DICTIONARY
OF THE
LAW OF SCOTLAND.

By ROBERT BELL, Esq. Advocate,
LECTURER ON CONVEYANCING APPOINTED BY THE SOCIETY
OF WRITERS TO THE SIGNET,

THIRD EDITION,
REVISED AND GREATLY ENLARGED
By WILLIAM BELL, Esq. Advocate,

Vol. I.

EDINBURGH:
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1826.
DICTIONARY OF THE LAW OF SCOTLAND

W. ROBERT BELL, Esq., Advocate

SECOND EDITION

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1826.
TO THE

RIGHT HONOURABLE

CHARLES HOPE,

LORD PRESIDENT OF THE COURT OF SESSION,

&c. &c. &c.

THIS WORK

IS,

WITH HIS LORDSHIP'S PERMISSION,

INSCRIBED, AS A MARK OF THE EDITOR'S PROFOUND

RESPECT.
ADVERTISEMENT.

The Editor undertook some years ago to revise for the press a new edition of this work. His intention at first was to have confined himself as nearly as possible to the limits of the former edition; but he very soon found that, partly from the original plan of the work not having been sufficiently comprehensive, and partly from legislative changes within the last few years, very considerable corrections and additions were indispensable—that many of the articles of the former edition required to be re-written—and that it was necessary to add many new ones. With the exception, therefore, of most of the articles under the letter A, the editor re-composed the whole of the first volume; adding upwards of three hundred new articles under the first five letters of the alphabet.

But the great increase of the size of the book occasioned by these additions, and the consequent difficulty of confining himself within the limits of the former work, rendered it necessary for the editor to deviate in some degree, in the second volume, from the plan which had been adopted in the first. In that volume, accordingly, the terms have been defined more concisely; but, at the same time, a very great number of articles entirely new will also be found in the second volume. The present edition has been in this way enlarged to double the size of the former; while it has been the anxious endeavour of the editor to avoid, as much as possible, all unnecessary repetition.

In the former editions few or no authorities were cited. That defect has now been remedied; and, with a few exceptions in the beginning of the first volume, almost every article contains references to the institutional writers, or to other books of
authority, or to other articles in which the subject is more fully treated. It has also been deemed proper, in this edition, to give short definitions of the most ordinary English law terms. These definitions have been abridged from the last edition of Sir Thomas Tomlin’s Law Dictionary.

The publishers have appended to the second volume, Sir John Skene’s Treatise de verborum significatione, as was done in the former editions.

As a great part of the first volume was printed before the passing of the new Judicature Act, and of the other recent statutes relating to Scotland, abstracts of such of those statutes as are not taken notice of in the body of the work will be found in the Appendix; such, for example, as the statutes concerning Confirmations, and the Commissary Court—the aliment of poor prisoners—the small debt acts—and some others. The Judicature-Act has been digested under the articles Process, Summons, &c.—the new Jury Act, under the article Jury; and all the other recent statutes are either abridged in the Appendix, or placed under their appropriate heads in the book itself.

It may be thought that such articles as Cautionary, Curatory, Evidence, Election Laws, Executor, Taitzie, and several others, all of which have been re-written for the present edition, are unsuitably long. But those articles treat of subjects which could not have been sub-divided, and articulately defined, without unnecessary repetitions, which have now been avoided by a general reference to the longer articles, under those heads, where fuller definitions might otherwise have been required. The same remark is, generally speaking, applicable to all the long articles in the book.

The Editor avails himself of this opportunity to return his best acknowledgments to his professional friends, who, in the progress of this work, have favoured him with many valuable suggestions, and with occasional aid in the execution of his undertaking.

Edinburgh, February 1826.
ABANDONMENT, in the law of insurance, is the right which the insured has, in certain cases of loss, to claim as for a total loss, abandoning to the insurer all right to the ship or goods insured. This right seems in general to exist wherever there is such a loss as either to make the voyage not worth pursuing; where the thing saved has lost its chief value; where the salvage is very high; or where further expence is necessary, which the insured will not undertake. The election to abandon must be made as soon as the loss is fully known, and reasonable notice of the abandonment must be given. In this country no particular form of notice is required; in some countries it is by protest. See Insurance.

ABBESS. The superior or governess of a nunnery or monastery of women.

ABETTING. A person is said to be abetting who protects a criminal, conceals him from justice, or aids him in making his escape.

ABBEEY. Prior to the Reformation, an abbey was a monastery or religious house, where religious persons, whether men or women, resided under the direction and control of an Abbot or Abbess. In Scotland the word Abbey is also used colloquially to signify the Sanctuary against personal diligence, afforded by the Abbey of Holyroodhouse. See Sanctuary.

ABBOT. An Abbot was the head and governor of a religious house or abbey. He had commonly a Prior under him; and, before the Reformation, an Abbot possessed a place in the Scotch Parliament in virtue of his office.
ABBREVIATE OF ADJUDICATION. This term is applied to an abstract of the adjudication. Adjudication is that diligence of the law by which the heritage of a debtor is adjudged to belong to his creditor in payment of debt: And the abbreviate of the adjudication is an abridgement for the record, containing the names of the creditor, of the debtor, and of the lands, with the amount of the debt. It is signed by the judge who pronounced the decree in the process of adjudication, and must be recorded in the register of abbreviates within sixty days after the date of the decree. Regulations 1695, Art. 24. Acts of Sederunt, January 18. 1715, and 10th July 1811.

ABDICATE, to resign. King James II. was declared, by the Convention of Estates 1688, to have abdicated the throne, and thereby to have left it vacant, on these grounds: "His having endeavoured to subvert the constitution of the king;" dom by breaking the original contract between king and "people; and, by the advice of Jesuits, and other wicked "persons, having violated the fundamental laws, and having "withdrawn himself out of the kingdom."

ABIDING BY, is a technical term, signifying a judicial step in a process of reduction. Where a deed is challenged as forged, the party founding on the deed must appear in Court, and abide by it.—This is done by his signing a declaration that he abides by the deed quarrelled, sub periculo falsi, which has the effect of pledging him to stand to the consequences of founding on a forged deed. It will most commonly happen, however, that the abiding by is qualified; as, for instance, in the case of a bill, the holder will state, that it came fairly into his hands in the course of business, and he will abide by it under that protestation and qualification, and as in no shape accessory to the forgery, if there be one. This is stated in a minute; and the Lord Ordinary will probably admit the party to abide by the deed, under the qualification expressed. An interlocutor to that purpose having been pronounced, the party appears, and signs a declaration to the following effect: "I A. do hereby abide by the bill, or other do-
cument quarrelled, sub periculo falsi, but under the protes-
tation and qualification contained in the above minute and
interlocutor, and which bill is marked by the Lord Ordin-
ary and by me, as relative hereto."

ABJURATION OATH. This oath is in the following
terms: "I — do truly and sincerely acknowledge, profess,
testify, and declare in my conscience, before God and the
world, that our Sovereign Lord King George, &c. is lawful
and rightful King of this realm, and all other his Majesty's
dominions, and countries thereunto belonging: And I do so-
lemnly and sincerely declare, that I do believe in my con-
sience that not any of the descendants of the person who
pretended to be Prince of Wales, during the life of the late
King James II. and since his death pretended to be, and took
upon himself, the stile and title of King of England, by the
names of James III. or of Scotland by the name of James
VIII. or the stile and title of King of Great Britain,
hath any right or title whatsoever to the crown of this
realm, or any other the dominions thereto belonging: And I
do renounce, refuse, and abjure any allegiance or obedience
to any of them: And I do swear that I will bear faith and
true allegiance to his Majesty King George, and him will de-
fend, to the utmost of my power, against all traitorous con-
spiracies and attempts whatsoever which shall be made a-
gainst his person, crown, or dignity; and I will do my
utmost endeavour to disclose and make known to his Ma-
esty, and his successors, all treasons and traiterous con-
spiracies, which I shall know to be against him or any of
them: And I do faithfully promise, to the utmost of my
power, to support, maintain, and defend the succession of
the crown against the descendants of the said James, and
against all other persons whatsoever; which succession, by
an act, entitled, 'An Act for the farther limitation of the
crown, and better securing the rights and liberties of the
subject,' is, and stands limited to the Princess Sophia,
Electress and Duchess Dowager of Hanover, and the heirs
of her body, being protestants: And all these things I do
"plainly and sincerely acknowledge and swear, according to these express words by me spoken, and according to the plain and common sense and understanding of the same words, without any equivocation, mental evasion, or secret reservation whatsoever: And I do make this recognition, acknowledgement, abjuration, renunciation, and promise, heartily, willingly, and truly, upon the true faith of a Christian. So help me God." This oath is ordered to be taken by all persons holding offices in Scotland, civil or military,—by judges, advocates, and practitioners,—by the heads and other members of colleges,—by the clergy of the Church of Scotland, and by schoolmasters; and, without taking it, no person can elect or be elected a member of parliament.

ABROAD.—Beyond Seas or across the Border. A person may be in a foreign country, or on a voyage, for amusement, for health, for business, or on public duty,—or he may be abroad with an intention of remaining abroad. Where a person has gone abroad for health, pleasure, or business, and with an intention of returning, he is presumed to have entrusted his affairs to those who will attend to whatever he may be interested in, in the judicial proceedings of his country; and, therefore, a decree of the Supreme Court may be obtained against him,—provided the summons has been executed at the market cross of Edinburgh, pier and shore of Leith, on diets of 60 and 15 days. Where the person is absent with an intention of remaining, things are different (See Absence). But the person may have gone abroad to avoid the diligence of his creditors; and then his absence, whatever reason may be assigned, will be held to be an absconding, and, as such, equal to his incarceration, unless where he is abroad on public duty. Persons resident abroad, whether foreigners or natives, are liable to the jurisdiction of the Scotch Courts, if they have either heritable or moveable property in Scotland. In the case of a foreigner possessed of moveable property only, previous arrestment ad jurisdictiorem fundandam is necessary. Such an arrestment does not seem to be required in the case of a native Scotchman domiciled abroad, with moveable property in this

ABROGATE. To abrogate a law is to repeal or recall a law.

ABSCONDING. Where a person either leaves the kingdom to evade the payment of his debts, or continues within the kingdom, but secretes himself, and is not to be found on a search; this certified by the execution of a messenger, proceeding on personal diligence by horning and caption, will have the effect, joined to insolvency, of rendering the person legally a bankrupt. See Meditatio fugae.

ABSENCE. A decree is said to be in absence where no appearance is made for the defender. Every Scotchman, who is within the kingdom, is liable to be called in an action before the Court of Session; in which action decree may be given against the defender, although no appearance be made for him. Even where he is abroad decree in absence may be obtained against him; nay, a foreigner, though not within the kingdom, provided he be possessed of a land estate in it, or of goods which have been attached for the purpose of founding jurisdiction, may be exposed to a decree in absence. It is not a settled point, whether a Scotchman, domiciled abroad, is in a different situation from a Scotchman absent, but with an intention of returning. Erskine holds him to be subject to the jurisdiction of the Court of Session without a previous arrestment; but see Brunsdun v. Wallace, July 9. 1789; see also Bell's Commentaries, vol. ii. page 173, 4th Edit. where Erskine's doctrine is supported. A decree in absence may be opened up by a reduction, or the effect of it suspended. See Abroad.

ABSOLUTE DISPOSITION, is a conveyance unqualified by any burden or reservation in favour of the granter, or any other person, in contradistinction to a conveyance containing, in gremio, a power of reversion, or any other reservation. A right of reversion is often constituted by a separate bond, by which the nature of the right of reversion is explained. In that case, this form of conveyance is called an absolute dis-
position and back-bond. In this way a species of security is given much more powerful than the common heritable security; for, by the absolute disposition, the disponee, or person to whom the right is given, is by sasine feudally vested* in the property, and may sell or dispose of it without being affected by any diligence directed against the former proprietor; and the disponee is accountable for the price to the proprietor, or those in his right, under the back-bond only. This is the proper form of security for future advances, and for securing obligations in relief. But the security is attended with this peculiarity, that, wherever the back-bond has been judicially produced and explained to the public, the security can extend no farther than to the amount expressed in the back-bond. For example, were a back-bond to declare that the disponee had received the right in security of a certain advance, or for relief of certain engagements, and were the trustee taken bound to reconvey on being relieved of that, and were that explained by the judicial production of the back-bond, the disponee's powers could not be enlarged by any private posterior agreement between him and the granter of the absolute disposition: In short, the right of the trustee would be limited by the disclosure of the object of the trust. Of this there is a remarkable instance in the case of Keith, trustee for Sym's creditors, against Maxwell, July 8, 1795. Maxwell was Sym's disponee, and had given a back-bond, declaring that he held the right in security of L.6000. This right was attempted to be reduced; and in the process of reduction the back-bond was produced, from which the nature of the trust appeared; the Court sustained Maxwell's right. Maxwell afterwards became security for Sym in a cash account to the extent of L.500; and Sym declared that the right under the absolute disposition should remain, not only for the original debt, but for this additional debt. The Court, however, refused to sustain the se-

* A person is said to be feudally vested in an heritable subject who has been infest in it, the effect of which is to confer upon him a complete right to the subject.
curity beyond the purpose expressed in the first back-bond, as they held the disclosure to alter the nature of the right, and to reduce it to that of a mere security, in terms of the back-bond.

**ABSOLUTE WARRANDICE.** See Warrandice.

**ACCELERATING DIVIDENDS.** By the bankrupt statute, 54 Geo. III. c. 137, § 46, the ordinary periods for payment of the dividends to the creditors are fixed, the first at twelve calendar months after the date of the sequestration, and the subsequent dividends at intervals of six months afterwards; but it is enacted, (§ 46.) that, after the second dividend, a majority of the creditors in value, at any general meeting called for the purpose, may determine that future dividends shall be made after a shorter interval, and even before the period assigned for the first dividend; four-fifths of the creditors in number and value are empowered to direct the trustee to apply for the authority of the Court of Session to make the first dividend at an earlier period than the end of the first year, (but not earlier than six months from the date of the sequestration) if, upon cause shown, it shall appear expedient to do so. This is called accelerating the dividends.

**ACCEPTANCE** is the act by which a party agrees to any terms or proposal offered to him by another, and thereby completes a contract. For this purpose writing is not essentially necessary. Acceptance may be inferred from facts and deeds. Thus, a verbal acceptance of the deed, or acting under it, or deriving a benefit from it, or even putting it on record, will be held as an act of acceptance, and such an act may be proved either by writing or by witnesses; Erskine, B. iii. tit. ii. § 45. There must, however, be a positive act indicating clearly the intention to accept. The mere possession of a deed containing an offer, or condition, will not be held as a sufficient acceptance. On the contrary, the presumption is, that the party received it for the purpose of considering its nature and effect before he should accept. See a strong case of this nature, Bell's Cases, No. 66. Children of Hogg, 2d June 1795. As delivery is a necessary solemnity, indicating on the part of the grantor of the deed his intention to render the deed completely binding on
himself, so, on the other hand, the acceptance of the deed by
the person in whose favour it is granted, is necessary to render
it binding upon him.

Acceptance in relation to a bill of exchange is the act by
which the person drawn upon undertakes the obligation to pay
the bill at the time, and upon the terms specified in it.

In England, it would seem that an acceptance may be made
verbally as well as in writing. But in Scotland, where the bill
is the ground of summary diligence against the acceptor, it
may be doubted whether acceptance can be adhibited in any
other way than by the subscription of the person drawn upon.
See Bill.

Acceptance upon Honour is the acceptance either of the per-
son on whom the bill is drawn, or of a stranger after the bill
has been protested for non-acceptance; it is in such a case said
to be done for the honour of the drawer. See Bill.

Acceptation is the extinction of a debt, by a
declaration that the debt has been paid when it has not; or the
acceptance of something merely imaginary in satisfaction of the
debt.

Accession is the term used in speaking of the com-
mencement of the king's reign. It is also one of the modes
by which property may be acquired; and is either natural or
artificial.

1. Natural accession.—By natural accession the young of
cattle belong to the owner of the mother, and the fruits and
produce of the earth to the proprietor of the soil. On the
same principle, the gradual addition acquired by grounds lying
on the banks of rivers (called alluvio) belongs to the owner of
the land receiving the addition.

2. Artificial accession is that addition which is made by
human industry,—including the cases of trees planted, or a
house built, on the ground of another, both of which belong
to the proprietor of the ground, and not to the planter or
builder. With regard to the machinery of cotton mills, steam
engines, &c. see the title Heritable and Moveable.

Accession, Deed of. This is a deed executed by
the creditors of a bankrupt or insolvent debtor, by which they approve of a trust given by their debtor for the general behoof, and bind themselves to concur in the plans proposed for extricating his affairs. It is analogous to the English deed of covenants.

ACCESSORIUM SEQUITUR PRINCIPALE. The accessory right follows the principal. Thus, suppose a person to be possessed of a sovereign right to lands, as by a minute of sale, and that he afterwards acquires an accessory right to the lands,—a right, for example, to the escheat of the seller,—he would not be allowed to ascribe his possession to the right of escheat, but must ascribe it to the minute of sale. This is an exception laid down by Mr Erskine, B. ii. tit. 1. § 30. to a general principle of the law of Scotland, that a person may ascribe his possession to any right he has in him, which he shall judge to be most for his interest, though acquired posterior to his beginning to possess.

ACCESSORY TO A CRIME. A person is said to be accessory to a crime who assists the criminal by his advice in the perpetration of the crime, or who assists in its execution, or furnishes the means of executing it. Even one who abets the crime, by previously promising protection to the criminal, will be considered in law as an accessory to the crime.

ACCESSORY ACTIONS are those which are in some degree subservient to others, as those of wakening or of transference. By the former of which, a cause, after it has lain over without any step being taken in it for the space of a year, (by which, technically speaking, it is said to have fallen asleep) may be revived, and proceeded in to a conclusion. By the latter, an action may, on the death of the defender, be transferred, in statu quo, against his heir.

Under this class of actions are ranked Provings of the Tenor, by which lost deeds are renewed; and Actions of Transsumpt, by which copies of principal deeds are certified.

ACCESSORY OBLIGATIONS. Accessory obligations are those which are adjoined to other obligations, as where an obligation is attempted to be corroborated by the further obli-
gation of an oath. Obligations for the regular payment of interest, cautionary obligations, and bonds of corroboration, are examples of accessory obligations, and all necessarily refer to some prior or principal obligation.

ACCOMMODATION BILLS are bills of exchange granted without value having been received by the acceptors, for the purpose of raising money by discount. These acceptances get the name of wind or accommodation bills; and the party for whose accommodation they are granted, whether drawer, acceptor, or indorser, is, of course, bound to relieve all the other parties whose names are on the bill from the consequences of their obligation. In case of the bankruptcy of the parties, various nice and intricate questions arise with regard to the mode of ranking for such debts. The general rules established seem to resolve into these: 1st, That the onerous holder is entitled to rank on the estates of all the parties on the bill to the effect of drawing full payment. 2d, As no double ranking is allowed, the estate of the acceptor, though he receive no value, cannot claim upon the estate of the party for whose accommodation the bill was granted; but a claim for the amount of the dividend paid is competent against the party himself. 3d, That, in the case of mutual accommodation bills, they are held to be good considerations for one another. There is another principle applicable to accommodation bills of considerable importance, namely, that the ordinary rules as to due negotiation do not apply to them. Hence, the drawer or indorser of such a bill, if he has participated in the accommodation, cannot plead against the holder the want of notice of dishonour. But where the accommodation is not for the drawer's behoof, but for the use of some of the other parties, the drawer has been held entitled to notice. See Bell's Commentaries, vol. i. p. 336, et seq. 4th edit.

ACCOMPILICES—Associates in the same crime (socii criminis.) By a general rule of our law, an accomplice is not received in evidence against a criminal: But from this rule are excepted, 1. Cases of treason; 2. Occult crimes; 3. Cases which are excepted by statute. Where an accomplice is to be
called in evidence against a pannel, he receives a remission of his crime, that he may have no bias to swear falsely.

ACCRETION, in a legal sense, takes place when a right in favour of the person from whom an heritable proprietor derives his title becomes effectual to the proprietor; for example, a person not infeft sells lands to which he has merely a personal right, and gives a precept of sasine for infefting the purchaser, who is accordingly infeft: Although that sasine, as proceeding on a precept from a person uninfeft, carries no feudal right to the purchaser, yet, if afterwards the seller be infeft, that title in him will validate the precept he gave, and the sasine following upon it, and so be said to accresce to the purchaser, and render his feudal right complete.

ACCOUNTS. Merchants accounts suffer a triennial prescription by the act 1579, c. 53. This prescription begins to run from the date of the last article. The existence of the debt (including the subsistence as well as the constitution of it) may be proved by the oath of the debtor after the expiration of the three years. The debt may also be proved by a writing signed by the debtor. See Prescription. By the bankrupt statute, 54 Geo. III. c. 137, where the debt claimed rests upon an open account, the creditor is required to produce a certified copy of the account signed by the party to whom it is due, along with an affidavit by the creditor. The provisions of the statute as to this are not very clear; but it seems now to be settled, that a correct copy of the whole account on both sides as it stands in the creditor’s books, must be produced certified as authentic, either by the creditor or his book-keeper. The oath of verity is a certifying of the account. Bell’s Com. vol. ii. p. 377, 4th edit. It is probable that the ambiguity of the present bankrupt statute on this point will be corrected in the statutes about to be enacted. See Sequestration.

ACCUMULATE SUM, is the sum for which decree of adjudication is given, composed, in the general adjudication, of the principal sum in the debt, interest, and penalty; and in the special adjudication, a fifth part more of the principal sum is added, as a compensation to the creditor on account of his
receiving land for his debt; but there is no instance of a special adjudication being carried into effect.

ACTIO REDHIBITORIA, was an action in the Roman law (founded on the implied warrandice of the contract of sale), by which, when the purchaser discovered a latent fault in the commodity purchased, such as rendered it unfit for the purpose for which it was intended, he was entitled, within six months, to return the goods, and claim repetition of the price. This action seems to have been competent wherever the defect was such as, if the buyer had been made acquainted with it, he would not have become a purchaser. By the law of Scotland, an action of this kind is admitted, where it is brought immediately; that is, within a few days after the sale; for, if it be longer delayed, the presumption is, that the purchaser is satisfied. It would appear that the law of England differs from the Roman and Scotch law in this respect, and that, by the English law, express warrandice from the seller is necessary, in order to entitle the purchaser to any remedy. Brown on Sale, p. 287.

ACT OF GOD, in law language, signifies any inevitable accident occurring without the intervention of man, such as storms, lightning, tempests, &c. and losses arising from such fatalities are not held to be such as one party under any circumstances (independently of special contract) is bound to make good to another. Such losses, for example, are sufficient to liberate innkeepers and stabels from their obligation under the edict, Nauta, cauponos, stabularii.

ACT OF PARLIAMENT. An act of parliament is a law passed by all the three branches of the legislature; his Majesty, the Lords Spiritual and Temporal, and Commons, in parliament assembled. This is the highest legal authority known in the Constitution, by which even the King may be bound, and which cannot be altered, repealed, or suspended, but by the same high powers, or by a long course of contrary usage or disuse; for, by the law of Scotland, a statute may, by disuse, cease to be obligatory.

The ancient acts of the Scotch Parliament were proclaimed
in all the country towns, boroughs, and even notified in the
baron courts. These means of promulgation were gradually
dropped as the use of printing became common; at last, by the
act 1581, c. 128, the publication at the market-cross of Edin-
burgh was declared to be sufficient. British statutes require
no formal promulgation; and in order to fix the time from
which they shall become binding, it was enacted, by 33d Geo.
III. c. 13, that every act of parliament, which should pass after
April 8. 1793, shall commence from the date of the indorse-
ment by the clerk of parliament, stating the day, month, and
year when the act was passed and received the royal assent,
unless the commencement shall in the act itself be otherwise
provided for.

ACT OF WARDING is a warrant issued by the magis-
trates of royal burghs authorising the imprisonment of a debtor.
This warrant is contained either in a judgment pronounced by
the magistrates, or in a decree of registration, proceeding from
the court of the magistrates, upon a clause of consent, or upon
The privilege of granting such warrants is peculiar to the
magistrates of royal burghs. It has been traced to the 2d
stat. Robert I. c. 19. Reg. Maj. p. 361; and is the only di-
rect execution for payment of debt known in Scotland, impi-
ronment under horning and caption being founded on a fiction
of the law, by which the debtor is imprisoned as a rebel. In
strictness, the imprisonment under an act of warding ought to
proceed only after an unsuccessful search for the effects of the
debtor; and it is the practice of the town-officers in Edinburgh
to certify that such a search has been made; after which, the
days of charge being elapsed, the debtor may be imprisoned.
Such warrants can be issued only against inhabitants of the
burgh subject to the jurisdiction of the magistrates, which all
persons are after forty days residence within the royalty. In
Ross's Lectures, vol. i. p. 255, there will be found some in-
teresting historical speculations connected with this subject.

ACTS OF SEDERUNT are ordinances of the Court of
Session, under authority of the act 1540, c. 93, by which au-
authority is given to the Judges to make such statutes as may be necessary for the ordering of processes and the expediting of justice. The Court is also authorised, by other acts of Parliament (as by the bankrupt statute), to make enactments relative to certain matters therein pointed out.

ACTS of the General Assembly of the Church of Scotland. The acts of the General Assembly, issued under their legislative powers, are binding on all the members and judicatories of the church. The form of their procedure, in these enactments, is regulated by an act of the church, (1697) termed the barrier act, which directs any proposal or overture for a new act, or for repealing an old one, to be laid by the member by whom it is proposed before the presbytery or synod to which he belongs; who, if they approve of it, will transmit it to the General Assembly as their own overture. This overture may either be dismissed or adopted by the General Assembly; and it may be adopted with such changes or modifications as they may think proper. The overture, being adopted by the General Assembly, is, by that body, transmitted to the several presbyteries of the church for their consideration, with an injunction to send up their opinion on the measure to the next General Assembly, who may pass it into a standing law, if it be the general opinion of the church that it ought to be enacted; but not less than forty presbyteries must have approved of it.

The delay which this form of proceeding necessarily occasions, is remedied by a power exercised by the General Assembly, of converting the overture (where the presbyteries have neglected to communicate their opinion on the point) into an interim act, which is held to be binding until the meeting of the next Assembly, and may be continued until the act be finally approved of or rejected.

ACT OF COURT IN A SERVICE, is a notorial instrument, stating the proceedings in the court of service, drawn up and signed by the clerk of court; and which bears evidence of what passed in the court relative to the service.

ACT OF GRACE. The act so termed is the act 1696,
c. 32. Previous to this act a prisoner for debt was considered as a criminal; it was as a rebel to the king that he was imprisoned, and his only means of subsistence arose from his claim on that fund which was destined for the support of criminals. The royal burghs, oppressed with the expense, applied to parliament for relief, and they obtained the act in question. This act proceeds upon the narrative, "That the burghs of this kingdom, havers of prisoners, are troubled and overcharged with prisoners thrust into their prisons, who have nothing to maintain themselves, but must of necessity either starve or be a burden upon the burgh;" and, therefore, the Legislature enacts, "That where any person is made, or shall be made, prisoner for a civil debt or cause, and shall be found, or become so poor, as that he cannot alimenter himself, then, and in that case, it shall be lawful to the magistrates of the burgh where the prison is to which the said prisoner is committed, upon the complaint of the said prisoner, and his making faith in their presence that he hath not wherewith to alimenter himself, to intimate the same to the creditors, one or more, at whose instance the said prisoner was committed, or is detained, and to require him or them either to provide and give security for an alimenter to him, not under three shillings (Scots) per day, or else to consent to his liberation; which, if the said creditors refuse or delay to do within the space of ten days thereafter, then it shall be leisome to the magistrates to set the said poor indigent prisoner at liberty, without any hazard of being liable for the debt," &c.; and it is declared, that "prisoners for criminal cases be in the same state as formerly."

This act was clearly intended to regulate the case of civil debts; but the question occurred whether by civil debts was meant debts ex contractu only, or debts also ex delicto; and the Court were at first of opinion that debtors, whose debts arose ex delicto, were not entitled to the benefit of the statute. This judgment is reported by Lord Kilkerran, Leslie, November 23, 1738, p. 430; and the same doctrine is laid down by Erskine, B. iv. tit. 3. § 28. The opinion was
however disregarded by the Court in 1787; and debts, though arising ex delicto, were held to be civil debts in the sense of the act, and, as such, did not exclude the debtor from the benefit of the statute. The case that occurred at this time was exceedingly well calculated for drawing a proper line of distinction between debts of a civil and criminal nature. The claimant was imprisoned on a decree which ordained him to pay L.3 to the private party as damages for an assault; L.1 as a fine to the procurator-fiscal, and L.2 sterling of costs. The Court thought that the decision in the case of Leslie ought to be departed from, and that damages, though ex delicto, awarded to a private party, were, in the sense of the statute, a civil cause of imprisonment; and, accordingly, the Court found the claimant entitled to the benefit of the act in so far as regarded the L.3 of damages, and L.2 of costs; but that the procurator-fiscal shall be at liberty to detain the prisoner until the fine of L.1 be paid, without being bound to aliment him. A debtor also, to whom the benefit of the cessio honorum was denied on account of his fraud, was found entitled to the Act of Grace; Aitken against Gray, May 27. 1790. See also Bell's Com. vol. ii. p. 533. 4th Edit.

There is one case, however, of civil obligation, in which a prisoner is not entitled to the benefit of the Act of Grace; and that is, where a person is imprisoned for not performing an act within his power; as, for instance, delivering up certain bonds which he admits to be in his custody. December 2, 1707. Turner against Ross. Fount. vol. ii. p. 533.

To entitle the debtor to an aliment, he must swear that he has no means of subsistence; and for the forms of application, &c. see Bell's Forms of Deeds, vol. vi. p. 488. Where the debtor has an alment, he will be refused the benefit of the statute, unless he give up his funds, even though they may have been given from charitable considerations. November 20. 1734. McKenzie against Blair, Kames' Dict. vol. ii. p. 173. A conveyance by the debtor does not seem to be required by the act; yet the keepers of the Edinburgh jails, as well as jailors in other
places, have been in use to require a conveyance in favour of the incarcerating creditor; and there seems to be reason in the demand, where there is a property belonging to the debtor which cannot be instantly turned into money, or made to render an aliment to the debtor; for, as it ought to have gone to the support of the debtor, the creditor who makes the advance is entitled to the fund primarily liable to be taken as a fund of aliment.

When the application is made by the debtor, it must be intimated to the creditors who have incarcerated or entered retainers; if no appearance is made for the creditors within ten days, the magistrates may liberate the debtor. But the ten days must have fully expired; for when magistrates liberated a debtor immediately after 12 o’clock mid-day of the tenth day, the Court found them liable for the debt. November 11, 1704, Blair against Magistrates of Edinburgh. Found. In computing the term, the day is held to run from midnight to midnight.

The magistrates do not seem to possess the power of paying the aliment where the creditor neglects.

The creditor may imprison the debtor on the same diligence after his liberation. June 19, 1759, Abercrombie against Brodie, Fac. Col. ii. 333.

ACT AND COMMISSION. This is the form in the judicial proceedings of the Court of Session, by which a commission is given by the Court to a person for taking a proof in a depending action. The power delegated to the commissioner is a very important one, as the accuracy of the report given of the evidence must depend in a great measure on his skill, knowledge, and integrity. Formerly the commissioner was suggested by the parties; but, by act of sederunt, 11th March 1800, this is prohibited, and the taking of proofs put under proper regulations. The commission circumscribes the nature of the proof to be led, and empowers the commissioner to take it between and a certain day. Warrant is given for citing the witnesses; and the commissioner is directed to cause his clerk to put down the evidence in writing to be subscribed by the witnesses, and
A day is appointed for reporting the proof to the Court. This form, however, has been now almost entirely superseded by the establishment of the Jury Court. See Jury Court.

ACT OF BANKRUPTCY. We have not what in England is termed an act of bankruptcy. But where a debtor flees, absconds, takes sanctuary, or defends himself against imprisonment, when the other circumstances of diligence and insolvency concur, they may be considered as acts of bankruptcy.

ACTOR, a Counsel or Advocate.—The term is still used by the clerks of court, who, in preparing their minutes, designate the respective counsel for the parties Actor and Alter.

ACTION. By an action is understood the "prosecuting in judgment what is due to one." This includes obviously not only the demand, whether it be made in the form of a summons or petition, but the steps necessary for supporting the demand and procuring the judgment of the court. The term action, therefore, includes the whole proceedings up to the final judgment in the cause.

Actions may be arranged under the following heads: Actions of the first or of the second instance. Actions of the first instance, are those which come originally before the Court of Session; and these may be divided into solemn and summary actions; the former of which is founded on the summons; the latter on the petition and complaint. The solemn action suffers a sub-division into petitory actions, in which something is demanded to be decreed by the judge; possessoriy actions, where possession is sought to be retained or recovered; declaratory actions, in which some right of property or of servitude is declared; rescissory actions, by which deeds are reduced; and, lastly, into accessory actions, which prepare the way, or are subservient to others. The summary action is that which is brought for the sake of dispatch by petition and complaint, as in election questions, and, under the bankrupt statute, against the trustee or commissioners.

These include the actions of the first instance which come originally before the Court of Session; those which come by review, are said to be actions of the second instance, as adva-
eations, by which the decisions of inferior judges are brought under review; suspensions, by which diligence is sisted until the justice of the debt be inquired into; and reductions of decrees, by which, on cause shewn, the decrees of judges may be annulled.

The following will give a more precise view of this arrange-ment:

I. Actions of the first instance, including

1. Solemn Actions, as
   1. Petitory actions.
   2. Possessory actions.
   3. Declaratory actions.
   4. Rescissory actions.
   5. Accessory actions.

2. Summary Actions, as
   1. Petitions and Complaints connected with some depending procedure, or against persons guilty of contempts of Court, or against members of the College of Justice.
   2. Petitions and Complaints in election questions, and in questions under the bankrupt statutes.

II. Actions of the second instance, consisting of

1. Advocations.
2. Suspensions.
3. Reduction of Decrees.

These will be treated of under their respective titles.

When the action is called in Court, parties, in the Supreme Court, are heard by their counsel; and if the circumstances be ascertained and there be no difficulty in point of law, a decision will be immediately given. Should a proof be requisite, according to the late practice, the witnesses were examined either by the judge or by a commissioner appointed by the judge: The depositions, in either case, were taken down in writing, and signed by the witness and by the judge or commissioner.
reporting the proof, the parties were heard on its import, and
the cause decided. Where the facts were ascertained, but a
difficulty occurred in point of law, memorials to the judge, or
informations to the court, were ordered, on which a judgment
followed. But the recent acts establishing the Jury Court
have, in a great measure, superseded the old form of proof by
Commission. See Jury Court.

Where a judgment has been pronounced by the Lord Ordin-
ary, it may be brought under his Lordship’s review by a re-
presentation; and formerly this might have been repeated un-
til the judge had prohibited any farther representation. But
now, by Act of Sederunt 7th February 1810, no more than
two representations against the same judgment can be present-
ed to the Lord Ordinary. The party may then bring the cause
before the whole judges by petition; but two consecutive judg-
ments of the Inner-house terminate the cause; and the party
dissatisfied with the judgment has no other resource than by
appeal to the House of Peers.

For a more precise account of this procedure, the titles Sum-
mons, Execution, Calling, Enrolling, Representation, An-
swers, Petition, Appeal, &c. may be consulted.

In actions brought before inferior courts, the pleadings are
conducted in writing, and the judgments pronounced may be
again laid before the judge. In the general case, the judgment
may be advocated and brought under review of the Court of
Session, where the same procedure takes place as stated above.

ADDITION is the English term for our expression designation;
and means the description of a party, whether made
by his titles, estate, profession, or place of residence.

ADHERENCE. Married persons may, by the act 1573,
c. 55, prosecute each other on account of desertion. In prac-
tice, the action may begin after the offending party shall have
deserted for the space of one year; and it is competent before
an inferior commissary. The sentence of adherence may be
enforced by letters of horning; and should the offender disobey
the charge, the act directs the church to admonish him; and
should he neglect the admonition of the church, he will be ex-
communicated. These forms being gone through, an action of divorce may be insisted in, but it can be brought before the Commissaries of Edinburgh only; and four years having elapsed from the first desertion, sentence of divorce will be pronounced: the effect of which is declared by the statute to be, that the offender shall "tyne and lose his tocher and donationes "propter nuptias." Where the wife is the offender, the husband, under this expression, is entitled to retain the tocher he received with the wife, without being liable to make any of the provisions to which by law, or by convention, the wife would have been entitled on the dissolution of the marriage. Where the husband is the offender, he must repay the tocher to the wife, as well as all the provisions to which she could have been entitled had the marriage terminated by the death of the husband. This action does not seem to be competent where the party is out of the kingdom.

ADJOURNMENT. To adjourn a court is, by a regular act, to stop the proceedings for the present, and delay them to a future time. The proceedings in a service, or even in a criminal trial, may be adjourned on cause shewn. But in a criminal trial no adjournment can take place after the assize have been sworn, excepting where the extraordinary length of the case renders it necessary. Hume, vol. iv. p. 245.

ADJUDICATION. The English use this term to express the act of giving judgment. But, in Scots law, it signifies the diligence by which land is attached in security and payment of debt, or by which a feudal title is made up in a person holding an obligation to convey without a procuratory of resignation or precept of sasine. There are thus, 1. The adjudication for debt; 2. The adjudication in security; and 3. The adjudication in implement.

1. Adjudication for debt.

Adjudication is the modern diligence which has been substituted for the apprising. The apprising originally seems to have been a very summary proceeding, by which, where the debtor was not possessed of sufficient moveable property, the Sheriff was authorised to give him notice to sell his lands
within 15 days, to pay the debt, and failing his doing so, to transfer the property absolutely to the creditor in satisfaction of his debt. The act 1462, c. 37, as a modification of the hardships of the older law, gave the debtor a power of redemption within seven years, on his repaying to the purchaser the price, and the expense of completing his titles. Where no purchaser appeared, the Sheriff is directed by that statute to apprise the lands by thirteen "of the best and worthiest of the "shire," and to make it over to the creditor to the extent of the debt; the superior being bound to receive the creditor or purchaser on payment of a year's rent, or to take the lands himself and pay the debt. Under this statute the apprising appears to have been conducted for sometime with a due regard to the interests of the parties interested; but the execution of the act, in the country, having fallen into the hands of Messengers, abuses arose, which were attempted to be remedied by conducting the apprising in every case at Edinburgh; the expense, however, with which this was attended, introduced the practice of allowing the creditor to enter into possession on a general redeemable title, and to draw the rents and profits during the whole term of redemption, without being under any obligation to account for the surplus over the interest of the debt.

This practice gave facilities to the grossest abuses; and to remedy some of the evils, the act 1621, c. 6, provided that the rents and profits, in so far as they exceeded the interest of the debt, should be imputed pro tanto to the payment of the principal. The same statute enacts, that the legal reversion of seven years shall not run against minors. The act 1661, c. 62, prorogates the legal reversion of appraisings, from seven to ten years, and provides, that all appraisings, within year and day of the first effectual one, shall rank pari passu; and defines the first effectual appraising to be that on which the first feudal right has been completed by sasine, or by charge against the superior. The expense of the first effectual appraising is also made common to all who shall take benefit by it. But it was by the act 1672, c. 19, that the adjudication as
ording to the present form was introduced. That statute, after narrating the various abuses of the old system of appraisings, enacts, that, in place of them, a process shall be raised in the Court of Session against the debtor, in which the Court shall adjudge from him a part of his lands, or other estate in use to be apprised, corresponding to the debt, interest, and the expense of entry and infeftment, with a fifth part more on account of the inconvenience to which the creditor is put by being obliged to take land instead of money: The value of the land so to be adjudged to be ascertained by a proof of the rental, or profits, to be led by the debtor (if he choose) and the creditor before the Court. Upon the decree of adjudication thus obtained, the creditor is entitled immediately to enter into possession; and as the land so set apart may be considered as of the nature of a surrogatum for the debt, the creditor is under no obligation to account for the surplus, if there should be any, after paying the interest. The period of redemption under this form, which is called a special adjudication, is made five years after the date of the decree; and it is declared, that after the creditor has attained possession under the decree, he shall have no farther execution against his debtor by arrestment, caption, or otherwise, except in the case of eviction under the warrandice. But as these provisions of the statute proceed on the supposition, that the debtor produces a sufficient progress of titles, and that he ratifies the decree of adjudication, and cedes summary and quiet possession to the creditor, it is farther enacted, that where the debtor does not comply with these requisites, it shall be in the power of the creditor to adjudge, generally, all right vested in the debtor, in the same manner as he might have used apprising under the act 1661, c. 62, and under the reversion, and with the powers competent to the creditor conferred by that act. This last is the general adjudication; and it must conclude only for the principal sum, interest, and penalty, but not for a fifth part more. — Act of Sederunt, 26th February 1684.

The action of adjudication introduced by the statute 1672, c. 19, cannot proceed until the debt has been constituted
either by a decree ascertaining its precise amount, or by a liquid ground of debt; and the summons of adjudication, after stating how the debt is constituted, narrates the statute 1672, and concludes alternatively for a special or general adjudication. This is necessary, because, although there is hardly an instance of a special adjudication having occurred in practice, yet the statute requires that the debtor should have the alternative; and it is only on his refusal to avail himself of the first alternative that the Court is authorised to pronounce a decree in the general adjudication. The decree in the action adjudges the lands, &c. to the creditor redeoably, and orders the superior to receive him as his vassal. In order to give the necessary publicity to such decrees, an abridged statement called an Abbreviate, containing the names of the debtor and creditor, and an enumeration of the subjects adjudged, is signed by the extractor who signs the decree, and recorded within 60 days, in a register appointed for the purpose.—See Abbreviate.

There are several points connected with the summons and process of adjudication, which it may be proper to enumerate more particularly: 1. The summons proceeds on a bill presented in the Bill-Chamber, which, being passed, is the warrant for signeting the summons. An error in the bill may be fatal to the proceedings. 2. The debt on which the adjudication proceeds, must be liquid and legally vested in the pursuer's person, by direct obligation, or by assignation, or by confirmation. 3. When a decree of constitution is necessary, it must be directed against the original debtor or his heir, who, if he declines to represent his predecessor, must appear in the action, and give in a renunciation to be heir; on which the creditor obtains decree cognitionis causa, which will be the ground of adjudication contra hereditatem jacentem of the deceased debt. A summons of constitution and adjudication may be combined in one summons.—Jurid. Styles, vol. ii. p. 228, 1st Edit. 4. When the summons of adjudication comes into Court, there is a difference in the procedure between a first and any subsequent adjudication; for the debtor in a first ad.
judication may appear and take a day to produce his titles, &c. with the view, if he chooses, of concurring in a special adjudication, which cannot be done in any subsequent adjudication. It is also provided by the act 54 Geo. III. c. 127, § 9, that the Lord Ordinary, before whom the first process of adjudication is called, shall ordain intimation thereof to be made in the Minute-Book, and on the wall of the Parliament House, in order that other creditors, who are in a condition to adjudge, may be conjoined in the process; and for that purpose 20 sedentary days are allowed. At the expiration of the 20 days, those who can produce instructions of their debts, with summonses of adjudication, libelled and signet, are conjoined in one adjudication. This procedure is proper to the first adjudication only. Another difference between the first and subsequent adjudications was that under the old form of process, the Court was in the practice of dispensing with the second diet of compearence, when that was necessary, in order to bring the process within year and day; but now, by the 50 Geo. III. c. 112, § 27, there is only one diet of compearence where the defender is in Scotland. And in the action of constitution, with a view to adjudication, where delay might be fatal, the Court is in the practice of pronouncing decree of constitution at once, reserving all objections contra executionem.

The adjudication is made effectual so as to compete with other heritable rights, (see Effectual Adjudication) by charter of adjudication and sasine; and in all questions with other adjudications, it will be rendered complete by presenting a signature in Exchequer, when the holding is of the Crown, or by executing a general charge of horning against superiors at the Market Cross of Edinburgh, and Pier and Shore of Leith, where the holding is of a subject, and recording an abstract of the signature or charge in the register of abbreviates of adjudication, 54 Geo. III. c. 137, § 11. The adjudication, being rendered effectual, may become the foundation of a preference; but all adjudications led within year and day of the first effectual adjudication, are, by the act 1661, c. 62, to be ranked pari passu. Adjudications after the expiration of the
year and day, are preferred upon the residue of the estate according to their dates.

The right of the adjudger is redeemable in the special adjudication in five years, and in the general in ten, and in the adjudication contra hereditatem jacentem in seven. The redemption may be effected under the general adjudication by the creditor's intromission with the rents and profits; but in the special adjudication, the rent goes for the interest; and the debtor, before he can redeem the subject adjudged, must pay the debt and a fifth part more. The adjudication may be made the ground of an action of maills and duties, (see Maills and Duties) by which the adjudging creditor will attain possession of the rents; but in that case he must account by a rental; and he will be liable in strict diligence in the recovery of the rents. The adjudger's right is rendered irredeemable by a decree of declarator of expiry of the legal, which is obtained in an action raised after the expiration of the period of redemption, in which action the debtor is required to redeem the lands, or to be foreclosed; and, in this action, the debtor in the general adjudication is entitled to insist that the creditor shall account for the rents and profits he has drawn, so as to have the precise balance ascertained. If the debt was not paid off within the legal, the adjudger's right formerly became ipso facto irredeemable, however small the balance remaining unpaid may have been. It is now settled, however, that a declarator of expiry is necessary, although it would appear that some very eminent lawyers have doubted how far the rule is a proper one. See Bell's Com. vol. i. p. 601, 4th Edit. It has been settled by a recent judgment in the House of Lords, that a charter of adjudication and infestment followed by 40 year's possession, forms a good irredeemable title without a declarator of expiry of the legal. Robertson against the Duke of Athole, 10th May 1815, Dow's Reports, vol. iii. See Legal.


The adjudication in security is not founded on the statute, but has been introduced and sanctioned by the Court from equitable considerations. It is the form to be followed where
the term of payment of the debt is not arrived, and the debtor is *vergens ad inopiam*, and other creditors adjudging. It gives a mere right in security; and enjoys the benefit of the *pari passu* preference under the act 1661; but it has no legal; and may be redeemed at any time. As an equitable remedy when insolvency is impending, this form of adjudication may be applied for where the debt is not yet due, or where it is contingent, or where the creditor has it not in his power to establish the amount of it, and some have thought, even when the creditor has no proof of his debt ready to produce. *Bell's Com.* vol. i, p. 611. 4th Edit.

