linen Co. .	Edinburgh	438,024	237,734	567,858	805,592	471,008	97,219	568,227
Com. Bank of Scotland Limited	Com. Bank of Scotland Limited	Edinburgh	374,880	252,821	628,045	880,866	570,063	80,072	650,135
National Bank of Scotland Limited	National Bank of Scotland Limited	Edinburgh	297,024	236,849	550,576	787,425	616,336	87,244	703,580
Union Bank of Scotland Limited	Union Bank of Scotland Limited	Edinburgh	454,346	274,642	608,002	882,644	576,126	101,403	677,529
Town and County Bank Limited	Town and County Bank Limited	Aberdeen .	70,133	128,555	153,853	282,408	226,473	24,517	250,990
North of Scotland Bank Limited	North of Scotland Bank Limited	Aberdeen .	154,319	189,576	224,012	413,588	272,615	25,759	298,374
Clydesdale Bank Limited	Clydesdale Bank Ltd.	Glasgow .	274,321	217,460	453,553	671,013	437,592	84,003	521,595
Caledonian Banking Co. Limited	Caledonian Banking Company Limited	Inverness .	53,434	41,751	84,886	126,637	80,459	13,834	94,293

Bankers' Books Evidence Act, 1879 (42 Vict. c. 11).—This Act was passed mainly for the relief of bankers, to avoid the serious inconvenience occasioned to them by their having to produce books which were in constant use in their business, and by having to send, for the purpose of verifying them, a clerk who would otherwise be employed at the time in making entries in those very books. Subject to the provisions of the Act, a copy of any entries in a banker's—including any company of bankers carrying on business as bankers under the Companies Act, 1862–1890 (45 & 46 Vict. c. 72, s. 11 (2))—books used in the ordinary business of the bank is in all legal proceedings, civil or criminal, or inquiry in which evidence is or may be given, and includes an arbitration, received as *primâ facie* evidence of such entry, and of the matters, transactions, and accounts therein referred to. It is competent to call for entries relating to banking accounts kept in the names of other persons besides the parties to the action, provided such entries would be admissible in evidence at the trial (*Howard*, 1889, 23 Q. B. D. 1; *Parnell*, 1892, P. 137). No copy of an entry is received in evidence unless it is first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank. Such proof may be given

by a partner or officer of the bank, and may be given orally, or by an affidavit sworn before any commissioner or person authorised to take affidavits. It must also be proved that the copy has been examined with the original, and is correct. The proof on this point may be given by any person who has examined the copy with the original. The following is the form of affidavit in use:—

At Edinburgh, the day of 18 , in presence of *A. B.*, one of Her Majesty's Justices of the Peace for the County of Edinburgh, compeared *C. D.*, of , Edinburgh, who, being solemnly sworn and examined, depones that the foregoing is a copy of the account kept in the ledger of the said bank at *X.*, in name of , from the day of until the day of , when the said account was closed (or as the case may be): That the said ledger was, at the time when the entries in the said account were made, one of the ordinary books of the bank, and the said entries were made in the usual and ordinary course of business, and that the said ledger is now in the custody of the bank: Depones also that he has examined the foregoing copy account with the original, and found it correct.—All which is truth, as the deponent shall answer to God.

(Signed) *C. D.*
A. B., J.P.

Where the bank is not a party to the proceedings, production of its books, the contents of which can be proved under the Act, is not compellable, unless by order of a judge made for special cause. Where, however, the bank is a party, its position is that of any other litigant, and production of its books can competently be called for. On the application of any party to a legal proceeding, a Court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order of this kind may be made either with or without summoning the bank or any other party, but a notice must be served on the bank three clear days before the same is to be obeyed, unless the Court or judge otherwise directs (*Arnot*, 1887, 36 Ch. D. 731; *Parnell, ut supra*).

Banker's Lien.—*Nature of banker's lien.*—A banker has a general lien over all bills, notes, and other negotiable securities deposited with him by his customer, in security of any balance that may be due to him by that customer. The phrase "banker's lien" is, properly, only used to designate the right of the banker to retain negotiable securities which have been placed in his hands, a right founded on the possession of subjects which belong to the customer. But the phrase is occasionally, though loosely, applied to his other rights which a banker may enjoy, also in security of a general balance due by a customer. These are (1) a right of general retention of property which has been transferred to him by a conveyance apparently unqualified, though in reality in security or in trust (*Hamilton*, 1856, 19 D. 158; *National Bank*, 1895, 22 R. 740); and (2) a right, in the case where a customer keeps two or more accounts, to retain a balance standing in favour of the customer on one account to meet a balance standing against him on the other. The first of these rights, in respect of which a banker is in exactly the same position as any one else, will be dealt with under the heading RETENTION: the second will be discussed below.