3. *Adjudication in Implement.*

The adjudication in implement, is a form of legal diligence, by which the want of a complete voluntary title to land, or other heritage, is judicially supplied; it is allowed by the practice of the Court wherever a regular deed conveys the property of heritage, but is defective in those clauses of form by which the feudal right is constituted. Thus, where a disposition is given without a procuratory of resignation, by which the lands may be resigned in the hands of the superior for a new title in favour of the disponee; or where it has no precept of sasine, by which the disponee may be infested and enabled to complete his title by "confirmation, the lands may be adjudged in implement, and the superior, in virtue of the original right in him, is decreed to give a new title to the disponee. This is done by the superior's granting a charter of adjudication in implement; in obedience to the direction of the judge; the infestment on which charter completes the feudal right in the disponee, and supplies the want of the clauses of form in the original right. This adjudication necessarily has no legal; is not redeemable; but, in its very nature, constitutes an absolute right from the first; neither is it subject to the *pari passu* preference of adjudications for debt. It would appear that the adjudication in implement may be competently raised before the sheriff-court, (*Boyd's Judicial Proceedings, Book iii.*) and that the abbreviates of them are signed by the sheriff, and recorded like other abbreviates. *In the* *Juridical*
It is said to be doubtful whether these adjudications are competent before the Sheriff, and that it must depend on the practice prior to the act 1672. By the bankrupt statute, 54 Geo. III. c. 137. § 29. the Court of Session is required to adjudge the land and other heritage belonging to the bankrupt, to belong to the trustee absolutely and irredeemably, in order that it may be sold for behoof of the creditors, which adjudication being in the nature of an adjudication in implement, as well as for payment or security, shall be subject to no legal reversion; and by § 30. the trustee is directed to record the act, or order, adjudging the estate of the bankrupt, within 15 days, in the register of abbreviates of adjudications, in the same manner and to the same effect that abbreviates of adjudication must be recorded.

ADJUNCTION is one of the modes of industrial accession borrowed from the Roman law. It takes place where the property of one man is added to that of another; as, for example, where a man builds on the ground of another. In such a case it is held that the proprietor of the ground is entitled to the building; but, as the presumption is that it was erected in the bona fide belief that the ground was the property of the builder, he is entitled in equity to be indemnified to the extent at least of the benefit which he has conferred. Stair, B. i, tit. 8. § 6. Ersk. B. ii. tit. 1. § 15.

ADMINICLE is a term of Scots law used in the action of proving the tenor of a lost deed, and signifies any deed, or even scroll, tending to establish the existence or terms of the deed in question.

ADMINISTRATOR IN LAW. An administrator seems, in English law, to mean the same with an executor; but, in Scots law, the term administrator in law is used to express the father's character of manager of the affairs of his children. Under this power he acts as a tutor for his children while they are pupils, and as their curator during their minority. The father's power extends over whatever estate may descend to his children, unless where that estate has been placed under a particular management. This power in the father ceases by the child's discon-
finuing to reside with him, unless he continues to live at
the father’s expense; and, with regard to daughters, it ceases
on their marriage, the husband being the legal curator of his
wife.

ADMIRAL. By the act 1681, c. 16. the act 1609, c. 15.
is ratified, and the High Court of Admiralty declared to be a
sovereign judicature in itself, and in its own nature to import
summary jurisdiction. The act farther declares the High Ad-
miral to be his Majesty’s Justice-General upon the seas, and in
all ports, harbours, or creeks, and upon navigable rivers below
the first bridges, or within flood-mark: and that he hath the
sole privilege and jurisdiction in all maritime and seafaring
causes, foreign and domestic, whether civil or criminal, within
the realm; and over all persons as they are concerned in the
same; and all other judges are prohibited from interfering with
the decision of any of the said causes in the first instance.
The act also subjects the decree and acts of all inferior courts
of admiralty both to the review and reduction of the High
Court of Admiralty; it gives a power to the High Court of
Admiralty to review its own decrees; prohibits advocations of
its judgments; and prescribes the form in which they may be
suspended. The Judge-Admiral must be an advocate, who,
for three years immediately preceding his appointment, shall
have bona fide attended practice in the Court.—26th Geo. III.
c. 47. § 5.

ADMIRALTY, COURT OF. The jurisdiction and
powers of the Court of Admiralty are fixed by the acts of
Parliament referred to in the preceding article. Its jurisdiction
is both civil and criminal. In civil matters, the Judge Ad-
miral is judge in the first instance (that is, the action must be
originally brought in the Court of Admiralty, though it may
be reviewed by the Court of Session), in all maritime causes,
as in questions on charter parties, freights, salvages, wrecks,
bottomries, policies of insurance, and all questions relating to
the lading and unlading of ships, or any act to be performed
within the bounds of his jurisdiction; he has jurisdiction also
in all actions for recovery of goods, or their value, when the
goods have been sent by sea from one port to another. In
criminal matters, he has the exclusive cognisance in the crimes
of piracy and mutiny on shipboard; yet in those of murder,
and in general where the crime does not offend against the laws
of navigation, his jurisdiction is not exclusive, although the
crime may have been committed on ship board.

The supreme jurisdiction of the High Admiral of Scotland
in criminal matters has been questioned, the Court of Admiralty
not being continued by the act of the Union with all its former
powers in the same manner with the other supreme courts;
for, 5. Ann. c. 8. § 1. art. 19. the jurisdiction of the Court of
Admiralty is placed under the Lord High Admiral of, or
Commissioners for the Admiralty of Great Britain. See Fac.
Col. July 5. 1780, Ritchie. See also Boyd's Judicial Pro-
ceedings, Book i.

ADMISSION to a Church, is an act of the presbytery of
the bounds admitting a minister to his church, or, as the law
expresses it, collating him to his benefice. This act proceeds
upon the presentation of the patron; or, should he delay to
present beyond six months after a vacancy, the title to present
belongs to the presbytery, in virtue of the jus devolutum
which they enjoy. Joined to this presentation there is the form
of a concurrence by the principal heritors, and what is termed
the moderation of a call, which is an instrument signed by
some of the elders, requesting the presbytery to proceed to
the ordination. See Minister.

ADPROMISSORS, or Cautioneers.—In the Roman law the
cautioneary engangement was undertaken by a separate act from
that by which the principal obligant was taken bound; he was
therefore termed adpromissor.

ADVENTURE, see Joint Adventure.

ADVOCATE.—The pleader of a cause in the Court of
Session. He is admitted into the Faculty of Advocates after
having undergone examination on the Roman and Scots law,
and after having published and defended a thesis on one of the
titles of the Pandects.

Hissee or honorary is not subjected to rules, since, as Stair
expresses it, it is the reward of services which can receive no proper estimation; but it may be made the ground of an action. It is from this body that the Judges of the Supreme Courts are nominated (see Clerk to the Signet); and advocates alone are capable of being appointed Sheriffs-depute. The Faculty of Advocates are members of the College of Justice, and as such entitled to the privileges belonging to that body.

ADVOCATION is one of the forms of process by which the decision of an inferior court may be brought under the review of the Court of Session. This is done by presenting a bill to the Lord Ordinary on the Bills, stating the circumstances of the case, and the ground on which the party complains of the judgment of the inferior court, and praying for letters of advocation, for having the cause brought into the Court of Session, and the judgment complained of altered. The Lord Ordinary, if he sees cause, appoints the bill to be answered, and sists procedure in the meanwhile. If, on considering the bill and answers, the Lord Ordinary thinks fit, he passes the bill of advocation, which then becomes the warrant for letters of advocation, which pass at the signet, and which are either executed against the respondent, or forced into Court by protestation at his instance. The case is then enrolled in the advocation and suspension roll, and debated and discussed in the same way as if the action had been originally brought in the Court of Session. It was formerly competent to present bills of advocation, on the grounds of iniquity or error, at any stage of the inferior court proceedings; but by the 50 Geo. III. c. 112, § 33 and 37, it is made incompetent to present bills of advocation on any of those grounds, until after a final judgment in the inferior court, which has been construed to mean a judgment, finally disposing of the cause, both upon the merits and the expenses, which, when they are awarded, must be modified and specially decreed for, before the bill of advocation can be presented. By the same statute, however, bills of advocation against interlocutory judgments are allowed on the grounds, "1st, Of incompetency, including
"defective jurisdiction, personal objection to the judge, and " privilege of party: 2dly, Of contingency: 3dly, Of legal " objection with respect to the mode of proof, or with respect " to some change of possession, or to an interim decree for " partial payment, provided that, in the cases specified under " this third head, leave is given by the inferior judge."

Advocations are incompetent, 1. In all maritime and seafaring causes, whether foreign or domestic. 2. In actions for payment of minister's stipends, or the rents of their benefices, before whatever inferior judicatory they may have been raised. 3. In actions founded on the statutes against profanity and immorality. 4. In actions brought for any sum under £12 sterling. Members of the College of Justice, however, are entitled to advocate such causes on the ground of their privilege. (See College of Justice). 5. Advocation is made incompetent in a variety of actions, limited to particular courts by express statute. These statutory exceptions are to be found chiefly in those Acts from which the justices of peace, commissioners of supply, courts of freeholders, police, &c. derive their jurisdiction. In the ordinary case, before the bill of advocatio is passed, it is necessary that the party presenting it should find caution to implement the judgment complained of, in case he shall prove unsuccessful in his attempt to alter it, and to pay the costs in the Court of Session, if they shall be awarded against him. There are several exceptions to this rule as to caution, which, however, it does not seem to be necessary to enumerate here. — See Ivory's Form of Process, vol. i. p. 92-102, et seq.

It was formerly the practice to pass or refuse all bills of advocatio at once without answers; but, by the 1 and 2 Geo. IV. c. 28, § 1. it is enacted that, upon bills of advocatio and suspension complaining of final judgments of sheriffs and other inferior judges, it shall be competent for the Lord Ordinary on the Bills, or for the Court, to remit the cause to the inferior judge, with instructions how to proceed; but no such remit is permitted except in the case of a suspension of a decree in absence, without hearing counsel or receiving a written answer
on the part of the respondent. By the same statute, § 2, it is enacted that the procedure on bills of advocation complaining of final decrees of removing shall be the same as that established for bills of suspension of such decrees, according to which no such bill can be passed, in time of Session, without a report to that Division of the Court to which it belongs, and, in time of vacation, without the fiat of two Lords Ordinary.

ADVOCATION OF BRIEVES. All questions originating in briefs for services must be brought in the first instance before the inferior judge, to whom the brief is directed; and, where any difficulty occurred, or injustice had been done, in the course of the proceedings, it was, under the former practice, by an advocation of briefs to the macers that the remedy was sought. But, by the act 1 and 2 Geo. IV. c. 38, § 11, the jurisdiction of the macers in services is abolished; and all briefs, formerly in use to be directed to the macers, are in future to be directed to the sheriff-depute of Edinburgh, or his substitute; and in all cases of competition of briefs, or where a party claims right to oppose a service, either party may apply for and obtain advocation of the briefs to the Court of Session, either from an inferior judge, or from the sheriff of Edinburgh, acting under special commission; and the Lord Ordinary, before whom the advocation is called, is directed to advocate the brief, and remit to the fifth or junior permanent Lord Ordinary to be judge in the service.

ADULTERY, is that crime by which the marriage-bed is polluted. A distinction was received in our law between simple and notour adultery. Notour adultery is that where issue is procreated between the adulterers; where they are known to live together at bed and board; or where they give scandal to the church, and are excommunicated for their obstinacy. By the act 1551, c. 20, notour adultery was punished by the loss of moveables; and, by a posterior statute, 1563, c. 74, it was rendered capital. The punishment of simple adultery is arbitrary. Adultery may be the ground of divorce (see Divorce)
as well as of an action of damages at the instance of the husband.

AFFIDAVIT is an English term for an oath given in writing in presence of a person entitled to administer an oath. In Scotland, voluntary affidavits are not admitted to be produced in the way of evidence. Evidence on oath can be given only in consequence of the warrant of a Judge, and where the party interested has an opportunity of being present, and of cross-examining the party giving his deposition. There are exceptions, however, by some statutes, as by the bankrupt statute, for example, which authorises and requires the claimants to lodge their claims, accompanied by affidavits or oaths of verity, 54 Geo. III. c. 137. Justices of the peace are in these, and various other cases, authorised to take the affidavit. An affidavit of this description may be made before a justice of the peace beyond his jurisdiction.

AFFINITY, is the relationship arising from marriage between the husband and the blood relations of the wife, and between the wife and the blood relations of the husband. Thus the relations of the husband stand in the same degree of affinity to the wife in which they are related to the husband by consanguinity. But there is no affinity between the kinsmen themselves. Thus, the husband's brother and the wife's sister have no affinity.

AFFIRMATION. Quakers, who are withheld by religious scruples from giving an oath, are permitted to make affirmation, by which they declare, as in the presence of God, the truth of what they affirm. Formerly this was not allowed to supply the place of an oath; and a libel being referred to the oath of a Quaker, he was held as confess, because he would not swear. January 18. 1678, Tailfer—Fount. But the Judges relaxed from this strictness; and a Quaker, conformably to the statutes of England, was allowed to give his oath in these terms:—"I do declare in the presence of Almighty God, the witness of the truth of what I say." February 26. 1710, Anderson—Forbes. It is allowed by the bankrupt statute, 54 Geo. III. c. 137, § 33.
AGE, in law, is used in reference to the period of life at which a person is entitled to enter into legal obligations, and to dispose of his property. Age, or lawful age, is when the person has completed the 21st year; previous to that, the person is said to be in minority. After 21 years of age, every person, not disabled from the management of his affairs by defect of judgment or other incapacity, is entitled to the entire management of himself and of his fortune; he may contract in every lawful manner, and dispose of his property at his pleasure. The period of minority is divided into that of pupillage and puberty, though, in common language, minority is generally used for puberty. Pupillage, in males, reaches to the age of 14 years; in females, to 12 years; and during pupillarity the tutor alone is entitled to manage the affairs of the pupil. During puberty, the minor may act for himself; but he can neither dispose of his heritable property during that period, nor bind himself for money advanced to him, unless in the line of the profession in which he is engaged; nor can he, by a deed inter vivos, dispose of his property, though by a testament he may bequeath whatever is testible.

AGENT, is the term generally used to signify a solicitor before the Court of Session. In 1797, one class of the agents practising before this Court were united into a corporation by a charter from the Crown (see Solicitor). The first clerks of advocates are entitled ex officio to act as agents in the Court of Session, a privilege which they seem to have enjoyed ever since the institution of the Court. Mercantile factors also are called agents.

AGNATE. Agnates, in the law of Scotland, are those related through the father, as cognates are those related through the mother.

ALBA FIRMA, properly speaking, is a money-rent, in contradistinction to a rent in victual. In blanch charters, where the duty consists of some trifling payment in acknowledgment of the right of superiority, it is usually expressed to be nomine albae firmæ, and it is also usual to add the words
*si petatur tantum*, by which, if the duty be not demanded within the year, the right to demand it is lost.

ALE, cannot be imported and sold within a barony without the consent of the baron.

ALEHOUSES, are not allowed to be kept without a licence obtained from justices of the peace or other magistrates empowered to grant them. Act 44 Geo. III. c. 55, § 5, &c.—48 Geo. III. c. 143, &c.

ALIBI, *elsewhere*; this term is used to express that defence in a criminal prosecution, where the party accused, to prove that he could not have committed the crime with which he is charged, offers evidence that he was in a different place at the time; hence, in every criminal libel, it is necessary to specify the crime, the place in which it was perpetrated, and the time, in such a manner as to enable the criminal, if he can, to prove an *alibi*.

ALIEN, one born in a foreign country, out of the allegiance of the King. By 4th Geo. II. c. 21, § 1, all children born out of the allegiance of the Crown of Great Britain, whose fathers are natural born subjects of Britain at the time of the birth of such children, shall be held to be natural born subjects, unless such fathers have been attainted of high treason, or are liable to the penalties of high treason or felony, in case of their returning to Britain, or who are in the actual service of any foreign prince or state, at war with Great Britain. By the act 13 Geo. III. c. 21, § 1, the same privilege is extended to all persons born out of the allegiance of the King, whose *fathers*, in virtue of the former act, are to be deemed natural subjects, although their mothers are aliens. The issue of a British *woman* by an alien, born abroad, are aliens. The children of aliens, if born in Britain, are, generally speaking, natural born subjects. Aliens residing in any place surrendered to Great Britain may act as merchants, &c. on taking the oath of allegiance, 37 Geo. III. c. 63 § 5. This statute saves the rights of the East India Company. An alien enemy coming into this kingdom, and taken in war, shall suffer death by the martial law. No alien can be returned
on any jury in a trial between subject and subject. Aliens are subject to the laws, and, in the greater crimes, are liable to the ordinary course of justice, although it seems doubtful whether they will be punished on local statutes.

The influx of foreigners to Great Britain in 1792 and 1793, caused by the French Revolution, led to the passing of various Acts of Parliament, known by the name of the Alien Acts, by which masters of ships, arriving from foreign countries, are required, under certain penalties, to give an account to the custom-house officers of the number and names of the foreigners on board. See statute 33 Geo. III. c. 4.—44 Geo. III. c. 43–67. Justices of peace and others are appointed, by these statutes, to grant passports to such aliens; and the King is empowered to restrain and send them out of the kingdom, on pain of transportation, and, on their return, of death. The same acts also directed accounts of the arms of aliens to be given, and prohibited them from going from one place of the kingdom to another without passports. These regulations have been altered and amended by various more recent statutes.—See 54 Geo. III. c. 155.—55 Geo. III. c. 54.—56 Geo. III. c. 86.—1 Geo. IV. c. 105.

An alien is not entitled either to acquire or to succeed to heritage in Scotland. These disabilities can be removed only by an act of naturalization, or by letters of denization. An act of naturalization is an Act of Parliament, conferring on the individual the privileges of a natural born subject, except only that he is incapable, as well as a denizen, of being a member of the Privy Council or of Parliament. No bill for naturalization can be renewed without such a disabling clause in it (1 Geo. I. c. 4.) nor without a clause disabling the person, so naturalized, from obtaining thereby any immunity in trade, in any foreign country, unless he shall have resided in Great Britain for seven years after the commencement of the session in which he is naturalized, 14 Geo. III. c. 84. These provisions have been usually dispensed with by special statute, on the introduction of bills of naturalization of any foreign princes or princesses.

Letters of denization are letters patent issued by his Majes-
ty, conferring on the person, in whose favour they are granted, the privileges of a British subject. A denizen is in a sort of middle state between a natural born subject and an alien. He may purchase and transmit lands, but cannot succeed to them. The issue of a denizen born out of the kingdom before denization cannot succeed to him. But all persons, natural born subjects of this kingdom, may inherit as heirs to their ancestors, although their ancestors were aliens, 16 Geo. III. c. 52. No denizen can be a member of the Privy Council or of Parliament, or have any office of trust, civil or military, or be capable of any grant of lands, &c. from the crown.

Every foreign seaman, who, in time of war, serves two years on board a British ship, by virtue of the King's proclamation, is by statute 13 Geo. II. c. 3, ipso facto naturalized. And all foreign protestants and Jews, upon residing seven years in any of the American colonies, without being absent above two months at a time; and all foreign protestants serving two years in a military capacity there, on taking the oaths of allegiance and abjuration, shall be naturalized, except as to sitting in Parliament or the Privy Council, and holding offices and grants under the Crown in Great Britain or Ireland. See 13 Geo. II. c. 7.—20 Geo. II. c. 44.—2 Geo. III. c. 25.—13 Geo. III. c. 25.—20 Geo. III. c. 20.—58 Geo. III. c. 97.

The act of Scotch Parliament (17 July 1695), instituting the Bank of Scotland, provides, that all foreigners, who shall become partners in the bank, "shall thereby be and become naturalized Scotsmen to all intents and purposes whatsoever;" and, as all Scotchmen became British subjects at the union of the kingdoms, it was thought, until lately, that all aliens, who were holders of Bank of Scotland stock, became thereby naturalized subjects of Great Britain. The Court of Session, however, in a late case, which is still in dependence in the House of Lords (Macao against the Officers of State), have held that the privilege was limited to the original partners of the bank; and, whatever may be the ultimate decision of that case, it is now settled by Stat. 58 Geo. III. c. 97, that aliens cannot be naturalized, except by Act of Parliament; or become denizens.
except by letters of denization; the only exception made by this statute being that of the acts for naturalizing seamen serving in British ships during war, and foreign protestants settling in the colonies, or serving in the British army, and the acts for the encouragement of the fisheries.

As to moveables, the general rule is, that aliens' friends may acquire right to them, without naturalization or denization; but from this rule there is an exception in the case of British ships under the Registry Acts. See 13 Geo. III. c. 26.—26 Geo. III. c. 60.—34 Geo. III. c. 68.—See also Brown on Sale, p. 173.

ALIENATION, is the act of transferring property; and, in the Scotch law, it signifies the transference of heritable property. The seller says, "I hereby sell, alienate, and dispone," as expressive of a complete onerous conveyance to the purchaser; or, when the deed is given gratuitously or without a price, the terms of conveyance are give, grant, and dispone. The form of alienating heritage will be found under the title Disposition. See also Entail.

ALIMENT, a maintenance. Parents and children are reciprocally bound to aliment each other. In like manner, lifterenters are bound to aliment the heirs and fiars, and creditors their imprisoned debtors, where they are unable to support themselves.

1. Parents and Children.—The maintenance of children is a natural obligation upon parents; Ersk. B. i. tit. 6. sect. 56. Thus, the father is liable in the first place; the mother in the second; and even the grandfather and grandmother, in their order, are liable; February 28. 1802, Tait against Whyte. This obligation must be proportioned, both in its extent and endurance, to the circumstances of the parent. Sons must be alimented until they arrive at the age of 21, daughters during their life, or until their marriage; but in the lower ranks, where the daughters must work for their livelihood, as well as the sons, the obligation to aliment the children continues no longer than until they are able to support themselves; January 13. 1666. Dick against Dick; Stair. The obligation by parents to support their children is implemented by the parent receiving
the child into family, and allowing the child to partake with him; February 16, 1666. Child of the Earl of Buchan, Stair, and November 27, 1685, the Laird of Kirkland, Falconar; unless in the case of bad usage, where a separate aliment will be allowed; July 19, 1716, Morison; and July 30, 1734, Hepburn.

The obligation on parents to support their children necessarily produces a counter obligation on the children to support their parents, when the indigence of the parent renders such aid necessary. January 25, 1754, Gibson. June 25, 1761, Seton against Paterson. February 11, 1764, Seton. December 18, 1758, Campbell. March 6, 1778, McCulloch; and July 20, 1710, Brown.

The eldest son, as proprietor of the heritable property, becomes liable, on the death of his father, and as representing him, to support the younger children; Morison’s Dictionary, voce Aliment. But this obligation does not affect him, where he possesses the estate not as representing his father; Mor. ib. and App. to Mor. voce Aliment. Neither does it affect a son who enjoys only a moveable estate through his father; nor a stranger who has succeeded to the estate of the father; August 10, 1780, Mearns against Gibbon. Where the rent of the heritable property is insufficient, the mother must contribute to support the younger children. Stair, B. i. tit. 5. sect. 7; and Mor. Aliment, No. 32. See Bastard.

The obligation on the heir succeeding to a landed estate goes the length of binding him to support the widow of the last proprietor, where she has no terce, or jointure, and no separate means of support. Balfour, July 21, 1534, Logan. Lochbuy, 1784. June 27, 1790, Young against Campbell: and March 1, 1796, Gibson against Kerr. Reid.

The obligation to support children extends to natural children. It is incumbent on the mother, and also on the father, that is, the supposed father, and continues for a longer or shorter period according to circumstances. Mor. Aliment, Nos. 74, 75, 76, 77, and 78. See Bastard.

It follows that parents are bound to furnish necessaries for
the children; and a merchant, who makes such furnishings, will be entitled to recover payment from the parents. But this will not extend to unnecessary or improper furnishings. January 14, 1698, Hopkirk against Deas. July 11, 1758, Barclay; and Scoffer against Reid, July 26, 1783. The Court sustained the claim of a merchant for necessary articles, with which he had furnished a young man, but rejected his claim for money to the extent of L.32, and the value of a silk cloak for a girl, valued at L.6. 9s. 5d.

2. Lifereinters and Heirs.—A liferenter is bound to aliment the heir or fiar of the landed estate over which his liferent extends. This obligation seems to have originated in an extended interpretation of the act 1491, c. 25. but may now be considered as an established doctrine of Scots law. Under the act 1491, c. 25. the superior in a ward estate, while the estate was in ward, was bound to aliment the heir; and the analogy of the situation, where the rents of an estate were wholly drawn by a liferenter, seems to have led the Court to impose a similar burden on the liferenter. The rule is extended to the person in possession of an entailed estate, who is bound to aliment the next heir. It would seem, however, that the obligation on the liferenter to aliment the heir or fiar does not extend to liferenters by reservation, who have of their own bounty bestowed a fee which it was optional to them to have given or withheld. In such a case, the liferenter will not be held to have incurred an obligation to aliment the person whom he has favoured. See Loch against Loch, 1822, First Division.

3. Creditors and their imprisoned debtors.—By the act 1696, c. 32, termed the Act of Grace, a debtor, who swears that he has no means of support, is entitled to aliment from the creditor at whose instance he is imprisoned, or to his freedom. See Act of Grace.

ALIMENTARY FUND, is a fund set apart by the destination of the giver, for an aliment to the receiver. By vesting a fund in this way, (to the extent, at least, of a moderate aliment) it may be put beyond the reach of the direct diligence of creditors. But although the bestower of the fund has, in
this manner, a right to fix its destination, it is not in the power of any man to exempt his own funds from the diligence of his creditors, by setting apart the whole or any portion of them as an aliment for himself. Pensions from the King are held to be alimentary, although they do not bear an express clause to that effect; and, in the statutes authorising the establishment of widow’s funds, it is usual to declare the widow’s annuity to be alimentary. See Bell’s Com. vol. i. p. 72, 4th edit.

ALLAY, or ALLOY, is a mixture of several metals with silver or gold; it is used to defray the expense of coinage, and render the gold or silver more fusible. The alloy in gold coin is silver and copper; in silver coin, copper alone. The standard of gold is 22 carats of fine gold, and two carats of alloy in the pound Troy; the standard for silver is 11 ounces 2 penny-weights, and 18 penny-weights alloy of copper. In the Mint, a pound of standard gold is coined into 44 guineas and a half; and a pound weight of standard silver is coined into 62 shillings.

ALLEGIANCE, is the fidelity due by every natural born subject to the king; it is due by every person who has been naturalized; and a temporary allegiance is due, during the period of his residence, by every foreigner who resides in the kingdom, and is protected by our laws. Since the period of the Revolution, allegiance has been enforced by an oath, termed the oath of allegiance, 1693, c. 6. The person taking it “sincerely promises and swears that he will be faithful and “bear true allegiance to his Majesty.” This oath must be taken by all those bound to take the oath of abjuration.

ALLENARLY, only, merely. This is a technical word of some importance in Scotch conveyancing. Thus, where lands are conveyed to a father “for his liferent use allenarly,” the effect of that form of expression will be to restrict the father’s right to a mere liferent, or, at best, to a fiduciary fee, even in circumstances where, but for the word “allenarly,” the father would have been unlimited fiar. See Conjunct Rights.

ALLODIAL, is used in contradistinction to feudal; in which sense, all moveable property is allodial. The term is supposed
to be of German origin, and composed of the *priva* and *vocable* for vassal. Others, again, have supposed the term to be derived from *all* and *odh*, property; and thus signifying absolute property. But whatever derivation may be assigned to the term, the meaning is perfectly understood; and it is used to signify property not held by any feudal title. In this sense, alodial property is said to consist, 1. Of the property belonging to his Majesty; 2. Of the superiorities reserved by his Majesty; and, 3. Of churches, churchyards, manses, and glebes, the right of which does not flow from the Crown. To these may be added the Udal lands of Orkney, which are held by natural possession, proveable by witnesses, without any title in writing. This form of holding remains to this day, in every case where the property has not been feudalised, by the vassals accepting of a charter from the Crown. But a change is constantly going on; and, after lands have been once feudalised and held by infeftment, they cannot be held nor passed from one to another without observing feudal forms. In practice, it is common to obtain a Crown charter of lands formerly udal-lands, by an adjudication in implement, proceeding on a trust-disposition, without procuratory or precept; though, according to principle, it might proceed at once on a resignation by the udal proprietor in the hands of his Majesty.

There is a holding not properly feudal, peculiar to a small property called the four towns of Lochmaben, which is held by a tenure, somewhat like the copy-hold right of England. The proprietors are enrolled as kindly tenants in the rental book of the proprietor of the estate, which constitutes their title. This title has been supported by decisions of the Court. See *Morrison's Dict.* p. 15,195.

**ALLOWANCE OF AN APPRISING.** The allowance was a decree in confirmation of an apprising, written on the back of it by the clerk to the hills, stating the amount of the debt, the lands apprised, and the names of the apprizer, debtor, superior, and messenger, and the dates of the executions, and authorising letters of horning, &c. against the superior. On
the change of form from the apprising to the adjudication, the allowance gave rise to the abbreviate. See Abbreviate.

ALLUVIO, is that addition which a river, running between the grounds of different heritors, may insensibly make to one of the properties, and which belongs to the owner of the ground to which the addition is made. But if, in place of a gradual increase, the course of the river should be altered by a violent flood, or by any convulsion of nature, the ground which may thus be added to one of the properties, does not belong to the owner of that property, but remains the property of that person to whom it originally belonged. See Accession, avulsio.

ALMONER, the person appointed to distribute the king's alms. A clergyman is usually appointed to the office.

ALTARAGE. Altarages were mortifications for the singing of masses for the souls of the granter, &c. at particular altars: and when, at the Reformation, these came to be suppressed, the founders were allowed to convert the endowments to the maintenance of bursars in one of the universities.

AMBASSADOR, a person sent by one sovereign power to another vested with authority to transact state affairs, and to act as representative of his constituent. The persons of ambassadors are protected under the law of nations. An ambassador will lose his privilege if he commit an offence against the state to which he is sent; and, for treason against the King's life, he may be condemned and executed; but, were he guilty of crimes of a less serious character, he would, in courtesy, be sent back to his sovereign to be punished by him. By the civil law, the person of an ambassador may not be arrested, or his moveables taken in satisfaction of debt. The law of nations regarding the privileges of ambassadors is part of the law of Great Britain; and, by express statute, (7 Anne, c. 12) ambassadors and their domestic servants are exempted from arrest. A resident merchant in this country, who acts as consul to a foreign power, is not thereby exempted from arrest. See Tomlins' Law Dictionary.

AMENABLE, to a certain court, signifies to be subject to the jurisdiction of that court.
AMENDMENT of THE LIBEL, is an addition or alteration made upon the facts stated, or upon the conclusions of the summons. It is made by permission of the judge; and is given into process in writing, with a reference to that part of the summons where it is meant to be introduced. Being allowed by the judge, it becomes part of the summons. No amendment of the libel can be received after a proof has been allowed, or, in cases where there is no proof, unless produced with, or before, the second representation against the Lord Ordinary's first interlocutor on the merits of the cause; Act of Sederunt 7th May 1810; and it seems to be irregular to make it where there is no appearance for the defender.

AMERCIAMENT, is properly an English law term, where an offender is at the mercy of the king in regard to the quantum of a fine; when it is used at all, it means a fine imposed on an offender.

AMICABLE SENTENCE, is applied to a decree arbitral.—See Arbitration.

AMNESTY, an act of pardon or of oblivion.

ANCESTOR, in Scots law, is one from whom a landed estate is derived, and who is represented by the person in possession. In this respect an ancestor differs from one to whom the estate has previously belonged, and from whom it has past to the present proprietor by purchase, or what is called a singular title; such a person is termed the author.

ANCHORAGE, is a duty payable by a vessel on its entering a port.

ANN, or ANNAT, is the half year's stipend payable for the vacant half year after the death of a clergyman, and to which his family or nearest of kin have right under the act 1672, c. 13. Thus, if a clergyman die after Whitsunday, his executors have right to the first half of that year's stipend, and his widow and nearest of kin have right to the other half as ann. If he survives Michaelmas, he has right to the whole of the year's stipend, and his nearest of kin draw the first of the next half year's stipend as the ann. The right to the ann is not vested in the clergyman, but in his next of kin, and therefore
can neither be assigned by him, even in a mortis causa deed, nor attached for his debts.

The rule for dividing the ann between the widow and children does not seem to be very clearly fixed; but Mr Erskine inclines to adopt the same rule of division which would be followed in regard to executry; that is, to give one-third to the widow, and two-thirds to the children per capita: where there are no children, one-half goes to the widow, and the other to the nearest of kin; where there are children, but no widow, it goes wholly to the children; and where there are neither children nor widow, it goes to the nearest of kin.

Confirmation is not required to vest a right to the ann in those by law entitled to it.—Ersk. B. ii. tit. 10. § 67, 68.

ANNEXATION, is the act of uniting lands to the Crown, and declaring them unalienable. It also signifies the appropriating of church lands to the Crown, and the union of lands, lying at a distance from the kirk to which they belong, to the kirk to which they are more contiguous.

1. Annexed property of the Crown.—The liberality of our Sovereigns during the 15th century had reduced the Crown to great poverty, and it was the object of Parliament to put an end to such alienations. But this determination was of short duration; and a continuance of the ancient system seems to have been secured, under the specious pretence of improving the country by giving out the property of the Crown in feu for payment of a rent. By the act 1455, c. 41, the annexed property of the Crown is described and declared unalienable, unless the gift receive the approbation of Parliament. The narrative of this statute explains well the situation of matters at this time:—"For sameikle as the povertie of the Crowne "is oft-times the cause of the povertie of the realme, and that "manie uther inconvenients ar there throw, the quhilkis were "lang to expreeeme, be the advise of the full Councell of the "Parliament, it is statute and ordained, that in ilk parte of "the realme for the King's residence, quhair it happenis him "to be, there be certaine lord-shippes and castelles annexed to
the Crowne, perpetually to remaine. The quhilk may not
be given in fee and heritage awaie, nor in franck-tenement
to onie person, of quhat estate or degree that ever he be,
but advise, deliverance, and decreete of the haill Parlia-
ment, and for great seeand and reasonable causes of the
realme."

It may gratify curiosity to state what sum was, in the mid-
dle of the 15th century, allotted for the support of the King,
and what were judged convenient residences for him in his
progress through the kingdom. By this act there are set
apart, as the annexed property of the Crown, "the haill cus-
toms of Scotland burdened with the pensions and other
things payable out of them,—the lordship of Ettrick Forest,
with all the bounds perteining thereto,—the haill lordship
of Galloway, with its freedoms and commodities as it hes
thir daies,—the castle of Crief,—the castle of Edinburgh,—
the lands of Ballincricie and Goffuird, with the lands lying
about pertaining to the King, in the scirifedome of Lou-
thiane,—the castle of Stirling, with all and sundrie the
king's lands lying about it,—the castle of Dumbartane, with
the lands of Cardrosse, Roseneth, with the pension of Cad-
gow, and the pension of the ferme meile of Kirkpatrick,—
the haill earldom of Fife, with the palice of Falkland,—the
earldom of Stratherne, with the pertinents,—the house and
lordship of Brechin, with the service and superiority of Cor-
toquhay,—the house of Innerness and Urquhard, and the
lordships of them, and the lordships of Abernethy, with the
water mailles of Innerness, togidder with the baronies of
Urquhard, Glenurquhane, Boneich, Bonochar, Annach, Ed-
derdaile (called Ardmannach), Peety, Brachly, Stratherne,
with the pertinents,—Reid castle, with the lordship of Rosse
pertaining thereto."

Such was the annexed property of the Crown at that time;
and there was too good ground for the enactment, as well as
too much expediency in it, to admit of its being openly in-
fringed. But, in the plan of subinfeudation, we find a more
certain as well as a safer way of dilapidating the annexed pro-
perty of the Crown. In two years from the date of the above statute, the following enactment is made, 1457, c. 71,—" As " anent few-ferme, the Lordes thinkis speidfull, that the King " beginne and give example to the lave. And quhat prelat, " barronne, or free-halder, that can accord with his tennent, " upon setting of few-ferme of his awin land in all or in part, " our Soveraine Lord sall ratifie and apprieve the said asseada- tion, sa that, gif the tennandrie happenis to be in waerd in " the Kingis hands, the said tennent sall remaine with his few- " ferme unremoved, payand to the King sicklike ferme, indur- " ing the waerd, as he did to the Lord, sa that it be set till a " competent availe, without prejudice to the King." And when, by the act 1540, c. 15, certain forfeited lands were annexed to the Crown, the next act, c. 16, is a renewal of the power of subfeuing. But the act 1584, c. 6. at once dissolves all previous annexations, and declares them to be capable of subinfeudation, provided the property does not fall below the new extent. The act 1597, c. 233, confirms those subfeus that had been made under the previous acts, with an increase of the rent; and the next act, c. 234, declares that the annexed property of the Crown should be given in feu only.

From these acts, it may easily be seen in what manner the annexed property of the Crown came to be dissipated; so that at the present day the castles of Edinburgh, Stirling, and Dumbarton, with the palace of Holyroodhouse, and the feu-duties of the ancient domains (now sunk by the increased value of money to almost nothing), alone remain of all the extensive territories of the Crown.

Annexation of Temporality of Benefices.—This annexation was made by the act 1587, c. 29; and it proceeds on a narrative of the poverty of the Crown, and his Majesty's desire to support the royal dignity without taxing his subjects; and, for that purpose, maintains the expediency of reserving what had formerly been given to religious houses, the cause of the disposition now ceasing, as the act expresses it (this was after the Reformation): and on these grounds the whole estates, profits, and emoluments belonging to the church, and to ecclesiastical
persons of every description, are, from and after July 29, 1587, declared to be the annexed property of the Crown under certain exceptions, and reserving a power to his Majesty of subseuing. See Teinds.

Annexation quoad sacra is the annexation of lands lying at a distance from the kirk to which they belong to another kirk to which they are more contiguous, in so far as relates to the pastoral charge; such lands still continuing part of the old parish, and remaining liable for reparation of the kirk and manse, and of course not liable for the proportion of these expenses in the new parish to which they are annexed.

ANNUALRENT, interest of money. Before the Reformation it was not lawful to lend money at interest; and, to evade the law, persons lending money received a yearly rent out of land: the profit of the money lent was thus denominated annualrent; and thus the term annualrent has come to be synonimous with interest. See Interest.

ANNUALRENT RIGHT, was a deed by which, in consideration of a certain price paid to him, a proprietor of lands granted a yearly rent out of his property redeemable by him, on repayment of the purchase money. This was a device to evade the laws in force previous to the Reformation against the taking of interest. But, after the Reformation, when it was made lawful to take interest, a bond was given by the borrower to the lender, by which he gave an heritable securit for the whole debts principal and interest; and, consequently, when these two securities come into competition, the annualrent right carried no farther right, though preferable to the heritable bond, than to the extent of the annualrent, while the surplus was carried off by the heritable bond; and, in this manner, the postponed security might have been first paid off. The manner in which the annualrent right fell into disuse is thus obvious. See Heritable Securities.

ANNUITY OF TEINDS, was an allowance to the King by the commission of teinds of 6 per cent. from the teind of erected benefices, ratified by the act 1633, c. 15. They were disposed by the Crown in security of a debt; but the drawing
of them was put a stop to in 1674, and the right has since that time lain dormant. See Teinds.

ANNUUS DELIBERANDI, is the year allowed by law to the heir to deliberate whether he will enter and represent his ancestor. The entry of an heir may be attended with serious consequences, and therefore he should have time to consider as to the propriety of subjecting himself to responsibility; it is for this purpose the year is allowed to him. The annus deliberandi commences on the death of the ancestor, unless in the case of a posthumous heir, in which case the year runs from the heir's birth. But the period for deliberating will not be extended on account of the heir's ignorance of the ancestor's death, as, for example, where the ancestor has died abroad.—November 14, 1783, Henderson v. Campbell.—Mor. p. 5292. During this period the heir may be charged to enter heir; a summons may even be executed against him, provided the days of compearance fall beyond the year.—Ersk. B. iii tit. 8, § 54.

ANSWER; The title of a written pleading given in to a Court of Justice by a party, either as a replication to the claim of the pursuer, or to a statement ordered by the judge, or in support of a judgment which has been brought under review by a representation or petition. See Judicial Procedure.

ANTENUPTIAL CONTRACTS OF MARRIAGE.

See Contract of Marriage.

APPARENT HEIR, in common language, is applied to the eldest son as the person to whom the succession will probably open. But, in Scots law, an apparent heir is the person to whom the succession has actually opened, and who remains apparent heir until his regular entry in the lands by service, or by infeftment on a precept of clare constat.

An apparent heir is entitled to the annus deliberandi, within which time he may weigh the consequences of his entry, and resolve to take up or to renounce the succession (see Annum Deliberandi). The apparent heir has a right to pursue a process of exhibition ad deliberandum; that is, he can compel those who are possessed of his ancestor's title-deeds to produce
them for his inspection and information. He may defend the titles of his ancestors. He may draw and discharge the rents, or even pursue for them. His executor seems to be entitled to draw what may have fallen due during the heir's apparenacy, and which remained undrawn at the time of his death. But an apparent heir cannot remove tenants; to enable him to do so, he must have completed his title.—Ersk. Inst. B. viii. tit. 8. § 54, et seq. Bell's Com. vol. i. p. 63. 4th Edit.

An apparent heir may pursue a judicial ranking and sale of his ancestor's estate, whether it be bankrupt or not, 1695, c. 24. The expence of the action is paid from the estate when there is no surplus after paying the creditors; but, when there is a surplus, the expence must be taken from it.—Ersk. B. ii. tit. 12. § 61.

An apparent heir is entitled to an aliment from a liferenter in possession of the estate. He may also reduce death-bed deeds; the bare right of apparenacy carries leases without the necessity of a service.

The creditors of an apparent heir are postponed to those of his immediate ancestor, as to the defunct's heritable estate, provided that the ancestor's creditors do diligence against the apparent heir, and the real estate belonging to the deceased, within three years after his death; act 1661, c. 24. The same statute declares that no right or disposition affecting the heritage of the defunct, made by an apparent heir, even after his entry and infestment, shall be valid to the prejudice of the predecessor's creditors, unless such right or disposition be made and granted a full year after the defunct's death. See Bell's Com. vol. i. p. 624. 4th Edit.

By the act 1695, c. 24, the onerous acts of an apparent heir, three years in possession, are rendered effectual against the estate which he possessed under his right of apparenacy; it being thereby declared, that an heir passing by his immediate ancestor, and entering to one more remote, or succeeding by adjudication on his own bond to one more remote, shall be liable for the debts and deeds of the interjected person (who has been three years in possession) to the value of the estate; but when
the heir obtains possession, without having completed his title; he is not held to represent the apparent heir. This is an omission in the statute.

APPEAL. An appeal is a reference to a higher tribunal; but the term in Scots law is confined to the act of bringing a decision of the Court of Session under review of the House of Lords. This is done by presenting a petition of appeal, which narrates the grounds of action and the judgment pronounced by the Court, and prays that the judgment may be reversed, varied, or altered.

This petition must be signed by two counsel; and must be presented to the House of Lords within five years from the extracting of the decree, at least within 14 days after the first day of the session or meeting of Parliament next ensuing the expiration of the said five years; and, when an appeal is taken against a judgment pronounced during the sitting of Parliament, the petition of appeal must be presented within 20 days after the date of the judgment, otherwise it cannot be received that session.

Where, however, the party entitled to appeal is under age, or covert, non compos mentis, imprisoned, or out of Great Britain or Ireland, the period for appealing is extended to five years after his full age, discovertury, coming of sound mind, enlargement out of prison, or coming into Great Britain or Ireland, and 14 days to be counted from and after the first day of the session or meeting of Parliament next ensuing the said five years, but not afterwards, or otherwise. Standing Order of House of Lords, 24th March 1725.

When a petition of appeal is presented, warrant for service is granted of course; and it is served on the agent or counsel of the other party, by exhibiting to him the principal order, and delivering at the same time a copy of the order; and this service is proved by an affidavit, in presence of a judge or justice of the peace, made by the person who has served the warrant.

Within eight days from the presenting of the appeal, the appellant, or some responsible person for him, must enter into a
recognisance to the extent of £200, to answer the expense which may be awarded to the respondent; and without this recognisance the appeal falls.

After this, appeal cases are prepared, and parties are heard in the House of Lords; when the decision of the Court is either affirmed or altered, or remitted to the Court of Session for reconsideration. Should any further procedure be requisite in the Court of Session, or should the case be remitted, the cause is brought before the Court by a petition, stating the judgment of the House of Lords, and requiring the Court to apply it.

By the act 48th Geo. III. c. 151, appeals from interlocutory judgments are prohibited, and appeals allowed only from judgments or decrees on the whole merits of the cause, except with the leave of the Division of the Court pronouncing such interlocutory judgment; or, except in cases where there is a difference of opinion amongst the Judges of the Division. By the same statute, appeals from interlocutors, or decrees of the Lords Ordinary, are prohibited, unless such judgments have been reviewed by the Division of the Court to which the Lord Ordinary belongs. But it is competent to a party, after the cause is thus exhausted in the Court of Session, to appeal from all or any of the interlocutors which have been pronounced.

Appeals from judgments of the Court of Justiciary to the House of Lords, do not seem to be competent. It would appear that this matter, at one time, was considered doubtful; but the expediency of prohibiting such appeals is so obvious, that there is little chance of their ever being entertained. See on this subject a recent publication, called "Forms of Procedure upon Appeals,” p. 85.”

Appeals from the judgments of the Court of Exchequer in Scotland, and from the Commission of Teinds, are competent.

By the first Jury Court act (55 Geo. III. c. 42), an appeal to the House of Lords was allowed from the interlocutors of the Court of Session, or Admiralty, on bills of exceptions and motions for new trials; but the late statute (59 Geo. III. c. 35, § 16), seems to take away this right, and renders the judg-
ments of the Jury Court, on motions for new trials at least, final, and “not subject to review by representation, petition, appeal “to the House of Lords, or otherwise.” The forms of procedure in the House of Lords on appeals are regulated by the standing orders of the House, which are appended to the late publication on appeals, already referred to, which also contains a concise view of the practice of the House of Lords upon appeals from the different Courts in Scotland.

Appeals from the final decrees of inferior courts within the districts of the Circuit, are made competent to the Circuit Court of Justiciary, by the act 20 Geo. II. c. 43, in such criminal causes as infer neither death nor demembrauon; and in civil causes, when the subject does not exceed £12 sterling. The sentences of the Circuit Judges, in such causes, are declared final. See Circuit Court.

APPELLANT, is the party by whom an appeal is made; the other party in the proceedings, in the House of Lords, is termed the Respondent.

APPEARANCE, is a term used to express the stating of a defence in a cause. Where a defender, in writing, or by counsel at the bar, states a defence, he is said to have appeared; and, in consequence of that appearance, the judgment pronounced in the cause cannot be opened up when allowed to become final, unless where new facts have come to the knowledge of the party. Such a decree is termed a decree in foro.—See a strong case of this kind, Ballenden against the Duke of Argyile, 6th July 1792, Fac. Coll. Mor. p. 7252.

APPREHENDING OF A DEBTOR, is the act of arresting him under a legal warrant on account of his failure to pay the debt. This may be done in certain cases under an act of warding (see Act of Warding); but the most ordinary warrant for apprehending a debtor, is a caption issued in the King’s name, and under his signet, charging messengers-at-arms to apprehend and imprison the debtor, and to call upon Magistrates for assistance in doing so. All Magistrates and Sheriffs are bound, when required, to assist in executing the caption, under pain on refusal of being made responsible for the debt.
The messenger who is entrusted with the caption, and his cautioner, are liable to pay the debt, if the messenger delays to put the caption in execution after having received instructions to do so.—Bell's Com. vol. ii. p. 523, 4th Edit. Imprisonment for debt being declared an evidence of notour bankruptcy by the act 1696, c. 5, and the law having admitted of a sort of constructive imprisonment, it is of importance to attend to the manner of apprehending the debtor. According to the regular form, the messenger ought to touch the debtor's shoulder with his baton; after this ceremony, he is held to be in custody of the messenger; and should he after that take refuge in the sanctuary, the messenger may follow him there, apprehend him, and take him to prison; neither will a sist on a bill of suspension obtained posterior to this have any effect. Whether the apprehending, or the actual incarceration, is to be held as imprisonment, in the sense of the act 1696, is a very important question, not only as it may affect the validity of securities, but as it must necessarily affect the directions which a man of business ought to give to a messenger empowered to apprehend a debtor. It seems, however, to be settled, that either the regular apprehending, or the actual incarceration, will be sufficient to render the debtor bankrupt. But it does not follow, because formal apprehension by the messenger is equivalent to imprisonment, that an informal apprehension will produce the same effect. Therefore, the debtor must either be actually imprisoned by being entered in the books of the jail, or he must be formally apprehended, in order to his being rendered bankrupt.—Bell's Com. vol. ii. p. 175, 4th Edit. See Bankrupt. Imprisonment.

APPRENTICE. An apprentice is one who engages by indenture to serve a master for a certain number of years, in order to learn some profession, art, or manufacture, which the master becomes bound to teach him. The terms of such an engagement, as to its endurance, apprentice-fee, the recompence given to the apprentice, &c. must depend on the nature of the employment, and the particular agreement of the parties. Though a pupil (that is a boy under 14 or a girl under 12
years of age), may enter into an indenture, yet he must have the concurrence of a parent or tutor, who alone can be liable in the penalty for the non-performance of the engagements on the part of the apprentice. After pupillarity, when the minor has no curators, he may effectually enter into an indenture, the conditions of which will bind him. Where the apprentice deserts his service, the master is entitled to the apprentice-fee without deduction. At common law, an apprentice cannot enlist as a soldier, nor enter into the navy, unless bred to the sea. The common law, however, is sometimes modified on these points by the annual mutiny act.

APPRETIATION, the valuing of pointed goods. In pointings, the effects carried off by the diligence of a creditor were valued twice by different valuators, once in the house or on the ground where the pointing took place, and a second time at the market-cross of the jurisdiction; which last valuation, if there was any variation, was the rule for valuing the goods. But, by the act 54 George III. c. 137, § 4, one valuation in the place where the goods are is made sufficient. See Pounding.

APPRIERS, are the persons appointed to value pointed goods. They must be licensed according to act of Parliament, and sworn de fidei administratione.

APPRISING. See Adjudication.

APPROBATE AND REPROBATE. A person is said to approbate and reprobate, where he takes the advantage of one part of a deed, but rejects the rest; as, for example, where a disposition on deathbed revokes a previous liege poussie conveyance, to the prejudice of the heir-at-law, but still gives the estate past the heir. The heir who challenges this deed, ex capite lecti, in so far as it defeats his interest in the estate, but who abides by it in so far as it revokes the liege poussie deed to his prejudice, is said to approbate and reprobate the deed. This the law does not admit of. A deed must be taken altogether, or rejected altogether.—See Deathbed.

APPROVED BILL, in mercantile law and usage, is a bill to which no reasonable objection can be made. The per-
on who sells goods for approved bills is not entitled arbitrarily to repudiate the bill offered; he must state a reasonable objection. Brown on Sale, p. 41.

AQUÆDUCTUS et AQUÆ HAUSTUS, are two servitudes; the former consists in a right of carrying a water-course through the grounds of another; the latter, of watering cattle at a river, well, or pond, situated in the grounds of another.

ARATRUM TERRÆ, a plough-gate of land; it consists of eight oxgates of land, because anciently the plough was drawn by eight oxen.

ARBITER, a person voluntarily chosen by parties to decide a difference between them.

ARBITRATION, is the voluntary reference of a dispute to the determination of one or more persons appointed for that purpose by the parties, and the decision following thereon. It is usually effected by means of what is called a submission, i.e. the contract of reference, and a decree-arbitral, i.e. the form in which the award is promulgated.

Submissions are either general or special: the former including all disputes subsisting at the time, and the latter applying merely to one or more particular subjects, e.g. a previously depending process. The deed of submission commonly contains the following clauses, viz. 1st, The proper clause of submission, describing the nature of the reference and the name of the referee. When there are more arbiters named than one, it is customary to provide in this clause for the event of their differing in opinion, either by naming an oversman, or, what is more usual, though perhaps less advantageous, by empowering the arbiters to nominate an umpire. 2d, A clause defining the arbiters or oversman's powers, which, in the ordinary case, are declared to be of the most comprehensive character, including, in effect, all the rights possessed by the ordinary tribunals which determine matters of the particular description submitted: Among others, a power is always given to take all manner of proba-

"pear and depone before them, or possessors of writings to exhibit them. But the Court of Session, on application at the suit of the arbiters, or any one of the parties, grant, by means of letters of supplement, a warrant for citing witnesses or havers."—Jurid. Styles, vol. ii. p. 183, 2d edit. It has of late become usual to give a special power also, to award to either party the expenses incurred by him, in the course of the submission,—a power which, it is understood, the arbiter does not otherwise possess. 3d. A clause specifying the time within which the decision is to be given. When this clause is expressed generally, thus, "The next to come, the submission by the present practice is limited to a year; on the other hand, when time is not specified, it is thought that, like other contracts, the submission will subsist for forty years. It is usual, however, to give power to the arbiters to pro-rogate the time within which they are to pronounce their decreet, especially if the dispute be of a complex or difficult nature. Of course, when a particular day or time is specified, and when no power to prorogue is granted, or, when granted, is not exercised, the submission falls on the expiration of the specified period."—Jurid. Styles, ut supra. 4th. A clause obliging the parties to implement the award under a specified penalty. To these clauses, in the ordinary case, there is annexed a provision for the continuance of the reference on creditors or representatives, notwithstanding the eventual death or bankruptcy of either party before its determination,—and also a declaration, that, in case the submission shall terminate without a final decreet-arbitral having been pronounced, any proof which may have been taken shall be received as legal in any after submission or process. The deed concludes with the usual consent to registration, both of the submission and consequent decree, in order to their being the warrant of diligence.

The first procedure under a submission is usually the appointment of a clerk, of which a minute is written on the back of the deed, and signed by the arbiter. The pleadings, when written, (for they are sometimes entirely oral,) commence by a claim lodged by one of the parties, which is followed by an-
swers, replies, &c. after which the arbiter either determines the case de plano (commonly intimating his opinion previously by notes issued to the parties, the grounds of which they are generally allowed an opportunity of canvassing), or allows a proof, or orders farther pleadings or procedure. When there are two arbiters, who differ in opinion, the reference, or devolution, as it is sometimes called, is made to the oversman, who, if he chuses, may order farther debate before deciding. Care should be taken, in the meantime, not to allow the submission to expire, but, when necessary, to prorogue it from time to time; and all minutes of prorogation, reference, &c. should be carefully extended, and formally tested.

The decree-arbitral (whether of an arbiter or oversman) commences with a narrative of the nature of the submission, and of the consequent procedure; and, after stating that the pronouncer of the decree has ripely advised the whole matter; and has "God and a good conscience before his eyes," it gives forth the findings and the decerniture. It concludes with an order on the parties to implement the decree under the penalty specified in the submission, and mutually to discharge each other of the matter submitted, on that implement being effected. Lastly, It ordains the submission and decree to be recorded in terms of the clause of registration in the submission, and the extract of both forms a warrant to either party for diligence against the other. A decree-arbitral is tested and executed in the form of a regular deed; and, to prevent objections under the stamp laws, it ought to be written separately from the submission, and not on the back of it.

By act of regulations, 2d November 1695, c. 25, decrees-arbitral are declared to be reducible on the grounds of bribery, corruption, or falsehood only. It is necessarily implied, however, in their nature, that they are also reducible when the arbiters manifestly exceed the powers with which the submission invests them, for by it their jurisdiction is defined. An arbiter is not entitled to decern for any remuneration to himself for his trouble, nor to recover any remuneration afterwards in an action; (see Kennedy against Kennedy, 20th Jan. 1819.
Fac. Coll.) a practice which had become common, but which is obviously not only ultra vires compromissi, but contra bonos mores.

The preceding remarks apply to arbitration conducted in the regular form of submission and decree-arbitral. It may be observed, however, that ubi res non sunt integrae, and especially in re rustica, effect will be given to the awards of referees, though neither proceeding on a formal submission, nor formal in themselves. But such awards found a right of action only, and cannot of themselves be the warrant of diligence. In contracts of copartnership, articles of roup, and similar deeds, a clause is frequently inserted binding the parties to refer to arbitration all disputes that may arise between them. The effect of such references appears to be questionable. In the general case, they certainly are not very expedient, as being vague in the character of the reference,—and where the arbiter is not expressly named, but merely described as the person who may be the holder of a particular office for the time, it would appear that the reference will not be effectual. Buchanan against Muirhead, 25th June 1799. Fac. Coll.—Bell's Com. vol. ii. p. 658, 4th Ed.

Under the Bankrupt Act, 54 Geo. III. c. 187, § 55, the trustee and commissioners have power to submit doubtful claims connected with the bankrupt estate to arbitration. In extrajudicial trust-deeds for behoof of creditors, a lawyer or accountant is sometimes named as arbiter, with power to judge of claims. These, however, are powers which no debtor can confer without the unanimous consent of the creditors.—Bell's Com. vol. ii. p. 581, 4th Edit.

ARBITRARY PUNISHMENT, is a punishment awarded according to the discretion of a Judge. In no case can it be extended to a capital punishment; it must be restricted to fine, corporal punishment, or imprisonment.

ARCHBISHOPS. Primates of the Church. During the establishment of Episcopacy in Scotland, there were two Archbishops; the Archbishop of St Andrews, who was the Primate
of all Scotland; and the Archbishop of Glasgow, who was called the Primate of Scotland.

ARMs, or armorial bearings, were originally the marks by which a warrior clad in armour was known in battle. These marks or devices were painted on their shields, or represented on their coats; hence coats of arms. These came to be permanent in families; and the whole was in time reduced to a system by which the different branches of families, the intermarriages between families, and their relationships, were marked out. This department was committed to the Lyon King of Arms, and seems to have gone into some disorder; for, by the act 1592, c. 125, his Majesty and the estates of Parliament, "considering the great abuse that hes bene amongst the lieges of this realm, in their bearing of arms, usurpaned to themselves sik arms as belangis not unto them; swa that it can not be distinguished be their arms quha ar gentlemen of bluid, be their ancestors, nor zit may be decerned quhat gentilmen ar descended of noble stock and linage, gave commission to Lyon King of Armes, and his brether herauldes, to visite the hail armes of noblemen, barronnes, and gentlemen, borne and used within this realme; and to distinguish and decerne them, with congruent differences, and thereafter to matriculate them in their buikes and registers, and to put inhibition to all the common sort of people, nocht worthie be the law of armes, to heare onie signes armorailles; that nane of them presume, or take upon hand, to bear or use onie armes, in time coming," &c. This act was ratified by the act 1672, c. 21. and the power of the Lyon King of Arms and heralds confirmed, and power given to them to give arms to virtuous and well deserving persons.

The privilege of giving arms may be thought to be exclusively the prerogative of the Crown; and Mackenzie, in his Treatise on Heraldry, expresses an opinion to that effect; and, on that ground, he objects to the clause so common in entailts, by which, failing the branches of the granter's family, the name and arms are conferred on the members of other families called to the succession. Yet nothing is more common in practice
than this clause; and even where the family, whose name and arms an heir of entail has been directed to assume, has no arms matriculated, the Court have ordered the heir to obtain a coat of arms from the Lyon Court, emblazoned according to the law of arms.—Moir v. Graham, 5th Feb. 1794. Fac. Col. Mor. p. 15,537.

By various acts of Parliament, (the last of which is 43 Geo. III. c. 161.) a tax is imposed on armorial bearings, whether borne on plate or carriages, &c.

ARMIGER, ESQUIRE, the term of dignity below a knight, and above that of a gentleman.

ARRAIGN, is an English law term, signifying to indict a prisoner, and call upon him at the bar for his defence. The term is unknown in the law of Scotland, except in trials for High Treason, in which the forms of procedure and the law in both countries are the same. See Tomlin's Law Dict.

ARRESTEE, the person in whose hands an arrestment is laid. If an arrestee disregards the arrestment and pays the money to the common debtor, he will be liable in damages and expenses. See Breach of Arrestment.

ARRESTMENT, may be applied either to the person or to the effects.

1. Arrestment of persons, is allowed in cases where there is reason to apprehend that the person will leave the jurisdiction of the Judge, and deprive the creditor of the means of redress. 1. Border Warrants.—Thus, on the borders of Scotland, there are what are termed border-warrants, by which the Scotch Judge, after examining the debtor and taking the creditors oath, grants warrant to imprison an Englishman on the application of his Scotch creditor, until he finds caution judicio sisti. 2. Arrestment within Borough. —The right of arresting a stranger within borough, which had been founded on our ancient law, was regulated by the act 1672, c. 8, which declares that no inhabitant of a royal burgh shall "arrest a stranger, or force them to find caution, or imprison them for any debt whatsoever, except allenerly $s for horse-meat, or man's-meat, abuilziments, or other mer-
chandise due by strangers to burgesses, for which they have no other security but their own compt-books, and for which the said privilege of arrestment shall only be competent to the merchant, innkeeper, or stabler, respective, from whom the same was gotten, and to whom it was originally indebted; and, in illustration of this, the act proceeds to declare, that this arrestment shall not be allowed to an assignee, nor where security has been taken for the debt. 3. Meditatio fugae Warrant.—When a creditor can swear that his debtor (whether native or foreigner) is in meditazione fugae, in order to evade payment of his debt, he may apply to the Judge; who, on inquiring into the circumstances, and finding reason to apprehend meditatio fugae, will grant a warrant for apprehending the person to be examined, and may afterwards grant warrant to imprison him, until he find caution judicio sisti. But should the person applying for this warrant be under a mistake, and should he have proceeded without sufficient grounds for his application, he will be liable in damages. Even the Judge who incautiously or informally grants such a warrant will be liable in the same responsibility. 4. Arrestment on Criminal Warrants. Where a crime has been committed, and suspicion attaches to a particular individual, he may be summarily arrested on a warrant granted by the Judge Ordinary, or by a Justice of the Peace for the district. If the Magistrate himself sees the offence committed, he may de plano arrest the offender, or give a verbal order for his arrest, although, where there is not a risk of escape, it is desirable that the warrant should be in writing. The warrant is for apprehending the person for "examination," and ought always to be so expressed. The mere suspicion that a crime has been committed, may, where the circumstances of suspicion are very strong, authorise a magistrate to issue a warrant for examining and detaining a suspected person until investigation be made. The power of magistrates to arrest persons found within their jurisdiction, for crimes committed beyond it, will be considered, voce Jurisdiction. See also Hume on Crimes, vol. ii. p. 68. et seq.

2. Arrestment of Effects.—Arrestment is that diligence of
the law by which a creditor attaches the debt due, or moveable belonging to his debtor, in the hands of a third party. Arrestment is competent whether the arrester's debt be presently due or future, and whether it be constituted or not; but the extent of the attachment is different in the two cases. Where the debt is constituted, the arrestment can be loosed only on payment; where the term of payment of the debt is not yet arrived, or where the existence of the debt depends on a contingency, or where the debt, although due, has not been constituted, the arrestment may be loosed on caution. This step produces an attachment only of the effects or debts arrested; the property is transferred to the creditor by a decree of the Judge; in what is termed a process of forthcoming; or, where there has been more than one arrestment used, or where demands are made on the arrestee by different claimants, in right of the common debtor, he may raise a multiplepoinding, or it may be raised in his name by any of the claimants. In the action of multiplepoinding, all that have any claims upon the funds are cited; and the decree of the Judge in that action, or in the forthcoming, will enable the arrestee to pay with safety.

The arrestment proceeds on letters in the King's name, passing the signet, and signed by a writer to the signet. These letters are authorised by a bill to the Lord Ordinary on the Bills. They state the ground of debt, whether a liquid obligation or a depending action; and the distinction formerly taken notice of, in regard to the nature and extent of the attachment, is invariably observed. Letters of arrestment on a depending action may now "be granted summarily upon the "production of the libelled summons;" 54 Geo. III. c. 137, § 2. There is also a warrant for arrestment in letters of horn- ing. Either of these warrants authorise arrestment to be used any where within the kingdom. A third species of warrant is contained in the precepts or decrees given by inferior judges, by which they authorise arrestment within their own territory, in payment of the debt contained in the decree.

All debts inferring a personal obligation to pay, may be the ground of an arrestment, even although that obligation should
be heritably secured; and all debts may be arrested excepting those heritably secured by infestment: even a debt constituted by an heritable bond may be arrested, if infestment has not followed on the bond, or the sasine has not been recorded; and the arrears and current profits of such debts may always be arrested. Conditional debts also, or depending claims, may be arrested; for the condition being purposed, or the claim ascertained, by the decree of a court, a debt is held to have been due from the first. Thus, where a debt or a sum of money, or even an unascertained claim, has been arrested, the right acquired under that arrestment may again be arrested by a creditor of the arrester; and a forthcoming brought on the original arrestment will ascertain the debt, so as to give effect to the subsequent arrestment; but future debts (under which future rents are included) are not arrestable. Rents current at the time of the arrestment fall under the diligence; but an arrestment used on the term-day (Whitsunday or Martinmas) does not cover the ensuing half-year’s rent; for the term day is the last day of the preceding term, not the first day of the new one. Bill debts are not arrestable to the effect of preventing the common debtor from indorsing them for value in the course of trade; but if the common debtor remain in right of the bill until forthcoming is raised, the arrestment is good. Bills indorsed for a special purpose, by the common debtor, are not arrestable in the hands of the indorsee; neither are debts destined for a particular purpose by those entitled to make the destination, as alimentary debts constituted by a stranger, pensions from his Majesty, salaries of offices, in so far as they amount to a reasonable allowance for the support of the person filling the office. Ersk. B. iii. tit. 6. § 7. But this must be taken with great allowance, since ministers’ stipends (Smith, 15th Dec. 1815. Fac. Coll.) and other salaries have been found to be arrestable. Servants’ wages, if they exceed a reasonable allowance for personal expenses, seem arrestable. Ersk. ib.

The arrestment is executed by a messenger at arms, where it proceeds on letters of horning or on letters of arrestment.
when it proceeds on a precept of arrestment, it is laid on by the officer of the inferior court. It is usual to arrest a random sum higher than the debt; but the arrestment of course attaches only what is actually due by the person in whose hand the arrestment is used. Where the person is a pupil, the arrestment must be used in the hands of his tutor; where the minor is past pupillarity, the arrestment may be used either in his own hands or in the hands of his curators; where the debtor has executed a trust, the arrestment must be used in the hands of his trustees; where the arrestment is to be used in the hands of a company, it must be used in the hands of the partners at their counting-house or ware-room, or in the hands of the individual partners, at their respective dwelling places. Where the arrestment is used in the hands of a corporation, it may be done either at a regular meeting of the corporation, or in the hands of the treasurer, or of the officer in whose name the corporation is appointed to sue or be sued. Where the debtor is abroad, it is necessary, by the act 54th Geo. III. c. 137, § 3, to intimate “to those having authority to act for the debtor in this country,” as well as to execute the arrestment edictally against the debtor at the Market Cross of Edinburgh, and Pier and Shore of Leith.

The preference of arrestments with each other, or with intimated assignations, depends on the priority of the arrestment, or of the intimation; hence, in the execution, it is proper to mention the hour at which the arrestment was used, and a priority of hours has been found sufficient to give a preference. Those individual preferences, which are the necessary consequences of the power of attaching the property of a debtor, were found on bankruptcy to be productive of great injustice; and it is therefore enacted, by 54 Geo. III. c. 137, § 2, that all arrestments used within 60 days before, and four calendar months after legal bankruptcy, under the act 1696, c. 5, shall be ranked pari passu (equally) as if such arrestments had all been used of the same date. Arrestments posterior to the four months cannot compete with prior arrestments, but are preferable according to the former law. If the arrestee disregards the arrestment, and pays after it has been executed, he is liable
in damages to the extent of the funds paid away, and in expenses; see Grant against Hill, 27th February 1792, Fac. Coll. Mor. p. 786. The arrestment falls by the death of the arrestee, whose heir may pay to the common debtor, unless interpelled; but it subsists to the effect of supporting an action of forthcoming, while the heir holds the subject; and it will also, if renewed, give a preference to the arrester over an arrester in the hands of the heir. The arrestment subsists after the death of the common debtor; and, on the death of the arrester, it remains effectual to his heir. See Stair, B. iii. tit. 1, § 24, et seq.—Ersk. B. iii. tit. 6.—Bell's Com. vol. ii. p. 70, et seq. 4th Edit.—See also Forthcoming and Multiplepound.

Arrestments are lost by the lapse of five years without any step to make the arrested effects forthcoming; the five years running from the date of the arrestment, when it proceeds on a liquid debt; but from the date of the decree in the dependence, when the arrestment proceeds on a dependence. See Ersk. B. iii. tit. 7, § 20.

ARRESTMENT Jurisdictionis Fundandae Causa; arrestment for the purpose of founding a jurisdiction. This arrestment is used to bring a foreigner under the jurisdiction of the courts of Scotland. A foreigner owes no obedience to the decrees of Scotch courts; and, therefore, unless either his person or effects be within the jurisdiction of a Scotch court, the decree of the court will be ineffectual against him. It is, therefore, the practice to grant a warrant for attaching the person of the foreigner, or for arresting his goods, to the effect of founding a jurisdiction; and this arrestment can be removed only on his finding caution judicio sosti (that is, to appear in Court). Where a foreigner has goods already arrested in this country, and the subject of an action, he may be cited edictally, as if he were a native. The arrestment jurisdictionis fundandae causa does not form a proper nexus on the goods, which will entitle the creditor to compete with other arresters. In order to create an attachment of this kind, he must, after bringing his action, use an arrestment on the de-
pendence in common form. See Bell's Com. vol. ii. pp. 173, 173, 4th Edit.; see also Foreigner.

ARREARS, money unpaid at the due time; the sum past due on a course of payments. See Heritable and Moveable.

ARRHAES, earnest, used in evidence of a completed bargain, and so understood in Scots law. Dead-earnest is earnest given by the purchaser over and above the price. Where, for instance, it bears so small a proportion to the price, that it is not presumed to be counted on, it is deemed dead-earnest; but where it is of greater consequence, it may be understood to form a part of the price. This is obviously an arbitrary question. But in whatever way it may be determined, earnest is, in Scots law, held to be evidence of a concluded bargain. Ersk. B. iii. tit. 3, § 5.

ARRIAGE AND CARRIAGE, were indefinite services formerly demandable from tenants; but, by act 20 Geo. II. c. 50, § 21 and 22, all indefinite services are prohibited; and none can now be demanded but such as are enumerated in the lease, or in a writing apart. Mill-services continue on the former footing. Ersk. B. ii. tit. 6, § 42.

ART AND PART, signifies the aiding or abetting in the perpetration of a crime. One may become art and part guilty of a crime, 1. By giving a warrant or mandate to commit the crime; 2. By giving counsel or advice to the criminal how to conduct himself in it; or, 3. By his assistance in the execution of it.

ARTICLES, LORDS OF, were a committee of the Scotch Parliament, which, in the mode of their election, and by the nature of their powers, were calculated to increase the influence of the Crown, and to confer on the King a power equivalent to that of a negative before debate. Robertson speaks of this committee in these terms: “As far back as our records enable us to trace the constitution of our Parliaments, we find a committee distinguished by the name of Lords of Articles. It was their business to prepare and to digest all matters which were to be laid before the Parlia-
ment. There was rarely any business introduced into Parliament but what had passed through the channel of this committee; every motion for a new law was first made there, and approved of or rejected by the members of it. What they approved was formed into a bill, and presented to Parliament; and it seems probable, that what they rejected could not be introduced into the House. This committee owed the extraordinary powers vested in it to the military genius of the ancient nobles; too impatient to submit to the drudgery of civil business, too impetuous to observe the forms, or to enter into the details necessary in conducting it, they were glad to lay that burden upon a small number, while they themselves had no other labour than simply to give or to refuse their assent to the bills which were presented to them. The Lords of Articles, then, not only directed all the proceedings of Parliament, but possessed a negative before debate. That committee was chosen and constituted in such a manner as to put this valuable privilege entirely in the King’s hands. It is extremely probable that our Kings once had the sole right of nominating the Lords of Articles. They came afterwards to be elected by the Parliament, and consisted of an equal number out of each estate, and most commonly of eight temporal and eight spiritual Lords, of eight representatives of boroughs, and of the eight great officers of the Crown.” Hist. of Scotland, B. i.

That this committee was empowered and chosen in a manner the most favourable for supporting and increasing the influence of the Crown, is proved by our statutes. The act 1594, c. 218, bears, That our Soveraine and his estates in Parliament, “having considered the great fascherie and inconvenience at sindrie Parliamentes, throw presenting of a confused multitude of doubtfull and informal articles and supplicationes; for remeid theirof in time cumming, statutis and ordainis, that quhen ever the Parliament is appoynted and ordained to be proclaimed, there sall ane convention be appoynted, of fourc of everie estaite, to meete twentie dayes
"before the Parliament, to receive all manner of articles and
supplicationes concerning general lawes, or tuitching particu-
lar parties: Quehilk articles and supplicationes sall be de-
ivered to the clerke of register, and be him presented to the
persones of the estaites, to be considered be them; to the
effect that things reasonable and necessary may be formallie
maid and presented in an buik to the Lordes of the Articles
in the Parliament time; and all impertinent, frivolous, and
improper matters rejected," &c. The manner of chusing the
Lords of the Articles in 1663, referring back in general to the
ancient practice, and more immediately to the 1633, is explain-
ed by the act 1663, c. 1. "His Majestie's commissioner repre-
sented to the estates of Parliament, that it was his Majestie's
express pleasure, that, in the constitution of Parliament and
choising of Lords of the Articles at this session, and in all
time coming, the same forme and order should be keeped which
had been used before the late troubles, especially in the Par-
liament holden in the year 1633; and the manner of election
of the Lords of Articles at the time being now seen and con-
sidered be the states of Parliament, they did, with all humble
duty, acquiesce in his Majestie's gracious pleasure thus sig-
nified unto them; and, in prosecution thereof, the clergy re-
tired to the Exchequer-chamber, and the nobilitie to the
Inner-house of the Session (the barons and burgesses keeping
their places in the Parliament-house). The clergy made
choice of eight noblemen to be on the Articles, (here they
were named) and the nobility made choice of eight Bishops,
viz. &c. which being done, the clergy and nobility met to-
gether in the Inner Exchequer-house, and having shown
their elections to others, the persons elected, at least as many
as were present, stayed together in that room, whilst all others
removed; and they jointly made choice of eight barons and
eight commissioners of boroughs, viz. &c. and then repre-
presented the whole elections to his Majestie's commissioner;
who, being satisfied therewith, did then, with the clergy and
nobility, return to the Parliament-house, where the list of
eight bishops, eight noblemen, eight barons, and eight bur-
"gesses, being read, it was approven; and his Majestie's com-
missioner did add to the list of the Officers of Estate, and ap-
pointed the Lord Chancellor to be President in the meet-
ings of the Lords of the Articles, who are to proceed in the
discharge of their trust in preparing laws, acts, overtures,
and ordering all things remitted to them by the Parliament,
and in doing every thing else which, by the law and prac-
tice of the kingdom, belonged or were proper to be done by
the Lords of Articles at any time bygone."

At the Revolution, this system appeared inconsistent with
the freedom of Parliament, and was declared a grievance by
the Convention of Estates 1689, c. 18; and it was accordingly
suppressed by the act 1690, c. 3. See Ersk. B. i. tit. 3. § 5.

ARTICLES OF ROUP, are the conditions under which
property is exposed to sale by auction. They refer, generally,
to the nature of the right to be conferred; express the titles by
which the property is to be conveyed; regulate the manner of
bidding; prescribe the rules by which offerers are to be prefer-
red; and name a person to be judge of the roup, before whom
the procedure takes place, and who is empowered to declare
the purchaser. These articles are executed by the expositer on
stamped paper; and, when the day of sale arrives, they are read
over in presence of the meeting, at the place and time appoint-
ed for the sale; and the lands being exposed to sale by an
auctioneer, a minute of the offers is made, generally on the
back of the articles, and signed by each offerer, and the high-
est offerer at the out-running of a sand-glass is declared to be
the purchaser by the judge of the roup. Minutes of the pro-
cedure are made, and regularly signed and attested at the time
of sale. These articles contain a clause of registration, by
which the parties consent to a decree going out in terms of the
conditions, under which they may be enforced by the diligence
of the law. Besides the rules and conditions expressed in the
written articles of roup, there are implied rules binding on
both parties. Thus, the expositer must bring the subject fairly
to sale, and not attempt to raise the price by the assistance of
a white-bonnet or fictitious offerer; and, on the other hand,
there must be no combination amongst the offerers to suppress the natural ardour of competition amongst intending purchasers. See Roups.

ARTICULATE ADJUDICATION, is an adjudication which is often used where there are more debts than one due to the adjudging creditor; in which case it is usual to accumulate each debt by itself, so that, in case of an error in ascertaining or calculating one of the debts, the error may not affect any other debt, but be confined to that debt in calculating which the error has occurred. It ought to be attended to, that sometimes the conclusion of the summons is alternative; and when decree is given in absence, unless the counsel who appears for the pursuer shall make his election, no regular decree or articulate adjudication can be extracted; for a decree, proceeding on an alternative conclusion, cannot authorise an extractor to decide to which of the alternatives the judge has given his authority; and, therefore, without a selection by counsel, the adjudication will not be regular. November 25, 1794, Landal against Carmichael. Bell's Cases.

ASCENDANTS, persons in the degrees of kindred reckoned upwards. Ascendants, according to the law of Scotland, succeed after collateral descendants. Thus, failing descendants, that is, children and their children in succession, and failing brothers and sisters and their descendants, the succession goes to ascendants, that is, to the father in the first place, (the mother, though an ascendant in the same degree, never succeeds to her child). Failing the father, the succession goes to collaterals, that is, to the brothers or sisters of the father, and their descendants. Failing the collaterals of the father, the succession goes to the grandfather and his collaterals; and so upwards as far as connexion can be traced; and, when all trace of connexion is lost, the succession goes to the King as ultimus hæres.

ASSAY OF WEIGHTS AND MEASURES, is the examination of weights and measures by the proper officers.

ASSASSINATION, is the murdering of a person either for hire, or by deliberate lying in wait. It might be inferred from
some Scots statutes, that even the attempt to commit this crime, is capital; but this is not the case. See Hume, vol. i. p. 174, 283.

ASSAULT, is a violent corporal injury done, or attempted, to be done, to another, as by striking at him with or without a weapon. The punishment is arbitrary; and, where the circumstances of the aggressor admit of it, redress is generally sought in a civil action for damages.

ASSEDATION, is an old law term, used indiscriminately to signify a lease or feu-right.

ASSEMBLY, GENERAL. See General Assembly.

ASSESSORS to a Judge, are persons possessed of knowledge in the law, who are appointed to advise and direct the decisions of the judges in certain inferior courts. Thus, advocates are appointed as assessors to the Magistrates of Edinburgh.

ASSETS, is an English law term, signifying goods or effects enough to discharge the burdens cast upon the heir or executor in satisfying the debts and legacies of the testator or ancestor. See Tomlin’s Law Dict.

ASSIGNATION. This term is used in various acceptations; 1st, Generally, as denoting the conveyance of moveables, in which sense it may be contrasted with the term Disposition, as applied generally to the conveyance of heritage; 2d, As denoting more particularly the conveyance of moveable rights and claims of debt; 3d, In common with the term disposition, as denoting the conveyance of the ipsa corpora of moveable subjects; 4th, It denotes the conveyance of heritable rights, not feudal in their nature, e.g. tacks; 5th, It is used to express the conveyance of all consequents of heritable rights of every kind, e.g. title-deeds, unexecuted warrants of infestate, &c. At present it is intended to treat of it under the second only of those meanings. The first requires no particular detail; and the other acceptations in which the term is used fall more properly to be explained under the various subjects to which they relate.

In the assignation of moveable rights and claims of debt,
the granter of the deed is called the cedent; the receiver, the cessionary, or more commonly the assignee; and the obligant in the claim or right assigned, the common debtor. After narrating the nature of the subject matter of the assignation, and the consideration of granting, the ordinary stile of the deed "makes and constitutes" the assignee, "and his heirs and "donators, the lawful cessioners" of the cedent "in and to" the matter assigned, and in and to the deed by which the right is constituted, or the written evidences of the claim, if there be any. This form of expression arises from the circumstance of the deed having been anciently (as it is yet in England) of the nature of a mandate or procuratory in rem suam. In modern practice, however, it is becoming common to use directly the words "assign, convey, and make over," (see Juridical Styles, 2d edition, vol. ii. p. 310, note) and these words certainly correspond more with the actual character and effect of the deed. The other clauses are, 1st, A declaration of the nature of the assignee's powers. In the ordinary case, these powers, whether expressed or not, include, of course, all those possessed by the cedent. 2d, A clause of warrantice. It is obvious that, generally speaking, the claim or right assigned is not, like a right to lands, of such a description as to imply that the cedent warrants it absolutely. He has himself no other security for its ultimate validity than the solvency or credit of the common debtor; and as, therefore, it is not to be presumed that he means to confer on the assignee a better title than he has himself, and thus, in effect, to become cautioner for the common debtor, the natural and implied warrantice of assignations is personal only, or, as it is usually called, from fact and deed. Warrantice of a higher kind, however, may be expressly stipulated for; and may be extended either to an absolute warrantice of the debtor's solvency at all times, or until any particular period. 3d, A clause, mentioning what deeds are delivered to the assignee,—and, lastly, the usual registration and testing clauses. When the assignee conveys again to a third party, the deed is called a translation; and when he reconveys to the cedent, it is called a retrocession.
In competition with one another and with arrestments, assignations are ranked, in the first instance, not according to their own dates, but according to the dates of the intimation of the assignation or execution of the arrestment; because it is only by such intimation or execution that the common debtor can be put in mala fide to pay to any claimant having a right of a posterior date. The most regular mode of intimating is under form of instrument by a notary and witnesses. When the debtor is within Scotland, this is done in the ordinary form of such notarial acts; but when he is out of the kingdom, it is requisite to obtain letters of supplement from the Court of Session, and to make the intimation edictally. Various equivalents to notarial intimation are admitted however, provided it be shown, in a public and sufficient manner, (not from mere private information given to the debtor) that the fact of the assignation has been duly brought to his knowledge. For this purpose, it is usual to take the acknowledgement on the back either of the assignation itself, or of the deed assigned; and if the date be stated, and the acknowledgement be signed by the common debtor, witnesses are not necessary. A written promise of payment by the debtor to the assignee, or the payment of interest on the debt to the assignee, is also equivalent to more formal intimation; as are also the executing of a summons or diligence against the debtor in name of the assignee. When there are more common debtors than one, intimation to one of them only completes the assignation, in so far only as he is concerned.

Next to the date of intimation, the dates of the deeds themselves form the criterion of preference. Though an assignation not intimated does not put the debtor in mala fide to pay to a posterior assignee, yet as the cedent, by granting such posterior assignation, is acting in fraudem of the first, he is, of course, liable, under his warrandice, in the damage which the first assignee thereby sustains.

An assignee is subject to all the defences at the instance of the common debtor, which would have been competent against the cedent, or, as it is usually expressed, utiur jure auctoris. It is now held, however, by a decision of the House of Lords,
(Sommerville v. Redfairn, Dow's Reports, vol. i. p. 50,) that this doctrine is not to be extended so as to subject the assignee to the effect of any latent qualifications, which the cedent may have made of his own right in favour of third parties. The soundness of this judgment does not appear to be universally admitted; but it seems difficult to reconcile any other rule with the doctrine, that the first intimated assignation carries the right. Such qualifications are in reality equivalent to assignations; and, if there is no evidence that they have been regularly brought to the knowledge of the common debtor, it is not easy to discover the legal principle by which an onerous assignee can be made liable in them. An assignee, who has made due intimation, is not liable to be affected by the cedent's oath, unless the matter has been made litigious by an action brought against the cedent by the debtor before the intimation, or where the assignation is gratuitous.—July 25, 1718, Faculty of Advocates v. Sir Robert Dickson; Mor. p. 866.

It is generally said that an assignee may use diligence, either in his own name, or that of the cedent, unless the deed of assignation has provided to the contrary; and, no doubt, an assignee may continue in his own name diligence commenced by the cedent, that is to say, he may raise in his own name a caption on a horning raised in the name of the cedent. But it seems safer, in every case, in order to prevent the circumstance of the cedent's having actually got payment, being used as a ground of suspension, rather to renew the particular step of diligence in the assignee's name, than to use it, for his behoof, in the name of the cedent.

Different rights (i.e. the rights themselves, not the profits of them), alimentary rights, and the paraphernal goods of a wife, do not admit of being assigned; but, with these exceptions, all other rights and claims may be assigned. (Ersk. B. iii. tit. 5, § 2). Bills and bank notes do not require assignation in order to convey them. The right to the former is carried by simple indorsation; and, as the latter are regarded as money, the right to them is carried by mere delivery.

ASSIGNEE, the person in whose favour an assignation is granted.
ASSOILZIE, is to free a party from the conclusions of an action, or to find a criminal not guilty.

ASSIZE, sometimes signifies the sittings of a court, sometimes its ordinances, and sometimes it signifies a jury.—See Skene, de significacione verborum, under the word Assisa. A jury, or assize in the Court of Justiciary, consists of 15 men, chosen and sworn by the Court from a greater number of persons, (not exceeding 45) who have been summoned by the Sheriff, and of whom a list must be served on the defender along with the copy of his indictment.

ASSUMPTION or THIRDS. This was a provision for the clergy by the act 1567, c. 10, which directed the whole teinds of all the popish benefices without exception to be paid to the collectors for the minister’s stipend; and particular localities were assigned in every benefice to the extent of a third. This was called the assumption of thirds. This plan of providing for the clergy was rendered unproductive by the act 1606, c. 2, restoring bishops, who, though laid under an obligation to provide for their clergy out of the thirds, succeeded in evading the law.

ASSUMPTION, DEED OF, is a deed executed by trustees under a trust-deed, or deed of settlement, assuming a new trustee or trustees. An express power from the truster is necessary in order to entitle trustees to execute such a deed; the terms of which must, of course, depend upon the nature of the powers conferred by the trust-deed.—See Jurid. Styles, vol. ii. p. 486, 2d Edit.

ASSURANCE, see Insurance.

ASSYTHMENT, is an indemnification due to the heirs of a person murdered, from the person guilty of the crime. The assythment may be made the ground of an action, wherever a person pleads on a remission, since the doing so is an acknowledgement of the crime. It may also be the ground of an action, wherever the crime has been found by the decision of a court.—M‘Harg against Campbell, February 24. 1767. Mor. p. 12, 541. But where the criminal has suffered the pains of law, no claim for assythment lies. If the criminal has fled, and been fugitated,
the assythment may be obtained from the donatory of the escheat of the criminal. See *Hume*, vol. i. p. 279, and ii. p. 477.

**ASTRICTION**, is the obligation imposed by the servitude of thirlage, by which certain lands are astricted to a particular mill, and the possessors bound to grind their grain there. See *Thirlage*.

**ATHEISM**, disbelief in the existence of God. Under the act 1661, c. 21. and 1695, c. 11. persons guilty of certain degrees of this offence were liable to capital punishment; but these statutes were repealed by the 53 Geo. III. c. 160, § 3. and the punishment is now arbitrary at common law. See *Hume*, vol. i. p. 559.

**ATTAINDER** is the corruption of blood consequent on a conviction for high treason. Its effect is to make the convicted person forfeit his honours and dignities, and become incapable of succeeding to any ancestor. The estate, which he is thus prevented from taking, falls to the immediate superior as escheat. It follows as a necessary consequence of the corruption of blood, that the heirs of the attainted person cannot inherit upon his death, nor can an heir succeed to an ancestor where the propensity between the two is through the attainted person. See *Treason*.

**ATTESTOR** of a cautioner; one who attests the sufficiency of a cautioner offered in the Bill-Chamber in a suspension or advocacy. This is a form peculiar to the Bill-chamber; where a doubtful cautioner is offered, a person is required to attest his sufficiency. The person willing to do so not only must attest his sufficiency, but agree to become *subsidiarie* liable for the debt. See *Cautionry*.

**ATTORNEY**; one appointed by another to act for him in his absence. There is not in Scotland, as in England, a class of practitioners of the law who take the name of attornies. The office of attorney in Scotland is private; and conferred by letters of attorney, which regulate the extent of power conferred on the attorney. The person, to whom infestment is given for the receiver, is denominated the attorney; and the office was formerly constituted by letters of attorney; but now the circum-
stance of holding the warrant for infeftment is held to be sufficient evidence of his commission, though a fraudulent use of the warrant may annul the sasine.

Auction, or Roup, is a sale where every person is admitted to offer under certain conditions previously stipulated. These form the contract between the seller and the buyer; and no device will be admitted on either side improperly to enhance the value of the subject by the seller, or improperly to diminish its value, or to deter purchasers, by the persons offering. See Articles of Roup.

Auctioneer, is the person by whom things are sold at auction; he puts up the articles to sale at a certain price,—he calls the offers,—and, at the outrunning of the time, he knocks down the article, and thereby ascertains the purchaser. This office requires the person exercising it to have a licence, for which a certain tax is paid to government.

Author, in Scots Law, signifies the person from whom a proprietor has purchased, or acquired property by singular titles, as contradistinguished from an ancestor from whom the property has come by descent. See Ancestor.

Auditor of the Court of Session; an officer appointed by the Crown, to whom either of the Divisions, or any Lord Ordinary, may remit to tax the costs of a suit in which expenses are found due. A special remit of the particular account to be taxed is necessary; and the auditor returns a report to the Judge, or Court, making the remit, who thereupon pronounces decree for the amount of the taxed account. If either party considers himself aggrieved by the report of the auditor, it is competent for him to state his objections to the Court or Judge, by whom they will be summarily and finally disposed of. This officer was appointed for the first time by the Court itself, by Act of Sederunt, 6th February 1806. His fees are settled by Act of Parliament, 50 Geo. III. c. 112, § 48. And by 1 and 2 Geo. IV. c. 38, § 32, the office is made permanent; and the nomination is vested in the Crown; the office to be held ad vitam aut culpam. By § 33 of the same statute, it is enacted, that, in all cases of decrees in absence, an account
of expenses shall be lodged in process, and taxed by the auditor, whose report shall be a sufficient warrant to the extractor to fill up the amount of the expenses in the extracted decree, without bringing the report under the consideration of the Lord Ordinary, unless by his own direction, or that of the auditor, or on the motion of any party interested. The persons eligible to the office of auditor, are writers to the signet, who shall have practised as such for not less than three years, and members of the incorporation of solicitors before the Supreme Courts in Scotland; 1 and 2 Geo. IV. c. 38, § 32.

AUGMENTATION, process of, is a process in the Teind Court, raised by the minister of a parish against the titular and heritors, for the purpose of obtaining an increase of his stipend. By the 48 Geo. III. c. 138. (1808) it is enacted, that no stipend which has been modified before the passing of that act shall be augmented, until 15 years after the date of the last final decree of modification; and that all stipends, augmented after the passing of that act, shall not be again augmented for 20 years; nor at any future period is a stipend ever to be augmented until 20 years after the date of the last decree of modification. The same statute provides, that all augmentations shall in future be modified in grain or victual, unless when peculiar circumstances render it necessary to modify them in money; but, although modified in grain, the stipend is to be paid in money according to the flax prices of that year for which it is payable. It is also enacted, (§ 17 of this statute) that, in addition to the heritors, the minister pursuing a process of augmentation shall cite the moderator and clerk of the Presbytery of the bounds. See Teinds. See also Connel on Tithes, and Ivory's Form of Process, vol. ii. p. 444.

AVAIL OF MARRIAGE, was the sum payable to the superior by the heir of a deceased ward vassal on his becoming marriageable. Marriage was a casuall.y in ward holding, which entitled the ward superior to receive from the heir of his former vassal a certain sum as the value (avail) or tax due on his marriage. Anciently, this casuall.y affected minor heirs only, who, after puberty, refused to marry upon the superior's requi-
sition, but afterwards the single avail became due, though the
heir had been major at the death of his ancestor, and had
died, neither married, nor required to marry, by the superior.
The avail was not due where the heir was married before the
ancestor's death, or where he died before puberty. The single
avail was fixed by the Court of Session, in 1674, at three years
rent of the vassal's estate; but it was afterwards reduced to two
years rent. The double avail was due where the superior of-
fered a wife to the heir, in every respect his equal, who pub-
licly declared her readiness to marry him, but whom he re-
fused to marry, and married another. At first, the double avail
was estimated at two single avails, but it is probable that,
had it been questioned, it would have been reduced to three
years free rent of the vassal's estate. In estimating the amount
of the avail, not only the ward estate, but the whole other free
estate of the vassal, was brought in computo as it stood at
the period when he became marriageable.

The act 20 Geo. II. c. 50, abolishing ward-holding, put an
end to this exaction. See Stair, B. ii. tit. 4. § 47. Ersk.
B. ii. tit. 5. § 18. ct. &eq.

AVERAGE. A term used in commerce to signify a con-
tribution made by the owners of the ship, freight, and goods
on board, in proportion to their respective interests, towards
any particular loss or expense sustained for the general safety
of the ship and cargo. This is the original and proper meaning
of average; and in this sense it is commonly called general, or
gross-average, as falling generally, or on the gross amount of
ship, cargo, and freight. Bell's Com. vol. i. p. 437. This
contribution was established by the Rhodian law, and prevails
in every commercial nation. Passengers on board, with the
apparel, jewels, &c. of their persons, seamen's wages, and pro-
visions, suffer no part of the general average. Goods thrown
overboard are estimated (in later times) at the price they
would have brought at the port of delivery, freight, duties, &c.
deducted.

Particular Average is used to denote a loss for which no
relief can be had by general contribution, e. g.: the loss of an
anchor, the accidental loss of any part of the ship or cargo washed from the deck, &c. Bell's Com. Ib.

Petty Averages are the accustomed duties of anchorage, pilotage, &c. which, when they occur in the usual course of the voyage, are not considered as a loss, but as part of the necessary expense, Bell's Com. Ib. p. 477; but if incurred for any extraordinary purpose, or to avoid impending danger, they are regarded as a loss includable within gross average. See Collision of Ships.

AVERAGE BOND, is a deed which it is usual for the parties liable to a general average to execute, empowering an arbiter to ascertain the value of the property lost, and to fix the proportion of the loss which each proprietor shall bear. See Jurid. Styles, vol. ii. p. 554. 2d Edit.