Covers only negotiable securities.—For the present, taking banker's lien in the strict sense, there is no case in Scotland in which it has ever been extended to any subject which could not be described as a negotiable

instrument or security. In England, however, it has been held to apply to all securities placed in the banker's hand, whether negotiable or not, such as a policy of insurance or a lease (*London Chartered Bank of Australia*, 1889, 4 App. Ca. 413; In re *Bowes*, 1886, 33 Ch. Div. 586; *Wolstenholme*, 1886, 54 L. T. 746). This distinction is probably founded on the fact that in England such subjects may be equitably mortgaged by mere deposit, while in Scotland such a security is not recognised. Even in England, however, a banker has no lien over plate deposited with him (*Brandao*, 1846, 12 Cl. & Fin. 787, per L. Campbell, at 809).

The main subjects of this right in Scotland are bills of exchange and negotiable securities—securities, that is, which pass from hand to hand, and are transferable by delivery. When, however, a bill is discounted by a banker, it has become his own property, and he can have no lien over it, as lien cannot exist except over property belonging to the customer (Bell, *Prin.* s. 1451; *Com.* ii. 113). Therefore, when a banker discounts several bills for the same customer, he has no lien over any one of them for the others; and so in a case where, by claiming on the sequestrated estates of several obligants on one bill, he had obtained more than twenty shillings in the £, it was held that he could not retain that surplus to meet any deficiency which might arise on other bills discounted for the same customer (*Patten*, 1853, 15 D. 617; see also *Davis*, 1794, 5 T. R. 488; Bell, *Com.* ii. 144). It is mainly, therefore, over bills deposited with him for collection, and not for discount, that the banker's lien extends.

Debts secured by the lien.—The lien covers all advances made by the banker to the customer in the ordinary course of his business as a banker, but not debts due to him in another capacity (Bell, *Com.* ii. 115). It would seem also to justify retention in security of all bills discounted by the banker, even although the term of payment has not yet arrived (*Davis*, *ut supra*). But although the banker may have a lien over securities belonging to the customer in respect of a contingent liability for a bill not yet due, he is not thereby justified in laying an embargo upon a balance standing in the customer's favour, unless the customer is *vergens ad inopiam*. That is to say, the banker cannot refuse to honour his customer's cheque on the ground that he is the holder of an unmatured bill, on which the customer may ultimately be liable to an extent greater than the balance standing in his favour (*Paul & Thain*, 1869, 7 M. 361; *Ireland*, 1880, 8 R. 215).

Does not extend to securities specifically appropriated.—The banker's lien will not extend to securities which have been specifically appropriated to a special purpose. Thus the deposit of securities for safe keeping, or to meet a particular debt, will in general exclude a claim of lien. But the appropriation must be clear and distinct, and may be altered or waived by the actings of the parties. The fact that securities were deposited for safe keeping only, has been held to be indicated by the circumstance that they were deposited in a box to which the banker had no key (*Leese*, 1873, L. R. 17 Eq. 224). In a similar case, Exchequer bonds were kept by a customer in a box in the strong-room of a bank. He took them out and gave them to the banker, in order that he might draw the interest and get the bonds replaced by new ones. It was held that this did not subject the bonds to the lien of the banker, on the ground that he had no lien while they were in the box, and that the means by which he obtained possession of them implied a promise to return them as soon as he had fulfilled the purpose for which he received them (*Brandao*, 1846, 12 Cl. & Fin. 787). On the other hand, bonds payable to bearer were deposited with a bank, on a receipt in the following

terms: "We hold for safe keeping, on your account, and subject to your order." It was proved that some of them had been deposited at the request of the bank agent, and that advances had been made to the customer on receiving them. On the bankruptcy of the customer, it was held that the lien of the banker was not necessarily excluded by the terms of the receipt, and that he was entitled to retain the bonds in security of his general balance (*Robertson's Tr.*, 1890, 18 R. 12).

Nor when securities sent for special purpose.—When a security is sent to a banker for a specific purpose, he has no right to disregard that purpose and retain the security to cover his general balance. Thus, where a bill was sent to meet a particular debt, it was held that another obligant in that debt was entitled to resist a demand made upon him for payment, and to insist that the bill should be applied for the purpose for which it was sent, and not retained to cover the general balance of the sender (*Allan*, 1831, 9 S. 519). Similarly, if a bill is sent to a bank to be discounted, the banker is bound, as a rule, either to discount or return it, and is not entitled, in a question with other creditors of the customer, to retain it undiscounted, and claim a lien over it for a general balance (*Borthwick*, 1833, 11 S. 716, and 12 S. 121: *Glen*, 1849, 12 D. 353).