AVERMENT, in Scotch judicial proceedings, is a statement in point of fact, which the party making it is understood to be prepared to prove. The word seems to have a different meaning in English law. See Tomlin's Law Dictionary.

AVIZANDUM. To make avizandum with a process, is to remove it from the public Court to the private consideration of the Judge. When a Lord Ordinary in the Court of Session, after hearing the parties, considers the case intricate, and requiring greater deliberation, instead of pronouncing a decision at once in Court, he takes the cause to avizandum; the process is then transmitted to him by the clerk of Court; and, after considering it, he issues his decision in the usual form. When the Lord Ordinary takes a case to his private consideration after an oral debate, it is not usual to write out any formal interlocutor making avizandum; but where written pleadings have been ordered, it is in the ordinary case necessary, after the pleadings are prepared, to enrol the cause in the Lord Ordinary's roll of motions, and to move him to make avizandum with the pleadings; and, in that case, the clerk of Court writes out a regular interlocutor, which is signed by the Judge, and becomes the warrant for transmitting the process to him for his consideration.

In actions of reduction, aliment, cessio bonorum, and other
Inner-House processes (as they are termed), all of which must, in the first instance, appear in the printed rolls of the Outer-House, but in which the Lord Ordinary cannot judge without a special remit from the Court, the Lord Ordinary, on the calling of the cause, makes what is called great avixandum; that is, he pronounces an interlocutor transmitting the process at once to the Judges of the Inner-House, before whom it is then enrolled, and proceeded in as an Inner-House process. See Form of Process.

AVULSIO, takes place where lands are, by an inundation or current, separated from the property to which they originally belonged, and added to the lands of another person; or where a river changes its course, and, in place of continuing to run between two properties, cuts off part of one, and joins it to the other. The property of the part thus separated continues in the original proprietor; in which respect the term avulsio may be contrasted with the term alluvio, by which an addition is insensibly made to a property by the gradual washing down of a river, and which addition becomes the property of the owner of the lands to which the addition is made. See Alluvio.

AWARD, is properly an English law term, signifying the judgment or determination of an arbiter. It is sometimes used in Scotland, but improperly, to signify a decree arbitral; for the award of an English arbiter, and the decree arbitral of a Scotch arbiter, have, according to the laws of the two countries, very different effects. The decree-arbitral of a Scotch arbiter is not reducible, except on the grounds of fraud and falsehood. See Arbitration.
BACK-BOND, is a deed attaching a qualification or condition to the terms of a conveyance or other instrument. This deed is used when particular circumstances render it necessary to express in a separate form the limitations or qualifications of a right. Thus, a back-bond granted by an absolute disponee in favour of the disponer, expresses the nature of the right held by the disponee, and burdens and limits it in all questions between the parties themselves. When such a back-bond is made public by registration in the record of sasines, it becomes, from the date of registration, a real qualification of the right which will be effectual against third parties. The publication of the back-bond, either by registration, or by producing it in a judicial process, has also this effect, that the parties cannot after that step disburden the disponee's right merely by cancelling or restricting the back-bond. The registration of the back-bond is held to be a feudal limitation of the disponee's right, which cannot be discharged by any agreement merely personal. See Absolute Disposition.

BACK-TACK, was a tack introduced into wadsets when that species of security was resorted to; and as it returned the possession of the land to the proprietor, on payment of a rent corresponding to the interest of the money, it freed the transaction of that risk which was held properly to belong to a wadset, and, consequently, had the effect of rendering the wadset what was termed an improper wadset. See Wadset.

BACKING A WARRANT takes place where a warrant for apprehending a person is granted in one jurisdiction, and comes to be executed in another. The judge ordinary of the bounds must concur in authorising his officers to aid the person pos-
sessed of the original warrant in carrying it into execution. This authority is given by indorsing, or backing the warrant, as it is termed. See Hume, vol. ii. p. 76, 13 Geo. III. c. 31. 45 Geo. III. c. 92, &c.

BAGIMONTS ROLL, was the rent-roll of benefices in Scotland made up by Benemundus de Vicci, vulgarly called Bagimont, who was employed in the reign of Alexander III. (A. D. 1275.) to collect the tenth of benefices. Skene's account of this roll is erroneous. See Hailes' Annals, vol. iii. p. 200.

BAIL, is the security given for the appearance of a person accused of a crime. Persons committed, or about to be committed for trial, are entitled, under the act 1701, c. 6, to be liberated on bail, provided the crime charged against them is not capital. See Hume on Crimes, vol. ii. p. 86, et seq. It would appear that the Court of Justiciary may, on extraordinary circumstances, take bail even in capital cases. Ib. 88. And the stat. 9 Geo. II. c. 35. § 35, authorises bail to be taken for officers of the customs or excise, and those assisting them, when, in the execution of their duty, they have killed or wounded any one, and thereby exposed themselves to a capital charge. The same is the case where persons have been killed or wounded on board a vessel, which has refused to submit to seizure or examination by a vessel of the royal navy or revenue; 24 Geo. III. Sess. 2. c. 47. § 23, 47 Geo. III. s. 2. c. 66. § 36.

The application for liberation on bail ought to be made in writing, and may be addressed to the judge committer, or to the Commissioners of Justiciary, or other judge competent to try for the crime. The magistrate must, within 24 hours after the petition comes into his hands, determine whether the crime be bailable, and fix the amount of the bail, unless when it is necessary, on a charge for sedition, to correspond with the Lord Advocate, in order to ascertain whether he means to apply for extension of the amount of the bail; in which case, it would seem that time for correspondence will be allowed; Andrew against Murdoch, 20th June 1806; Hume, vol. ii.
p. 91. On the requisite bail being found, the magistrate is bound *immediately* to liberate the prisoner. A failure in any part of the magistrate's duty subjects him to an action for wrongful imprisonment, 1701, c. 6.

The act 1701 fixed a *maximum* for bail, according to the rank of the person accused, which, owing to the change in the value of money, it was found necessary to alter; and, by 39 Geo. III. c. 49, the *maximum* is fixed at £1200 sterling for a nobleman, £600 for a landed gentleman, £300 for any other gentleman, burgess, or householder, and £60 for any inferior person; and, on a charge of sedition, any of the Lords of Justiciary, on an application from the Lord Advocate, may extend the bail to such sum as may be thought proper in the circumstances of the case. Some of the revenue statutes fix particular bail for offences against the revenue laws. See 24 Geo. III. c. 47, 42 Geo. III. c. 82, 45 Geo. III. c. 121, &c.

The bail found is, that the person admitted to bail shall appear and answer to any libel for the offence charged, which shall be raised within six months after the date of the bail-bond; and, if the trial is to proceed in an inferior court, and the party fail to appear, the bail-bond is declared forfeited, and warrant granted for apprehending him, inferior judges having no power to *outlaw* for non-appearance; *Hume*, vol. ii. p. 66.

Where persons are apprehended in Scotland on a warrant indorsed in terms of the 13 Geo. III. c. 31, or 44 Geo. III. c. 92, for crimes committed in other parts of the United Kingdom, and carried before the judge who indorses the warrant, he may, if the offence be bailable, take bail for the person accused, in the same manner as the judge who issued the warrant might have done. If the offence charged be not bailable, the judge who grants the original warrant must write on the face of it “*not bailable*;” and where these words are not written, the judge before whom the offender is brought, under the indorsed warrant, may admit him to bail; 45 Geo. III. c. 29, § 1. and 2.

*BAIL in civil actions*, see *Caution*. 
BAILIARY, LETTER OF, is a commission by which an heritable proprietor, entitled to grant such a commission, appoints a baron bailie, with the usual powers to hold courts, appoint officers under him, &c. See Jurid. Styles, vol. ii. p. 261, 2d edit.

BAILIE, a magistrate, also an officer appointed by a proprietor to give infeftment in land.

1. A Magistrate.—The bailie of a burgh, whether a royal burgh or a burgh of barony, is a magistrate possessed of certain jurisdiction by common law as well as by statute. Thus, at common law, he is held to possess the same power within his territory as the sheriff in his county; and by special statute, 1644, c. 33, 1663, c. 6, the provost and bailies of royal burghs have power to value and sell ruinous houses to the highest offerer. Their criminal jurisdiction extends to petty riots; but none except the magistrates of the burghs of Edinburgh, Stirling, and Perth, have jurisdiction in blood-wits. The chief magistrate of the burgh is named in all commissions of the peace.

The Bailie of the Abbey, is appointed by the Duke of Hamilton, as heritable keeper of the palace of Holyroodhouse, and has jurisdiction in all civil debts contracted within the precincts of the Sanctuary. Bell's Com. vol. ii, p. 556, 4th edit.

2. An officer appointed by precept of sasine to give infeftment. —Anciently any person might have been named as bailie to give infeftment; but, by 1606, c. 15, all sasines on precepts from Chancery in favour of heirs, upon retourn, are ordered to be given by the sheriff as bailie; because, when an heir is to enter by retourn to lands held of the Crown, he becomes debtor to the Crown; and it is the duty of the sheriff, as the King's bailie, to receive payment, or to take security for the casualties due on the heir's entry. In every other case, any person may be bailie; and the precept, although blank in the bailie's name, is a sufficient warrant for any person to perform the office. At the same time, were there any reason to suspect fraud, the Court would allow an investigation to ascertain the authority under which infeftment had been given. The blank
in the precept of sasine is not filled up after the office is exercised.

BAIRNS, "is a known term used to denote one's whole issue." (Ersk. B. iii. tit. 8, § 48.) But although this be the common meaning of the term, it does not always receive that interpretation. Thus, in a contract of marriage, where an estate is intended to be secured to the heirs of the marriage, the term bairns, or heirs of the marriage, will be understood to mean the heir in heritage; whereas, in a money provision, or in an heritable property of small value, the same term will be held to signify the whole children equally. See Children of a Marriage.

BAIRNS PART OF GEAR, or legitim, is the share of the father's free moveable property, to which, on the father's death, the children are entitled by law. See Legitim.

BANERET, is a knight made in the field of battle. Banerets created by the King under the royal standard in battle, take precedence of Baronets.

BANISHMENT, the punishment of expulsion from Scotland inflicted on persons convicted of certain crimes for which that punishment is provided. See Transportation.

BANK, the place or office where a corporation or company of money-dealers carry on their business. The term also applies to the corporation itself; and in this sense banks are said to be either public or private. Public Banks may be constituted by act of Parliament, or by charter from the King. The constitution of the company, its office-bearers, extent of capital, and the rights of the partners, must depend upon the powers conferred by the Crown, or by Parliament, and on the bye-laws which the corporation may frame, or on the conditions of the original contract. Banks instituted by act of Parliament possess this advantage over other banks, that the partners may be made liable to the extent of their respective shares only, and no farther; whereas, the partners in other banks, like the partners in a private trading company, incur an unlimited responsibility for the debts of the bank. In Scotland, there are three public or chartered banks.
1st, *The Bank of Scotland*, erected by a private act of the Scots Parliament (17th July 1695), with a capital of L.1,200,000 Scots (L.100,000 sterling), increased by several British statutes (the last of which is 44 Geo. III. c. 23), to L.1,500,000 sterling. The shares are declared assignable, the transfers being entered in a book subscribed by the assigner and assignee; they are also disposable by will entered in the book of transfers without confirmation; and they may be transmitted "by adjudication, or other legal conveyance, in favour of one person allenarly, who, in like manner, shall succeed to be a partner in his predecessor's place; so that the foresaid sums of subscription may neither be taken out of the stock, nor parcelled among more persons by legal diligence in any sort to the diminishing or disturbing of the stock of the said company and good order thereof." On the bankruptcy or forfeiture of a share-holder, the Governor and Directors may order his share to be sold by public roup, after such intimations as are prescribed for the sale of bankrupt lands. The act does not say whether the stock is to be heritable or moveable.

2d, *The Royal Bank of Scotland*, erected by charter, in pursuance of 5 Geo. I. c. 20. The stock of this bank is declared moveable, descendible to executors, but not liable to arrestment or attachment. By a bye-law, no proprietor can transfer, but in presence of the Court of Directors, who may stop the transfer until he finds security for what he owes the bank.

3d, *The British Linen Company* was erected into a body corporate by charter in 1746. The shares are declared of the nature of personal estate, and to be transferred by certain forms. The charter was confirmed and enlarged in 1806, by a charter from Geo. III. Nothing is said in the charter as to the mode of attaching the stock.

**BANK-STOCK,** is the capital of the bank divided into shares, according to the original constitution of the company. These shares are held by the partners of the bank; and may be disposed of, and are transferred by an entry in the books of
the bank, under such forms as may have been devised for the security of the bank and of the partners.

BANK-NOTES, are notes issued by a bank for value received, and made payable to the bearer on demand, but bearing no interest; they supply the place of coin, either by authority of public law, in the case of the national bank, or by public consent, in the case of private banks. They are, properly speaking, nomina debitorum, or obligations which may be the ground of an action, rather than corpora of moveables, and will be so interpreted in a conveyance of moveables.

BANK CREDITS, are credits peculiar to Scotch banking, by which, on proper security given to the bank, a person receives liberty to draw to a certain extent agreed upon, and for which, with the interest that may fall due upon the sum drawn, the previous security is given. The account opened with the bank on this credit is carried on by occasional money transactions; the person receiving the credit drawing out or lodging money as his occasions require. The balance is thus continually fluctuating; the sum which the person is due the bank one day being perhaps repaid the next day, and drawn out again the day following. The fluctuating nature of this balance, as well as the provision of the act 1696, c. 5, that no heritable security shall be given for a future debt, formed an obstacle to an heritable security being given to banks for cash credits. The only way formerly of managing such a transaction was for the person desirous of obtaining such a credit on heritable security, to procure friends whose personal security was sufficient, who might join with him in an obligation to the bank; and to those friends he gave an heritable bond of relief. But even this was not held to remove the difficulty; for although the bond was given to relieve the cautioners of their obligation, yet it was thought that the fluctuating nature of the original debt affected even the cautionary engagement, and rendered it ineffectual.—See Creditors of Brugh, 2d March 1791; Mor. p. 1159. But this has been since provided for by a clause in the act 54 Geo. III. c. 137, § 14, which declares, "That it shall be lawful for any person or persons possessed of lands, or other
heritable subjects, and desiring to pledge the same in securi-
ty of any sums paid or balances arising, or which may arise
upon cash-accounts or credits, or by way of relief to any
person or persons who may become bound with him or them
for the payment of such sums or balances, although posterior
to the date of the infestment, to grant heritable securities
accordingly upon their said lands, or other heritable estate,
containing procuratory of resignation and precept of sasine,
for infesting any bank or bankers, or other persons who shall
agree to give them such cash-accounts or credits, or for in-
feeting such persons as shall become cautioners for them, or
jointly bound with them, in such cash-accounts or credits:
Provided always, that the principal and interest which may
become due upon the said cash-accounts or credits shall be
limited to a certain definite sum, to be specified in the secu-
ritv, the said definite sum not exceeding the amount of the
principal sum and three years interest thereon at the rate of
five per centum; and it is hereby declared, that it shall and
may be lawful to 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 par-
ties shall settle between themselves; and that the sasines or
infeetments taken upon the said heritable securities shall be
equally valid and effectual as if the whole sums advanced
upon the said cash-account or credit had been paid prior to
the date of the sasine or infestment 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 infestment renounced.

On compliance with this regulation, an heritable security may
be given for a cash credit.

BANK AGENT. The national banks, as well as private
bankers, generally employ persons to act as their agents for
conducting their banking operations in provincial towns. The
powers of these agents depend upon the rules of the particular
bank for which they act; but, in the ordinary case, they are
authorised to discount bills, &c. for behalf of the bank, on
their own responsibility. The power of granting cash credits
is generally reserved to the principal bank. Caution to a
large amount is required for bank agents; and, on the failure
of the agent, it seems to be held that the money found in the
desks, drawers, or boxes, used for carrying on the business of
the bank, is the specific property of the bank, and may be re-
claimed by it; and this although the identical notes issued by
the bank may have been replaced by others. See Bell's Com.
vol. i. p. 201, 276, 4th edit.

BANK INTEREST is the interest allowed by public
and private banks on money deposited with them; and at pre-
sent (1822) it varies from 3 to 3½ per cent. For all money ad-
vanced by them, either by discounting bills or on cash credits,
the banks charge the legal interest of 5 per cent.

BANKER, is the partner or manager of a private bank,
who deals in discounting bills. It may be proper to state
here some of the rules in regard to bill transactions with
bankers. A bill, regularly discounted, is held to be a bill
purchased by a banker, and, on his failure, is the property of
his creditors. Bills sent merely for negociation are the pro-
erty of the sender, if distinguishable; the banker, as to
them, being merely an agent. Where bills are blank indorsed
to a banker, on the understanding that the indorser is to be
allowed to draw for a certain proportion of their amount, the
bills belong to the indorser, under a lien for the advances.
Long dated bills, deposited in security of bills at a shorter
date discounted by a banker, are held to be impledged to the
banker; and, on retiring the short dated bills, the customer is
entitled to receive the long dated bills, notwithstanding the
intervening bankruptcy of the banker. Bills blank indorsed
to a banker, and deposited for a special purpose, may be dis-
counted or paid away by the banker to whom they are so in-
dorsed; and, on his failure, the indorser cannot reclaim the
bills, but must rank as a mere personal creditor. A banker
has a lien for the general balance of his account over all bills
deposited with him, "unless they have been discounted, in
which case they are taken out of the account between the
123, 4th Edit.

BANKS FOR SAVINGS, are banks established for re-
ceiving the savings of labourers and others. The act of Par-
liament for their encouragement is the 59 Geo. III. c. 62.

BANKRUPT. A bankrupt is an insolvent person who
has subjected himself to the operation of the bankrupt laws.
Every person subject to the laws of Scotland may be rendered
legally bankrupt. The statutes which contain the definition
of legal bankruptcy, are the act 1696, c. 5, and the 54 Geo.
III. c. 137. By the former statute, a “notour bankrupt” is
a “debtor who, being under diligence by horning and caption
at the instance of his creditor, shall be either imprisoned or
retire to the Abbey, or any other privileged place; or flee
or abscond for his personal safety; or defend his person by
force; and who shall afterwards be found, by sentence of
the Lords of Session, to be insolvent.” And the stat. 54
Geo. III. c. 137. § 1. extends the description of bankruptcy
to persons subject to the laws of Scotland who are absent from
Scotland, or not liable to imprisonment, by reason of privilege
or personal protection; and declares that a charge of horning
executed against such a person, or an execution of arrestment
of any of his effects not loosed or discharged within 15 days,
or a poinding of any of his moveables, or a decree of adjudica-
tion of any part of his heritable estate, shall, when joined
with insolvency, be held a sufficient proof of legal bankruptcy,
and equivalent to notour bankruptcy, under the act 1696.

To this description of bankruptcy, all persons, whether
Scotsmen or foreigners, subject to the law of Scotland, are
liable; and its effects, under the act 1696, are, that all volun-
tary dispositions, assignations, or other deeds, granted directly
or indirectly by the bankrupt at or after the time of his bank-
ruptcy, or within 60 days before it, in favour of a creditor,
either in satisfaction or further security, to the prejudice of
other creditors, are void and null. It is also declared, that,
in the application of this act, all dispositions, heritable bonds,
or other heritable rights, granted by the bankrupt, on which infestment may follow, shall be reckoned to be of the date of the sasine lawfully taken thereon. It is farther declared, that all dispositions or other rights granted for relief, or in security of future debts, shall be of no force as to any debt contracted after the date of the sasine. The act concludes by ordaining fraudulent bankrupts to be punished by being held infamous infamia juris, and by banishment, or such other punishment, short of death, as the Court of Session shall see cause to inflict (See Fraudulent Bankrupt). And the statute 54 Geo. III, c. 137, § 2, declares that, when a debtor has been rendered legally bankrupt in terms of the act 1696, all arrestments used for attaching the effects of the bankrupt within 60 days before, and four calendar months after the bankruptcy, shall be ranked pari passu, and that (§ 5) all poindings used within the same period shall give a preference to the poinder; but every other creditor having liquid grounds of debt, or decree for payment, and summoning the poinder, or judicially producing the same in any process or competition relative to the price of the poind-ed goods, before the lapse of the four months, shall be entitled to a proportional share of the price of the goods so poinded corresponding to his debt, deducting the expence of the poinding, which the poinding creditor shall retain. The same statute (§ 12) also enacts that, in all questions on the act 1696, and under this statute, the dispositions, heritable bonds, or other rights on which infestment may follow, instead of being reckoned of the date of the sasines, as provided by the act 1696, shall be held of the date of the registration of the sasine; and (§ 13) that all dispositions, assignations, and venditions which do not require sasine, shall be reckoned (in so far as these statutes are concerned) of the date of the intimation, delivery, or other act requisite for completing the right, without prejudice to the validity of these rights in all other respects. From the provision of the act 1696, regarding securities for future debts, heritable securities for cash accounts are excepted; 54 Geo. III. c. 137, § 14. With regard to judicial sales of the lands of a bankrupt, and alienations, on the approach of bankruptcy,
to conjunct and confident persons, see the articles *Judicial Sale and Ranking* and *Conjunct and Confident*.

The foregoing statutory provisions for ascertaining the date of legal bankruptcy, and preventing undue preferences, are applicable, without exception, to all persons subject to the law of Scotland; but a particular class of statutory regulations have also been introduced applicable exclusively to mercantile bankruptcy, and having in view a system of general attachment and distribution of the estates of insolvent merchants and traders. The statutes on this subject are the 23 Geo. III. c. 18; 33 Geo. III. c. 74; and 54 Geo. III. c. 137; see *Sequestration*. The last mentioned statute expires with the present session of Parliament (1822); and in the act about to be passed a variety of important alterations and improvements are proposed to be made on the existing law in regard both to mercantile and to common bankruptcy.

BANNOCK is a thick cake of oatmeal, and is a term for one of the duties in thirilage; it is a perquisite of the servant or assistant in the mill.

BANS. Ban is a Saxon word signifying proclamation or public notice, *Burns' Law Dict.* But bans, in Scots law, is used to signify the proclamation in church, which by the law of Scotland is necessary to constitute a regular marriage. This proclamation is made in church, immediately before the commencement of divine service; it is done with an audible voice; and consists in calling the names and designations or additions of the parties who intend to intermarry, and inviting those who know of any sufficient objection to offer it before it be too late. *Ersk. B.* i. tit. 6. § 10. By the 10 Queen Anne, c. 7, it is enacted, "That no episcopal minister residing in Scotland "shall marry any person but those whose bans have been duly "published three several Lord's days in the episcopal congre- "gation which the two parties frequent, and in the churches "to which they belong as parishioners by virtue of their resi- "dence." Marriages contracted without proclamation of bans "are valid; but the parties, celebrator, and witnesses of such "marriages, are liable in certain penalties. The parties may be

BARATRY, is the crime committed by a judge who is induced by a bribe to pronounce a judgment. Baratrum committit qui propter pecuniam justitiam baractat, he commits baratry who barters justice for money. This practice seems in former times to have been very general in Scotland. See the act 1540, c. 104.

BARATRY, amongst ecclesiastical persons, was the offence of exporting money out of Scotland to purchase benefices at Rome, and was prohibited by several old acts of Parliament. See 1426, c. 84, 1567, c. 3, Acta. Parl. vol. iii. p. 14.

BARATRY of mariners, is gross fraud on the part of the master or mariners, tending to their own benefit and to the prejudice of the owners of the ship. See Bell's Com. vol. i. p. 658, 4th Edit.

BARGAIN, is a consensual contract or agreement, and is generally used to signify such contracts as may be completed without the intervention of writing, e.g. sales of moveables, locations, &c. By the stat. 1669, c. 9, such bargains, which are proveable by witnesses, prescribe in five years after the bargain. In re mercatoria, bargains of great importance may be proved by letters of correspondence, or even by less formal writings. See Bell's Com. vol. i. p. 248, 4th Edit.

BARRENNESS, see Sterility.

BARON, in its more ordinary acceptation, is the degree of nobility next to a viscount. But anciently, in Scotland, all those vassals who held their lands immediately of the Crown were termed Barons. When titles of nobility were conferred on barons, they were called the greater barons; but both the greater and the lesser sat indiscriminately in the Scots Parliament until 1427, when, by the act 102 of that year, the attendance of the lesser barons was dispensed with, on condition of their sending representatives from each county, to be called “commissioners of the shire.” The act 1457, c. 75, renews the leave of absence; and the act 1503, c. 78, extends it to
all barons whose valuation is under 100 merks new extent. Leave of absence from Parliament was at that time a privilege which the lesser barons enjoyed, but it was optional to them to use it or not; and, at last, from their almost total failure to attend, an opinion prevailed that they had no right to sit in Parliament, unless when elected commissioners of the shire, under the act 1427, c. 102. Ersk. B. i. tit. iii. § 3 and 4.

When a seat in Parliament became an object of ambition, it was necessary to settle this question; and the statutes 1587, c. 114, 1661, c. 35, and, lastly, 1681, c. 21, introduced the plan of representation on which the election law of Scotland is founded. See Election Law.

But although every person holding of the Crown came under one or other of the above denominations of greater or lesser barons, yet, to constitute a baron in the strict law sense of the word, his lands must have been erected, or at least confirmed, by the King in liberam baroniam: And such a baron had a jurisdiction both civil and criminal, which he might have exercised either in his own person, or by his bailie. But this jurisdiction was, by 20 Geo. II. c. 43, reduced to the right of recovering from his vassals and tenants the feu-duties and rents of the land, and compelling them to perform the services to which they may be bound, and to the right of deciding in civil questions where the debt or damage does not exceed 40s.; and beyond this his civil jurisdiction cannot be prorogated. The criminal jurisdiction of the baron is, by the same statute, limited to assaults, batteries, and smaller offences, which may be punished by a fine not exceeding 20s. &c. Where a fine is inflicted, it is to be recovered by poinding, or, in default of goods, by one month's imprisonment at farthest. But this jurisdiction is put under so many regulations and restrictions, that it is seldom, if ever, exercised by the baron. The act 20 Geo. II. farther provides, that no future charter of erection of a barony shall convey any higher jurisdiction than for recovering the rents of lands, multures, and mill services: An exception has, however, been made to this by a late statute, 35 Geo. III. c. 122, by which the King is authorised to erect free and in-

Vol. I. G
dependent burghs of barony in those parts of the sea-coast in which the fisheries are carried on; the magistrates in such burghs are to exercise the power of justices cumulatively with the justices of the county.—Ersk. B. i. tit. 4, § 25, et seq.

BARON OF EXCHEQUER; the judges of the Court of Exchequer are termed Barons of Exchequer. See Exchequer.

BARONET, a dignity or degree of honour next after barons, having precedence of all knights excepting knights bannercets, created by the King under the royal standard.

BARONY, is the territory over which the rights of barony extends; it also signifies the right itself. The right of barony can be conferred only by the King, and cannot be transmitted by the baron to be held base of himself. Where it is transmitted, it must be by a public holding, which enables the disponent to renew the title from the Crown by resignation or confirmation, and so come into the place of the disponent.

The right of barony also incorporates the whole parts of which the barony consists, so that a conveyance of the barony, in general terms, carries every part and parcel of the barony, though not named, and every right connected with a barony, though these rights be not expressed. One effect of the right of barony is to unite the whole separate subjects of which the barony consists, so that one sasine, taken on any one part of the barony, carries the whole; and whereas the clause of union unites only lands which are locally contiguous, the effect of barony is to unite lands though flowing from different superiors, or held by different tenures, as well as where the subjects are contiguous by situation. By the act 1595, c. 93, it is provided, that the inhabitants of all barony lands shall be amenable to the courts within whose jurisdiction the lands are situated. See Baron.

BASE RIGHTS. Where a person disposes feudal property to be held under himself, instead of under his superior, the right which the disponent thus acquires, is called a base right. In the original charter, the lands are disposed to the receiver, to be held by him of the granter either in feu or in
blench, (for there is no other species of holding in modern conveyancing). In the feu-holding, a feu-duty or annual payment in money or victual is given. In the blench holding, an elusory duty, as a penny Scots money, &c. is provided as an acknowledgment of superiority. Where lands are given out on either of these holdings, the charter expresses the subject, the disponee or vassal, the holding, the nature of the warrantice undertaken by the granter; it assigns the rents to the disponee, and contains an order on the granter's bailie to give infeftment to the vassal. This is the base right, by which, in modern conveyancing, a subinfeudation is made; the granter remains vassal to his own superior, and the subinfeudation makes not the slightest change on the titles he holds from his superior. Thus, suppose A to hold of the Crown blench, and that he subfeus his lands to B, to be held in feu. A is the vassal of the Crown, and B is the subvassal in the lands. B, the subvassal, has thus two superiors; A, from whom he derives his right, who is his immediate superior, and the Crown which is his mediate superior. The right in A is termed the dominium directum, in reference to B's right over the property; and B's the dominium utile, or property. A's right is termed a public one; B's a base or subaltern right. These two rights stand on different sets of titles, entirely unconnected with each other. A's title stands on his Crown charter and sasine; B's on his base right. The base right in favour of B can never be confirmed by the Crown, to the effect of making B hold of the Crown; this would be to deprive A of his subvassalage, which no act of the Crown or of B can accomplish. Formerly, when the casualty of recognition existed, by which the whole land, on the acts of the immediate superior, (that is of A, in the case supposed) might have recognised, it was common for a subvassal to take a confirmation from his mediate superior, because the confirmation, though it did not make the subvassal hold of his mediate superior, freed him from the consequences of this casualty; but now that ward-holding is abolished, the necessity of this measure is at an end, and a confirmation of this kind is not sought for. The only confirm-
tion in modern practice is the confirmation of a right given to a purchaser to be held of the seller's superior, which will be explained in treating of the purchaser's title, and under the terms Disposition and Public Right. See also Charter.

It is thus obvious, that the base right is a charter in favour of a sub-vassal, either in feu or blench; but the modern disposition to a purchaser, from considerations of expediency, gives the disponee the alternative either of a public or a base holding; and infeftment taken on the precept of sasine in such a disposition constitutes a complete base right, which may be afterwards rendered public by a charter of confirmation from the disposer's superior. See Disposition.

BASTARD, a child born of a woman who was not married to the father at the time of conception, and who was never thereafter married to him. Bastards are termed illegitimate children, in contradistinction to legitimate or lawful children born in lawful wedlock. But, although the act 1600, c. 20, declares, that a marriage contracted after a divorce for adultery between the divorced person and the paramour is unlawful, and that the issue are incapable of succeeding to their parents, it would seem that such children are not to be regarded as illegitimate or bastards. Stair, B. iii. tit. 3, § 42 Ersk. B. i. tit. 6, § 51.

A bastard can have no heirs except of his own body, because succession is through the father only, and bastards have no lawful father. Stair, ib. § 44. On the failure of heirs of a bastard's body, the King succeeds as ultimus heres. But although a bastard cannot succeed as heir or executor either to his father or mother, he may succeed by destination; he may also dispose of his own estate, heritable or moveable, by a deed inter vivos; and he may even settle his heritable estate on any person he pleases by a destination which is not to take effect until after his death. But if he have no lawful children of his own body, he can neither dispose of his heritable or moveable estate on death-bed, nor can he make a testament to the prejudice of the Crown's right. Where he has lawful issue, however, he may make a testament either in their fa-
your or in favour of a stranger; for the King, being excluded by the mere existence of such issue, has no interest to challenge any destination of the bastard’s property which he may think proper to make. The widow of a bastard, whether there be issue or not, enjoys her legal rights of terce and *jus relictæ*; and creditors are entitled to use the ordinary diligence for attaching the heritable or moveable estate of a bastard, both before and after his death. See *Stair*, ib. *Ersk. B. iii. tit. 10, § 5, et seq.* As to the legitimation of bastards, and its effects, see *Legitimation*.

**BASTARD, ALIMENT OF.** The aliment of illegitimate children is a joint burden upon both parents. The mother is entitled to the custody of the child, and the father is bound to contribute his proportion of the expense; and, if neither the mother nor father can support the child, it must be supported by the parish. The period for which the mother is entitled to the custody of the child does not appear to be precisely fixed; and, by decisions of the Court, it has varied from seven to fourteen years. *Ersk. B. i. tit. 6, § 56.*—*Mor. Dict. 442. et seq.* and p. 11,080. Neither does it appear to be settled whether or not, after the period of the mother’s custody of the child ceases, the father is entitled to insist on taking the child from the mother. In the case of Goadby against M’Candy, 7th July 1815, *Fac. Coll.* the mother was preferred to the custody of a child of thirteen years of age, in competition with the relations of the deceased father. As to the *quantum* of aliment awarded against the father, it has varied of late from L.4 to L.10 a year, according to the rank of the parties; in general, the award against artizans is from L.4 to L.6 a year, and, where the father is of a higher rank of life, L.10 a year is generally given. It is payable quarterly by advance, and is continued until the child can earn its bread. On the insolvency of the father of an illegitimate child, the mother’s claim for aliment to the child gives her *a jus crediti*, which entitles her to rank for the aliment on the bankrupt estate; in which respect she has an advantage over the mother of a lawful child, who, having united her fortunes and those of her children with the
father, must follow his fate, and, independently of special contract, has no *jus crediti* entitling her or her children to rank for their legal provisions in case of insolvency; *Bell's Com.* vol. i. p. 549, 4th edit. It may be observed here, that a debtor who has been imprisoned for the aliment of a bastard child is not entitled to the *cessio*. *Ib.* vol. ii. p. 575.

**BASTARDY, GIFT OF.** Is a gift from the Crown of the heritable or moveable effects of a bastard who has died without lawful issue, and without having disposed of his property in *liege poutic*. By this deed the King gives, grants, and disposes to the donatory, the bastard’s estate and effects, with power to institute an action of declarator of the bastardy, which is necessary to entitle the donatory to take the benefit of the gift. See *Jurid. Styles*, vol. i. p. 461 and 504, 2d edit. See *Gift*.

**BASTARDY, DECLARATOR OF,** is an action instituted in the Court of Session by the donatory in a gift of bastardy, for having it declared that the lands or effects which belonged to the deceased bastard, belong to the donatory in virtue of the gift from the Crown. The defender called in this action, is the person who, had the bastard been a lawful child, would have succeeded to him. If the bastard’s heritable estate has been held immediately of the Crown, the property and superiority are consolidated, and it is unnecessary to bring an action of declarator of bastardy, unless a donatory has been named. But where the bastard’s lands are held of a subject, the King, who cannot be vassal to his own subject, always names a donatory, who, in order to complete his title, must obtain a decree of declarator of bastardy. See *Stair*, b. iii. tit. 3. § 48; and *Jurid. Styles*, vol. ii. p. 114, first edit.

**BASTON,** a staff or baton. This is the proper symbol of resignation, though a pen has, by immemorial custom, been made use of as the symbol in the act of resignation.

**BATTERY PENDENTE LITE** is the offence of assaulting an adversary in a law-suit, during the dependence of the suit. The words of the act are, “who shall wound to the effusion of blood, or otherwise to invade one of them another,”
It may be committed by either of the parties at any time between the date of executing the summons and the final termination of the process, by the execution of diligence for enforcing the decree of the court. It is sufficient to render a party guilty of the crime that he has been accessory to the attack. There are two statutes, 1584, c. 138, and 1594, c. 219, which declare the punishment of the crime to consist in the loss of the cause; that is, the pursuer, when he offends, loses the sum pursued for; and the defender, when the offence has been committed by him, is condemned in terms of the conclusions of the libel. This offence may be tried either directly before the proper criminal court, or incidentally by petition and complaint in the court in which the principal cause depends; and the cases, Feb. 27, 1781, Gordon, Mor. p. 1378, and Feb. 20, 1789, Fowler, Mor. ib. prove that the old acts of Parliament on the subject, are held to be still in force. See also Annan against Ross, 4th March 1790, Mor. p. 1379.

BEASTS, WILD; the right to wild beasts, or to fowls or fishes, is acquired by occupancy, unless they have been previously deprived of their natural liberty, as by inclosing deer in a park, fishes in a pond, or birds in an aviary; but when, by any accident, they have regained their natural liberty, and the former proprietor has given over his pursuit of them, the right to them may, as before, be acquired by occupancy. Domestic animals, although they should stray, still remain the property of their original owner. Ersk. b. ii. tit. 1, § 10.

BEATING OF JUDGES. To beat, strike, or insult any Judge sitting in judgment, or on account of his judicial proceedings, seems to be a capital offence, 1593, c. 173, 1600, c. 4. Threats of violence used to a judge on account of his conduct in that capacity, will subject the offender to an arbitrary punishment. Hume, vol. i. p. 399, et seq. Mr Erskine includes, under this crime, all offences against the law or its execution, e. g. defacement of messengers, breach of arrestment, battery pendente lite. Ersk. B. iv. tit. 4, § 32. See Defacement, Breach of Arrestment, and Battery Pendente Lite.
BEES. By the Roman law, a swarm of bees which alighted on the grounds of another, and was by him inclosed in a new hive, became his property. The bees were considered as having acquired their natural liberty, and so to have become a fair object of acquisition. Mr Erskine states this doctrine as if it had been adopted in the law of Scotland. Ersk. B. ii. tit. 1, § 10.

BEGGARS. There are many severe statutes against beggars and vagabonds; thus, 1424, c. 42. 1525, c. 22. 1579, c. 74. 1592, c. 147. 1597, c. 268; and the whole acts against beggars and vagrants are renewed and ratified by the act 1698, c. 21. Hume, vol. i. p. 473. See Vagabonds.

BEHAVIOUR AS HEIR, or gestio pro hærede, is a passive title by which an heir, by intromission with his ancestor's heritage, incurs a universal liability for his debts and obligations. This passive title was introduced into the law of Scotland as early as the institution of the College of Justice, for the purpose, it would appear, of checking the frauds to which creditors were exposed under the more ancient law, according to which the heir was liable to the extent of his actual intromissions only. Stair, B. iii. tit. 6, § 1. Ersk. B. iii. tit. 8, § 82.

The passive title of gestio pro hærede is incurred, 1. By the heir's immixing with the heritable subjects of the ancestor, letting tacks, &c. 2. By intromitting with heirship moveables, which, in questions of succession, are reckoned heritage. 3. By intermeddling with the title-deeds of the ancestor's heritable estate in such a manner as to give rise to a reasonable presumption that he intends to represent him. 4. By the heir's making over to a third party any part of the ancestor's heritable estate, or by granting discharges to any of the ancestor's debtors. But the simple renunciation by the heir of all claim to the succession in favour of the heir-male or of provision, even for a valuable consideration, infers no passive title, because creditors are not hurt by such a renunciation. 5. The passive title of gestio pro hærede is incurred under the act 1695, c. 24, if the heir, without service or entry as heir,
shall "either enter to possess his predecessor’s estate, or any "part thereof, or shall purchase," either by himself or by means of another person for his behoof, any right to his predecessor’s estate, or any legal diligence or other right affecting the estate, redeemable or irredeemable, except as highest bidder at a judicial sale. But, in construing this clause of the statute, it has been held, in opposition to the opinion of Erskine, that the mere purchase by the heir of a debt affecting the ancestor’s estate, will not subject the heir, unless he possess in virtue of the right so purchased. Clelland v. Campbell, 10th June 1796, Mor. p. 9759. In this case, however, although the point was fully discussed, it was not at the instance of creditors. See Ersk. B. iii. tit. 8, § 85.

It may be remarked in general, with regard to this passive title, that the question, whether or not it has been incurred, will depend a good deal upon circumstances; and, as its consequences may be highly penal, it would seem that, where the intromission has been inconsiderable, and where there has been evidently no intention of defrauding creditors, the heir will be relieved from the effects of his intromission. Ersk. ib. § 86, and Cases in Notes. Stair, B. iii. tit. 6, § 4. The Court has even authorised an actual service as heir to be set aside in order to free the heir from this passive title. Ayton, 7th July 1784, Mor. p. 9732.

BENEFICE, a church living. Prior to the Reformation, benefices were of two kinds; they consisted either of lands or tithes; the former were called the temporality, the latter the spirituality of benefices. In consequence of the Reformation, James VI. considered himself proprietor of all the church lands, and erected several abbeys and priories into temporal lordships.—Those to whom he gave these grants were termed lords of erection, or titulars, as having a title to the erected benefices.

On the abolition of popery, when the property of abbeys and priories came into the hands of the Crown, there were superintendents who supplied, in some measure, the place of bishops; till at last, in 1572, the titles of bishop and archbishop were in-
duced, and bestowed on those clergymen who should in future be ordained members of cathedral churches. By 1592, c. 116, presbyterian church government was established by kirk sessions, presbyteries, provincial synods, and general assemblies. By 1606, c. 2, bishops were restored to all the rights competent to them, consistently with the Reformation. Episcopacy, thus established, continued till 1638, when presbytery was a second time introduced. By 1662, c. 1, presbytery was again displaced by prelacy; and at last, by 1689, c. 3, and 1690, c. 5, presbytery was finally established.

In 1587, it was found necessary to put a stop to the erections of those temporal lordships out of the property of the church; and, by the act 1587, c. 29, all church lands, whether belonging to bishops, abbeys, or other beneficiaries, were annexed to the Crown, to remain for ever unalienable, excepting therefrom the lordships previously erected, lands made over to hospitals, benefices vested in laymen before the Reformation, and, lastly, the manses and glebes which belonged to popish churchmen. But the King continuing to make further erections, the statute 1591, c. 121, declared all erections made posterior to 1587 void.

The restoration of bishops rendered it necessary to rescind the act of annexation 1587, in so far as related to the benefices belonging to the bishops chapters. The re-establishment of presbytery, in 1690, returned these benefices into the hands of the Crown; and the act 1690, c. 29, declares all such lands to be held of the Crown. But this property being at the disposal of the Crown, considerable donations have been made to universities and other public uses; and from this fund pensions are often given.

In one concentrated view, then, it will be observed, that the abbacies and priories, and even bishoprics, were erected into temporal lordships, the proprietors of which received the titles of lords of erection, titulars, or commendators; and that the property which formerly belonged to the bishops and their chapters was, to a considerable extent, brought back into the hands of the Crown, by the restoration of episcopacy, and its
subsequent abolition. It happened that the lords of erection, and other lay proprietors of church lands, exercised the same rights in drawing the teind which had formerly been exercised by the clergy; when fortunately this state of matters was put an end to by the decrees arbitral pronounced by Charles I. on the surrender of tithes. This surrender or submission was the result of a revocation made by the King, and of a reduction proceeding thereon, of all erections whether made before or after the act of annexation 1587. It was chiefly intended to provide the parochial clergy in proper stipends out of the tithes, and to put an end to the hardships arising from the drawing of tithes.

The decrees declare the King's right to the superiorities of erection. 1000 merks were to be given by the King to the lords of erection for each chalder of feu-farm, and for each 100 merks of feu-duty or other constant rent; and in the mean time the feu-duties were to be retained. By 1690, c. 29, all these superiorities are declared to belong to the Crown; and, by 1707, c. 11, the power of redeeming the feu-duties was renounced. The tithes are, by the decree arbitral, allowed to be valued, and the proprietor to be thereafter at liberty to dispose of his crop on paying the annual value of the tithe. The proprietor is farther entitled to purchase his tithes at nine years purchase.

Besides the right of superiority of the lands possessed by the lords of erection, the King was found entitled to 6 per cent. out of the tithes of the erected benefices; and this right was ratified by the act 1633, c. 15. It was drawn until 1674, at which time it was suspended by an order from the Crown, and has not since been demanded.

The spirituality of benefices, or the tithes, will be afterwards explained. (See Tithes.)

BENEFICIUM CEDENDARUM ACTIONUM. This was a right conferred by the Roman law, whereby a co-cautioner, who had paid the debt for the principal debtor, was entitled to compel the creditor to assign his right of action against the other co-cautioners, so as to enable the cautioner
who paid to operate his relief from those who were bound along with him. By the Scots law, a co-cautioner, who has paid, has an action of relief, without the necessity of any such conveyance from the creditor. In the practice in Scotland, the catholic creditor, who has security extending over several subjects, must, if he draws his payment from one subject only, convey his security to the other creditors on that subject, to the effect of enabling them to draw from the other subjects over which the security extends, so as in the end to make the catholic debt rank proportionally on all the subjects over which the security extends. (See Catholic Creditor.)

BENEFICIUM INVENTARII, is a privilege enjoyed by an heir in heritage, who is doubtful whether his predecessor's estate be sufficient to pay his debts. This privilege was borrowed from the Roman law, and introduced into the law of Scotland by the act 1695, c. 24, by which statute an apparent heir is permitted to enter to his predecessor cum beneficio inventarii, or upon inventory, according to the practice in moveable succession. The effect of entering in this way is, that the heir becomes liable for his predecessor's debts and deeds to the value of the heritage given up in the inventory only, and no farther. The statute allows the heir the annum deliberandi, and requires him within the year to make up and exhibit upon oath a full and particular inventory of "all lands, "houses, annualrents, or other heritable subjects," to which he "may, or pretends to succeed." Which inventory must be regularly subscribed before witnesses, and given in to the sheriff- clerk of the county where the heritage is situated, or, if the defunct had no lands or heritage requiring sasine, to the sheriff-clerk of the county where the defunct died. The inventory thus given in, must be subscribed by the sheriff and the clerk of the court, and recorded in the sheriff court books, from which extracts of the inventory are to be obtained, and within 40 days after the expiration of the year and day from the defunct's death; the extract of the inventory must be recorded in the books of Council and Session, in the particular register kept for the purpose. Where any part of the defunct's heri-
table estate has been accidentally, and without fraud, omitted in the inventory, the omission may be supplied by what is called an eik, or addition to the inventory, which must be made and subscribed, given in, and recorded, in the same manner with the principal inventory, provided such eik is made within 40 days after the heir comes to the knowledge of the omission. By intromitting with the heritage without attending to the provisions of this statute, the heir will incur a universal responsibility for the debts of the defunct. (See Behaviour as Heir.) The act does not require the heir to serve within the year. If the inventory be given in and recorded within the statutory period, the heir may serve at any time he pleases (Ersk. B. iii. tit. 8, § 68) and the only change produced in the form of the service is, that the heir is declared to be served cum beneficio inventarii. The inventory and service may be expedite by a factor appointed by the Court of Session to manage the heritable estate of the defunct, in the apparent heir's absence. Paton, Petitioner, 24th July 1785, Fac. Coll.; Mor. p. 4071. See as to the form of entry cum beneficio inventarii, Jurid. Styles, vol. i. p. 361, 2d Edit.

BENEFICIUM COMPETENTIÆ. By the Roman law, the granter of a gratuitous obligation, who was reduced to indigence before fulfilling his obligation, had beneficium competentiae, or the privilege of retaining a sufficiency for his own subsistence. The Scots law confers this privilege on fathers and grandfathers against their children and grandchildren, even although the effect of it should be to reduce the children to indigence; but it does not extend it to the case of strangers, or to collateral relations, or even to the case of a brother against a sister; Ersk. B. iv. tit. 3. § 89. See also Hogg against Hoggs, 30th Nov. 1749; Kilk. Mor. p. 1390, and Hardies against Hardie. 1st July 1813. Fac. Col. According to Erskine, (B. iv. tit. 3. § 27.) a bankrupt who has obtained the benefit of a cessio bonorum, and who afterwards acquires property, has beneficium competentiae, but this doctrine is not sanctioned by any reported case; on the contrary, it has been held that a bankrupt, in such circumstances, has not beneficium com-
petentiae, and that all which he is entitled to reserve are his working tools and his wearing apparel. Bell's Com. vol. ii. p. 577, 579, 4th Edit. and cases there cited.

BENEFICiUM DIVISIONIS, in the Roman law, was an equitable privilege, by which a co-cautioner, who was required to pay the debt, might insist that the creditor should make the demand on him only pro rata, or for his proportion along with the other solvent cautioners. By the law of Scotland, a co-cautioner enjoys this privilege when he is bound simply as cautioner, along with another, for the principal debtor: But where cautioners bind themselves "conjunctly and severally," with and for the principal debtor, the benefit of division is of course lost, and the creditor may select any of them he pleases, and recover the whole debt from him.—Stair, B. i. tit. 17, § 12; Ersk. B. iii. tit. 3, § 63.

BENEFICiUM ORDINIS, or the benefit of discussion. Both by the Roman law and by the law of Scotland, a cautioner, who is bound simply as such, may insist, before paying the debt, that the principal debtor shall be discussed; that is, that the debt shall not only be demanded from him, but that letters of horning for the debt shall be executed against him, and the denunciation recorded; that his moveables shall be attached by poinding, or arrestment and forthcoming, and his heritage by adjudication. Stair, B. i. tit. 17, § 6. Ersk. B. iii. tit. 3. § 61.

BENEFIT OF CLERGY, in the criminal law of England, is a privilege which a person convicted of a felony (not excluded from the benefit of clergy) may plead in arrest of judgment for the first offence. This privilege operates as a sort of statutory pardon, and was originally confined to the clergy, or to persons in holy orders; it was afterwards extended to all persons who could read, and at that time it was the practice, on the conviction of a felon whose crime was not denied the benefit of clergy, to present him with a book in which he was required to read, and on the proper officer pronouncing the words " legit ut clericus," the convicted person was burnt
on the hand and discharged. If he could not read, he suffered the statutory punishment for his crime. By the 5 Anne, c. 6, the benefit of clergy was extended to all persons convicted of clergyable offences, whether they could read or not; and by the same statute, and several subsequent ones, instead of burning on the hand, a discretionary power is given to the judge to inflict a pecuniary fine or imprisonment. The benefit of clergy is now allowed in all felonies, unless it be taken away by express words in the statute constituting the crime. In the more enormous capital offences, the benefit of clergy has always been excluded; and in the criminal code of England, there are many recent enactments creating felonies "without benefit of clergy." A very interesting historical account of the origin of this privilege will be found in Blackstone, B. iv. c. 28. See also Tomlins' Dictionary.

BERWICK-UPON-TWEED. This town, which was originally part of the kingdom of Scotland, was ceded to England by Edward Baliol, and its liberties and customs as an English town were afterwards confirmed by Edward IV. and James VI. Although, therefore, it has some local peculiarities derived from the ancient laws of Scotland, it is clearly a part of England, being represented by burgesses in the House of Commons, and bound by all acts of the British Parliament, whether expressly mentioned or not. See 20 Geo. II. c. 42. Indictments and other local matters in the town of Berwick may be tried by a jury from the county of Northumberland. Black, vol. i. p. 99.

BESTIALITY, carnal intercourse with the lower animals, is a crime punishable by the Scots law with death. The attempt to commit the crime may be punished arbitrarily; Hume, vol. i. p. 465.

BIGAMY, is the contracting of a second marriage during the subsistence of a former one. By 1551, c. 19, this crime, whether committed by the man or the woman, is punishable with the pains of perjury; these are, confiscation of goods, imprisonment, and infamy. Mr Hume seems to think that, in or-
der to found a charge of bigamy, both marriages must be completed by formal celebration; but this point has not yet been settled by any precedent. Hume, vol. i. p. 455, et seq.

BILL, in Scotch judicial proceedings, is the name given to the application or petition to the Court of Session, praying the Court to authorise those signet letters which require such a warrant to pass the King's signet. See Bills of Signet Letters, Bill-Chamber. Petitions against judgments of the Court or of the Lords Ordinary, and in general all applications or pleadings not ordered by the Court, were formerly denominated bills, and the roll in which such petitions are set down to be moved in Court is still called the roll of single bills. See Stair, B. iv. tit. 2. § 12, and B. iv. tit. 40. passim.

BILL OF EXCHANGE. This document is defined by Chitty, in his Treatise on Bills of Exchange, in these terms: "A foreign bill of exchange is an open letter of request from one person to another, desiring, or, in other words, authorising that person to pay a sum of money therein mentioned to a third person, and is consequently an assignment to the payee of a debt due from the drawee to the drawer."

This form of assignment took its origin entirely from the practice of merchants, to whose transactions it is peculiarly adapted. The facility afforded by it to commercial dealings, which, among merchants residing in different countries, must have been greatly incumbered by an adherence to more formal writings, early recommended the bill of exchange to the attention of the law in every country in Europe. In Scotland, two objects seem to have been principally kept in view in the regulations on this subject. In the first place, to confer upon bills such privileges as appeared to fit them for that course of transactions to which they were meant to be applied. And, secondly, as the attainment of this object required a departure from the ordinary forms of legal writings, to establish such rules as might guard against fraud, and to confine the use of this document, as far as possible, to mercantile purposes, or at least to transactions equally simple in their character.
The short outline which is here to be given of the law of bills, may be arranged under the following heads:—
1. The form of bills.
2. The privileges of bills.
3. The transmission of bills.
4. The negotiation of bills.
5. With regard to the prescription of bills, see Prescription.

1. Of the form of Bills. Bills of exchange, in the strict acceptation of that term, are made payable, according to the definition already quoted from Mr Chitty, to a third person, not the drawer of the bill; and almost all foreign bills are made out in that form. But a bill may competently be made payable to the drawer himself, which is generally the case in inland bills. Such a voucher, though capable of being employed in some measure to supersede the bond, is still, from its transmissible nature, well calculated for mercantile dealings, and is held in all respects entitled to the same privileges with the other; Tudhope, 22d June 1748; Kames’ Rem. Dec.; Mor. p. 1510.

The following are forms of these bills:—

First No. —


At sixty days after sight of this our first of exchange (second and third of same tenor and date being unpaid), pay to Messrs B. and Co. or order, the sum of one thousand pounds sterling, value received of them, and place the same with or without advice, to account of

To C. and Co. in Paris.

A. & Co.

£100 sterling. Edinburgh, 1st January 1822.

Three months after date, pay to B, or order, at your shop here, the sum of one hundred pounds sterling, value received of

To C, merchant in Edinburgh.

A.

Accepts, C.
Edinburgh, 1st January 1822.

L.100 sterling

Three months after date, pay to me, or my order, at your shop here, the sum of one hundred pounds sterling, value received of

A.

To B, merchant, Edinburgh.

Accepts, B.

The following particulars are to be observed in relation to the form and nature of bills:

1. It is not necessary that bills should be either holograph of the acceptor, or tested in the same manner with other probative writings. Subscription, even by initials, where the party acknowledged they were truly abridged, has been sustained; Shephard v. Innes, 19th November 1760, Fac. Coll. Mor. p. 589. But a bill subscribed by notaries without witnesses was held to be void; Buchanan, 27th June 1765, Fac. Coll. Mor. p. 16,985. Bills are held also to prove their own dates; Kennedy v. Arbuthnot, February 1725, Mor. p. 1477 and 12,617; but any vitiation of the date is fatal; Murchie v. McFarlane, 1st July 1796, Mor. p. 1458; Allan v. Young, 5th March 1800; Fac. Coll. Mor. App. voce Bill of Exchange, No. 10; although there is one instance where a bill altered in the date was sustained, on the ground that it was done, probably by the acceptor himself, to correct a blunder; Henderson v. Hay, 20th February 1802; Fac. Coll. Mor. p. 17,059. It is laid down by all our law writers, that the want of a date infers a nullity; and although there seems to be no authority for this doctrine in the decisions of the Court, the limitations in point of time which have been made to the privileges of bills appear clearly to point out the date as an essential part of these documents.

2. Bills may be made payable either at a specific term, at a certain period after date, or after sight, or on demand. It is contrary to the nature of a bill, however, to make it payable on
any contingency, or at a period very remote. Thus a bill made payable after the decease of the acceptor was held to be invalid; M'Arthur Stewart v. Fullarton, 29th January 1782, *Fac. Coll. Mor.* p. 1408. Where the bill was payable three years after date, it was held not to enjoy the extraordinary privileges of bills; Leslie, 16th February 1725, *Edgar's Decisions*, p. 170; *Mor.* p. 5770. As to bills payable by instalments, see Carron Company v. Muirhead, 25th February 1796; *Mor.* p. 1457. Any vitiation of the term of payment will be fatal; Lee, Rodgers, and Company, 26th December 1801, decided in the House of Lords, (referred to in report of case Henderson v. Hay, 20th February 1802, *Fac. Coll.* and *Mor.* p. 17,059) where a bill payable on demand was altered to "one day after date."

3. It is likewise inconsistent with the proper character of a bill to insert in it any stipulations or conditions. The payment of a certain sum of money at a particular term forms the only obligation of which it admits. Thus a bill with a clause for payment of a penalty has been held to be null; *Ersk. B.* iii. tit. 2, § 38; Drummond v. Graham, 9th December 1743; *Rem. Dec. Mor.* p. 1424. Prior to the case of Graham, however, a bill was found good which bore a clause of "with "penalty conform to law;" " because by law there was no "penalty due," (M'Neil, 24th January 1741, *Mor.* p. 1422) and in a subsequent case (M'Lachlan, 2d January 1760, *Mor.* p. 1432) the same decision was given upon a bill expressed in precisely the same terms, "the debt being acknowledged by the acceptor." But it should be remarked that, in neither of these cases, was there any stipulation for a specific penalty, but only for a penalty "conform to law;" and, as no penalty is due by law upon bills, the clause could import no stipulation of any kind, and might, therefore, fairly be held pro non scripto. There seems to be no good ground to hold, then, that the general principle has been departed from, to the effect of sustaining a bill with a specific clause of penalty.

A clause of interest before the term of payment also appears to infer a nullity, although some writers have represented the
later decisions as departing from this doctrine. The Court have certainly varied considerably in their determinations on the subject. Bills of this kind were at first sustained, and the decisions continue in this course down to 1738; see Mor. p. 1418, et seq. In 1741, a contrary judgment was given; Clerk Home, 162; Killie: Bill of Exchange, No. 5; Paterson against Finlays, 25th February 1741, Mor. p. 1422. Afterwards, the Court found a bill with this clause effectual (Lauder, 10th June 1744, Mor. p. 1424); and a similar decision was pronounced in 1750; Gordon, &c. against King's Advocate, 2d November 1750, Mor. p. 1426. Immediately afterwards, a change took place in the course of the decisions, and a bill with a clause of interest was held to be null; Lockhart, 11th December 1750, Mor. p. 1427; Moncrieff, 30th July 1751, Mor. p. 1428; Douglas, 15th November 1757, Mor. p. 1429. Another change has been said to have taken place, upon the authority of two decisions in which the bills were sustained. 1st, The case of M'Lachlan, 2d January 1760, already referred to, in which the bill bore a clause for "interest and "penalty, conform to law;" but here the same remark applies, and with double force, which has been already made upon this decision in regard to the penalty; for interest was not stipulated from the date of the bill, but, on the contrary, "con- "form to law," which could mean nothing else than interest from the term of payment. Such a clause as this does not seem to be objectionable, Ersk. B. iii. tit. 2, § 38, for this reason, that interest from the term of payment is due ex lege, and a clause to that effect amounts to nothing more than what is sanctioned by law; while a clause of interest before the term of payment is an obvious attempt to evade the law of bills by a special agreement opposed to it, and, on this account, has been justly held to take away from the document the character of a bill altogether. 2d, The other case is that of Sword, 23d June 1790, Fac. Coll. Mor. p. 1433. This decision appears from the report to have proceeded on the ground that the bill was holograph, a circumstance not certainly of much weight in the question; but the attempt thus
to rest the judgment upon a specialty, of itself shows that this case cannot well be regarded as an authority on the general principle. The report, however, expressly bears, that "the "Court were unanimous that the law, as formed by the later "decisions, annuls bills which stipulate for interest before the "time of payment; but several of the Judges doubted the pro-"priety of having gone farther than merely to disannul that "improper action, leaving those bills in which it was con-"tained effectual in other respects." So far then from afford-"ing any authority in support of the validity of bills containing a stipulation for interest before the term of payment, the opposite principle of law seems to be expressly recognised by this decision.

4. The next part relates to the nature of the obligation and cause of granting. 1. The bill must be drawn for a sum of money. A bill for the delivery of victual, &c. would be null; Leslie, 16th December 1713, Mor. p. 1397; Douglas, 18th February 1715, Mor. ib.; Bruce, November 1729, Mor. p. 1399. 2. An onerous consideration is not necessary; the person giving his acceptance binds himself to pay to every onerous holder. (See Accommodation Bill.) 3. A gaming debt above L5. cannot be the subject of a bill, Pringle against Biggar, November 7, 1740; Mor. p. 9509; the same where for a wager, Maxwell against Blair, 14th July 1774, Mor. p. 9522; nor for the price of liquor lost at play, McCoull against Braid-wood, March 5, 1767, Mor. p. 9518. The objection was at one time disallowed where the bill was in the hands of an onerous holder; Neilson against Bruce, 25th January 1740, Mor. p. 1509 and 9507; Stewart against Hislop, 18th Feb-ruary 1741, Mor. p. 9510. 4. A donation or a legacy cannot be given in the form of a bill; Weir against Parkhill, 7th January 1737, Kilk. Mor. p. 1413; Fulton and Clerk against Blair, November 9, 1722, Mor. p. 1411; Huttons against Hutton, February 13, 1724, Mor. p. 1412; Wright against Wrights, 11th February 1761, Mor. p. 8088; Dowie against Millie, 2d February 1786, Mor. p. 8107. But bills granted by a donor mortis causa to a friend, who, to accomplish the
the donor's purpose, granted his bill to the proposed legatees, were supported by the Court; Adam against Johnstone, 2d December 1782, *Fac. Col. Mor.* p. 1416; and in this case it was observed on the Bench, that, since the introduction of the sexennial prescription of bills, those documents are to be construed with less suspicion and strictness than formerly. A bill blank indorsed may, however, be given as a donation on death-bed, where the act of delivery is fairly proved, Barbour &c. against Hair, 8th February 1753, *Fac. Coll. Mor.* p. 6097; and there is an instance where a donation by means of a bill of exchange and relative order on a bank, was sustained after the donor's death; Steel against Wemyss, December 18. 1793, *Fac. Coll. Mor.* p. 1409. The objection that the bill has been given as a legacy, is not competent where the bill is in the hands of an onerous indorsee, Shaw against Farquhar, 24th November 1761, *Fac. Coll. Mor.* p. 1444. 5. A bill for the price of smuggled goods is not valid, Duncan against Thompson, 8th February 1776, *Fac. Coll. Mor.* App. voce *Pactum Illicitum*, No. 1.; Cullen and Co. against Philip, 15th May 1793, *Fac. Coll. Mor.* p. 9554; Reid and Parkinson against M'Donald and Elder, 15th May 1793, *Fac. Coll. Mor.* p. 9555.

5. The person entitled to grant a bill may be best described by the exceptions, since the general rule is, that every one, capable of managing his own affairs, may be a party to a bill. These exceptions are, 1st, In regard to those under age. A minor cannot accept a bill unless he be engaged in trade and the bill be given in the course of that trade; for, in that case, to deny effect to the bill would be to deprive minors of the power of carrying on trade; Grieve against Tait, 14th July 1732, *Mor.* p. 9036. Craig against Grant, 5th July 1732, *Mor.* p. 9035. 2. A married woman cannot, in the general case, bind herself (Fawell against Chessel's Trustees, *Bell's Cases*); but here also an exception is made in favour of trade; for a married woman engaged in trade may (on the principle by which the preceding cases are regulated) grant bills in the
course of that trade which will be binding on her; Churnside against Currie, 11th July 1789, Fac. Coll. Mor. p. 6082.

In order to constitute a regular bill, the name of the drawer must be adhibited; and this may be done at any time before it is founded on as the ground of diligence. The want of the drawer’s name seems formerly to have been fatal to the bill; but latterly a different opinion has prevailed, and action has been given for payment of a bill though the drawer had omitted to adhibit his subscription; Ogilvy against Moss, 28th June 1804, Fac. Coll. Mor. App. voce Bill of Exchange, No. 17.

Where more persons than one accept a bill, they are all bound jointly and severally, or in solidum, whether the bill be so expressed or not. A against B, Edgar’s Dec. 10th December 1724, Mor. p. 14,675, Gordon against Sutherland, 20th January 1761, Fac. Coll. Mor. p. 14,677. Where several are bound, and one of the acceptors is described as principal, the rest as cautioners, the principal will be liable for the whole; Alexander, &c. against Scott, 17th June 1742; Clerk Home, Mor. p. 14,675.

6. The stamp laws, which prescribe the nature and value of the stamp upon which the bill must be written, may with propriety be brought under the present head. But these laws are often varied, so that any direction beyond that of attending to the stamp law for the time, would do more harm than good. Yet there is one point connected with this subject on which a caution may be proper. It is this: In writing out a bill, care should be taken to write upon the stamp, and to leave no blanks at the beginning or end of the lines. The case of Graham against W. Gillespie and Co. 27th January 1795, Fac. Coll. Mor. p. 1453, affords an instructive example of the necessity of attention in this respect. It seems proper to give here the form of the bill in that case, with the words which were added to the bill after it had been accepted, printed in Italics, from which the manner of committing a fraud of this description will be apparent. The stamp was placed at the
beginning of the second and third lines, and thus covered the
deception at the time of the bill being presented for acceptance.

£458. 10s. Sterling.  Glasgow, 24th July 1791.

Six months after date pay to us, or
to our order, at the shop of C. and Co. the sum of four
hundred and fifty eight pounds ten shillings, value received.

To B. and Co.

A. and Co.

B. and Co.

In deciding on the effect of this bill in the hands of an one-
rous indorsee, the Court had no difficulty in regard to the ef-
fect of a fraud or of a forgery. The acceptor in either case
would not have been found liable; but a distinction was taken
in this case, where the acceptors had negligently put their
names to a blank bill, or, what was equivalent to it, to a bill so
drawn out as to render the imposition practicable. In that
view, and the loss being one which necessarily must have fal-
len, either on the acceptor, or on the discounter, the Court
held that, as the acceptor had subscribed a bill which rendered
the fraud practicable, whereas no blame was imputable to the
discounter, the loss ought to fall on the acceptor, whom they
accordingly found liable for the whole sum of L.458. 10s.;
and, following out the principle of this decision in the very
same case where a similar fraud had been practised on a L.50
bill, which was converted into a bill for L.450, but where the
fraud was executed clumsily, and in such a manner as might
have excited suspicion, they held that the discounter must
bear the loss. See also on this point Pagan, &c. against

In regard to the stamp for a bill, it may also be observed,
that a bill will be valid, although written on a stamp of a
higher value than the schedule requires for the sum in the
bill, provided the stamp be a bill stamp, for, if a bill were
written on a receipt stamp, no matter of what value, it
would seem that it will infer a nullity; although the last men-
tioned point has not been expressly decided in Scotland. See
Bowack, petitioner, 21st June 1804, Fac. Coll. Mor. App. voce Bill of Exchange No. 16.

II. Of the Privileges of Bills. Bills, being transmissible documents, are held in some measure as money, capable of being circulated from hand to hand, and no burden which does not appear upon the bill can affect an onerous holder. Hence, a payment made to the drawer, if not marked in the bill, would not affect the claim of an onerous indorsee for full payment of the contents; Erskine against Thomson, 12th Dec. 1711, Forbes's Decisions, Mor. p. 1501.; Fairholm against Cockburn, 24th June 1714, Dalrymple's Decisions, Mor. p. 1505.

Claims of compensation are equally ineffectual against an onerous holder. Neither is the onerous holder affected by arrestments used in the hands of the acceptor, by the creditors of the drawer or indorser; Smith against Home, 5th Dec. 1712, Dalrymple's Decisions, Mor. p. 1502; Rossie against Ogilvy, 15th July 1709, Forbes's Decisions, Mor. p. 1501.

Bills have also special privileges in the summary mode of diligence competent for enforcing payment. The statute 1681, cap. 20, enacts, "That in case any foreign bill of exchange "from or to this realm, duly protested for not acceptance, or "for not payment, the said protest having the bill of exchange "prefixed, shall be registrable within six months after the date "of the bill, in case of non-acceptance, or, after the falling "due thereof, in case of not payment, in the books of Coun- "cil and Session, or other competent judicatories, at the in- "stance of the person to whom the same is made payable, or his "order, either against the drawer or indorser, in case of a pro- "test for non-acceptance, or against the acceptor in case of a "protest for non-payment, to the effect it may have the authority "of the judges thereof interposed thereto, that letters of horn- "ing on six days, and other executorials necessary, may pass "thereupon, for the whole sums contained in the bill, as well "exchange as principal, in form as effeirs, sicklike and in the "same manner as upon registrate bonds, or decrees of regis- "tration, proceeding upon consent of parties." The act far-
ther declares, "That if the protests be not duly registrate "within the six months, no summary execution can follow, and "the debt must be recovered by an ordinary action." This statute was, by the act 1696, c. 36, extended to inland bills and protests in all points.

Under these enactments, the protested bill may be recorded in the books of Council and Session, and the extract of the registered protest forms the warrant for letters of horning pass- ing the signet, upon which the ordinary forms of diligence may follow; or the protest may be recorded in the sheriff, com- missary, or bailie court books of the district where the bill was payable, or within which the debtor resides. In this case, the extract of the protest contains a precept for such diligence, as the jurisdiction of the judge admits of, and, if necessary, letters of horning may be obtained upon it by means of a bill present- ed to the Lords of Council and Session for that purpose. See Diligence.

III. Transmission of the Bill.—The bill is transmitted by indorsation, which may be made by the creditor putting simply his name on the back of the bill, without stating the name of the indorsee, which is called a blank indorsation. A bill in this shape may be passed from hand to hand without farther indorsation, and the blank may be afterwards filled up with the name of any one into whose hands it may come; or the indorser may make a special indorsement, by putting above his subscription words to this purpose, "Pay the contents to C." The effect of either of these indorsations will be to render the indorser liable in recourse to the indorsee for the amount of the bill, in case it be not paid by the acceptor. It may happen, however, that the indorser has no interest in the trans- action, and, though desirous of transmitting the bill to those who have an interest in it, he is unwilling to give his credit to the bill; and, in that case, he may indorse the bill with safety, by adding these words, "Pay the contents to D without "recourse on me, C." and this will free C from any responsi- bility in case the acceptor should fail. A partial indorsation,
unless the rest of the bill has been paid, is not sanctioned in the law of England. These indorsations have no date affixed to them. The transmission of bills by indorsation is held to be competent even after the term of payment, and where there are no marks of dishonour on the face of the bill so indorsed, the indorsee has all the privileges of an indorsee before the term of payment, and will not be exposed to the exceptions pleaded against the drawer; Wilkie against Wilson, 30th Nov. 1811, Fac. Coll.—Crawford against Robertson’s Trustees, 30th June 1814, Fac. Coll.; and, in one case, the Court preferred the indorsee, although, before the indorsation, the bill was not only past due, but had been protested, and the protest recorded, and an arrestment used in the acceptor’s hands at the instance of a creditor of the indorser. This was decided in a competition between the arrester and the indorsee; but it is said in the report, that at the date of indorsation there were no markings on the face of the bill from which its dishonour could be discovered. See Freer against Richardson & Co. 18th Nov. 1806, Fac. Coll.; Mor. App. voce Bill of Exchange, No. 19. The rule in England appears to be different; see Bell’s Com. vol. i. p. 314, Notes, 4th Edit.

IV. The negotiation of the bill.—Due negotiation of a bill consists in the regular and punctual prosecution of those steps, which, in case of dishonour by the acceptor, are essential to found the holder’s claim of recourse against the drawer or indorsers. For this purpose three things must be attended to, 1. Presentment for acceptance or payment. 2. Protest in case of dishonour. 3. Intimation to the drawer and indorsers.

1st, The duty of presentment for acceptance will depend upon the terms of the bill. If it is made payable at a certain term, it is sufficient to present it on the day of payment. Where, on the other hand, it is payable at a particular period after sight, it is requisite to the due negotiation, that it be presented within a reasonable time after the indorsation, the precise extent of which will depend upon the custom, the distance to which the bill must be transmitted, and all the circumstances
of the case. The draft may, however, be left with the drawee for twenty-four hours, that he may make up his mind whether to accept or not. With regard to an accepted bill, if it be payable at a particular term, it must be presented (and if dishonoured, it must be protested or noted) on the day of payment, or within the three following days, which are called days of grace; Cruikshanks against Mitchell, 29th January 1751, Kilk. Mor. p. 1576; British Linen Company, 19th May 1807, not reported, but noted, Bell's Com. vol. i. p. 322, 4th edit. A bill payable on demand must be presented within a reasonable period, corresponding to the circumstances of the case, and without any undue delay. The presentment must be made at the place of payment specified in the bill, or, if no place of payment is mentioned, to the acceptor personally, or at his dwelling-house, or at his place of business: If at the last, it must be done during the hours of business. The only legal evidence of presentment is an instrument of protest under the hands of a notary public, certifying that he presented the bill and protested it for non-payment or non-acceptance. The instrument of protest must specify that the bill was presented by the notary before two witnesses, whose names must also be inserted, although it is not necessary that they sign the instrument. It seems doubtful, however, how far the presentment by the notary's clerk is not sufficient; Stevenson against Stewart, &c. 14th November 1764, Fac. Coll. Mor. p. 1518. British Linen Company, 19th May 1807, supra. See also Bell's Com. vol. i. p. 319, et seq. 4th edit.

3. The bill being dishonoured, notice must be sent to the drawer and indorsers intimating the protest, and claim of recourse arising to the holder. This ought to be done in writing; but a verbal intimation is sufficient, provided the evidence of it be clear; Syme against Ferguson, 25th June 1813. The delivery of the notice into the post office, or into the hands of any regular carrier, is held in the English cases to be sufficient, although the receipt be denied; see Bell's Com. vol. i. p. 327, 4th edit. In regard to foreign bills, the statute 12 George III. c. 74, declares, "that
"notification of dishonour is to be made within such time as is required by the usage and custom of merchants." Mr Erskine's doctrine, that the notification must be made "within three posts at farthest," seems to rest on no authority, and it has been disregarded by the Court in the case of Carrick against Harper, 23d May 1790, Fac. Coll. Mor. p. 1614: In that case, the court seemed rather to sanction the rule established by the English decisions, which appears to amount to this, that the notice must be sent the next day, where the parties reside in the same place, and, if possible, by the next post, to those who reside at a distance.

The intimation with regard to inland bills is also regulated by statute. The act 12 Geo. III. c. 72, § 41, (made perpetual by 23 Geo. III. c. 81,) declares, "that it shall be sufficient to preserve recourse, if notice is given of the dishonour within 14 days after the protest is taken." This rule is sufficiently explicit. It is only necessary to observe, that English bills are not held to be inland in the sense of this act; Ferguson and Company against Belsh, 17th June 1803, Fac. Coll. Mor. App. voce Bill of Exchange, No. 13, where the bill was drawn in England; Reynolds against Syme, &c. 4th February 1774, Fac. Coll. Mor. p. 1598, where the bill was drawn upon England.

The notice must be sent to those indorsers against whom the person sending the notice intends to claim recourse. The party receiving the notice must intimate, without undue negligence or delay, in the same way, to any of the prior indorsers, against whom he wishes to secure his own recourse; and in questions amongst indorsers, it seems to be held, that a greater latitude may be taken, and that the fourteen days mentioned in the statute 12 Geo. III. c. 72, apply to notification to the drawer. Accordingly, in questions amongst indorsers, recourse has been held to be preserved, although the notification of dishonour was in one case made at the distance of nineteen days (Carrick, 23d May 1790, supra cit. Mor. 1614), and in another at the distance of seventeen days, and then by a charge of horning; Andrew against Adam, 2d June 1812. See
also Henderson against Duthie, 19th January 1799; Fac. Coll. Mor. App. voce Bill of Exchange, No. 7.

It is necessary to notify the dishonour to the drawer or indorsers notwithstanding the known insolvency of the acceptor; Bell's Com. vol. i. p. 331, 4th Edit. But neither notification of dishonour, nor protest is necessary where the drawer has no effects in the acceptor's hands; for in this case the drawer loses nothing by the want of intimation or protest; Hill against Menzies and Anderson's trustee, 5th June 1805, Fac. Coll. Mor. App. voce Bill of Exchange, No. 18. See Accommodation Bills. See as to prescription of bills, the title Prescription; as to discounting of bills, see Banker.

BILL CHAMBER, Bonds in. See Caution.

BILL CHAMBER, is a particular department of the Court of Session, for determining upon applications for warrant to expedite signet letters. The King's Signet in Scotland is placed under the direction and control of the Judges of the Court of Session; and it is in the form of letters passing under it, that all ordinary civil actions are instituted, or legal execution either against person or property authorised. Some of those letters, such as ordinary summonses, are allowed to pass the signet without any special warrant from the Court, but a variety of signet letters require the authority of the Court of Session to be interposed in the shape of a deliverance on a bill or petition as their warrant. (See Bills of Signet Letters.) These warrants are in the ordinary case granted of course; and signet letters are now so well regulated by the recognized forms and practice of the Court, that the deliverance authorising them to pass at the signet is sufficient if signed by the officiating clerk in the Bill-Chamber; 53 Geo. III. c. 64, § 17. Letters of suspension and advocation, however, are not allowed to pass without the special determination of the Court upon the reasons of suspension or advocation stated in the bill; and the deliverance on them must be signed by the judge officiating in the Bill-Chamber. See Advocation, and Suspension.

All bills praying for signet letters are presented at an office
named the Bill-Chamber; the clerks in which either themselves grant the necessary warrant in virtue of the act 53 Geo. III. c. 64, or they transmit the bill to the judge officiating in the Bill-Chamber for his determination upon its merits, before whom pleadings, either oral or written, may take place, after which he pronounces a judgment, either refusing the bill, or passing it, or remitting the case to the inferior judge. The decision of the Lord Ordinary officiating in the Bill-Chamber may be brought under review of the Court by petition; and the judgment of the Court thus sitting on Bill-Chamber causes may be brought before the House of Lords by appeal, in the same manner with their judgments in ordinary cases. It is almost exclusively in questions as to the passing or refusing of bills of suspension of diligence, or of advocation of the judgments of inferior courts, that these discussions in the Bill-Chamber take place; and it may be proper to add, that the result of such a discussion, however protracted, can only be the refusal or the granting of a warrant for expediting letters of suspension or of advocation; so that the introduction of a cause into the Court is all that is attained by the party who succeeds in getting such a bill passed; and, in general, even this advantage is not gained, unless caution be found to fulfil to the opposite party the decree which may be ultimately pronounced in the cause thus introduced. See Advocation, Suspension, Caution.

The Bill-Chamber is open at all times, both during the sittings of the Court of Session and in vacation; and by the 53 Geo. III. c. 64, § 2, it is enacted, that the junior judge in the Court of Session shall officiate permanently in the Bill-Chamber during the sitting of the Court; and the other judges, excepting the Lord President and the Lord Justice-Clerk, weekly by rotation, during vacation. Petitions against interlocutors pronounced by the Lord Ordinary in the Bill-Chamber during vacation, must be presented to that Division of the Court to which the Lord Ordinary belongs. And the statute provides that, at presenting bills to the permanent Lord Ordinary on the Bills during Session, the party shall mark upon the
bill the Division of the Court to which it is intended that the case shall go, in case the Lord Ordinary’s judgment is submitted to review.

In those services of heirs which were formerly in use to be conducted before the macers of the Court of Session, and which now, by 1st and 2d Geo. IV. c. 38, § 11, must proceed before the sheriff of Edinburgh or his substitute, it is necessary to present a bill at the Bill-Chamber, praying the Court of Session to grant warrant for a commission to the sheriff of Edinburgh to proceed in the service; and this bill, and the deliverance upon it, become the warrant for the commission to the sheriff of Edinburgh, which is issued from Chancery in the King’s name. See Jurid. Styles, vol. i. p. 365, 2d Edit. See also Briefe, Advocation of Briefes, and Service of an Heir.

By the bankrupt statute, 54 Geo. III. c. 137, § 66, it is enacted, that all applications under that act, which are directed to be made to the Court of Session, may be made to the Lord Ordinary on the Bills in the time of vacation, or during any recess of the Court, or while the Court is not sitting; and the Lord Ordinary on the Bills is vested with the full powers of the Court in all proceedings under that act, while the Court is not sitting, except that he cannot grant a discharge to the bankrupt, without a special remit from the Division of the Court to which the process of sequestration belongs.

BILL OF RIGHTS. The statute 1. William and Mary, stat. ii. c. 2, is so called from declaring the rights of British subjects.

BILL OF LADING, is an acknowledgement granted by the master of a ship to the shipper of goods, specifying the particular description of goods, and the quantity shipped. The bill of lading contains also an obligation on the master to deliver the goods so shipped at the port to which the vessel is bound, to a particular person named, or to his order, or to his assignees, on payment of the freight, &c. It is usual to sign three copies of the bill of lading, one for the buyer or consignee, another to go with the cargo, and a third for the seller or consignor, each bill containing a clause, that, one being
fulfilled, the rest shall be void. Bills of lading are invalid if not written on a proper stamp; Bell's Com. vol. i. p. 453, et seq. 4th edit. The bill of lading is transferable by indorsation without intimation to the master; and the property of the goods specified in the bill is transferred to the indorsee unaffected by any claim of retention of the goods on the part of the original seller, or any right in him to stop them in transitu. The master is bound to deliver the goods to the holder of the bill, or to the person who has acquired right to it by indorsation; Bell's Com. vol. i. p. 117, 4th edit. See the Form of the Bill of Lading, Jurid. Styles, vol. ii. p. 547, 2d edit.

BILL OF HEALTH, or SICK BILL, is the name given to the application by an imprisoned debtor under the act of Sederunt, 14th June 1671, for liberation on account of bad health. The debtor's sickness "and extreme danger of life," must be attested on oath under the hand of "a physician, surgeon apothecary, or minister of the gospel in the place;" and on such certificate being given, the magistrates are authorised to allow the party to reside during his sickness in some house within the town, they being always responsible in case he shall escape, and bound that, on his recovery, he shall return to prison. The practice in Edinburgh is, for the debtor to present a petition to the magistrates, accompanied by the proper certificate; and if they are satisfied, they pronounce an interlocutor finding him entitled to leave the jail, on his lodging a bond with sufficient caution that he shall remain within the jurisdiction of the magistrates, and return to prison on his convalescence. The question as to the nature of the security to be given for his return, must necessarily be one of circumstances; and it rather appears that the magistrates are not entitled to insist for unexceptionable caution, as that, in many cases, would amount to a total denial of the privilege. The only rule seems to be, that the magistrates must pay regard to the health of the debtor, and take such precautions as circumstances admit; and, where satisfactory caution is not found, it would appear, that they are bound to place a guard over the person of the debtor, so as to pre-
vent his escape. A prisoner liberated on account of bad health is not freed from restraint; he must be confined to a house within the town, unless his illness be such as absolutely to require air and exercise; and the time during which he has been out of prison, on a sick bill, may be computed as part of the month’s imprisonment necessary to entitle him to pursue a process of cessio bonorum. See Bell’s Com. vol. ii. p. 527, et seq. 4th edit.

BILL OF HEALTH, of a ship, is a certificate of the health of the crew, required where the vessel has come from a suspected port. Under the obligation in the charter party to furnish the ship “with every thing needful and necessary for the voyage,” the master will be bound to procure a bill of health, where that is necessary; and if, from a neglect to procure it when it might have been got, the vessel is prevented from delivering her cargo, the master or owners will be liable to make good to the freighter any loss thence arising. Bell’s Com. vol. i. p. 464, 4th edit.

BILL OF ADVOCATION, see Advocation.

BILL OF ADVOCATION to Court of Justiciary, is an application to the Lords Commissioners of Justiciary, precisely similar to the bill of advocacy to the Court of Session in a civil cause, praying that the proceedings in an inferior criminal court may be advocated, or brought under review of the Court of Justiciary. Instead, however, of expending the letters of advocacy, the practice is to debate and finally discuss the whole merits of the case upon the bill, as is sometimes done in civil causes in the Court of Session. During the litigation on the bill of advocacy, the personal presence of the parties is not required; but, after the bill is passed, the presence of both parties is necessary, as in an original criminal process in the Court of Justiciary. One Judge may pass a bill of advocacy, but two are necessary to refuse one. Hume, vol. ii. p. 498.

BILL OF SUSPENSION, see Suspension.

BILL OF SUSPENSION in Court of Justiciary. This (like the bill of suspension in the Court of Session) is an application to the Lords of Justiciary, after conclusion of a cri-
minal trial in an inferior court, to prevent execution of the sentence. The merits of the bill of suspension are judged of in the same manner with those of the bill of advocation; and in it also one Judge may pass the bill, but two Judges are required to refuse it. It is proper to observe here, (and the same observation applies to advocations of criminal processes) that, if the reason of suspension be, that the verdict of the jury is not warranted by the evidence, it will be disregarded by the Supreme Court; the only ground on which a verdict can be brought under review in this form being, that the inferior judge has admitted unlawful evidence, or has improperly circumscribed the proof; for these and similar grounds of complaint do not affect the Jury but the Judge, who has not afforded the Jury the legal materials for coming to a correct verdict. The Court of Justiciary, on the same principle, will judge of all objections which appear on the face of the verdict, or which arise from irregular proceedings on the part of the Jury. It will not prevent the suspension of a sentence that it has been already partly executed, Hume, vol. ii. p. 494.

BILLS OF SIGNET LETTERS, are the warrants necessary to authorise the keeper of the King's Signet in Scotland, to affix it to certain classes of the writs which pass that seal. All Signet Letters of the nature of diligences against the property or person, (with the exception of hornings on decrees of the Jury Court, which pass the Signet on a decree of that Court, as their warrant, 59 Geo. III. c. 35, § 19), must proceed on an immediate warrant from the Court of Session, interposed either in the shape of a decree, or of a deliverance, or interlocutor, on a bill, i. e. a petition praying for the letters. Signet Letters on decrees are said to pass "per decretum," and on bills ex deliberatione dominorum concilii. The following enumeration embraces the whole Signet Letters which require bills, viz. hornings on the decrees or precepts of all Judges, Supreme or Inferior, except the Court of Session, hornings even on decrees of the Court of Session when containing unusual clauses, e. g. a warrant to charge the debtor as
out of the kingdom, letters of open doors, ejections, captions; arrestments on unregistered liquid obligations, and on summonses before the Court of Session, loosing arrestments, inhibitions, lawburrows, supplements, suspensions, advocations, summonses of adjudication, summonses of reduction improbation, summonses of wakening and transference, summonses for interruption of the prescription of real rights, summonses of declarator of ultimus heres or bastardy, in general all summonses which require the concourse of the Lord Advocate, and all summonses where by practice the ordinary induciae can be shortened by authority of the Court. In most of these instances the necessity of a warrant in the shape of a bill and deliverance, is obvious from the nature of the case; and in the others it is required by practice on account of some peculiarity in the character of the letters.

In suspensions and advocations, and also in loosing arrestments when there is any pleading, the deliverance passing the bill must be signed by the Judge who passes it. In all other cases the signature of the Bill-Chamber clerk officiating for the time, is, by 53 George III. c. 64, § 17, declared to be sufficient. In cases where evidence of the statements in the bill is required to be produced with it, the deliverance is expressed "Fiat ut petitur, because the Lords have seen the precept," or other document produced in evidence; and the reason as expressed in the fiat on the bill, must be repeated in the signet letters, of which it is the warrant. In cases where such evidence is not required, and where the bill is passed of course, a simple fiat ut petitur is sufficient. At whatever time the letters are signeted, they must always bear the date of the bill on which they proceed. Bills bear at the end the name of a writer to the signet; but do not require to be signed, except in the case of suspensions or advocations, which must be signed either by a writer to the signet, or by an agent before the Court of Session. The bills remain of course in the signet office, and serve as the warrants also of any extracts of the letters which may be required. See Bill-Chamber, Signet Letters.
In the Court of Justiciary, when the process against the accused person is raised by *Criminal Letters*, a bill is presented to the Lords Commissioners of Justiciary, setting forth at large the tenor of the intended charge, and praying for criminal letters. Where the Lord Advocate is the sole prosecutor, this bill is signed by him, or by some one having his authority; and where the prosecution is at the instance of a private party, the Lord Advocate must subjoin his *concursus* at the bottom of the bill. One of the Justiciary judges gives a deliverance on the bill, which is the warrant for raising criminal letters, which pass the signet of the Court of Justiciary, and proceed in the King's name in the usual form, fixing a diet for trial, and authorising the citation of the party, witnesses, and jury. Where the prosecution is instituted by indictment at the Lord Advocate's instance, although no such warrant is necessary to authorise the indictment, yet an application to the Lords of Justiciary in the form of a bill is required as the warrant for letters of diligence for citing the party indicted, and the witnesses and jury. See *Hume*, vol. ii. p. 149.

In the practice of the Court of Admiralty, bills analogous to those of signet letters, are also necessary to authorise certain writs to pass the signet of that court.

**BILL OF EXCEPTIONS**, see *Jury Court*.

**BISHOPS**, the higher dignitaries of the church of Rome or of England. When the church government of Scotland was Episcopal, there were two Archbishops, the Archbishop of St Andrews and the Archbishop of Glasgow; the former had the title of *Primate of all Scotland*, the latter that of *Primate of Scotland*. Bishops were, by 1540, c. 125, nominated by the King, who sent to the chapter or clergy of the cathedral (see *Chapter*) a *conge de élire*, or a power to elect, at the same time recommending a particular churchman, whom it behoved them to choose. After being chosen by the chapter, he was called bishop-elect; and the king's patent, under the great seal, confirming the election, established in him a right to the
spirituality of the benefice. The King then granted a mandate for the consecration of the bishop, at which it was requisite that three bishops should officiate. The last step was that of doing homage, and swearing obedience to the King. These ceremonies being gone through, the bishop acquired full right to the fruits of his benefice from the day of his election.

Black Acts, are the acts of the Parliaments of the five Jameses, with those of Mary's reign, and of James VI. down to 1586 or 1587. They were called the black acts, from the circumstance of their being printed in the Saxon character.

Black Mail, was a yearly payment, for security and protection, made to those bands of armed men who, about the middle of the 16th century, laid many parts of the country under contribution. The legislature, with a view to put a stop to such unlawful violence, enacted, that whoever, under pretence of securing their lands against the rievers, should pay to them a yearly contribution in money, should suffer death, 1567, c. 21, 1578, c. 102.

It does not appear, however, that the punishment of death was ever inflicted, either on the payer or the taker of this exaction. Hume, vol. i. p. 473. See a singular example of a contract of black mail of so late a date as 1741, Hume, vol. ii. Appendix No. 8.

Black Rod. The gentleman usher of the black rod is chief gentleman usher to the King, and has his title from the rod which he carries as the badge of his office. His duty is to keep the chapter house door, when a chapter of the Order of the Garter is sitting; and, during the sitting of Parliament, he attends on the House of Lords. To his custody all Peers called in question for any crime are first committed. See Tomlins' Dictionary.

Blanch-Holding, is one of the tenures of the law of Scotland. The duty payable to the superior in blanch holding is in general trifling, as a penny Scots; or merely nominal, as a peppercorn, si petatur tantum. It may happen, however, that the duty is of greater value; and then the distinction received in practice is founded on the nature of the
duty: where it is of yearly growth, if it be not asked within the year, the right to exact it is understood to be lost; whereas, if it be not of yearly growth, it founds a claim at any time within the years of prescription. In Exchequer, the blanch-duty is always exacted; and, where it is not converted into money in the investitures, it is valued and ascertained. The casualties common to this and to feu-holding are non-entry, relief, disclamation, purprespure, and liferent escheat.—See these titles and also, Feu-holding.

This manner of holding was anciently in use; and many estates were held both of the Crown and of subjects-superior in blanch. On the abolition of ward-holding, by the 20th George II. c. 50, all the lands which held formerly ward of the Crown were converted into blanch holding; and, by the act 25th George II. c. 20, and his Majesty’s warrant under the privy-seal, January 1753, all lands held ward of the Prince were declared in future to be held blanch; and in this manner lands held by this tenure were much increased. But the tenure is now seldom adopted in the constitution of what is termed an original right. See Original Right.

Besides the estates held blanch in one or other of those ways, there is an alternative blanch-holding inserted in every disposition of sale, so as to enable the purchaser to constitute a base right, holding of the seller, capable of carrying the property of the subject sold as it stood in the seller. Infeftment on the precept of sasine, in a disposition containing the alternative holding, completes a feudal title in the person of the purchaser, who may afterwards complete his title with the superior, so as to come precisely into the seller’s place. See Base Right and Public Right.

BLANK BONDS, were bonds, formerly known in practice, blank in the name of the creditor. They passed like bills by mere delivery, the bearer being at any time at liberty to fill up his name, and pursue for payment. The ostensible reason, and perhaps the original one, of introducing these bonds into practice, was to save the expense of conveyances, and to facilitate the transmission of the right. But experience proved that
they were capable of being easily converted to fraudulent purposes; and, therefore, the act 1696, c. 25, declared all deeds in which the creditor's name is left blank to be null. But the insertion of the creditor's name, posterior to the delivery of the deed by the granter, must be proved in order to found the objection under the statute; Sinclair, 13th June 1746, Mor. p. 11,559; Ruddiman, 30th July 1746, Mor. p. 11,562. The statute excepts the notes of trading companies, and indorsations of bills of exchange. Ersk. B. ii. tit. 2, § 6.

BLASPHEMY, is the denying or vilifying of the Deity, by speech or writing. This is termed divine lese majesty, or treason against the Deity. A distinction is made between ascribing any thing inconsistent with the divine attributes of God, and oaths and imprecations tending to throw contempt on religion. The former crime was, under the old law, punishable by death; the latter by an arbitrary punishment proportioned to the circumstances of the offence. The acts 1661, c. 21, and 1695, c. 11, which provided capital punishment for offences of this description, were repealed by 53 Geo. III. c. 160. The punishment is now arbitrary at common law. As to offences against religion, see Hume on Crimes, vol. i. p. 559.

BLAZON, of a messenger-at-arms, the badge of his office displayed by a messenger in the act of apprehending a debtor. See Apprehending of a Debtor.

BLOOD-WITS, riots in which blood is spilt. The sheriff of the county and justices of the peace have a cumulative jurisdiction in judging of these offences. Ersk. B. i. tit. 4. § 4.