Resulting lien of banker over securities when special purpose fulfilled.—It is a further question how far a banker may claim a lien over a security sent to him to meet a particular debt, or deposited with him to cover a particular advance, after that debt or that advance has been paid. Is he entitled to detain the security, or the balance of its proceeds, to meet a balance due to him by the customer on general account? This question would seem to depend on whether the deposit of the security was an isolated transaction, or part of a general course of dealing between banker and customer. In the former case, it would seem to be established in England, that if a security is deposited on a specific contract and for a specific advance, the lien of the banker is excluded. This would seem clear where the security is deposited to meet an advance not exceeding a certain amount (In re *Meadows*, 1859, 28 L. J. Ch. 891: In re *Bowes*, 1886, 33 Ch. Div. 586). But the same result has been arrived at in other cases, where the terms of the contract were in no way inconsistent with a right of lien. Thus, when a customer sent to a bank two securities, with a letter which was held to mean an express pledge of one of them, it was held that, as the transaction had thus been brought within the limits of express contract, no lien could be implied, and therefore that the banker had no right to retain the security, which was not expressly pledged (*Wylde*, 1863, 33 L. J. Ch. 51; see also *Wolstenholme*, 1886, 54 L. T. 746). On the other hand, where a customer is in the habit of depositing securities and receiving advances from his bankers, the general lien of the banker will not be excluded, with regard to any particular security, by the fact that that security was deposited as cover for a particular advance (*National Bank*, 1895, 22 R. 740: *Jones*, 1858, Johnson, 430, 28 L. J. Ch. 155). And it is not specific appropriation if a customer keeps more than one account,—for instance, a loan, a discount, and a general account,—and deposits a security in one of these. The banker is then, in the absence of any special agreement, entitled to a lien over that security for any balance which may be due to him upon the whole accounts taken together (In re *European Bank*, 1872, L. R. 8 Ch. App. 41).

Lien over securities which customer had no right to pledge.—As a person who takes negotiable securities in good faith and for valuable consideration acquires a good title to them, even though his author had no right to transfer them, the banker's lien may exist over securities

which the customer had no right to subject to it (*Brandao*, 1846, 12 Cl. & Fin. 747). Such cases frequently arise when securities belonging to his clients are deposited with a banker by a stockbroker. The question in these cases is not whether the customer had any authority to deposit the securities, or to subject them to the lien of the banker, but whether the banker knew, or ought to have known, that he had no such authority. It may now be taken as settled, and in the latest Scotch case was not disputed (*National Bank*, 1895, 22 R. 740), that when a stockbroker, or any other person carrying on an analogous business, pledges negotiable securities with his banker, the latter is not bound to inquire who these securities belong to, or whether the broker has authority to pledge them (*National Bank, ut supra; Sheffield*, 1888, 13 App. Ca. 333; *London Joint-Stock Bank*, 1892, A. C. 201; *Bentinck*, 1893, 2 Ch. 120). But although in a case of express pledge the banker is entitled to assume that the broker, if he is acting for clients, has their authority to pledge, he is not entitled to assume that the broker has any authority to subject them to a lien for his own general balance. If, therefore, the banker knows, or has good reason to know, that the securities deposited with him are not the property of his customer, he cannot claim a right to retain them for a debt due to him by the customer, on the ground of lien. Thus, where a billbroker sent a bill to a bank to be discounted, accompanied by a letter which showed clearly that he was acting for a principal, it was held that the bank could not appropriate the proceeds of the bill to meet a debt due to them by the broker (*Furrer & Routh*, 1850, 12 D. 1190). And when a stockbroker pledged negotiable securities with a bank for a definite advance, and the bank had no reason to believe, and did not believe, that these securities were his own property, it was held that the true owner could recover them on payment of the amount for which they were expressly pledged, and that the bank had no lien over them for a general balance due to them by the stockbroker (*National Bank*, 1895, 22 R. 740).

Power of banker to realise securities subject to his lien.—In English law, the lien of a banker implies the right to realise the securities over which the lien extends (Smith, *Merc. Law*, 697). In transactions such as those above discussed between stockbrokers and bankers, authority to realise might be held in Scotland to be implied from the usage of dealings between the parties. But it is not clear whether it would be held in every case, that when a banker held a lien over a negotiable security he was entitled to realise it. Indeed, it was remarked by Lord M'Laren, in the case of *Robertson*, that although the bank there had a lien over certain securities deposited with them, they had no right to sell them, and could be interdicted if they had proposed to do so (*Robertson's Trs.*, 1890, 18 R. 12, at p. 20). But if the securities deposited are bills of exchange, the banker, as agent to collect, is bound to present them for payment when due, and would seem to be entitled, at least if they are indorsed to him, to employ the proceeds in reducing a balance due to him by the customer to whom the bills belong (Bell, *Com.* ii. 23; *Peacock*, 1869, 32 L. J. C. P. 266).

Right of banker where customer has two or more separate accounts.—The phrase "banker's lien" may also, as has already been stated, be used to designate the right of a banker, with whom a customer has several accounts, to apply, on the bankruptcy of the customer, a credit balance standing on one account to meet a debit on the other. This is, properly speaking, a right to plead compensation between two debts, and not a lien. When no question of trust is raised, this right is undoubted. The separate accounts

are kept merely for convenience of bookkeeping, and the banker is entitled, on the bankruptcy of his customer, to recast his accounts, and treat the whole as one (In re *European Bank*, 1872, L. R. 8 Ch. 41). But when a customer keeps two accounts,—one in his private, and one in a representative, capacity, —questions may arise as to the right of the banker to set off a balance on the latter against a deficit on the former account. The question is entirely one of notice. If the banker knew, or had good reason to know, that the money in one account belonged to clients for whom the customer was acting, he has no right to apply that money to pay a debt due to him by the customer (*Bodenham*, 1852, 2 De T. M. & T. 903; *Bridgeman*, 1857, 24 Beavan, 302; ex parte *Kingston*, 1871, L. R. 6 Ch. 632). But he is not bound to inquire closely to whom money paid into the customer's account belongs, if it is not earmarked as belonging to third parties by the nature of the account to which it is paid in (*Dunlop's Trs.*, 1891, 18 R. 751; affd. 1893, 20 R. (H. L.) 59; *Teale*, 1894, 11 T. L. R. 56). Thus, on the one hand, it was held that where a solicitor, who was treasurer of a county, opened an account entitled "police account," the money paid into that account was as fully earmarked as trust money as if it had been placed in a box marked "county moneys," and the bank had therefore no right to apply it to meet a deficit on the solicitor's private account (Ex parte *Kingston*, *ut supra*). On the other hand, in *Teale*, *ut supra*, a solicitor opened three accounts with a banker, headed "office," "deposit," and "private" account. He told the banker that the deposit account would be mostly the money of clients. He afterwards reduced the number of his accounts to two, and incorporated the deposit with the office account. On his subsequently becoming bankrupt, with a credit balance on the office, and a debit on the private, account, it was held that the bank had no reason to know, and were not bound to inquire, whether the balance on the office account consisted of money belonging to clients or not, and were entitled to set it off against the debt due to them on the private account.

Banker cannot set off executry funds against debt due to him by deceased.— On the same principle, it has recently been decided that, where a customer died indebted to his banker, and his executors opened an account as executors with the same bank, the banker had no right of lien, retention, or compensation which would entitle him to apply these executry funds to meet the debt due to them by the deceased. An executor, it was held, was not *eadem persona cum defuncto* to the extent of admitting compensation between a debt due to the executor and a debt due by the deceased (*Gray's Trs.*, 1895, 33 S. L. R. 140; see *Hunt* (Clark-Kennedy's factor), 1896, 3 S. L. T. No. 366). The executry estate, in the case of *Gray's* trustees, was insolvent, but the judgments would seem to go the length of excluding any right of retention on the part of a banker over executry funds for a debt due to him by the deceased.

Lien over Stock.—By the constitution of most banking companies, the company has a lien over the stock or shares of the bank for any debt which may be due to them by the shareholder. This lien is effectual even although the shareholder in reality holds his shares as a trustee or agent (*Burns*, 1840, 2 D. 1348), unless the bank had notice of the trust or agency (*Bradford Co.*, 1886, 12 App. Ca. 29). A further lien is provided, in the case of banking companies registered under the Companies Acts, 1862, by Clause 10 of Schedule I., Table A, of that Act. It is there provided that "the company may decline to register any transfer of shares made by a member who is indebted to them." This clause, unless it is altered or ex-

cluded by the articles of association, gives any company a lien over its own shares. The provision, however, is not satisfactory, as the company has no right to realise its security by selling the shares (Buckley, *Companies Acts*, 6th ed., 458). And it has been held that it only entitles the company to refuse to register voluntary transfers; and therefore that a trustee in bankruptcy, who claims upon a legal and not a voluntary transfer, is entitled to be placed upon the register, and thereby acquires the right to realise the shares without providing for the lien of the company.

[See Bell, *Prin.* s. 1451; Bell, *Com.*, M'L.'s ed., ii. 112–16; Grant, *Law of Banking*, 4th ed., 244.] See RIGHT IN SECURITY; LIEN; RETENTION.

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