BONA FIDES. A bona fide possessor is a person who possesses a subject upon a title which he honestly believes to be good. A bona fide possessor, from whom the subject has been evicted by a person having a better title, will be entitled to retain the fruits or profits which he has received during his bona fide possession. This is an equitable rule, founded not only on the hardship of subjecting a person who has lived in the belief that the property was his own to a claim for repetition of
what he has drawn from it, but also on the negligence of the real proprietor, who has himself to blame for his delay to vindicate his property. A crop of corn belongs to the person by whom it has been bona fide sown; and, where the bona fides continues, until after the legal terms of payment of rent, the rent, although still in the tenant’s hands unuplifted, will belong to the bona fide possessor. Erskine (B. ii. tit. 1, § 26,) is of opinion that interest of money erroneously paid to a person bona fide believing himself the creditor, is in the same situation with fruits and rents; but the Court seem to have adopted a different rule; Oliphant against Smith, 30th November 1790, Fac. Coll. Mor. p. 1721.

Bona fides ends when the possessor becomes aware of the insufficiency of his title, whether by private knowledge or otherwise. But this is obviously a point which there must be considerable difficulty in fixing. When the defect of title is apparent at once, the execution of a summons for trying its validity will be held as a sufficient interruption of the bona fides. Where, however, the question of right is attended with difficulty, the interruption of the bona fides may not be held to have taken place until after litiscontestation, or even until a final decree in the action has been pronounced. The question, indeed, is evidently one which must depend on the special circumstances of the particular case. Ersk. B. ii. tit. 1, § 28 and 29. See Mala Fides; see also Adjunction.

BOND. A bond is a written obligation to pay or to perform,—and is, of course, as various in its nature as the circumstances vary relatively to which it may be granted. The most important bonds in Scotch practice are those of an heritable kind; but these, as well as the varieties of the personal bond, will be explained under other titles (see Heritable Bond, Disposition in Security, Bond of Corroboration, &c.); and the present observations shall therefore be confined to the simple moveable bond for repayment of borrowed money.

The style of this bond commences with an acknowledgment, by the granter, of the receipt of the money. The common and safe form in this part of the bond, is to declare that the money
has been "instantly" received. Sometimes the money is stated to have been received at a bygone period; but it is expedient if possible to avoid this form of expression, as it may expose the bond to reduction under the act 1696, in so far as it is a security for a prior debt. The stile then goes on to oblige the borrower, his heirs, executors, and successors, to repay to the lender and his executors, or assignees, (and sometimes to nominatim substitutes,) the sum lent, at a definite period, generally at one of the terms of Candlemas, Whitsunday, Lammas, or Martinmas, with interest from the time of advance, until repayment, and a fifth part more of the principal sum of penalty in case of failure. On this part of the deed, it may be observed, that as the granter may be succeeded by various descriptions of heirs, some of whom would by law be liable subsidiarie only, and in a certain order, it is not unusual to add to the terms "heirs, executors, and successors," the words "renouncing the benefit of discussion," which have the effect of rendering all the borrower's successors liable, conjunctly and severally, to the creditor, reserving of course to the person who pays, his relief against the heir primarily liable. The interest payable is generally the legal interest of 5 per cent, but, of course, it may be restricted to a lesser rate if the parties choose. Under the penalty in the bond, the creditor, on the debtor's failure in punctual payment, is not entitled to recover more than the actual expense or loss incurred in making the bond effectual; and it is not usual in moveable, as it is in heritable bonds, to annex any penalty to a failure in the termly payments of interest. The form of the bond concludes with a consent to registration, in order that letters of horning, on a charge of six days, may proceed against the debtor if he should fail to pay, and the deed is closed with the usual testing clause. See the form, Jurid. Styles, vol. ii. p. 21.

Moveable bonds, like other deeds, can, of course, be granted by one or more obligants who may bind themselves either jointly and severally, or pro rata only, or they may be granted by bodies politic,—and, like every other liquid obligation, may be made the ground of the diligence of adjudication against the
debtor's heritage. Moveable bonds are transferred by assignation. Since the date of the act 1661, c. 32, they descend in all cases to executors, and are taken up by confirmation. Prior to the passing of that act, when a bond bore interest, it was regarded as a quasi feudum, and held to be heritable in questions of succession. The statute, however, altered that rule, except only in so far as regards the rights of husband and wife, and the fisk,—that is to say, the principal sums in moveable bonds do not form part of the goods in communion, and did not fall under the single escheat before the abolition of that casualty. It is always practicable, however, to confer an heritable character on the bond, though it have no relation to a particular heritable subject, by merely making it payable to heirs, excluding executors; in which case, it necessarily becomes heritable by its own terms, and not because any heritable subject is impledged for the repayment. See Ersk. B. ii. tit. 2. § 9, et seq.

BOND OF CAUTION, is an obligation by one person as surety for another, either that he shall pay a certain sum, or perform a certain act. The terms of this bond must necessarily depend upon those of the principal obligation to which it is an accessory. In the ordinary case, the principal debtor, and the cautioner, are taken bound in the same deed, but it may happen that the obligation by the cautioner is undertaken in a separate deed. Separate bonds of caution are necessary in various steps of judicial procedure,—as in processes of suspension and advocation, in which, before the letters are expede, the suspender and the advocator must lodge in the Bill Chamber a bond of caution to the satisfaction of the opposite party, and of the clerk of the bills, containing an obligation on the cautioner to fulfil the decree to be pronounced in the cause, and to pay whatever damages or expenses may be awarded, (See Suspension and Advocation, also Caution.) Judicial caution is also required to be found in loosing arrestments, in law-burrows, by tutors and curators for the faithful discharge of their duty, and in many other instances which need not be enumerated here.
BOND OF RELIEF, is a bond by the principal debtor granted in favour of a cautioner, declaring the nature of the cautioner's obligation, and that it was undertaken solely for the benefit of the granter of the bond of relief,—who binds himself to relieve the cautioner from the consequences of his obligation. Sometimes heritable security is granted to the cautioner for his relief, or the friends of the principal debtor become bound along with him in the bond of relief. See examples of such bonds, Jurid. Styles, vol. i. p. 286, ii. p. 84, et seq. 2d edit.

BOND FOR A CASH CREDIT IN A BANK. Where heritable security is not granted to the bank, this is a simple personal bond by the person in whose favour the credit is granted, and his cautioners, who are in the ordinary case bound along with him as principal debtors to the bank. See an example of such a bond, Jurid. Styles, vol. ii. p. 31, 2d edit. As to the manner of granting heritable security for such credits, see Bank Credits.

BOND OF CORROBORATION. A bond of corroboration is an additional obligation granted by the debtor in a bond by which he corroborates the original obligation. This deed may be used, 1. For the purpose of accumulating arrears of interest into a principal sum, and adding it to the original debt, so as to make the whole bear interest. 2. Where the debtor in a bond dies, his heir may grant a bond of corroboration of his ancestor's debt, which will save the expense of constituting the debt against the heir. 3. Where the creditor in a bond dies, the debtor may grant a bond of corroboration to his heir, which will save the expense of a confirmation or of completing a title in the person of the heir. It may be thought, that, in those cases, the transaction would be simplified by cancelling or discharging the old bond and taking a new one; but, it is to be observed, 1. That an inhibition which might strike at a new bond, of the date of the bond of corroboration, may have no effect against the original bond; and, 2. That a bond of corroboration may fall under the act
1696, c. 5, in case the granter should become bankrupt within the sixty days; in which case, the original bond must be resorted to, or the debt must be constituted precisely as if no bond of corroboration had been granted. See examples of this deed, Jurid. Styles, vol. i. p. 290. ii. p. 36, et seq. 2d edit.

BOND of BOTTOMRY, is a real security over a ship, granted by the owner or by the master, for the repayment of money advanced for the outfit of the vessel, or for repairs. This form of security is in the nature of a contract of hazard, for the loan is repayable only in the event of the ship's safe arrival at the port of destination; and, in consideration of this risk, the lender exacts a certain rate of premium, greater or less, according to the risk. When bonds of bottomry are granted by the owner, to raise money for the outfit of the vessel, they are preferable according to the priority of their date. But when they are granted by the master in foreign ports, for repairs at different periods of the voyage, the last in date is entitled to priority in payment. It is proper to attend particularly to the description of the voyage, and to specify the ports at which the vessel is to touch, so as to avoid disputes as to the nature of the risk. See examples of this bond, Jurid. Styles, vol. ii. p. 534, et seq. 2d edit.

BOND of RESPONDENTIA, is a bond precisely similar in its nature to a bond of bottomry, except that the security is given over the goods on board of the vessel, instead of the vessel itself. See Jurid. Styles, vol. ii. p. 536, 2d edit.

BOND of PRESENTATION, is an obligation granted for behoof of a person in custody on a legal warrant, in order to obtain his temporary liberation. The obligant in such a bond, becomes bound to present the person so liberated to the officer holding the warrant, at a particular day and place. A failure to produce the debtor in terms of this obligation, will subject the granter of the bond in fulfilment of the obligation, for the non-performance of which the apprehension had taken place; e. g. to pay the debt where the debtor has been relieved from custody under a caption, or to produce the debtor at all diets of Court, where he has been freed from an arrest un-
der a meditatio fugae warrant. But although, independently of express stipulation, this is the legal consequence of undertaking such an obligation, it is usual, in formal bonds of presentation, to insert an express clause to that effect.

It will afford the obligant in a bond of presentation no defence, for his failure to implement his obligation, to allege that the debtor, during his temporary liberation, has obtained a sist on a bill of suspension; or has retired to the sanctuary; or has done any thing to evade the presentation, which he could legally have avoided doing, it being the very object of the bond to provide against acts of that description. On the other hand, it is equally clear, that the obligant is freed by the intermediate death of the debtor, and that he is entitled to have implement postponed on account of the debtor's sickness, or any other inevitable accident. It appears also to be clear that he is liberated by the debtor's imprisonment, previously to the time of presentation, on another warrant, for by that means the object of the bond is accomplished, and the creditor cannot possibly allege detriment. There is an old case indeed, (Potstead against Scot, 7th July 1681, Mor. p. 1807), in which the contrary was found; but the ratio of that decision, as stated in the rubric, viz. "that the being imprisoned for another debt was considered to be the act of the debtor," is evidently unsound both in law and in reason; and the judgment seems to be disapproved of by later authorities. See Bell's Com. vol. i. p. 297. 4th edit.

The most effectual form of the bond of presentation is a deed regularly tested and executed on a proper stamp, containing, besides the clause of presentation, a specific obligation on the granter, to pay the debt in case of failure to present, and a clause of registration on which the obligant may be immediately charged with horning, should he not duly implement the principal obligation. It is not uncommon in practice, however, to accept of a simple letter of presentation with a similar clause; but such a letter can afford a ground of action only, and is no warrant for summary diligence. Such a letter ought to be regularly tested; but an informality in this respect will seldom
affect its validity, for, if the debtor has been liberated on the faith of the letter, that will be held a sufficient rei interventus; and the objection that it is not regularly tested, will avail nothing; Dunmore Coal Company against Young, 1st February 1811, Fac. Coll.

BONDING OF GOODS, is the depositing of imported goods in the King's cellars, where they remain impounded for payment of the duties. The bonding system is regulated by the statute, 43 Geo. III. c. 132. under which the King's warehouse may be regarded as the warehouse also of the importer of the goods, where they lie at his risk and at his disposal, subject only to the King's pledge. It was at one time doubted in the Court of Session whether it was not necessary that the duties should be paid and the goods actually taken out of bond and delivered to the buyer, in order to complete the transfer. But it is now settled that whether the duties are paid or not, an order of delivery addressed to the keeper of the King's cellar, accompanied by notice to the keeper and a transfer in the cellar books, amounts to complete delivery. See Bell's Com. vol. i. p. 96 and 110. 4th edit.

BONORUM, CESSIO. See cessio bonorum.

BOOK DEBTS, are debts by open account. The proof of debts of this description may sometimes be attended with difficulty. The evidence of furnishings made by merchants and retail dealers is generally parole; and the creditor's books, together with the evidence of the delivery by his clerks or porters, will in the ordinary case be held sufficient. If delivery cannot be proved, it would seem that circumstantial evidence of various kinds will be admitted on the part of the creditor; and it has been held that the books of a regular merchant afford a semiplena probatio, to the effect of allowing the claim to be supported by the evidence of a single witness and the oath of the merchant in supplement. Bell's Com. vol. i. p. 250. 4th edit.

BOOKING OF A PRISONER FOR DEBT. When a debtor has been apprehended and carried to prison, the amount of the debt for which he is incarcerated, and the prisoner's name, are recorded in the jail books, which is termed book-
ing the prisoner. This record was originally introduced by the magistrates in order to inform themselves of the amount of their responsibility, and it is the jailor, not the creditor’s, duty to see the proper entry made. At present it is the practice to enter the whole sum of debt, and to pay a proportional fee to the jailor, though formerly the creditor was safe in entering only a part of it, and arresting the debtor in prison for the remainder. By the former practice, a debtor, after being once entered, could not be liberated without obtaining letters of relaxation and liberation from the King, after intimation to the creditor, and a charge to the magistrates to set him at liberty; but now, if the debtor can pay his debt as it stands in the prison books, he is free. Bell’s Com. vol. ii. p. 523, 4th edit.

BOOKS OF ADJOURNAL; the records of the Court of Justiciary.

BOOKS OF SEDERUNT; the books in which the acts of sederunt of the Court of Session are recorded. Besides the acts of sederunt, these books contain the names of the Judges present at each meeting of the Court, the dates of the admission of the Judges, Clerks of Session, and other Officers of the Court, Advocates, &c. Formerly, indeed, most of the public papers of importance were recorded in these books; and even matters totally unconnected with the business of the Court, such as eclipses and other remarkable events. See M’Kenzie’s Obs. on Stats. p. 164.

BORDER WARRANT, is a warrant issued by the Judge Ordinary, on the borders between Scotland and England, on the application of a creditor, for arresting the person or effects of a debtor residing on the English side of the border, and detaining him until he find caution judicio sisti, (i.e. that he shall sist himself in judgment), in any action which may be brought for the debt within six months. The creditor applying for such a warrant must swear to the verity of the debt; and as in meditatio fugae warrants, to which these warrants are analogous, it is necessary to examine the debtor as to the fugae before warrant to incarcerate is granted, so in border warrants it seems to be proper to examine the debtor as to his domicile, &c. before

BORROWING, is the act of receiving in Loan. Contracts of loan are of two kinds, viz. mutuum and of commodate. The former of these comprehends the loan of such subjects as are either consumed or given away in the very act of using them, as in the case of corn, wine, money, &c.; the latter is that kind of loan in which the borrower is bound to restore the individual subject lent, and therefore nothing can fall under it which may be either destroyed or alienated. See Loan, Mutuum and Commodo.

BOROUGH LAWS. This name is given to a collection of ancient laws relative to Burghs. These laws are not considered as of a binding power, but are still of use in tracing ancient manners and customs; Ersk. B. i. tit. i. § 36.

BOTTOMRY, Bond of. See Bond of Bottomry.

BREACH of ARRESTMENT, is an act of contempt of the law, committed by an arrestee disregarding the arrestment used in his hands, and paying the sum, or delivering the goods arrested, to the common debtor. The person guilty of breach of arrestment was formerly exposed to a prosecution both civil and criminal. The criminal action was competent either before the Court of Session or the Court of Justiciary; the punishment was an arbitrary one, joined to escheat of moveables, out of which the debt of the arrestee and damages were given. This, however necessary at a remote period, has not been exemplified in modern practice. The civil action is for payment of the debt a second time by the arrestee, and for damages to the arrester, though even this rigour is not countenanced by modern practice; and the only consequence of breach of arrestment now, is that the person guilty of it is liable in damages to the extent of the funds paid away, and the expenses; Grant, 27th February 1792, Fac. Coll. Mor. p. 786. See also Arrestment. Where goods are arrested, and the arrestment loosed on caution, if the goods cannot be restored, the cautioner is held to be liable for the debt.
BREAKING INClosures, &c. There are several statutes for the encouragement of planting and inclosing; and, with that view, not only are advantages held out to those who comply with the directions of the statutes, but punishment is denounced against those who destroy planting or break inclosures. Thus the act 1661, c. 41, ordained every heritor possessed of land, of which the valued rent is £1000 Scots, to inclose four acres of land yearly, and plant the same with oak, elm, ash, plane, saugh, or other timber, for the space of ten years then next; certain immunities from taxation were conferred on the lands so inclosed; and it was ordained, "that who ever shall break down the hedges or dikes of the said parks or inclosures, or be found within the same, being a stranger, shall be holden and repute a breaker down thereof, and shall pay five pounds for every fault," or work ten days for meat and drink only; and the heritors and tenants, &c. shall keep their cattle and goods out of their neighbours inclosures, under the penalty of five pounds for ilk contravention, toties quoties. This act was ratified by the act 1685, c. 39, which enacts farther, that no person shall cut, break, or pull up any tree, or peel the bark off any tree, under the pain of £10 Scots for each tree within ten years old, and £20 Scots for each tree above the age of ten, &c. And it also ordained, that no person shall break down or fill up any ditch, hedge, or dike, whereby ground is inclosed, and shall not leap, nor suffer their horse, nolt, or sheep, to go over any ditch, hedge, or dike, under the pain of £10 Scots, toties quoties; the one-half to be given to the heritor, the other half to the mending of the highways. And, by the act 1686, c. 11, winter-herding is enforced, by which all heritors, life-renters, tenants, cottars, and others possessors of lands and houses, shall cause herd their horses, nolt, sheep, swine, and goats the whole year, as well in winter as in summer; and in the night time shall keep the same in houses, folds, or inclosures, so as they may not eat and destroy their neighbours grounds, woods, hedges, or planting; certifying them that they shall be liable to pay half a merk for ilk beast they shall have going on their neighbours ground,
besides the damage done to the grass or planting. And it is declared to be lawful to the possessor of the ground to detain the said beasts until he be paid of the said half merk for ilk beast found upon his ground, and his expense in keeping the same.

BREAKING OF PRISON, is the crime of escaping out of prison. In order to constitute this crime, it is necessary that the person guilty of it shall have escaped out of a legal prison, in which he was confined on a legal warrant, whether as a criminal, or as a person accused of a crime, or as a debtor. It makes no difference whether the offence has been committed by violence or by corrupting the jailor. The punishment is arbitrary, and must necessarily be regulated by the circumstances attending the commission of the crime. Hume, vol. i. p. 395.

Where a debtor makes his escape, the magistrates will be liable for the debt, whether the insufficiency of the prison or the carelessness of the jailor has led to the escape. But if the debtor escape in the night time, by the use of instruments, or by open force, or by any accident which cannot be justly imputed to the magistrates or the jailor, Mr Erskine holds that they are not liable, if they can prove that, immediately on the escape being discovered, they made all necessary search for the debtor; Ersk. B. iv. tit. 3. § 14. It follows that the magistrates are not liable if the escape has been effected by superior external force; but the onus probandi lies with the magistrates to prove such force, as well as their own vigilance, and their prompt pursuit of the debtor. Bell's Com. vol. ii. p. 525, 4th Edit.

BREVE TESTATUM. The breve testatum was an acknowledgement in writing, which, by the ancient practice, was made out on the lands at the time of giving possession to the vassal, and attested by the seals of the superior, and pures curiae; afterwards the breve testatum was signed by the superior wherever he happened to be, and possession was given separately by the superior's bailie; Ersk. B. ii. tit. 3. § 17.

BREVI MANU, is an expression used to signify the performance of an act by a party on his own authority.
Thus, for example, it was anciently the practice in Scotland for an heritable proprietor, on his own authority, to point his tenant's moveables, for payment of his rent, without applying to any other judge. The landlord, in like manner, exercised the power of brevi manu removal, when his tenant refused to remove at the stipulated term. The practice of pointing or detaining cattle found trespassing seems to be a remainder of the brevi manu pointing. Some interesting historical details on this subject will be found in Ross's Lectures, vol. i. p. 385.

BREWING. Anciently the right of brewing was given by a licence from the superior, and there was generally a clause in the charter cum brueriis. But neither this clause nor a licence is now held to be necessary to entitle a feuar to brew for his own use. But a person with a right of barony may prevent a feuar or a stranger from importing and vending ale within the barony without his licence; Ersk. B. ii. tit. 6. § 8.

BRIbery, is the offering or taking of a reward, unduly to influence the conduct of the person receiving it in the exercise of his duty. This is an offence of peculiar atrocity when it extends to the administration of justice. The punishment of the crime, when committed by a Judge of the Court of Session, is infamy, loss of office, confiscation of moveables, and an arbitrary punishment in the person; 1579, c. 93. And there are many enactments directed against inferior judges who may be guilty of this offence: See Hume, vol. i. p. 401. See also Baratry. As to bribery at elections for Members of Parliament, see article Election Laws.

BRIEVE. A briefe is a writ issuing from Chancery, in the name of the King, addressed to a judge, ordering trial to be made by a jury of certain points stated in the brief. These writs seem at one time to have been the foundation of almost all civil actions in Scotland; (Stair, b. iv. tit. 1, § 2,) but it is in the service of heirs, the election of tutors to minors, the cognoscing of lunatics or of idiots, and the ascertaining the widow's terce, and sometimes in dividing the property belonging to heirs portioners, that briefes are now in use. The
briefe of perambulation, which was in use long after the institu-
tion of the Court of Session, and even till lately, by which all
questions relative to marches were settled, is now supplied by a
declaratory action; and the apprising of land, which proceeded
before a jury, was converted into an action before the Court by
the summons of adjudication. See Adjudication. The briefes
which have been retained shall be shortly explained.

Brieve of Inquest.—The principal object of this briefe is
to require the judge to whom it is directed, to ascertain by a
jury whether the person who applies for it is heir to a person
deceased. It is executed edictally by the officer of the judge
to whom it is directed; and fifteen days must elapse between
the date of executing or proclaiming the briefe, and the ser-
vice. The jury is not now summoned; it may be taken
without any previous intimation, and consists, according to
modern practice, of fifteen persons. The inquest being set,
in presence of the judge, the heir presents his claim, with
the briefe and executions. He must also produce the ne-
necessary evidence of the heads of the briefe which he is
called on to prove. Having proved or verified his claim, the
inquest or jury serve the claimant heir in the particular charac-
ter claimed and proved; and their sentence is attested by the
judge, and retoured by the clerk of the court to Chancery, from
which an extract properly authenticated is obtained, termed an
extract retour of the service.

The briefe remains in every case the same, excepting in the
description of the character of heir; but the points or heads of
the briefe are differently answered in the general and in the spe-
cial service. In the general service, the two first heads, viz.
whether the ancestor died at the faith and peace of the king,
and whether the claimant be his next and lawful heir, are alone
answered. The death of the ancestor must be proved; That
he was not a rebel is presumed; And the relationship of the
claimant, in its whole chain of connexion, must be proved,
though the retour is general, finding the person nearest and law-
ful heir of the deceased. Where any connexion can be proved,
it is deemed the nearest existing, and will exclude the King as ultimus heres.

This general service carries every personal right to heritage that was vested in the ancestor. But it may often happen that a subject is vested in the ancestor by a personal right, destined to a particular description of heirs. In that case, a general service as nearest and lawful heir of the ancestor will not carry the property destined to a particular description of heirs; and it becomes necessary to serve the claimant as heir of provision or of entail. In that case, care should be taken to describe him as heir under the particular deed on which his claim is founded; it ought to be described in his claim, and produced to the jury. This is called a service in general.

The effect of this service, whether a general service, which carries all personal heritable rights destined to heirs whomsoever, or the service in general, which carries the personal heritable rights destined to a particular description of heirs, is to carry to the heir a full right in the estate, which, in the event of his death without completing his title farther, makes the property descend to his own heir.

In the special service, the claimant proves not only the death of the ancestor, but that he died vested and seised in certain lands. This is done by production of the ancestor's charter and seisin. The whole other heads of the brieve are also answered. Thus, the third head is, Of whom the lands are held? This is proved by the ancestor's infeftment. 4. By what tenure? This is also proved by the investiture. 5. The old and new extent of the lands is inquired into; these are proved by former retours of the same lands, or by a comparison of the extents of other lands in the neighbourhood with the rents of those lands, and the rents of the lands to which the heir is to complete his title; and a calculation, proportioning in this way the old and new extents of the lands retoured, certified under the hand of an accountant, will be received as evidence. 6. Whether the claimant be of lawful age? This is presumed. 7. In whose hands the fee has been since the death of the testator? On this head, if there has been a liferent, the deed
by which the right was constituted is produced, and will have the effect of excluding the non-entry.

Where the lands lie in different counties, or the Judge Ordinary is incapacitated from nearness of relationship to the claimant, the special service was, until lately, conducted before the macers of the Court of Session, under a special commission directed to them from Chancery. But by stat. 1 and 2, Geo. IV. c. 38, § 11. (1821) it is enacted, that the services in use to be conducted before the macers, shall proceed before the sheriff-depute of Edinburgh, or his substitute, as sheriff in that part, specially constituted by a commission to be obtained under a warrant from the Court of Session, in the same manner that the commission to the macers was obtained under the former practice. See the provisions of the statute, and the proceedings in the special service explained more fully under the title Service of an heir.

Brieve of tutory.—The object of this brieve is to serve the nearest agnate tutor as at law. It is issued from Chancery, in the King’s name, and is directed to any judge. The heads of it are, 1. Who is the next male agnate of the full age of 25 years, and entitled to succeed to the pupil on his death. 2. Whether the agnate be attentive to his own affairs. 3. Whether he is able to give security for the pupil’s indemnification. 4. Who is the next cognate. The first of these heads only is inquired into. (See Tutor.)

Brieve of Idiotsy and Furiosity.—The forms of these briefs are very much the same. They are directed to the judge ordinary of the bounds within which the person to be cognosced resides; and the jury are directed to inquire, 1. Into the state of the person. 2. Who is the next male agnate on whom the office of curatory may be conferred. In the brieve of idiocy, the direction is to inquire whether the person be of an unsound mind, furious, and naturally an idiot. In the brieve of furiosity, it is, whether he be of an unsound mind, prodigal and furious, viz. who has neither time nor measure in his expenses, but squanders his estate by profusion,—“qui neque tempus nec modum impensarum habet, sed bona di- lacerando profundit.”
Brieve of Terce — The object of this brieve is to cognosce the widow to her terce. It is directed to the sheriff of the county where the lands lie; and the jury are directed to enquire, 1. Whether the claimant was the lawful wife of the deceased; and this is presumed, if she was habit and repute his wife. 2. Whether the husband died infest in the lands; and this is proved by production of the husband's sasines. This is not a retourable brieve. The sentence of the jury serves the widow to her terce; and it is the duty of the judge to "ken" her to it, by dividing the lands between her and the heir. See Terce.

Brieve of Division amongst heirs Portioners.—An heir portioner who wishes to separate her share of the lands to which she succeeds, from that belonging to another heir portioner, must apply to Chancery for a brieve directed to the sheriff of the county in which the lands lie. This brieve is proclaimed at the market-cross, and also served upon the parties concerned; and, at the diet appointed, the rights and allegations of the parties being settled, the Judge remits to an inquest of fifteen persons to measure the land and make a division. The jury report to the Judge; and lots being cast for the different shares, the Judge decrees in the division, and ordains possession to follow in terms of it. An extract of the decree is held conclusive, and may be enforced by the authority of the Judge. This form is now but seldom resorted to, the parties in general settling the matter extrajudicially by arbitration or otherwise; Jurid. Styles, vol. i. p. 417.

BRITISH STATUTES, are the statutes of the British Parliament. Formerly all British statutes were held to be of the date of the first day of that session of Parliament in which they were made: But now, by 33d Geo. III. c. 13, it is enacted, that, from and after April 8. 1793, the clerk in Parliament shall endorse in English, on every act, the time when it receives the royal assent; which is declared to be the date of its commencement, unless another period of commencement be mentioned in the body of the act.
BROCAKE, is properly the hire or commission due to a bro-
er for managing a transaction. Brocage contracts (as they are
termed), by which a reward is stipulated for the promotion of
a particular marriage, by means of influence to be exerted over
one of the parties, are held to be contra bonos mores, and can
afford no ground of action; Bell's Com. vol. i. p. 235.

BROKER. A broker is a person who negotiates sales of
goods and other mercantile transactions as agent for another,
for which he exacts a certain fee or reward from the party for
whom he acts. See Factor.

BULL, a brief or mandate by the Pope. By 13 Eliz. c. 2,
the procuring, using, or publishing bulls is declared to be high
treason; and by 7 Ann. c. 21, § 1, 2, 3, the English treason
laws are extended to Scotland.

BURDENS. In a general acceptation the word burden
may signify any restriction, limitation, or encumbrance affect-
ing either person or property. In the present article, however,
the term is to be considered as applicable solely to burdens in
money, imposed either on the receiver of a right or on the sub-
ject of the right itself, in the deed by which the right is con-
stituted. Burdens in this sense are said to be either personal
or real. Where the grantee is taken bound by acceptance of
the right to pay a certain sum either to the grantor or to a
third party; but where there is no clause charging the sub-
ject conveyed with the sum, the burden is said to be personal;
that is, it will be binding upon the receiver and his representa-
tives, but will constitute no real incumbrance on the lands, or
other subject conveyed, nor amount indeed to any thing more
than a mere personal obligation on the grantee. But where
the right is expressly granted under the burden of a specific
sum which is declared a burden on the lands themselves, or
where the right is declared null if the sum be not paid, and
where the amount of the sum and the name of the creditor in
it can be discovered from the records by having entered the in-
strument of sasine, the burden is said to be real.

Where the burden amounts to nothing more than a mere per-
sonal obligation on the receiver of the right, there can be little
difficulty either as to the mode of constituting or of exercising it.
But there are several points in regard to the constitution and
effect of real burdens which deserve attention. In order to
create a real burden, it is necessary, 1st, To declare the debt
imposed, or to be imposed, to be a burden on the lands them-
selves. Where the burden is laid upon the dispoence merely,
and not upon the lands, even although the conveyance should
bear expressly to be granted and accepted under that condition;
or, although the condition should be appointed to be engrossed
in the infeftments, the debt will form no real burden. But
where the right is declared void in case the sum be not paid, it
is held to be a real burden. 2d, The next essential is, that the
debt be properly expressed as a burden on the lands, in the dis-
positive clause of the conveyance. This clause is the criterion for
determining the character of the burden, and it is only in case
of ambiguity in the dispositive clause, that other clauses, or
particular expressions in the deed, will be admitted to explain
the nature of the burden. 3d, In order to render the burden
effectual against the creditors of the dispoence, it must be ex-
pressed and incorporated in the sasine, so as to enter the re-
cord. A general reference in the sasine to the burdens as
appearing in the disposition, or other conveyance, was at one
time held sufficient; but a contrary rule has been established
by more recent decisions. It is proper to observe, however, that,
while the dispoence remains uninfest, the burden, if properly ex-
pressed as a real burden, will be effectual against him and his
creditors as a qualification of the personal right. Lastly, As no
indefinite and unknown incumbrance can be created on land, it
is necessary that, both in the disposition and in the sasine, the
burden should be specific in its amount, and in the name of
the creditor, in order that creditors contracting with the dis-
poence may know the extent of the burden, and whether or not
it has been paid or extinguished. A clause charging the lands
disposed with the disponent’s debts, in general terms, was
formerly held sufficient to constitute the debts real burdens;
but the contrary is now settled, although it need hardly be
added, that such a clause lays the disponee, who accepts the right so qualified, under a personal obligation to pay the disponent's debts.

Keeping the foregoing essentials in view, the terms in which a real burden may be imposed are various. Thus the disponent may expressly burden the lands conveyed with a sum payable to himself,—or he may create a burden in favour of a third party,—or he may reserve either to himself, or delegate to a third party, a power or faculty, as it is termed, to impose a real burden on the lands. (See Faculty to Burden.) And with regard to reserved burdens generally, it may be observed, that the real security which they afford depends on the disponee's sasine. A distinction has been sometimes made between burdens reserved in favour of the disponent, and those created by him in favour of a third party; and, it has been said, that, in the former case, the disponent's original infestment constitutes the security. But there seems to be no good ground for such a distinction. The right under the burden, is not a right of property, but in security merely, depending for its existence on the existence of the debt. A general service has been held a sufficient title in the heir of the disponent to discharge such a burden (Cuthbertson against Barr, 7th March 1806, Fac. Col. Mor. App. title Service and Confirmation, No. 2); and the principle on which the security depends, applies equally to the case where the burden is reserved in favour of the disponent, and to that in which a third party is made the creditor. In neither case is it necessary to complete the transference of the real security, as in the case of an heritable bond, by sasine. It seems also now to be understood in practice, that a simple assignation intimated to the holder of the burdened infestment is a proper transference of the burden to the assignee; and although such assignations are frequently recorded in the register of sasines and reversions, there does not appear to be any ground for preferring an assignation so recorded to a first assignation duly intimated, although not recorded. Whether the burden be reserved in favour of the disponent, or of a third party, a general
service transmits the burden to the heir of the creditor. Bell's Com. vol. i. p. 589, 4th Edit. and addenda to vol. i. p. 658.

The creditor in a real burden may make his right effectual, 1st, By pointing of the ground (see Pointing of the Ground.) 2d, By adjudication, without which the creditor has no means of entering into possession, and no title to pursue an action of maills and duties; Stair, B. ii. tit. 10. § 1. Although the burdened lands have been sold to another, and although the purchaser be not personally liable for the debt, yet the creditor may adjudge the lands to the extent of the burden. With regard to the ranking of debts secured by real burdens, it is to be observed, 1st, That, if the burden is properly laid on the lands, the creditor in it is preferable to the creditors of the disponee, whether the disponee be infest or not. 2d, Where the creditor in the burden is a third party, he is preferable to all posterior debts of the disponent, from the date of the infestment in the disponee's favour; and that although the disponent may have given heritable securities to the posterior creditors, because no debt posterior to the disposition and infestment can compete with a debt made real by them. 3d, In a competition between the creditors of the disponent, who creates the real burden, the preference of the creditor in the burden will probably depend on the date of the infestment in the disponee's sasine, seeing that the disponent is not fully divested, until the infestment of the disponee. 4th, In a competition between the creditor in the real burden, and the creditors of the disponee, the preference of the creditor in the burden will be complete, whether infestment has followed on the disposition or not; the burden being a qualification of the right, whether it remains personal, or is made real by infestment. 5th, In questions of preference amongst one another, on a shortcoming of funds, the creditors in real burdens will be preferable according to the date of the diligences which they have used to make the burdens effectual. The proper diligence to afford a title in such competition seems to be adjudication; and those burdens upon which adjudication has been used will be preferred to those which have not
been adjudged for; Creditors of Ross, 30th June 1714, Mor., p. 10,243.

The creditor in a real burden may validly transfer it by assignation intimated to the debtor; and such an assignation of the personal claim of debt will carry with it the real burden as an accessory. In a late case, the Court held that "the real burden or security not being followed by infestment, nor capable of it, could be validly transferred by disposition and assignation duly intimated and recorded in the register of sasines." But, although the recording of the assignation in the register of sasines is mentioned in that particular case, it does not appear to have been held essential; and certainly this is not a deed which the act 1617, c. 16, requires to be recorded in the register of sasines. See Miller against Brown, 7th March 1820, noted, Bell's Com. vol. i. p. 658, 4th edit. The proper diligence for attahching the right of the creditor in the real burden seems to be adjudication. And when the burden is paid off, the proper evidence of its extinction, is a discharge and renunciation by the creditor in the burden, recorded in the register of sasines, &c. With regard to personal burdens, which resolve into mere personal obligations on the dispence, it is almost unnecessary to observe, that they may be validly conveyed by an intimated assignation, and that the creditor's right in them may be attached by arrestment. See on the subject of this article, Stair, B. ii. tit. 3, § 54, et seq. and tit. 10, § 1. Ersk. B. ii. tit. 3, § 49, et seq. Bell's Com. vol. i. p. 585, et seq. 4th edit. See Faculty to Burden.

BURDENS, PUBLIC, see Public Burdens.

BURGAGE HOLDING, is that tenure by which the property in royal burghs is held under the king. It is originally constituted by a charter from the crown in favour of the burgh; the effect of which is, to make every proprietor of property situated within the burgh, hold that property directly under the king as superior, for the reddendo (now merely nominal) of watching and warding; or, as it is commonly termed, "service of burgh, used and wont." The title of a dispence to burgage property,
proceeds on a resignation made by delivery of staff and baton (see Act of Sederunt, 11th Februraray 1708) in the hands of the magistrates, in virtue of a procuratory granted by the vassal last infeft, and followed by an immediate infeftment given by the magistrate in favour of the disponee, without the inter-
vention of any precept or charter by progress. The title of an heir in burgage subjects is completed sometimes by a pre-
cept of clare constat and infeftment, but much more frequent-
ly by a single act, called a cognition and sasine; the magis-
trate appearing on the ground, and taking a proof of the heir's propinquity, and afterwards giving him infeftment as heir, under the usual salvo jure cujuslibet. An adjudging cre-
ditor is infeft at once in burgage property on producing his decree of adjudication. When the title is merely per-
sonal (i.e. an unexecuted procuratory of resignation), the disponee, heir, or adjuder, obtains right to it in the ordinary form, used in similar cases, and infeftment is then given to him in the manner above explained. As these infeftments are of the nature of charters, and are the only evidence of the in-
terposition of the superior, it is properly the duty of the town-
clerk to expedite them; and this is enjoined by the act 1567, c. 27. And by 1661, c. 11, these sasines are ordained to be recorded within 60 days of their dates in a particular regi-
ster kept by the town-clerk for the burgh.

The proper vassal in burgage holding being the whole com-
munity, which, in a legal sense, never dies, the casualties of non-entry, relief, &c. are not known in this holding. There is no widow's terce due from burgage subjects. The nature of the holding also properly excludes subinfeftations, although a base infeftment in an annual rent out of burgage property, given by a bailie of the burgh as bailie in that part, and the town clerk as a common notary, has been held effectual; Bennet, 5th July 1711, Mor. p. 6895. See also Bell's Com. vol. i. p. 581, 4th Edit.

The King, in granting the charter of the burgh, cannot prejudice the rights of other superiors, so that it sometimes
happens that property situated within the limits of the burgh is not held by this tenure; nor does property acquired by the burgh, subsequently to the date of the charter, fall under this holding, except by a new erection.

BURGESS, is a member of the corporation of a burgh, admitted either by the charter of erection, or by birth, as being the son of a burgess, or by serving an apprenticeship to a burgess, or by marrying the daughter of a burgess, or by election by the magistrates of the burgh. The oath taken by a burgess on admission is to the following effect: "I confess and allow, with my heart, the true religion presently professed within this realm, &c. I shall be leal and true to our sovereign lord the King's Majesty, and to the provost and bailies of the burgh; I shall obey the officers thereof, fortify, maintain, and defend them in the execution of their offices, with my body and goods; and I shall not colour unfreemen's goods under colour of my own: In all taxations, watchings, and wardings to be laid on the burgh, I shall willingly bear my part thereof, as I am commanded by the magistrates: I shall not purchase nor use exemptions to be free thereof, re-nouncing the benefit of the same for ever: I shall do nothing hurtful to the liberties and commonweal of the burgh: I shall give the best counsel I can, and conceal the counsel shown to me: I shall not consent to dispone the common goods of the burgh, but for a common cause and a common profit: I shall make concord where discord is, to the utmost of my power: In all lineations and neighbourhoods I shall give my leal and true judgment but prayer or reward."

On making this oath and paying the dues of admission, the burgess receives an extract of the act of his admission, under the hand of the town clerk. The heir of a burgess has a right to heirship moveables; Ersk. B. iii. tit. 8. § 17.

BURGH, ROYAL. A royal burgh is a corporate body erected by a charter from the Crown. The corporation consists of the magistrates and burgesses of the territory erected into the burgh. The magistrates are generally a provost and
bailies, dean of guild, treasurer, and common council, who are elected according to the particular set or constitution of the burgh. By stat. 1663, c. 6, the provost and bailies of royal burghs have power to value and sell ruinous houses when the proprietors refuse to rebuild or repair them; and many enactments are to be found in the acts of the Scots Parliaments, regulating the trade in royal burghs, and defining the privileges of the magistrates and burgesses; See Kames's Stat. Law abridged, art. Burgh Royal. The criminal jurisdiction of magistrates of royal burghs is now very much limited. They may judge in petty riots; and Edinburgh, Stirling, Perth, and some other royal burghs, have by their grants a cumulative jurisdiction along with the sheriff, in blood-wits. The eldest magistrate of every royal burgh has, since the Union, been named in all the commissions of the peace. The magistrates have right, with consent of the majority of the burgesses, to impose certain small taxations or duties on the inhabitants, for the use of the burgh, and they have also the power of proportioning some of the taxes imposed by Parliament; Ersk. B. i. tit. 4. § 22.—Mr Ivory's edit. note 104. A convention composed of commissioners from each of the royal burghs meets annually at Edinburgh, with power to make regulations for promoting the trade and common weal of the burghs, and to inquire how their annual revenues have been applied. But the care of the revenues of royal burghs belongs properly to the Crown, and neither the convention nor any private burgess or number of burgesses, have any title to call the magistrates to account for their administration of the revenue of the burgh, or even to complain against special acts of mismanagement or peculation. Ersk. ib. § 23, Mr Ivory's edit. Note, 105. There are 66 royal burghs in Scotland; and, by the treaty of Union, it is provided that 15 of the 45 representatives of Scotland in Parliament shall be returned by the royal burghs; of these 15 Edinburgh elects one, and the other royal burghs are divided into fourteen districts, from each of which a member is returned to Parliament, according to a well devised system of rules.
and regulations for preserving the elections as pure as possible. See article Election Laws.

BURGH OF BARONY and BURGH OF REGALITY. A burgh of barony, or a burgh of regality, is a corporation analogous to a royal burgh, consisting of the inhabitants of a determinate track of ground within the barony erected by the king, and subjected to the government of the magistrates. The right of electing magistrates is vested by the charter of erection sometimes in the baron or the lord of regality, the superior of the barony, and sometimes in the inhabitants themselves; and whatever jurisdiction belongs to the magistrates, the superior's jurisdiction is cumulative with it. The same rule holds in burghs of regality, both in regard to the manner of incorporating them, and as to the superior's cumulative jurisdiction. See Ersk. B. i. tit. 4. § 30. Mr Ivory's edit. note 108. Burghs of barony or of regality, as such, have no representatives in Parliament.

BURDENSECK, is the name given to the provision of our ancient law, by which, it is said, that a man was not punishable for the theft of as much meat as he could carry on his back, provided the theft was committed to satisfy the cravings of hunger. There is some difference amongst authorities both as to the justice of this rule, and the extent of its application; and it is now understood to be settled, that it is not recognised in the law of Scotland; Hume, vol. i. p. 54.

BURGLARY, is an English law term, signifying the breaking and entering the dwelling-house of another in the night-time with the intention to commit theft, or any other felony, whether the felony be completed or not. See Tomlin's Law Dict. See Housebreaking, Theft, Stoutheart.

BURIAL PLACE. A burial place may be the subject of sale; and, when belonging to a landed proprietor, it passes as part and pertinent of the estate.

BURSARY, is the name given to an endowment or exhibition in a Scotch University, for the support of a student.

BUTCHERS. By the present practice, butchers are not summoned to act as jurymen in criminal trials; Hume, vol. ii. Vol. I.
p. 305. By the act 1703, c. 7, butchers are prohibited from possessing on lease or otherwise, either directly or indirectly, more than one acre for the purpose of grazing cattle, &c. The object of this act seems to have been to prevent monopolies; but there is no evidence of its ever having been enforced.

BUYING OF PLEAS. By act 1594, c. 216, it is enacted, that it "shall not be leisum to onie Lordes of the Session, ordinar or extraordinare, Advocates, Clerkes, Writers, their servandes, or onie uther member of the College of Justice, or onie uther member of the College of Justice, or onie inferior judgments within this realme their Deputies, Clerkes, or Advocates, directly or indirectly, by themselves, or onie utheris in their names, to their behoove or utilitie, to bye onie landes, tyndes, rowmes, or possessiones, quhilkis ar dependand in controversie or question betuixt onie partes, or hes bene dependand, and not as zit decided: Quhilkis gif they, or onie of them, do, and contravecenis the premises, the saidis Lordes of Session, Advocates, Clerkes, Writers, their servandes, or onie uther members of the College of Justice, or onie inferior judgments within this Realme, their Deputies, Clerkes, and Advocates, sall amit and tine their office, place, and all priviledges and immunities bruikd, or that may be bruikd be them, be vertue thereof." In consequence of this act, the offenders suffer deprivation, but the sale remains good.

BY-LAWS. Every corporation lawfully erected has power to make by-laws or private statutes for the government of the corporation, which are binding on themselves, unless contrary to the laws of the land, or to the terms of their charter.
CALENDAR MONTH. A calendar month consists of 30 or 31 days, except February, which has 28, and in leap years 29 days.

CALLING OF A SUMMONS. After a summons has been executed, and the diet of appearance has arrived, the first step taken by the pursuer in order to bring the case into Court is to call the summons. In the Court of Session this was formerly done by the clerks of court reading over the names of the pursuer and defender from a partibus written on the margin of the summons. This duty was performed every Thursday and Saturday morning during the sitting of the court, and on each of the nine last sederunt days of the summer and winter sessions; and appearance was made for the defender by the clerk of the counsel who was to be employed by him, appearing at this calling, as it was termed, and stating the names of the defender's counsel and agent, which were marked upon the margin of the summons by the clerk of court. The summons thus marked was then given by the pursuer's agent to the agent for the defender to prepare defences; at the expiration of six days it was necessary to return it, and the case was then enrolled in the Ordinary Action Roll, and debated and disposed of in the usual manner. If no appearance was made for the defender at these callings by the clerks of court, the case was then enrolled in the regulation roll, and if, when the case came before the Lord Ordinary in the course of that roll, the defender still failed to appear, decree in absence was pronounced of course.

But, by act of sederunt, 11th March 1820, the former practice was altered; and it is provided by that act, that the summonses with a partibus, &c. shall be lodged with the clerks of
Court; and that, instead of *viva voce* calling, the clerks shall make up and exhibit, for public inspection, in the Outer-House, lists of the summonses for calling, containing the names of the pursuer and defender, with the names of the pursuer's counsel and agent; which lists are to remain exhibited from ten o'clock in the morning till two o'clock in the afternoon, every Friday during the sitting of the Court, and every day during the nine last sederunt days of the Session. Appearance for the defender is entered by his agent simply borrowing the summons from the clerk to the process, before seven in the evening of the day on which the lists are exhibited, the clerk, at the same time, marking the appearance on the *partibus* in common form; and, if the summons is not so borrowed for the defender, it may be borrowed by the pursuer's agent, for the purpose of being enrolled in the *Regulation Roll*, as having been called in absence. When the summons has been borrowed by the defender's agent, he must return it on or before the sixth day after entering appearance, under pain of caption; and it is then enrolled in the ordinary action roll, and disposed of in the usual way.

The summons, of course, cannot be called until the diet to which the defender has been cited has arrived, but it is not necessary that it should be called precisely on that day. If not called, however, within year and day from the date of the execution of citation, the execution falls, and the suit cannot be insisted in without a new citation. See *Form of Process*.

**CALLING OF AN ADVOCATION OR SUSPENSION.**

This calling is performed in precisely the same manner with the calling of a summons, and is regulated by the same act of sederunt. But there is this difference between letters of suspension and advocation and summonses, that they may be brought into Court without being called, while the summons must be called before it can come into the Outer-House rolls. In a suspension or advocation, the charger or the respondent may, by means of a protestation, force production of the letters, at the Minute-Book, which supersedes the necessity of their
being called, and authorises their being enrolled in the Outer-House rolls. See Protestation.

CALUMNY, OATH OF. The act 1429, c. 125, in order to prevent calumnious and unnecessary suits, ordains both parties, at the beginning of a cause, to swear, either by themselves or their counsel, that the facts set forth by them are true. This oath of calumny, as it is termed, was in practice never put, unless the adverse party required it; and, when made, it was held as an oath of credulity or opinion merely. The party putting it was not thereby understood to renounce all other probation. The terms of the oath are prescribed in the act of sederunt 13th January 1692. Oaths of calumny have been little in use since the act of sederunt 1st February 1715, by which it is provided (§ 6), that a party or his counsel may be called upon to confess or deny any relevant matter of fact founded upon by him; and, if he shall deny what shall afterwards be proved to have been known to him, he shall be found liable, without modification, to all the expenses to which his opponent shall have been put by such calumnious denial. See Ersk. B. iv. tit. 2, § 16. A false oath of calumny will not subject the maker of it to a prosecution for the crime of perjury; Hume, vol. i. p. 363.

CANDLEMAS-DAY. The feast of the purification of the Blessed Virgin (February 2).

CANON-LAW. This law consists of the decretum, a collection made after the middle of the 12th century, drawn from the opinions of the fathers and Popes, and from church councils, in imitation of the Roman Pandects,—of the decretalia collected from the epistles of the Popes.

CAPTAIN OR MASTER OF A SHIP, see Shipmaster.

CAPTION. A caption is a warrant for the apprehension of the person of a debtor or obligant, on account of the non-payment of a debt, or the non-performance of an obligation. With the exception of the act of warding (see Act of Warding) which can be executed within burgh only, the caption is, strictly speaking, the only civil warrant recognised in law for the above purpose. The fiction on which the apprehension under the
caption proceeds, is, that the debtor in the obligation having refused obedience to the King's letters, charging him to pay or perform, is imprisoned as a rebel.

A caption is a writ which passes the King's signet, and which is prepared by a writer to the signet. It proceeds in the King's name, and is addressed, like all other signet letters, to messengers-at-arms, as sheriffs in that part, commanding them to charge sheriffs, magistrates, and messengers, within three days after the charge, to apprehend the person against whom the caption is directed, and to imprison him until he fulfil the charge in the letters of horning which he has disobeyed. In practice, however, the charge to sheriffs, &c. is never given unless (which will seldom happen) the magistrate refuse to assist the messenger in the execution of his duty; and, by long established custom, the messenger, on receiving possession of the caption, may, and does apprehend and incarcerate the person against whom it is directed de plano, and without the necessity of adopting the form which its style apparently requires. In apprehending the debtor, the messenger is entitled, of course, when he may need it, to demand the assistance of the civil authorities; and, under the terms of the caption, he has unlimited power to open doors and lockfast places in search of the person of the debtor.

A caption must proceed on proper evidence of the failure to pay or implement; and this evidence consists in the exhibition at the Bill-Chamber of letters of horning against the debtor executed, denounced, and recorded (see Horning, Denunciation), alongside with a bill praying for letters of caption. The Bill-Chamber clerk, on being satisfied with the evidence produced to him, grants a deliverance on the bill, which is the warrant to the keeper of the signet to affix the seal to the caption.

In practice, it is not unusual for messengers, in virtue of the powers given by the caption, to break open doors for the mere purpose of executing poudings, although the legal course, when pouding is their only object, is to apply for letters of open doors (see Open Doors, Letters of). The practice of
using a caption for this purpose seems unsafe; and when it can be proved that the messenger knew, when making such forcible entry, that the debtor was not at that time in the house, the legality of the proceeding is very questionable. The warrant in the caption authorises the breaking open of lockfast places in search of the debtor's person; and certainly a power so ample ought to be strictly interpreted, and confined literally to the purpose for which it is granted. See on the subject of this article, Stair, B. iv. tit. 47, § 13.—Ersk. B. iv. tit. 3. § 12, et seq.—Bell's Com. vol. ii. p. 522, 4th edit. See also Apprehending of a Debtor.—Booking of a Prisoner.—Imprisonment.

CARRIER, a person who holds himself out to the public as willing to undertake for hire the conveyance of goods from one place to another. The Roman edict, Nautæ cauponæs stabularii, which imposed a liability on shipmasters, innkeepers, and stablers, for goods entrusted to them, may be considered as part of the common law of Scotland; and the principle of the edict has been extended to the case of carriers by land as well as by water. It would seem that no distinction will be made on account of the description of vehicle employed; and the owners, whether of waggons, carts, mail-coaches, or stage-coaches, will be liable to make good any losses happening to the goods while in their custody, and until they are delivered agreeably to their address; the rule, founded on considerations of public policy, being, that a person who holds himself out as willing to perform for hire this sort of service, thereby incurs an universal responsibility. Of course, such persons are liable to the fullest extent for their servants and others employed by them. The carrier's engagement, however, is not understood to bind him to deliver the goods beyond the place to which he plies, unless he undertakes to do so, and, at common law, he is not responsible for losses arising from the act of God, or of the King's enemies. In the present uncertainty of the law with regard to the extent of the carrier's responsibility for the loss of parcels containing money or valuable articles, when he has not been made aware of their exact value, the safest course seems to be to make a special contract with the carrier, by specifying the
value of the article, and paying a proportional hire. Booking in the carrier's books seems to be the proper evidence of the delivery of the article to the carrier. See Ersk. B. iii. tit. 1, § 29; and Bell's Com. vol. i. p. 371 and 379, et seq. See also Public Carriages.

CARUCATE of LAND, as much land as can be tilled in a year by one plough.

CASH-ACCOUNT, see Bank Credit.

CASUALTIES of SUPERIORITY. The casualties of superiority are certain emoluments arising to the superior, which, as they depend on uncertain events, are termed casualties. The casualties proper to ward-holding, while that casualty subsisted, were ward, recognition, and marriage (see these titles, also Ward-holding). The casualties common to all holdings, are non-entry, relief, disclamation, purprenure, and liferent escheat. (See these titles.) The superior is secured in his duties and casualties by his own charter and sasine. They form a debitum fundi preferable to the vassal's creditors, and may be made effectual by poinding of the ground; and they form also a personal claim against the vassal. This preference is not confined to arrears or current feu-duties, but extends to non-entry and relief duties, and to the composition for singular successors; Bell's Com. vol. i. p. 582, 4th edit.

CASUS AMISSIONIS. In an action for proving the tenor of a deed or other writing which has been lost, it is necessary to condescend upon the particular accident by which the document was lost or destroyed, or, at least, to give some satisfactory explanation of the manner in which the loss has happened. In technical language this accident is termed the casus amissionis. See Tenor, action for Proving of.

CATHEDRAL. The church where the bishop had his see was styled the cathedral.

CATHOLIC CREDITOR. A catholic or universal creditor, is a creditor whose debt is secured over several subjects, or over the whole subjects belonging to his debtor; as, for example, one who has heritable securities over two or more estates for the same debt. Such a creditor is bound to claim his debt according to certain equitable rules, and is not entitled
to exercise his right so as to injure unnecessarily the claims of secondary creditors. Thus, although he may draw his whole debt from one of the subjects, if he do so, he must assign his security to the secondary creditors on the subject from which he has drawn payment, to the effect of enabling them to draw a proportional part of the debt from the other subjects over which the catholic security extended. But where a catholic creditor, secured over two estates, on each of which there is a secondary security, has bona fide purchased or otherwise acquired right to one of these secondary securities, it is held (although the soundness of the opinion has been doubted), that the catholic creditor, in these circumstances, is not bound to assign to the prejudice of the secondary security he has thus acquired, but that he may draw payment from one of the subjects over which the catholic security extends, so as to leave the other free to the operation of the secondary security over the other to which he has acquired right. It has also been held that a catholic creditor, before the bankruptcy of his debtor, may renounce his security over one of the subjects, reserving his claim for the whole debt against the other, although it should happen that the subject to which he has so restricted his security is burdened with a secondary security, the creditor in which, of course, suffers by the restriction; Edie and Laird, &c. 29th June 1793, Fac. Coll. Mor. p. 3403. Where the subjects over which the catholic security extends belong to two different persons, one of whom is principal, and the other cau-
tioner, the catholic creditor who has drawn payment from the subject of the principal debtor, cannot be required to assign so as to enable a secondary creditor on the principal’s estate to claim upon that of the cautioner; and if the catholic creditor has drawn his debts from the cautioner’s estate, the cautioner is entitled to an assignation so as to enable him to operate full relief from the estate of the principal debtor. See Bell’s Com. vol. II. p. 283, et seq.—Ersk. B. II. tit. 12, § 66.—Kames’ Principles of Equity, vol. I. p. 124. et seq.

CAUTIONARY, is that obligation by which a party becomes surety for another; or, according to Stair’s definition, it
is "the promise or contract of one, not for himself, but for "another." It seems at one time to have been understood in practice that writing was necessary to the constitution of a proper cautionary obligation (see Rigg, 16th November 1788, Fac. Coll. Mor. p. 2102). But this doctrine, for which there is no direct authority, appears to be inconsistent with later decisions, (see Bell, 18th November 1812, Fac. Coll.—Rhind, 20th February 1816, Fac. Coll.) and is not reconcilable with the general principle of our law, which admits of obligations by verbal consent, with the single exception of such obligations as relate to heritable rights; see Ersk. B. iii. tit. 2. § 2. At any rate, it seems to be settled that, in ordinary personal contracts, such as sale or location, or where legal diligence has been interrupted by the interposition of a cautioner, the cautionary obligation may be undertaken verbally. In the ordinary case such verbal cautionary can be proved only by the cautioner's oath; but where the principal obligation may be proved by witnesses, and where the principal and the cautionary obligation have been entered into unico contextu, evidence prout de jure will be admitted; Campbell against McLachlan, 4th June 1752. Kilk. Mor. p. 12,286, and the case of Bell, ut supra.

A simple cautioner, or adpromissor as he was termed in the Roman Law, is one who binds himself as cautioner with the principal, for the greater security of the creditor. Such a cautioner is entitled to the benefit of discussion, that is, he is entitled to insist that the principal debtor be discussed by the execution of diligence both against his person and property, before the cautioner is called upon to satisfy the debt or obligation (see Beneficium ordinis). There is another description of cautioner who was termed in the Roman Law expromissor. Such a cautioner comes under a distinct obligation, in which he is himself the principal, having, however, a claim of relief as mandator or negotiator for another. A cautioner of this description has not the benefit of discussion.

Cautioners are frequently taken bound conjunctly and severally, or as full debtors with the principal, in which case both parties are liable in solidum. Where there are more than one cautioner,
each of them is liable in the first instance only for his own share, if the subject of the obligation be divisible; (see Beneficium divisionis) unless, from the insolvency of the other cautioners, the creditor cannot recover from them.

It follows, from the nature of the obligation, that a cautioner who has paid the debt has an action ex mandato against the principal for relief; and for this purpose he is entitled to demand an assignation from the creditor, not only of the debt and whole diligence, but also of any other securities held by the creditor; and should this claim of relief be cut off by any proceeding on the part of the creditor, the cautioner is thereby liberated from his obligation. The cautioner’s claim is for relief from the principal obligation, with the interest and expenses paid by him; but under this claim he is not entitled to include the expense of diligence against himself, because he ought to have paid without diligence. The cautioner is entitled to sue the principal debtor for relief from the cautionary obligation, even before payment; 1st, Where the debtor is taken bound to deliver the cautionary obligation cancelled at the same term at which he is bound to pay the creditor, and where the term of payment is past, because in that case the cautioner is as fully entitled to insist for implement of the obligation as the creditor himself is. 2d, Where the principal debtor is vergens ad inopiam, the cautioner may attach his funds for his relief before either payment or distress. 3d, Where the cautionary obligation is conditional, and may be long pendant, the cautioner will be allowed to adjudge in security, although there have been no previous distress, under the qualification that no execution shall follow on the decree until distress.

Where an additional cautioner is interposed and becomes bound in a separate deed, as in a bond of corroboration, it has been questioned whether the new cautioner has a total relief against the original cautioners or a proportional relief only. The rule seems to be, that, if the new cautioner have become bound on behalf of the former cautioners, he will be entitled to claim a total relief from them. If he has interponed solely on
account of the principal debtor, he will be entitled to a proportional relief only, precisely as if he had become bound along with the original cautioners; Smiton against Millar, 15th November 1792, Fac. Coll. Mor. p. 2138.

Extrajudicial cautioners have the benefit of a limitation or prescription of their obligation. This was introduced by the act 1695, c. 5. which provides, that no person "binding and engaging for, and with another, conjunctly and severally, in any bond or contract for sums of money, shall be bound for the said sums longer than seven years after the date of the bond, but that, from and after the said seven years, the said cautioner shall be eo ipso free of his caution; and that, whoever is bound for another, either as express cautioner, or as principal, or as co-principal, shall be understood to be a cautioner, to have the benefit of this act; provided that he have either clause of relief in the bond, or a bond of relief apart intimated personally to the creditor at his receiving of the bond, without prejudice to the true principal's being bound in the whole contents of the bond or contract; as also of the said cautioners being still bound conform to the terms of the bond, within the said seven years, as before the making of this act: As also, providing that what legal diligence by inhibition, horning, arrestment, adjudication, or any other way, shall be done within the said seven years, by creditors against their cautioners, for what fell due in that time, shall stand good, and have course and effect after the expiring of the seven years, as if this act had not been made."

The limitation introduced by this statute does not extend, 1st, To a letter of credit or of guarantee in a mercantile transaction. 2d, To an obligation for an annual payment. 3d, To an obligation ad factum præstandum. 4th, To a cautioner in a bond of relief. 5th, To a cautioner in a bond of corroboration. 6th, To the case where the term of payment of the debt is beyond the seven years from the date of the bond. 7th, To a cautioner in a contract of marriage, or for the discharge of an office. 8th, To an engagement by letter or otherwise, to pay, or see paid, a
sum already lent. 9th, To the case of a bill of exchange where-in one signs as cautioner; nor, lastly, to judicial cautionary.

Where the cautioner has a separate bond of relief, in order to secure the benefit of the act, it must be intimated either notarially or judicially to the creditor; mere private knowledge is not sufficient. The cautioner's obligation will be extended beyond the seven years, provided, 1st, That the bond has been renewed, or a corroboration granted by the cautioner, or negotiations carried on for paying the debt, so as to bar the cautioner personali exceptione from founding on the act. 2d, That the creditor shall have raised diligence against the cautioner, or shall have obtained decree against him within the seven years, for it would seem that mere citation in an action is not sufficient in this, as it is in other prescriptions. It is also to be observed, that the diligence or decree within the seven years does not operate in the septennial limitation like an interruption of prescription in the ordinary case. The effect of the limitation is effectually to liberate the cautioner from all responsibility beyond the seven years; and the diligence or decree against the cautioner can extend only to the sum in the bond, and the interest falling due within the seven years; Bell's Com. vol. i. p. 273, 4th edit. A cautioner, who has by mistake paid the debt after the expiration of the seven years, will be entitled to demand repetition from the creditor; Carrick against Carse, 5th August 1778, Fac. Coll. Mor. p. 2931.

With regard to the discharge of extrajudicial cautionary obligations, it may be observed, generally, that a discharge of the principal is a discharge of the cautioner, for the cautioner has become bound, relying on his relief from the principal. A discharge of a co-cautioner is a discharge to the remaining cautioners, to the extent of the share which the discharged co-cautioner would have borne. The renunciation by the creditor of any security held by him over the principal debtor's estate will also discharge the cautioner. Even the discharge of the debtor from prison by the creditor will have this effect, as will the acceptance of an extrajudicial composition on the debtor's estate by the creditor individually, without the con-
sent of the cautioner. In like manner, it will discharge the cautioner, if the creditor, without consulting him, ranks on the debtor’s bankrupt estate, or consents to the acceptance of a composition under the bankrupt statute, so as to enable the principal debtor to get his discharge; although this general doctrine is somewhat affected by the decision, Whitelaw, &c. against Steins, 20th May 1814, *Fac. Coll.* But see *Bell’s Com.* vol. i. p. 275. To take a composition, however, under the bankrupt statute, to which the creditor has not given his concurrence, will not liberate the cautioner; *Bell’s Com. ib.*

Mere negligence on the part of the creditor will not free the cautioner; thus, the creditor is under no obligation to execute diligence when the term of payment arrives, although, if he has completed diligence, he cannot himself discharge it, without forfeiting his claim against the cautioner. Unless fraud or collusion between the creditor and the principal debtor can be proved, it will not avail the cautioner to plead that, by due diligence, the debt might have been recovered from the principal; for the cautioner in such circumstances has in his own power the remedy of inhibition, adjudication, or arrestment, in security. The loss of recourse in the case of undue negotiation of a bill of exchange seems to be an exception to this general rule (see *Bill of Exchange*), and some cases of cautionary for the due execution of an office may afford another exception; see *Bell’s Com.* vol. i. p. 276, 4th edit. See also on the subject of cautionary, *Stair, B. i. tit. 17, § 3, et seq.* *Ersk. B. iii. tit. 3, § 61, et seq.* *Bell’s Com.* ibid. p. 264.

**Cautionary for the Faithful Performance of an Office.**—The cautionary obligations of this description are various; but it is unnecessary to enumerate them particularly. The most important are, 1. *Cautionary obligations for the intromissions of a Bank Agent.* The responsibility which the cautioner in such a case undertakes is very serious; and, on the failure of the agent, difficult questions of equity may arise as to the degree of vigilance which the bank ought to exercise in the periodical accountings with the agent. In all such questions much must necessarily de-
pend on the terms of the particular bond; but cases of neglect may certainly be figured which would bar all claim against the cautioner. The bonds given on these occasions refer to past as well as future losses; and any improper concealment by the bank at the time of arranging the caution might also have the effect of liberating the cautioner. It may be observed here, that a clause frequently inserted in these bonds, providing that no suspension shall pass except on consignment, will not receive effect, as being a pactum illicitum; Bell's Com. vol. i. p. 278, 4th edit. 2. Cautioners for a messenger at arms. In this case, the cautioners are taken bound to make good "the damage, interest, and expenses, which the lieges shall sustain through the negligent, fraudulent, or informal execution of the messenger." Under this obligation, it is held, 1. That the cautioners are liable only for what the messenger does in his character of messenger, and not for his actings as agent, a capacity in which messengers are frequently employed. 2. That the messenger, as such, has no discretionary power. 3. That the cautioners are liable not merely to the employer of the messenger, but to those against whom he has committed any fault. 4. That, in estimating the damage arising from the messenger's neglect, the law holds the damage to be the amount of the debt, nor will any proof be allowed of the desperate circumstances of the debtor, in order to show that due execution of the diligence would not have secured payment; Bell's Com. ib. 3. Cautioner for a Notary. The responsibility here is similar to that in the case of the messenger. It will be no defence to the cautioner, that the error has arisen from want of skill, which the examination before admission was intended to guard against. Neither is it necessary to make out a case of fraud,—the cautioner will be liable for the consequences of error or neglect; Bell's Com. ib. p. 279.

It may be observed in general, with regard to cautioners for the due performance of an office, 1. That, having once engaged for the officer's fidelity, they are not entitled to withdraw suddenly, although they may do so after a reasonable notice; and, 2d, That, on the death of the cautioner, the obligation will subsist against his representative.
until he shall by a similar notice terminate the obligation; Bell's Com. ib. p. 280.

**Judicial Cautionary.** There are several descriptions of cautionary required in judicial procedure.

1. *In a Suspension or Advocation.*—By the form of the bond, the cautioner becomes liable jointly with the principal for the sums, with interest and expenses of process, which may be decreed for against the suspendee or advocator, upon discussing the letters of suspension or advocation. The obligation on the cautioner is precisely similar to that under which the suspendee or advocator is himself, and is not affected by the death of either the charger or the suspendee, during the dependence of the process; Act of Sederunt, 29th January 1650. An attester is liable only *subsidiarie*, and is consequently entitled not only to insist that both the principal and cautioner shall be discussed before himself, but he may also claim a total relief against both of them. It has been held that a person who has signed a bond of caution of this nature, which has been returned from the Bill-Chamber to get an attester, may withdraw his obligation at any time before the attested bond has been accepted of by the opposite party, and received by the Bill-Chamber clerk; Sir M. S. Stewart against Mitchell, 1786, *Fac. Coll. Mor.* p. 2157. After the bond has been lodged in the Bill-Chamber, and answers put in for the charger, however, although no express acceptance has been signified, the cautioner is not entitled to resile; Crawford against Lynde, 26th May 1819, *Fac. Coll.* Neither can the charger, after the cautioner has been accepted, and the letters expedite, require a new cautioner in the event of the insolvency of the cautioner already received. The cautioner in a suspension is not liberated by the circumstance of the decree under suspension being converted into a libel; Act of Sederunt, 27th December 1709; *Ersk. B.* iii. tit. 3. § 71.

2. *Caution in loosing arrestment.*—The obligation extends no farther than to the sums arrested. The cautioner here is not entitled to the benefit of discussion.

3. *Caution judicio sisti,* Lays the cautioner under an
obligation to produce the party for whom he becomes bound, at all diets of Court, when required. In case of failure to do so, the bond is forfeited, and the cautioner incurs the penalty, which is generally the debt sued for, without the benefit of discussion. A cautioner judicio sisti, may at any time liberate himself by producing the party in Court, and protesting to be free from farther liability. In like manner, when the pursuer extracts the decree without calling upon the cautioner to produce the party, the obligation is at an end.

4. Caution judicatum solvi. This species of cautionary is required only in maritime suits before the Court of Admiralty. The cautioner becomes liable for the solvency of the party during the dependence of the process, and for payment of the debt subsidiarie; and such a cautioner, of course, has the benefit of discussion.

5. Caution usufructuaria, is that caution which furnishes may be required to give for the preservation of the furnished subjects against waste or injury. The act 1491, c. 25, authorizes such caution to be insisted for at the suit of any party interested; and, on refusal, the act 1535, c. 15, imposes the penalty of exclusion from the profits of the subject until security be given; Ersk. B. ii. tit. 9 § 59.

6. Juratary Caution, is a description of security sometimes received in suspensions, where the party is unable to procure other caution. It consists of an inventory of his effects given up upon oath, and assigned in security of the sums which may be found due in the suspension. See Act of Sederunt, 14th June 1799.

7. Cautioner in Bail. This cautionary is applicable to criminal cases, and resembles the caution de judicio sisti. The cautioner becomes bound, under a specific penalty, to produce the person of the accused, “to answer to any libel that shall be offered against him for the crime or offence with which he is charged, at any time within the space of six months.” The six months will be computed from the date of the bailbond; and unless there is an express obligation to produce the person of the accused “at all diets of court,” the cautioner...
will be discharged of his obligation by producing him on the first diet; and, if the trial is then delayed, bail must be applied for of new; Hume, vol. ii. p. 92. Upon failure to implement the obligation, the cautioner's bond will be declared forfeited, and the penalty will be recovered by the Barons of Exchequer. See Bail.

8. Caution in Lawburrows. The caution here is, that the complainant shall not be molested in his person or property by the party complained of, under a certain penalty, which, on contravention, will be levied from the cautioner. One half of the penalty goes to the complainant, the other to the public; act 1581, c. 117. See Lawburrows.

CAVEAT, is an intimation made to the proper officer to prevent the taking of any step (the presenting of a signature for instance) without intimation to the party interested, so as to enable him to appear and object to it.

CELLAR, KING'S, see Bonding Acts and King's Cellar.

CERTIFICATE; a declaration of a fact by an officer or other person acting in a public character. A certificate of baptism is signed by the session-clerk. A certificate of bad health, by a physician or surgeon, must bear to be on soul and conscience. In the Bill-chamber proceedings, an attestation by the clerk that no caution has been received, is termed a certificate.

CERTIFICATE of REGISTRY of A SHIP, is a copy of what is entered in the register of the ship in the books of the custom-house. It is written on parchment, and signed by the collector or comptroller of the customs at the port of registry of the ship, and delivered to the captain as a voucher of the character and privileges of the vessel as a British ship; Bell's Com. vol. i. p. 80, 4th edit. See the form of this certificate, Jurid. Styles, vol. ii. p. 507, 2d edit. See also Ship.

CERTIFICATION, in judicial procedure, signifies properly the assurance given to a party of the course to be followed in case he disobeys the will of the summons or other writ, or the order of the Court. Erskine defines it to be “the penalty to be inflicted on the defender if he shall neither comply with the will of the summons, nor show a reason why
he is not bound in law to comply with it;” B. iv. tit. 1. § 7.
Certification is either expressed or implied. In the ordinary
summons the defender is ordered to appear in Court against a
certain day, “with certification as effectus.” This certification
was at one time so severe, that reiterated contumacy on the
part of the defender was punished with confiscation of his pro-
erty (1449, c. 29); but now the certification in the summons
amounts to nothing more than an absolute assurance to the de-
fender, that, if he fails to appear in the usual manner, the
Judge will decree in his absence. The certification in the general
charge is, that, in default of the heir’s entry, the creditor shall
have the same action against the heir as if he had entered. In the
special charge, the certification is, that action may be had
not only against the heir, but also against the lands belonging
to the deceased; Ersk. B. ii. tit. 12, § 12. The most im-
portant certification in our law, however, is that in the process
of reduction improbation. In that action two terms are al-
lowed to the defender for the production of the writ sought to
be reduced, and, after the expiration of these terms, ten days
longer are allowed; but, should the writ not then be produced,
decree of certification may be pronounced by the judge, the
effect of which is to hold the writ as forged and fabricated;
and such a decree once pronounced, can hardly be recalled,
even although it has been pronounced in absence; Ersk. B.
iv. tit. 1, § 21.—Stair, B. iv. tit. 3, § 31. In the simple re-
duction, the certification is merely that the deed called for
shall be held as void until produced; Ersk. ib. § 24.
CERTIORARI, is an English writ, analogous to our letters
of advocation. It is issued out of the Court of Chancery or
King’s Bench, directed in the king’s name to the judges or of-
ficers of inferior courts, commanding them to certify, or to
return the records of a cause depending before them, to the
end that the party may have more sure and speedy justice be-
fore the king, or such judges as he shall assign to try the
cause; Tomlin’s Dict.
CESS, see Land-Tax.
CESSIO BONORUM. Imprisonment for debt, which,
according to the terms of the letters of caption, could be terminated only by payment; would, in the greater number of cases, have proved an extremely harsh and oppressive deprivation of liberty to insolvent debtors. The process of _cessio honorum_ may be termed an equitable relief from the severity of the law in this respect. This process is sued out in the form of a summons before the Court of Session at the instance of the imprisoned and insolvent debtor, in which summons the whole of his creditors must be called as defenders. When the process has come into Court, the pursuer must exhibit a condescension containing a full statement of his affairs, and he must satisfy the Court that his inability to pay his debts has arisen from innocent misfortunes. Any one of the creditors is entitled to appear and object to the statement; and the pursuer will not be allowed the benefit of the process, until he has given a satisfactory explanation of the state of his affairs; the _onus probandi_, however, of all objections lies with the creditor. When the objections have been obviated, the Court pronounce an interlocutor finding the debtor entitled to the benefit of the _cessio_, and, upon his lodging in the hands of the clerk of Court a disposition _omnium honorum_ in favour of his creditors, and making oath that the condescension contains a full and true state of his affairs, and that he has made no conveyance of any part of his property, either before or since his imprisonment, to the prejudice of his creditors, decree of _cessio_ will be pronounced; the effect of which is to liberate the debtor from imprisonment, and to protect him from re-incarceration for any debts due prior to the decree to the creditors who have been called in the action. The decree also generally contains a dispensation to the pursuer from the necessity of wearing the dyvour's habit. See _Dyvour._

The particulars which are chiefly deserving of attention relate to the title to pursue the process of _cessio_: 1. The pursuer must be imprisoned for non-payment of debt. Hence, a person imprisoned upon a _meditatio fugae_ warrant is not entitled to pursue this process,—nor one imprisoned _ad factum praeventum_, when the act is within his power. But it seems now
to be settled, that a person imprisoned for non-payment of damages awarded against him for a delict, or for non-payment of a fine which has been awarded to a private prosecutor, may pursue a cessio; Bell's Com. vol. ii. p. 569, et seq. 4th edit. 2. The debtor, before he can obtain decree of cessio, must have suffered at least a month's uninterrupted imprisonment. It is settled, however, that the summons may be competently raised before the expiration of the month; and it has also been held, that the custody in which a debtor remains, who is enlarged on a bill of health, is equivalent to legal imprisonment, and that the time during which he has been so enlarged may be computed as part of the month; Bell's Com. ibid. (See Bill of Health). 3. It is not necessary that the pursuer should remain in prison until decree is pronounced; but he must be subject to the orders of the Court at that time, and not within the sanctuary; and it seems also to be now settled, that a month's imprisonment in the jail of the sanctuary does not entitle a person to pursue this process; Dunlop, 11th July 1799, Fac. Coll. Mor. 11,800. 4. If the incarcerating creditor has abandoned the diligence during the month, the debtor cannot obtain the cessio by remaining voluntarily in prison: But the Court would probably interfere to prevent oppression, by successive renewals and abandonments of the caption; Bell's Com. ib. p. 569. 5. It is a rule that, where the debtor is incarcerated for aliment to his bastard child, he is not entitled to pursue a cessio; and, if a cessio be opposed by the mother of a bastard child as a creditor for its aliment, the cessio will be refused; Ritchie, 20th December 1811, Fac. Coll. and Steele, 4th July 1812, stated in note to report of Ritchie's case.

The effect of a decree of cessio being not to discharge the debtor, but merely to relieve him from the operation of personal diligence, it affords no protection against the attachment by his former creditors of any property which he may subsequently acquire, either by his own industry or otherwise. The creditors, however, before proceeding with diligence against the new acquisitions of the debtor, are bound to realize the property conveyed by the disposition omnium honorum, and to apply it,
as far as it will go, in extinction of their debts. (Bell's Com. vol. ii. p. 579, 4th Edit.) In surrendering to his creditors either new acquisitions, or the property formerly belonging to him, the debtor is not entitled to retain any thing but his working tools, properly so called (see Beneficium competentiæ); and where the debtor has a fixed salary, it is settled that he must give up all that exceeds a proper aliment; thus clergymen have been held bound to give up part of their stipend, and officers in the army a proportion of their half-pay. Bell's Com. ibid. p. 577. See also Ersk. B. iii. tit. 3. § 26. et seq.

CHALDER, a chalder of victual consists of 16 bolls.

CHALKING OF DOOR, a mode of warning tenants in urban tenements to remove. See Removing.

CHALLENGE, an invitation or defiance to fight a duel, whether given verbally, or in writing. By 1696, c. 35, the person, whether principal or second, or other interposed person, concerned in giving a challenge, was punishable with banishment and escheat of moveables, although no fighting ensued; but this statute was repealed by 59 Geo. III. c. 70. See Duelling.

CHALLENGE OF JURORS. To challenge a juror, is to object to his acting as a jurymen. The English Treason Laws, which were extended to Scotland by 7 Anne, c. 21, allow a person tried for that crime thirty-five peremptory challenges, i.e. challenges without cause assigned.

In other criminal cases the pannel had not, until lately, by the law of Scotland, any right of peremptory challenge; but he is served with a list of the whole forty-five persons from which the jury is to be selected, and has thus an opportunity of learning all reasonable objections which may be stated against any of them, and, on cause shown, he may object without limit. The lawful grounds of objection are, 1. That the proposed jurymen is infamous, infamia juris, or an outlaw. 2d, That he has hostile feelings towards the pannel, or that he has expressed such feelings. 3d, That he is insane, or deaf, or dumb, or a minor. 4th, Where the prosecution is at the instanc of a private party, it is a good objection that the jury-
man is near of kin to the prosecutor, or that he is dependant upon him in such a manner as to create an undue bias; Hume, vol. ii. p. 301. And now, by the statute 3 Geo. IV. c. 85, the prosecutor and pannel have, each of them, five peremptory challenges. See Jury.

By the act establishing the Jury Court in civil causes in Scotland (55 Geo. III. c. 42 § 21) peremptory challenges to the number of four to each party are allowed; and challenges, on cause shewn, are, of course, unlimited. The act 59 Geo. III. c. 35, by which the Jury Court is made permanent, makes no alteration in regard to the right of challenge. See Jury Court.

CHAMBERLAIN. The Chamberlain of Scotland was an officer of high dignity and of supreme jurisdiction. He had the inspection of all royal burghs, and power to inquire into the conduct of the magistrates, and to apply the burgh revenues to their proper use: He decided disputes between burgess and burgess, and held circuits for the exercise of his jurisdiction. He judged also in matters of public police within burghs, a power now exercised by the Dean of Guild. The office of Chamberlain of Scotland has been long since abolished. Ersk. B. i. tit. 3. § 38.

The Lord Great Chamberlain of England, is an officer of considerable importance. He is governor of the Palace of Westminster; and, upon all solemn occasions, such as the coronation of the King, the keys of Westminster Hall are delivered to him. He has the care of providing all things in the House of Lords during the sitting of Parliament. The Gentleman Usher of the Black Rod, Yeoman Usher, &c. are under his authority. The office is hereditary. Tomlin's Dict.

The Lord Chamberlain of the Household, has the superintendance and government of all affairs belonging to the King's chamber (except the bed-chamber), and also of the wardrobe; of artificers in the King's service, King's messengers, comedians, &c. The sergeants-at-arms are also under his inspection, and the King's chaplains, physicians, apothecaries, sur,
geons, &c. He has a vice-chamberlain under him; and both are privy councillors. *Tomlin's Dict.*

**CHANCELLOR OF A JURY,** is the presses or foreman of the jury, who announces the verdict when it is a verbal one, and who delivers it in, and, along with the clerk, subscribes it in name of the jury, when it is in writing. *Hume,* vol. ii. p. 421. By the Jury-Court act, 55 Geo. III. c. 42, § 33, it is provided that the chancellor of the jury in civil causes shall be elected by a majority of the jury, after they are sworn, and, in case of an equality of votes, the juror first sworn shall have a double vote. See *Verdict.*

**CHANCELLOR, LORD.** The office of Lord Chancellor of England is the highest under the crown. The Lord Chancellor is appointed to the office by the mere delivery of the King’s great seal into his custody. He is a privy councillor *ex officio,* and speaker of the House of Lords by prescription. He has the appointment of all justices of the peace throughout the Kingdom. In England he is the guardian of all infants, idiots, and lunatics, and has the general superintendence of all charitable institutions. In his judicial capacity, he exercises the very extensive jurisdiction of the Court of Chancery. He not only keeps the King’s great seal, but all patents, commissions, warrants, &c. from the King are perused and examined by him before being signed; the highest branch of his jurisdiction is that of cancelling the King’s letters patent when granted contrary to law. The Lord Chancellor is superior in point of precedence to every Temporal Lord. *Tomlin’s Law Dict.*

The office of Lord Chancellor in Scotland was abolished at the Union in 1707. The Chancellor of Scotland was formerly an officer of very great importance. He presided in the Scots Parliament, and in all courts of judicature (1661, c. 1.), and had the principal direction of the chancery. He had the custody of the great seal, and was chief counsellor to the King (*Balf. Practicks,* p. 15.); and took precedence of all others *ratione officii.* On the abolition of the office, a keeper of the great seal for Scotland was appointed; in affixing the seal,
however, to the writs passing under it, he acts merely ministerially. See *Great Seal*.

**CHANCERY or CHANCELLORY.** The chancery in Scotland is an office, managed by the director of chancery and his deputies, in which are recorded all charters, patents of dignities, gifts of offices, remissions, legitimations, presentations, commissions, briefs, retours, precepts thereon, and all other writs appointed to pass the great or the quarter seals. The director of chancery is keeper of the quarter seal, or testimonial of the great seal as it is also termed; and in this office all writs passing under the quarter seal are written. All writs passing through chancery are recorded before they are given out to be sealed. It is from chancery that all briefs are issued, and to it all retourable briefs are returned to be recorded. See *Brieve, —Seals*.

**CHAPELS and ALTARAGES.** Before the abolition of Popery, it was usual for pious persons to found and endow chapels which were served by a chaplain; or altarages, which were small endowments for the maintenance of a priest to perform divine service at an altar, on behalf of the soul of the founder, or some of his deceased friends; *Ersk. B. i. tit. 5. §3*.

**CHAPTER.** In the times of Popery and Episcopacy the chapter was the Bishop’s council, consisting of an Archdeacon, Dean, and Canons or Prebendaries, who were generally ministers within the diocese. By the advice of this council, the Bishop managed both his spiritual affairs, and the temporal affairs of the diocese. See *Stair, B. ii. tit. 8. §15; Ersk. B. ii. tit. 10. §5*.

**CHARGE.** In the technical language of Scots law, a charge is the command of the King’s letters to perform some act, as to enter heir. The term is also applied to the messenger’s copy of service, requiring the person to obey the order of the King’s letters, as a charge on letters of horning, or a charge against a superior.

*Charge to enter heir.—General charge.—* This is a writ issued in the King’s name, and passing the signet, ordering the heir within forty days to enter-heir to his predecessor, under certification, that, if he fail, the creditor shall have action against
him in the same manner as if he had entered. The general charge is intended merely as the foundation of proceedings against the heir; and although such a charge may be given during the currency of the annus deliberandi, yet no summons can be raised for constituting the debt, until after the expiration of the year, unless, during the course of it, the heir has intromitted with the effects of the deceased, and so incurred a passive title. When the action has been raised on the expiration of the general charge, the heir, if he chooses, may appear and renounce the succession, in which case decree cognitionis causa may be obtained at the instance of the creditor. This decree is termed a decree of cognition, because its chief object is to ascertain the amount of the debt; but such a decree, proceeding on a renunciation by the heir, cannot affect either his person or separate property. Where no appearance is made for the heir, decree will be pronounced against him as lawfully charged to enter heir, which has the effect of constituting him debtor personally, and gives the creditor action against him and his estate, as well as against the estate of the ancestor; Ersk. B. ii. tit. 12. § 12, et seq.

The debt being thus constituted, it still remains, that the heritable rights which belonged to the ancestor should be vested in the heir, or made liable to the diligence of the creditor; and for this purpose the heir must receive either a special or a general special charge.

The special charge, is a writ also issued in the king's name, and passing the signet. It narrates the general charge and procedure for constituting the debt, and that the heir will not enter himself heir in special to the heritage in which his ancestor died intestate, so as to enable the creditor to adjudge that property,—and it ordains the heir within 40 days to enter himself heir in special to his ancestor, under certification, that, if he fail, the creditor shall have action of adjudication against him and the lands, precisely as if he were so entered. The execution of this charge is by 1540, c. 106, made equivalent fictione juris to the heir's actual entry, and, on the expiration of the 40 days, an adjudication at the instance of the creditor will effectually
carry the subjects to which the heir was charged to enter; Ersk. B. ii. tit. 12, § 13.

The General Special Charge.—The only difference between this charge and the special charge is, that it is applicable to those heritable subjects to which the ancestor had personal rights, not completed by sasine; and the heir is charged to make up his titles to the unexecuted procuratories or precepts, &c. under certification that, if he fail, the creditor shall have the same action against the heir and the heritage, that he would have if he were retourned heir in general to his ancestor; Ersk. ib. By the stat. 54 Geo. III. c. 137, § 8, it is enacted, that, after one charge, whether general or special, has been given on inducæ of forty days, every subsequent charge may be on inducæ of twenty days only; and by the same section of the act these inducæ are declared to be applicable whether the heir is within Scotland or not.

Where the heir himself, and not the ancestor, is the debtor, there is no occasion for a general charge. All that the creditor can have in view in such a case is, that his debtor shall complete his titles to the property to which he has succeeded, so that it may be attached for his debt; and, for this purpose, it is necessary to raise letters either of special or of general special charge, according to the state of the titles to the subjects of the succession; and, on the expiration of this charge, whether the heir enters or not, the subjects may be effectually attached by adjudication at the creditor's instance; 1621, c. 27; Ersk. B. ii. tit. 12, § 14. But, even in this case, the heir is not obliged to answer the charge until the expiration of the annus deliberandi; and the creditor cannot go on with his proceedings during the year, unless the heir chooses either to obey the charge, or to assume possession of the estate, or grant conveyances of it. It has been doubted whether the heir, when he is himself the original debtor, is at liberty to renounce the succession which has opened to him, and which might have enabled him to discharge his debts; and it was once held that such a renunciation was competent; Carse, 23d March 1627, Durie, Mor. Supplement, p. 40; but the cor-
rectness of that decision seems to be questioned; Bell's Com. vol. i. p. 606, 4th Edit.

The act 1540, c. 106, authorises charges to enter to be given only where the heir is of perfect age; but, by immemorial usage, it is the practice to charge minors. It has been already observed, that the charge may be given during the currency of the annus deliberandi; and in those cases where the general charge is meant to be the foundation of an ordinary summons, the action will be sustained if the summons on which it proceeds was not executed until a year after the ancestor's death, although the forty days of the charge were not elapsed at the date of the execution. But where a special charge has been given with a view to an adjudication, the summons of adjudication, according to the construction put on the statute, cannot be raised until the expiration of the annus deliberandi, and of "the forty days next ensuing that year, within which the heir is charged to enter." Ersk. B. ii. tit. 12. § 15.

CHARGE ON LETTERS OF HORNING. The will of Letters of Horning commands messengers at arms, as sheriffs in that part, to order the debtor to pay the debt within a certain number of days; and this the messenger does by leaving for the debtor what is termed a copy of charge; by which, in virtue of the letters of horning, he commands and charges the debtor to make payment of the debt, specifying the sum, and describing the voucher of debt as in the narrative of the letters of horning, and that within the days and under the pain expressed in the letters. This must be signed by the messenger (1592, c. 139). The date must be in writing (1693, c. 12), and the names and designations of the witnesses inserted. The form of giving this charge is regulated by the act 1540, c. 75; and the cases provided for are, 1. Where the charge is delivered personally, and then the form is simple. 2. Where the debtor is not found, and the charge is left with his servant. In this case, it must be left at the principal dwelling-place, and with the servant within the dwelling-place; and this fact must be expressed in the execution. 3. The other case pro-
vided for by the act is where the party cannot be found, and access cannot be got. In that case, the messenger must knock six audible knocks on the door, and then affix a copy of charge on the most patent door of the house. The execution returned by the messenger is a certificate of his having gone through the form of delivering the charge; which execution must be signed by him and by the witnesses, whose names and designations must also be inserted; 1681, c. 5.

When the debtor is furth of the kingdom, this charge may be given at the market-cross, pier and shore of Leith, on 60 days, provided the letters contain a proper warrant for such charge. See Horning.

**CHARGE AGAINST SUPERIORS.** These charges may be used by heirs, by adjudgers, or by purchasers.

*Charge by an heir.*—The charge may be used against a superior, or against the heir of a superior. 1. *Against the superior.* By the 20th Geo. II. c. 50, the heir, on production of his special retour, may obtain a warrant for letters of charge to charge the superior to enter him on fifteen days notice; which he is bound to do on receiving the non-entry and relief duties, and exhibition of the ancient titles; and this charge may be enforced by personal diligence against the superior; *Ersk. B. iii. tit. 8, § 79.* 2. *Against the heir of the superior.* Where the superior is dead and his heir unentered, the superior’s heir must, in terms of the act 1474, c. 58, be charged by the heir of the vassal to infest himself within 40 days, under certification, that, should he fail, he shall lose the tenant for his lifetime; which has been explained to mean the casualties arising from the delinquency of the vassal, and besides be liable in damages; and should the heir fail to enter, the vassal may proceed to charge the intermediate superiors, until he comes to the Crown, from whom he will receive a title; *Ersk. ib. § 80.*

*Charge by an adjudger.*—Where an adjudger wishes to render his debt real, and capable of competing with other real rights, he must obtain infeftment; and, with this view, where the superior refuses to enter him, he must raise letters of horning (the warrant of which is contained in the decree of adjudi-
cation), and upon these charge the superior to enter him within 21 days. This was introduced by the act 1647, c. 43; and, although that act was rescinded, the practice has continued; and the superior is bound to give an entry on payment of a year's rent of the subject. Should the superior neglect the charge, the next highest superior may be charged to give an entry to the adjudging creditor, and so on up to the Crown, from which a charter will be obtained which will vest a feudal right in the adjudging creditor; Ersk. B. ii. tit. 12, § 25. But should the creditor have in view only the rendering his adjudication the first effectual one, it is enacted (54 Geo. III. c. 137, § 11), "That the presenting a signature in Exchequer, when the holding is of the Crown, or the executing 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 rendering an adjudication an effectual one, in the sense of the act 1661, c. 62. (See Adjudication.)

Charge by a purchaser.—By the act 20th Geo. II. c. 50, § 12, every purchaser possessed of a disposition with a procuratory of resignation may demand an entry from the superior, on payment of the entry-money stipulated in the original charter, or of a year's rent. On the superior's refusal, the purchaser may apply to the Lord Ordinary on the Bills, praying a warrant for letters of horning to charge the superior to receive him; and upon production in the Bill-Chamber of the disposition or other conveyance, containing procuratory of resignation in favour of the purchaser, warrant will be granted for letters of horning, on fifteen days inducet, to charge the superior to enter the purchaser. Should the superior be himself unentered, the purchaser may proceed and charge him in the manner above explained.

This is the only way in which a superior can be compelled to give an entry; for although the purchaser may be entered
by confirmation, that entry is the voluntary act of the superior, and admits of no charge at the instance of the purchaser.

CHARTER. A charter is the evidence of a grant of heritable property, made under the condition that the grantee shall annually pay a sum of money, or perform certain services to the granter; and, by our law, it must be in the form of a written deed. The granter of a charter is termed the superior,—the grantee the vassal,—the vassal is said to hold the subject of the superior,—and the annual sum or service stipulated is termed the duty. Charters are called blench or feu from the nature of the stipulated prestation,—a me or de me from the kind of holding,—and original, or by progress, from being first or renewed grants of the same subjects.

*Blench and Feu Charters.* In former times the duty which superiors almost always required from their vassals, was military service, and the vassal was then said to hold ward. This holding, however, was abolished by the act 20 Geo. III. c. 50; and since that act took effect, the only duties which it is lawful to insert in charters, are blench and feu-duties. A blench duty is a mere nominal payment,—as a penny Scots or a red rose, *si petatur tantum.* A feu-duty is a consideration of some value. Charters containing these different duties, are termed according to their nature blench or feu-charters. Original blench charters are not very common in modern practice. From the nature of the duty stipulated in them, superiors can derive no advantage from granting such rights, but, on the contrary, subject themselves to considerable inconvenience and expense, in so far as it is necessary for them to complete titles to the superiority in favour of themselves, or their heirs, to enable them to renew the blench right after the death of the original vassal.

*Charters a me and de me.* All charters were originally written in Latin, and one of the clauses began with the words "*Tene* "*endas predictas terras de me,*" to shew that the grantee was to hold the lands of the granter, or to consider him as superior. A charter having a clause in these terms, was called a charter *de me.* It often occurred, however, that vassals disposed
their lands to a third party, to be held not of themselves as superiors, but of their superiors—and for this purpose they granted charters, conveying the lands to be held a me de superior meo; and these were termed charters a me. As, however, the vassal had no authority to grant such charters, it was necessary to get them ratified by the superior, in order to render them valid. A charter de me then is a grant of lands to be held of the granter—a charter a me is one to be held of the granter's superior.

Original Charters and Charters by progress.—An original charter is one by which the first grant of the subject is vouched; a charter by progress is one by which the renewal of a grant is proved in favour of the heir, or singular successor, of the first or succeeding vassals.

I. Original Charter.—According to its modern form, the original charter contains the following clauses: 1. The narrative which contains the name and designation of the granter or superior, and the inductive cause or consideration, onerous or gratuitous, which may have induced the superior to grant the right; and, where the consideration is pecuniary, the narrative also contains a receipt and discharge for the sum paid. 2. The dispositive clause, in which the superior declares that he has granted and disposed, and thereby grants and disposes the lands to the vassal; it specifies the heirs who are to succeed to them; it contains a minute description of the lands, stating the county, parish, &c. in which they are situated; and when the superior means to reserve any right on the subjects to himself or others, or to make the grant under any peculiar conditions, such reservations or conditions are inserted here. 3. The tenendas, stating that the grantee is to hold the lands of the granter as superior. 4. The reddendo, which expresses the duty in money or services to be paid by the vassal to the superior, with the sum which an heir, and sometimes a singular successor, is to pay for a renewal of the grant, termed relief and entry money. 5. The clause of registration, which is only for preservation, and in the books of Council and Session. 6. The precept of sasine, which is a mandate to a person called a
bailie, to give symbolical delivery to the vassal of the subjects conveyed; and, 7. The testing clause. Besides these clauses, it is usual to insert a clause of absolute warrandice, which warrandice, however, is implied, and an assignation to the rents, which is only useful before infeftment, is taken on the precept. Original charters are now seldom granted by the Crown. As most of the lands in the kingdom have already been inserted in charters from the Sovereign, the charters which he is now called on to grant, are chiefly renewals of former rights. Nevertheless, when property has fallen to the Crown as ultimus hæres, by forfeiture, or otherwise, there is no other mode by which the donatory, to whom such property may be gifted, can complete his right, but by obtaining an original charter from the Crown. But even such a charter is assimilated in its form more to a charter by progress, than to an original grant, as it contains the clause termed a Quæquidem, stating to whom the property last belonged, how it reverted to the Crown, and was gifted to the new grantee.

II. Charters by Progress.—After an original charter has once been granted, and the vassal infeft on it, no person claiming either as his heir or singular successor can obtain a complete title to the subjects as they stood in his person, without a renewal of the grant from the superior. The requisites to enable the claimant to demand such a renewal from the superior, differ according as he is an heir or a singular successor.

1. Precept to an heir.—When a vassal has died infeft in lands, his heir, in order to establish his right to them, must expede a special service,—a proceeding by which it is ascertained judicially that the ancestor was the last feudal proprietor of the lands when he died, and that the heir is now entitled to them. On the production of the retour of such a service, the superior is bound to issue a warrant for infefting the heir, which, however, is not in practice called a charter, but a precept upon a retour. In its form, this precept merely narrates the retour, and grants warrant for infeftment; and it contains, of course, the usual registration and testing clauses. It

Vol. I.
is issued for the purpose of infesting the heir only. It is not, therefore, granted to his heirs or assignees,—and he is not entitled to convey it, so as to enable another person to infest himself by virtue of it.

When the crown is superior of the lands, the precept to an heir is granted as a matter of course, on production of the special service. In this case, the precept is directed to the sheriff of the county where the lands lie, who acts as bailie for the crown, and gives infestment accordingly; and, by a special clause, he is directed to take security for the casualties payable on such an occasion. As these casualties are calculated to a particular term, the precept becomes null, in consequence of a declaration inserted to that effect, if the infestment be not expedite before the term of Whitsunday or Martinmas immediately posterior to its date; and in that case a new one must be obtained. The sheriff-clerk has the exclusive privilege of acting as notary in expediting the infestments on these precepts.

When, again, a subject is superior of the lands, and when he refuses to give an entry, the vassal may, by exhibiting his retour to the Court of Session, obtain a warrant for letters of horning, to charge the superior to grant the precept within 15 days, on payment of the non-entry and relief duties. It is not usual, however, for subjects superior to require the heir to expedite a special service, for, if they be satisfied from other sources of the heir’s right, they may legally grant warrant for his infestment without any other authority. The precepts issued in cases of this kind, are termed precepts of clare constat. (See Clare Constat.)

When the ancestor has died uninfest, having right to a disposition of the lands containing a procuratory of resignation and precept of sasine, or to a decree of adjudication or of sale, his heir, by expediting a general service, may place himself in precisely the same situation, and enjoy the same rights as his predecessor,—and, therefore, like him, he may obtain from the superior a charter, as a singular successor, in the manner about to be explained.
2. Charters to singular successors.—These are of various kinds.

Charter of resignation.—When a person has purchased lands from a vassal, to be held of his superior,—and when he wishes to be placed in precisely the same situation in which his author stood, by becoming immediate vassal of the superior,—this can only be accomplished with the superior’s consent. To obtain this consent, certain forms are necessary. One of these forms, and that most consistent with feudal principles, is, for the original vassal to grant a procuracy of resignation in favour of the purchaser, which is a mandate to a procurator to appear before the superior, and there, for the vassal, to resign the lands into the superior’s hands, for the purpose of his granting them again to the purchaser. The resignation is made symbolically by the procurator delivering a staff and baton to the superior. When the superior is thus reinvested with the property, he makes a new grant of it to the disponee; and, in evidence of this grant, he executes a charter in his favour. This charter, as being preceded by a resignation of the subjects, is called a charter of resignation. It differs from an original charter, in having a clause called, from its first word, a Quæquidem, inserted immediately after the dispositive clause. The object of the Quæquidem is, to specify that the subjects belonged formerly to the granter of the procuracy of resignation, and were, by virtue of that procuracy, resigned for new infeftment in favour of the grantee, as having right, either as the disponee named in the procuracy, or as the heir or singular successor of that disponee. It also differs from an original charter, in having a clause saving and reserving the rights of all parties, so that the superior inures no new warrandice not incumbent on him already by the original grant. At one time, no superior could be compelled against his inclination, to receive, as vassal in the lands, any person who was not the heir expressed in the original grant; but, by the act 20 Geo. II. c. 50, superiors are bound to enter all singular successors who have got from the vassal dispositions containing procuratories of resignation,—they receiving the fees or
casualties which law entitles them to on a vassal’s entry, viz. a
year’s rent of the lands, and, if they refuse, such disponees
are entitled to apply for letters of horning to charge the supe-
riors to receive them. Superiors are also bound to give the
new grant under all the conditions specified in the procuratory
of resignation, in so far as they do not alter or impair their
own rights.

Charter of confirmation.—Besides the mode just explained,
there is another by which a disponee may be received as vas-
sal in the lands, in place of the disponer. In its modern form,
the Disposition includes the clauses of a charter a me, and
when the disponee has taken infeftment on the precept it con-
tains, the superior may declare that infeftment to be equivalent
to SASINE on a precept granted by himself. This is accomplish-
ed by means of a charter of confirmation, so called because
it ratifies and confirms the otherwise invalid title of the gran-
tee. The clauses of this charter are all similar to those of an
original grant, except the dispositive, which, in this case, nar-
rates and confirms the title-deeds in favour of the disponee;
and, as the infeftment has already been taken, it contains no
precept of SASINE. Superiors cannot be compelled to grant
charters of this description.

Charters of adjudication and of sale.—The mode of enter-
ing adjudgers and purchasers at judicial sales, differs from that
of entering a disponee who has right to a procuratory of resi-
nation, only in so far as it is not necessary to resign the lands
into the superior’s hands, to entitle him to grant the charter in
their favour. The charter of adjudication, therefore, or of sale,
is almost precisely similar to that of resignation, only the Quae-
quidem omits the mention of the resignation, and recites merely
the decree and other deeds, by which the lands are transferred
to the new vassal. Superiors were compelled to enter apprizers,
on payment of a year’s rent, by the stat. 1469, c. 37; and this
rule was extended to adjudgers by 1672, c. 19, and to purcha-
sers at judicial sales by 1681, c. 17, joined with 1690, c. 20.

Charter of novodamus.—It sometimes happens that an heir
or singular successor applies for a charter, when he cannot ex-
hibit a sufficient legal title to require the superior to grant one, though, at the same time, from immemorial possession of the lands or other circumstances, there can be no doubt of his right. In such cases, superiors are in the practice of giving new grants of the subjects, under the reservation, however, of their own rights, and the rights of all others, as accords of law. As such charters are not granted upon the resignation of a vassal, or in obedience to a decree, they proceed a non habente potestatem, and, therefore, they are ineffectual till prescription has followed on them.

Mode of expediting Crown Charters.—To authorise the issuing of a Crown charter in favour of a singular successor, certain previous warrants are necessary. The first and most important of these is the signature. This is a writ prepared by a writer to the signet, containing all the clauses of the charter which it is wished to expede. It must be presented to the Barons of Exchequer, who hold a commission from the Crown for this purpose, and is revised by them to ascertain if it be correct. When the charter is a charter of resignation, the lands must be resigned in the hands of the Crown, which is done by one of the officers of the Court of Exchequer, as attorney under the procuratory of resignation, delivering a baton to the presiding Baron; and instruments are taken by a notary upon the act of resignation. The signature is then signed by the Barons; and the cashet, which is a stamp containing a fac simile of the Royal sign-manual, is adhibited. When the charter is one of novodamus, or if it creates a barony or the like, the signature must be superscribed by the King himself. Formerly the signature became the warrant of a precept under the signet, directed to the Keeper of the Privy Seal. The precept under the signet was prepared by the writers to the signet, and framed in Latin; it was directed to the Keeper of the Privy Seal, and became the warrant of a new precept, under that seal, to the keeper of the Great Seal, authorising a charter in the terms of the warrant. These warrants were recorded at the respective offices, and retained by the officer giving out the new warrant. Thus, the
signature, which was the warrant of the precept, was retained at the signet; the precept was retained by the Keeper of the Privy Seal; and the Privy Seal precept was retained by the Keeper of the Great Seal, by whom the charter was sealed, and given out to the Crown vassal. But these forms have been curtailed, and the precept under the signet becomes the warrant of the charter. The Great Seal completes the charter, and renders it equivalent to a formally subscribed private deed. In giving infeftment on the Crown charter, the precept may be executed by any one as bailie, and any notary may act as notary.

**CHARTER PARTY**, is a mutual contract between the owners of a ship and the freighter, by which the freighter hires the vessel, either to perform a particular voyage, or for a certain specified time, at a stipulated hire or freight. Where the vessel is hired by time, the commencement and termination of the time must be accurately stated; and where hired by the voyage, the voyage must be properly described, and provision made for deviations or accidental interruptions. The charter party also specifies the freight, and whether it is to be paid by the voyage, or by the day, week, or month; and contains various other regulations and provisions arising out of the nature of the contract; and it generally contains a clause of registration, which may be the ground of summary execution without a previous action. Writing is not absolutely necessary to prove this contract. It may be proved by the oath of the owners; but before either informal missives or any other writings can be founded on in Court to prove the contract, such writing must be stamped. The stamp for a regular charter party, or for any memorandum or other writing equivalent to it, is, by 48 Geo. III. c. 149, thirty shillings.

The owners are bound by the nature of this contract, that the vessel shall be sea-worthy, or fit for the stipulated purpose, and that the master and seamen shall be skilful: That the ship shall be at the destined port on the day appointed, and shall sail at the stipulated time; and that the goods shall be delivered according to the bill of lading, and in good condi-
tion, unless prevented by the act of God or the King's enemies. The freighter, on the other hand, is bound to furnish the cargo and pay the freight in terms of the bargain, and, in case of delay occasioned through his fault, to indemnify the owners for the lost time. These conditions, which may be termed the naturalia of the contract, may, of course, be modified or varied by express stipulation. Difficult questions may also arise as to the owner's right to demand freight pro rata iteneris; but these and all other questions depending upon the construction of the special contract, or arising out of accidents in the course of the voyage, must depend so much on the circumstances under which they occur, that they can hardly be comprehended under any general rule. See the form of this contract, and a specification of the particulars deserving of attention in framing it, Jurid. Styles, vol. ii. p. 538, 2d edit. See also Bell's Com. vol. i. p. 449, 4th edit.

CHARTERED COMPANIES. See Public Companies.

CHATTELS, is an English law term, signifying all goods, moveable or immovable, except such as are in nature of freehold or parcel of it. Tomlin's Dictionary.

CHAUD MELLE, is a term in our ancient law, applied to homicide committed on a sudden, and in heat of blood. The person guilty of this offence had the benefit of sanctuary, from which, however, he might have been taken for trial, but if he proved chaud melle, he was returned safe in life and limb. The privilege of sanctuary to criminals was abolished at the Reformation; but the act 1649 (re-enacted 1661, c. 22) seems to be held in practice to include the case of homicide in chaud melle. The object of that statute is to fix the different degrees of casual homicide, and to remove doubts in future. The cases specified are homicide committed in lawful defence, or upon thieves or robbers breaking houses during the night, or homicide committed in the time of masterful depredation, or in pursuit of denounced rebels for capital crimes, in none of which cases is a capital punishment to be inflicted. But as homicide in chaud melle is not specified, it has been doubted whether the benefit of the statute ought to be extended to that
offence. Our practice, however, has been favourable to such
an extension; and this construction of the statute has the san-
tion of the highest authority in the criminal law of Scotland.
See Hume, vol. i. p. 235, et seq. See also Homicide.

CHIEF BARON. The President of the Court of Ex-
chequer; the judges of which Court are taken from serjeants-
at-law or English barristers, or from Scotch advocates of five
years standing.

CHILD-MURDER. The act 1690, c. 21, enacts, that,
if any woman shall "conceal her being with child during the
"whole of her pregnancy, and shall not call for or make use
"of help and assistance in the birth, the child being found
"dead or amissing, the mother shall be holden and reputed
"the murderer of her own child," although there be no ap-
pearance of wound or bruise upon the child's body. To miti-
gate the severity of this enactment, and at the same time to
check a too lenient practice which had been introduced of ban-
ishing women guilty of this crime, on their own petition, the
act 49 Geo. III. c. 14, provides, that, on conviction of the
crime, as described in the act 1690, c. 21, the mother shall be
imprisoned for a period not exceeding two years. The expo-
sure and desertion of infant children may amount to murder,
culpable homicide, or misdemeanour merely, according to the
circumstances attending the commission of the offence. Hume,
vol. i. p. 286, et seq.

CHILD-STEALING, is a crime punishable, by our law,
with death. Hume, vol. i. p. 82, et seq.

CHILDREN, are either lawful or unlawful. Lawful
children, are those children who are either procreated in mar-
riage, or afterwards legitimated by the intermarriage of the
parents. The legal presumption is, that all children born of
a woman who, at the time of conception, was lawfully married,
are legitimate; nor can this presumption be defeated, except
by direct evidence that the husband could not possibly be the
father of the child. Thus, if it can be proved that the hus-
band is impotent, or that he was absent from his wife at the
time of conception, the presumption of legitimacy ceases. It
seems to be fixed in our practice, that the period of absence necessary to elide the legal presumption must have commenced at least ten months before, and that it must have continued until within six lunar months of the birth of the child. The proof of absence must be special; and although it is not necessary in Scotland, as it is in England, that the husband must have been out of Britain, yet the distance between the husband and wife must have been such as to exclude the possibility of intercourse. It would not be sufficient to defeat the presumption of legitimacy, to prove that the wife had been engaged in a protracted criminal intercourse with a stranger, including the period of the supposed conception, and that her husband and she at that time lived in separate houses. *Ersk.* B. i. tit. 6, § 49, *et seq.*

With regard to children unlawfully begotten and made lawful by the subsequent intermarriage of the parents, it is to be observed, that the legitimacy of such children rests upon a fiction of the law, by which it is held that the marriage was contracted at the time that the child was begotten; so that, if either the father or mother was at that time married to a third party, or if a marriage of either of the parents to another person has intervened, after the birth of the child, so as to prevent the retrospective operation of the fiction, it would seem that such child cannot be legitimated in this manner. When, however, there exists no such impediment, children legitimated by the subsequent intermarriage of their parents enjoy all the rights of lawful children; and, of course, an eldest son thus legitimated will succeed as heir to his father's heritage, to the exclusion of a son procreated in wedlock. *Ersk.* B. i. tit. 6, § 52. But, if the parents are domiciled, and intermarry in a country where legitimation *per subsequens matrimonium* is not recognised, such marriage will not render their children, born before their marriage, legitimate to the effect of entitling them to succeed as lawful children in Scotland; Sheddan, 1st July 1803, *Fac. Coll. Mor.* App. *voce Foreign*, No. 6; affirmed on appeal, 2d March 1808. As to the effect of letters of legitimation, see *Legitimation, Bastard*.

*Unlawful* or *illegitimate* children, are children conceived
and born out of marriage, and whose parents never afterwards were married to each other. See Bastard.

CHILDREN of A MARRIAGE. In marriage settlements, it is very common to destine lands, or to give provisions, to the children of a marriage, or to the bairns of a marriage, or to the heirs and bairns of a marriage. All of these expressions are to be judged of from the circumstances of the case. Where the estate is of value, or has been long in the family, the term bairns, or children of the marriage, though ill calculated to describe the eldest son or heir in heritage, may yet be held to point out him in preference to the whole children. Whereas, if the estate be of little value, or consist of money, or even burgage property, the same form of expression may have the effect of calling in the whole children equally. Ersk. B. iii. tit. 8. § 48. See Bairns.

CHIROGRAPHUM apud debitorum repsumitur solutum. The written voucher of debt being found in the possession of the debtor, affords a presumption that payment has been made by him. This, however, is not a presumptio juris et de jure, and may therefore be defeated by an express proof that the voucher did not come into the hands of the debtor by the consent of the creditor; Ersk. B. iii. tit. 4. § 5.

CHURCH of SCOTLAND. The Roman Catholic religion was abolished in Scotland by the act 1560, ratified by the act 1567, c. 2. After the Reformation, the form of church government inclined to Episcopacy or to Presbytery, as the influence of the one party or the other predominated, until at last, by the treaty of Union in 1707, Presbytery was finally established as the form of church government in Scotland. Immediately after the Reformation, the government of the church was given to parochial presbyters, under the control of officers termed superintendants. In 1572, the titles of Bishops and Archbishops were given to the clergymen who were then, or should thereafter be, ordained ministers of the cathedral churches. They had also the privilege of sitting in Parliament. But, by 1592, c. 116, Presbyterian church government was established in kirk sessions, presbyteries, pro-
vincent synods, and general assemblies. Episcopacy was restored by 1606, c. 2, and gave place to Presbytery in 1638. Episcopacy was a second time restored in 1662; and, in 1689, was again succeeded by Presbytery; which from that time has continued to be the established religion of Scotland.

Presbytery being thus established, those Presbyterian ministers who had been expelled from their churches in 1661, were, by the act 1690, c. 2, ordered to be replaced; and the church government is declared, by 1690, c. 5, to be in their hands, and in the hands of the ministers and elders chosen by them, or whom they may thereafter choose; a general assembly is appointed, with directions to settle all the disorders of the late times, and a confession of faith is recognised. This act is confirmed as the foundation of a treaty of union betwixt the two kingdoms by the act 1707, c. 6; and the confession of faith and form of church government, as established in Scotland by law, are declared to be a fundamental and essential condition of the treaty of union. Ersk. B. i. tit. 5. § 5, et seq. Many severe laws were formerly enacted for enforcing conformity to the established form of church government. See Nonconformity.

CHURCH PATRONAGE, see Patronage.

CHURCH LANDS, see Benefices.

CHURCHES, and other things destined to sacred purposes, are held to be extra commercium, and cannot be applied to uses of private property; yet, from expediency, it frequently happens that the situation of churches is changed, church bells and communion cups are disposed of, and new ones purchased in their place; and the parishioners also acquire a quasi property in the seats or area, for the special purpose of attending divine service. Ersk. B. ii. tit. 1. § 8.

CHURCHES AND CHURCH-YARDS. The burden of upholding churches and the walls of the church-yard is, by long usage, imposed on the heritors of the parish; and where the parish is partly within borough and partly in the country, the expense must be borne by heritors and proprietors of houses in proportion to their real rents. Ersk. B. ii. tit. 10.
§ 63. But although this is a burden which attaches to the lands, it is not properly a debitum fundi. Singular successors in the lands and creditors are not liable for arrears, but only for that part of the expense applicable to the years of their possession; Bell's Com. vol. i. p. 593, 4th edit.

CHURCH JUDICATORIES. The Judicatories of the Church are kirk-sessions, presbyteries, provincial synods, and general assemblies. The constitution of these shall be explained in their order,—1. Kirk-Session.—Composed of the minister of the parish and lay elders. 2. Presbyteries.—Which include a certain number of parishes, varying in number, according to local situation and other circumstances, there being 30 parishes in some presbyteries, and no more than four in others. The presbytery is composed of a minister and lay elder from each parish within its bounds, and of the professors of divinity in any university within its bounds, provided they be clergymen. There is a moderator of the presbytery chosen twice a-year, a clerk of the presbytery, and an officer to execute its orders. 3. Provincial Synods.—These are composed of three or more presbyteries. The number of provincial synods are at present 15. Every minister within the bounds of the synod is a member of court; and the same elder who last represented the kirk-session in the presbytery is the representative of the kirk-session in the provincial synod. A communication is established amongst the different provincial synods, by sending one minister and one elder, who are entitled to sit, to deliberate, and to vote with the original members of the synod. The synod has a moderator, clerk, and officers, of its own choosing. 4. General Assembly.—This is the supreme ecclesiastical court, in which both the ministers and elders of the church sit by representation. The representation is regulated by the 5th act of Assembly 1694, which provides,—"That all presbyteries consisting of 12 parishes, or under that number, shall send in two ministers and one ruling elder: That all presbyteries consisting of 18 parishes, or under that number, but above 12, shall send in three ministers and one ruling elder: That all presbyteries consisting of 24 parishes, or under that
number, but above 18, shall send four ministers and two ruling elders: And that presbyteries, consisting of above 24 parishes shall send five ministers and two ruling elders. That collegiate kirk, where there are two or more ministers, are, so far as concerns the design of this act, understood to be as many distinct parishes; and no persons are to be admitted as members of assemblies but such as are either ministers or ruling elders." And, by a subsequent act (Assembly 1712, c. 6), it is provided, That, when the presbytery exceeds 30 ministerial charges, it shall send six ministers and three ruling elders. The 66 royal burghs of Scotland are represented in the General Assembly by ruling elders; Edinburgh sending two, and every other burgh one. Each of the five universities in Scotland is represented by one of its members. According to this proportion of representation, the General Assembly consists of the following members:

200 Ministers representing presbyteries.
89 Elders representing presbyteries.
67 Elders representing royal burghs.
5 Ministers or elders representing universities.

361 Members of the General Assembly.

The General Assembly of the Church of Scotland meets by the joint authority of the church and of the crown, the meeting being appointed both by the moderator and by his Majesty's commissioner. The act 1592, establishing Presbyterian government, declares "it lawful to the kirk and ministers, every year at the least, and oftener pro re nata as occasion and necessity shall require, to hold and keep general assemblies." And the act 1690, by which Presbyterian government was restored at the Revolution, allows the general meeting and representation of the ministers and elders, according to the custom and practice of Presbyterian government, throughout the whole kingdom. In pursuance of these acts, the General Assembly meets annually in the month of May, and continues to
sit for ten days. The Assembly has a moderator, chosen by itself, who presides in its deliberations; a procurator or advocate; principal and depute clerks, agent, printer, and other officers. The annual meeting of the General Assembly is honoured with a representative of the sovereign, in the person of a Lord High Commissioner. When the Assembly is dissolved, it is done first by the moderator, who appoints the time for holding the next General Assembly, and then by the Lord High Commissioner, who, in his Majesty's name, dissolves the present, and appoints another assembly to be held on the same day named by the moderator; thus uniting the civil and ecclesiastical powers of the state, which indeed seem to be indispensably necessary to the constitution of a regular assembly.—Ersk. B. i. tit. 5, § 6.

The jurisdiction of the church includes certain civil as well as ecclesiastical powers. The civil powers consist in the right which presbyteries have of pronouncing decisions with regard to manses and glebes, and the qualifications of schoolmasters; (See Schools.) The ecclesiastical powers of the Church of Scotland are legislative, judicial, and executive; and, in the exercise of their judicial powers, their sentences are not subject to the review of any civil court.

The legislative power has been explained under the heads of the acts of the General Assembly; and it is only requisite to add a few words here on their other powers. The judicial power of the church consists in the infliction or removal of those censures which belong to a spiritual society; and, in regard to the clergy, a judgment of deposition will have the effect of depriving the individual of the emoluments of his office as minister of the parish. But a difference takes place in the origin of the procedure, where it is directed against a layman, from what takes place when it is directed against a clergyman. The procedure against a layman of the established church must commence in the kirk-session of his own parish; and the judgment of the kirk-session may be brought under review of the presbytery, while that of the presbytery may be again brought before the synod, and from that the case may still be
carried to the General Assembly. The procedure against a clergyman cannot commence in the kirk-session, because the clergyman is the moderator of that court; and the other members being inferior, he cannot be tried there. It is, therefore, before his superiors, the presbytery, that the procedure against a clergyman must commence; and the judgment of the presbytery may be reviewed by the synod, that of the synod by the General Assembly. It is by this gradual progress, from judicatory to judicatory, that the injustice of inferior courts may be rectified by the more unbiased and enlarged views of the supreme ecclesiastical court of the country. This system of review differs from that in civil causes, from the situation of the judges, who have all an interest equally with the parties to have the doctrines and principles of church discipline and order preserved entire. Although, therefore, in civil causes, the power of appeal rests in the parties, yet, in ecclesiastical causes, the members of the different courts have an interest that entitles them, as well as the parties, to carry the decision of their own court to the review of a superior one. Thus, a point may be brought before a superior court,—1. By reference—And then, in place of deciding, the inferior court refers to the superior court, and may sit and vote in that superior court; a circumstance which is an objection to this form of procedure, since the joining of so many members may give a bias to the decision of the superior court. 2. By appeal—Where the party is entitled to bring the whole proceedings of the inferior court under review of the superior court; and, in defending the judgment, the members of the inferior court are entitled, and in some degree bound, to defend the judgment which they have pronounced. 3. By complaint—Where a decision appears to the members of the court to be wrong, the minority may enter their grounds of dissent in the minutes; and they may also, if they see cause, complain to the superior court, which will bring all the members of the inferior court, as well as the parties, to the bar of the superior court, which may decide on the cause in the same manner as if the cause had come before them by appeal of the parties.
The executive power of the church is exercised in a great measure by the presbyteries, though the supreme executive power remains with the General Assembly. The most important occasions of exercising this power are the settlements of vacant parishes, in which the General Assembly gives directions to the presbytery within which the parish lies as to the manner in which they are to proceed; or, when any reluctance appears on the part of the presbytery, the whole course of procedure is prescribed by the General Assembly; and the presbytery act in a ministerial capacity, and must implicitly obey the instructions they receive. See Hill's Theological Institutions.

CIRCUIT COURT OF JUSTICIARY. The act 1672, c. 16, divides the kingdom into three districts, and appoints circuits to be made by the Justiciary Judges. This regulation is affected by different statutes, as 20 Geo. II. c. 43; 23 Geo. III. c. 45; 30 Geo. III. c. 17. The circuit courts of the southern district are directed to be held at Jedburgh, Dumfries, and Ayr; the western at Stirling, Inverary, and Glasgow; and the northern at Perth, Aberdeen, and Inverness. The Court must remain at each place not less than three days; and no business begun at any of the places must be left unfinished. There are two circuits in the year; one in spring, which must be held between the 12th March and the 12th of May, and another in harvest. One judge may proceed to business in absence of his colleague; and, when necessary, the Circuit Court may certify a case commenced before it, to the whole Court of Justiciary for consideration. See Hume, vol. ii. p. 20, et seq.

With regard to presentments and informations in order for trial before the Circuit Courts, it is enacted, by 8 Anne, c.16, that the sheriffs, magistrates of burghs, justices of the peace, and other inferior judges, shall hold courts at their usual places of sitting, on the 22d February and 22d July yearly, to receive information of matters criminal to be tried at the ensuing circuit, and to transmit written abstracts of the accusations offered before them, and the evidence by which they
are supported, to the Lord Justice-Clerk and his deputies, forty days at least before the sittings of the respective Circuit Courts, so that indictments may be raised in due time. In practice, however, this duty has devolved on the sheriff, who is bound to make immediate inquiry into the circumstances of every crime committed within his sheriffdom, as soon as his fiscal, or the injured party, shall lay a complaint before him, so that in general the offender is in custody or under bail, and the precognition duly transmitted to the Lord Advocate, before the days mentioned in the statute; Hume, vol. ii. p. 26.

The jurisdiction Act (20 Geo. II. c. 43) allows an appeal to be taken to the Circuit Court of Justiciary, 1st, In criminal cases, against the judgment of an inferior judge inferring neither death nor demembration; and, 2d, In civil causes, where the subject does not exceed L.12 sterling (now extended to L.25 sterling by 54 Geo. III. c. 67, § 5). These appeals must be lodged with the clerk of the inferior court within ten days after the judgment has been pronounced; and the adverse party, or his agent, and the inferior judge himself (where the appeal contains any conclusion against him), must be served with a copy of the appeal fifteen days at least before the sitting of the Circuit Court. But no such appeal is competent, except against a final decree of the inferior court. The Circuit Judges must proceed in these causes summarily, and their decision is declared final. In cases of difficulty, however, they may report their proceedings to the Court of Session or of Justiciary, as the cause appealed happens to be civil or criminal; Ersk. B. i. tit. 3. § 28. See Mr Ivory's edit. notes 61 and 62. See also Hume, vol. ii. p. 197.

The Jury Court also may hold sittings twice a year if necessary, at the different circuit towns where the Circuit Court of Justiciary meets, twenty-one days notice of such sittings being given by intimation on the walls of the Outer Parliament House, and in the lobby of the Court of Exchequer, and also on the door of the court-house of the circuit town, and the door of the sheriff's court in the other county towns, of the cir-
cuit; 55 Geo. III. c. 42. § 15.—Act of Sederrun, 9th December 1815, § 7.—59 Geo. III. c. 35, § 22.

CIRCUMDUCTION of the TERM, is the sentence of a judge, declaring the time elapsed for leading a proof, and precluding the party from bringing forward any farther evidence; Ersk. B. iv. tit. ii. § 32.

CIRCUMSTANTIALE PROOF, is a proof of circumstances and presumptions all tending to infer a certain fact meant to be proved. This mode of proof is resorted to where direct proof cannot be obtained; Ersk. B. iv. tit. 2. § 34.

CIRCUMVENTION, deceit, or delusion. All bargains, in which an intention to take undue advantage by either of the parties, is apparent, may be set aside on the ground of dole or extortion, without proving any special circumstance of fraud or circumvention. But it is not enough that the deed challenged be merely hurtful and irrational; for, unless it be evidently oppressive, it is not reducible without an actual proof of dole, even although the granter of it be of a facile temper, if he be not absolutely an idiot. If, however, there be lesion in the deed and facility in the granter, the most slender circumstances of fraud or circumvention will be sufficient to set it aside; Ersk. B. iv. tit. 1, § 27.

CITATION is the calling of a party in an action. It is done by an officer of court, or by a messenger at arms, under a proper warrant. Citations in the Court of Session are given by messengers at arms, under authority of summonses passing the King’s signet, or under warrants given by the Court, on petitions and complaints; and in inferior courts the citations are generally given by the officers of court, on warrants issuing from their respective courts. In the ordinary case, the citation must be given, and an execution returned agreeably to the rules laid down for regulating charges. See Charge on Letters of Horning.

Parties may also be cited edictally, that is, by a citation published at the market cross of Edinburgh, and the pier and shore of Leith. This form of citation is necessary where the party cited, although amenable to the courts of this country,
is resident out of Scotland. A foreigner having a landed estate in Scotland, may be cited in this manner in any action relating to such estate; but the Court of Session, as being the commone forum of all who reside abroad, is the only court to which he can be competently cited. It seems to be doubtful whether a native Scotchman having no property in Scotland can be cited edictally ratione originis. The cases in which the question has been raised have been in general attended with specialties, and, upon the whole, the conclusion drawn from the authorities on the point is rather unfavourable to such a citation, where it proceeds on nativity alone; See Ersk. B. i. tit. 2, § 18 and 19, Mr Ivory's edit. Note 28. Kames' Stat. Law abridged, App. Note 7. See also Jurisdiction.—Foreigner. Edictal citation is necessary in several other instances; thus, when a minor is called as a defender, his tutors and curators are cited, not by name, but edictally at the market cross of the head burgh of the county where the minor resides (Ersk. B. iv. tit. 1, § 8); and in the case of choosing curators, there must be a similar edictal citation of all having interest; 1555, c. 35.

Citation on a reference to Oath of Party.—Where a party is cited upon a reference of the matter in dispute to his oath, under certification that, if he do not appear and depone, he shall be held as confessed, he must be cited either personally by a messenger, or apud acta, that is, the day of appearance must have been notified to him in court by the judge. But if the party be furth of Scotland, or have no fixed or known residence, an edictal citation will be sufficient; Ersk. B. iv. tit. 2, § 17.

Citation for interrupting prescription.—The currency of either the positive or the negative prescription may be interrupted by a citation in a process. Thus, the positive prescription may be interrupted by a citation in a process at the instance of the party, in right of the property, against the person in possession, for recovery of possession; or the negative prescription may be interrupted by a citation in a process at the creditor's instance against the debtor for payment of the debt.
By 1669, c. 10, all citations for interrupting prescription are directed to be executed by messengers at arms against the defenders personally, or at their dwelling places, and at the parish church, during, or immediately after divine service; or if the defenders be furth of Scotland, then at the market cross of Edinburgh, and pier and shore of Leith, upon 60 days: but, in practice, this rule is disregarded. The same statute enacts, that all citations used for interrupting prescription, whether in real or personal rights, shall be renewed every seven years, otherwise to prescribe, unless the parties be minors, in which case the act is not to extend to them during the years of their minority. As this statute is limited to citations, if it should happen that the citation is followed by the appearance of the parties in court, or any other judicial step, it is no longer to be accounted a bare citation, but becomes a depending action, which will subsist for 40 years without being renewed, unless it be an action limited by statute to a shorter period, e. g. an action on arrestment, which prescribes in five years. For the security of purchasers and other singular successors, the act 1696, c. 19, ordains that all summonses used for interrupting the prescription of real rights shall pass upon a bill under the signet, and specify all the grounds on which they proceed, and that the summons and execution shall be registered within 60 days in a particular register to be kept at Edinburgh for the purpose; otherwise that they shall be of no effect in interrupting prescription against singular successors. See Ersk. B. iv. tit. 7, § 38, et seq. The septennial limitation of cautionary obligations not being properly of the nature of a prescription, cannot be interrupted by mere citation in an action; Bell's Com. vol. i. p. 274, 4th edit.

CIVIL LAW, from Civitas, is, properly speaking, the law of a state. In this sense it is synonymous with positive or municipal law. But the term Civil Law is generally applied to the Roman law. The Roman law consists of the Pandects, and an abridgment thereof called the Institute; and of the Code, containing the constitutions of the Emperors from Adrian to Justinian; and the Novels, consisting of the later constitu-
sions of the Emperors. This law, which was the law at one
time of all Europe, has materially influenced the jurisprudence
of this as well as of every other European state. But, besides
this general influence on what may be termed the common or
traditionary law of those countries, the Roman law is directly
received as legal authority in all of them to a certain extent at
least. In this country, the establishment of the Court of Ses-
son, and the bias towards the civil law which the judges of
that court (who were principally ecclesiastics) had received,
produced a very remarkable effect on the municipal law of
Scotland. From that time, our ancient common law gave place
to the civil law, except in those cases where the principles of
feudality were opposed to it. But, gradually, the statutory
law, the feudal law, the mercantile law, and the principles recog-
nised and established by the decisions of the Court of Session,
have formed a system of wise and equitable rules, which leave
to the civil or Roman law nothing more of its former influence
than what naturally and necessarily arises from the equity of
its principles, and the force of the reasoning on which its de-
cisions are established.

CLAIM. To claim is used synonymously with to demand
what is due. Where a proprietor insists for what belongs to
him against the person withholding it, he is said to make a
claim. But the term has also a technical meaning in Scots
law as applicable to the claim in a service,—the claim of enrol-
ment,—or the claim by a creditor on a bankrupt estate.

Claim in a service, is the petition addressed by the heir to
the inquest, in which he states his relationship to the deceased,
and prays to be served heir to him, either in general or in
special, or of provision, as the case may happen. In the ge-
neral service, the claim states simply that the heir is nearest and
lawful heir in general to the deceased. In the special service
the claim enumerates the lands in which the ancestor died in-
feft, with the particular tenure by which they are held,—the
new and old extent, &c.; and states the claimant to be heir to
the deceased in these lands, and prays the jury to find so. The
claim in the service of an heir of provision of course, specifies the
particular deed containing the destination under which the claimant prays to be served heir. See forms of these claims, Jurid. Styles, vol. i. p. 337, et seq. See also Service of an Heir.

Claim of enrolment as a freeholder, is the application made to the freeholders of a county by a person who wishes to be put upon the roll. This claim is addressed to the freeholders assembled at the meeting at which the claim is made. It states the names of the lands, the titles thereto, and their dates, with the old extent or valuation on which the claimant desires to be enrolled, and requires the freeholders to admit him, as being duly qualified. Before a freeholder can present such a claim, he must have been year and day infeft; and the only meetings at which enrolments can be made, are the Michaelmas head court, and the meeting for election of a member of Parliament. In order to entitle the claimant to be enrolled at the Michaelmas head court, his claim must be lodged with the sheriff-clerk, at least two calendar months before the meeting. But, at the meeting for election, the production of the claim and titles mentioned in it, on the very day of the meeting, is sufficient; Wight on Elections, B. iii. c. 1. and App. of Cases, p. 13. (See Election Laws).

Claim on a bankrupt estate.—By 54 Geo. III. c. 137, it is enacted, that a creditor claiming to be ranked on a sequestrated estate, must describe distinctly the ground of his debt, and accompany his claim with an oath of verity, which shall specify every security which the claimant holds for the debt, whether over the estate of the bankrupt or otherwise. It is sufficient to describe the debt in the oath of verity, by reference to an accompanying account; and in order to entitle the claimant to draw any dividend, it is necessary for him to lodge with the trustee the whole grounds or vouchers of his debt. See Bell's Com. vol. ii. p. 372, et seq. 4th Edit.

CLANDESTINE MARRIAGE, is a marriage contracted without the due observance of the ceremonies which the law has prescribed, viz. the regular proclamation of banns, and the nuptial benediction pronounced by a clergyman properly qualified. By the law of Scotland, clandestine marriages are
valid and effectual as regular marriages, but the parties, celebrator, and witnesses, are liable to certain penalties. By 1661, c. 34, the parties are liable to imprisonment for three months, and to certain fines according to their rank. The act 1672, c. 9, also provides a forfeiture of the legal rights of *jus mariti* and *jus relictæ*; but this act seems to fall under the general repealing statute, 1690, c. 27. The witnesses to such irregular marriages are liable, by 1698, c. 6, to a fine of L.100 Scots each. The celebrator, by 1661, c. 34, is punishable with banishment from Scotland, under pain of death, in case of his return; and, by 1698, c. 6, which ratifies the former act, he is liable "to such pecuniary or corporal pain as the Lords of the Privy Council shall think fit to inflict." But this discretionary power has never been exercised by the Court of Justiciary. The celebrator incurs the penalties of the statutes, if he be not a regularly ordained clergyman of the Church of Scotland, or an Episcopalian clergyman admitted to orders by an English or Irish Bishop, or if he has omitted to produce and record his orders, or to take the oaths to Government as required by 10 Anne, c. 7, and 19 Geo. II. c. 34. A Catholic Priest is liable to the penalties if he celebrate a marriage. The celebrator, although a regular clergyman, also incurs the penalties, if banns have not been duly proclaimed. It is proper to observe, however, that a magistrate before whom the parties appear to declare themselves married persons, so as to complete the civil contract, is not to be considered as a celebrator in the sense of the statutes, unless he takes upon him to pronounce the nuptial benediction; the statutes having in view merely the religious part of the ceremony. In prosecutions before the civil judge for the recovery of penalties, the procurator for the church is made joint prosecutor along with the Lord Advocate. By the 7 Anne, c. 6, the right of action is limited to two months after the transgression; but it is doubtful whether this limitation relates to any thing but the pecuniary fines, and, at any rate, it is for the benefit only of clergy of the Episcopal communion. See Hume, vol. i. p. 459, et seq. See also Marriage.
CLARE CONSTAT, Precept of, is a deed executed by a subject superior, for the purpose of completing the title of his vassal's heir to the lands held by the deceased vassal, under the granter of the precept. The deed is addressed to the superior's bailies in that part, whose names are left blank, so that the office of bailie may be exercised by any one; it then sets forth, that, from documents shown to him, the superior is satisfied that his late vassal died infeft in the lands, which are described, and that the heir in whose favour the precept is granted is the nearest and lawful heir of the deceased: the holding and reddendo are then mentioned, and the deed concludes with a precept of sasine, directing infeftment to be given to the heir in the usual form. Where the investiture of the lands contains a destination in favour of heirs, different from heirs general, the precept ought to be granted to the heir in his proper character, for, although a reference to the particular investiture, with a general description of the heir as nearest and lawful heir to the ancestor in the lands described, may be construed to mean the precise character of heir called by the destination, yet it is better to avoid a question of construction, by describing the heir with the same accuracy which would be required in a service.

The precept of clare constat may proceed on any evidence, whether judicial or not, which satisfies the superior that the person claiming the entry is heir of the last vassal. Where, however, extrajudicial evidence to the satisfaction of the superior cannot be obtained, a service of the heir in the proper character must be produced, before the superior can be required to grant the precept. Where the title is at all doubtful, it is for the advantage of the heir to have a service, for, although a precept of clare constat and infeftment form a good title of prescription, yet the title thus completed may be challenged at any time within the period of the long prescription of forty years; whereas a special service cannot be challenged after the lapse of 20 years, and, of course, a precept of clare constat, when proceeding on a service, has the benefit of this shorter prescription.
The superior's title to grant a precept of clare constat is limited by the terms of the investiture. He can renew the right in the person of the heir called to the succession by the investiture, or, where there is no special destination, he may give an entry in this form to the heir-at-law. But he cannot give it to a general disponee, nor even to the heir of investiture in liferent, and to his son in fee. In order to authorize any such variation, the heir must first complete his own title, after which, of course, if the destination does not prevent him, he may transmit the property in any line he thinks proper. It follows, from the nature of the precept of clare constat, that the heir cannot assign the unexecuted precept of sasine contained in it, so as to be the warrant of infeftment in favour of any other person than himself. Precepts of clare constat are also excepted from the act 1693, c. 35, so that they become void by the death of the granters or receivers. See Precept of Sasine.

The heir, by taking infeftment on the precept of clare constat, becomes liable passivé for his ancestor's debts, and, at the same time, he acquires an active title as to the subject contained in the precept, in questions with the superior, but it gives no active title as to any other subjects belonging to the deceased. Mr Erskine seems to think that, upon principle, this mode of entry by private consent ought to have conferred no active title whatsoever; Ersk. B. iii. tit. 8, § 71.

An entry by precept of clare constat can be given only where the last proprietor stood publicly infeft; but where the infeftment of the ancestor was base, a charter of confirmation and precept of clare constat may be combined in the same deed, the superior, in the first place, confirming the ancestor's base infeftment, and closing the deed by a precept of clare constat for infefting his heir. See Confirmation.

CLAUSE OF A DEED, is one of the sub-divisions of a deed. The ordinary clauses inserted in deeds are expressed according to certain technical forms which have been sanctioned by practice, and the legal import and effect of many of which have been settled by adjudged cases; so that it is at all
times unsafe to vary the usual form of expression of such clauses. See Dispositive Clause, Testing Clause.

CLAUSE OF REGISTRATION, see Registration.

CLAUSE OF WARRANTICE, see Warrantice.

CLAUSE OF PRE-EMPTION, is a clause sometimes inserted in a feu-right, stipulating, that, if the vassal shall be inclined to sell the lands, he shall give the superior the first offer, or that the superior shall have the lands at a certain price fixed in the clause. It is settled that a clause of this kind is not struck at by the act 20 Geo. II. c. 50, by which clauses de non alienando are prohibited; but Mr Erskine holds that, without a clause of irritancy, the clause of prescription will be unavailing against singular successors. This, however, does not seem to be quite settled. (See Ersk. B. ii. tit. 5, § 28, and Bell’s Com. vol. i. p. 27, 4th edit.) At any rate, it is clear that a clause of pre-emption can have no operation against singular successors unless it appear in the saisine; Bell’s Com. ib.

CLAUSE DE NON ALIENANDO. This was a clause formerly in use to be inserted in feu-rights, by which the vassal was taken bound not to alienate the feu without the superior's consent. But, by the statute 20 Geo. II. c. 50, § 10, all such clauses, restraining the power of alienation, are prohibited and declared of no force, even although inserted in deeds before the date of the statute, the Court of Session being empowered to modify an additional feu-duty to those superiors who suffer by the retrospective operation of the statute; and, by Act of Sederunt 10th March 1756, the indemnification is fixed at a feu-duty equal to a fourth of one per cent. of the valued rent of the lands, where the lands are valued, and, where the lands are not valued, a sixth part of one per cent. of the real rent; Ersk. B. ii. tit. 5, § 28. It is settled that a clause of prescription does not fall under the statute. See Clause of Pre-emption.

CLAUSE OF DEVOLUTION. A clause of devolution may be defined generally to be a clause devolving some office, obligation, or duty, on a party in a certain event, e. g. on the
failure of another to perform. It is unnecessary to specify the various deeds in which such a clause may occur. By much the most important instance of it, however, in our practice, is to be found in the articles of roup in a judicial sale, in which a clause is inserted, binding the highest offerer to find caution for the price within 30 days, and, on his failure to do so, devolving the purchase on the next highest offerer, under a similar obligation, and so on downwards; intimation of the devolution being made within ten days of the offerer's failure to find caution, and the offerer so failing being bound to make good the difference between his offer and the offer taken. This clause, which has been introduced solely for the benefit of the exposers, is attended with evident hardship to the bidders at a sale; for even the second highest may be kept in a state of suspense for forty days after the sale, and the remaining bidders for a much longer time. In construing the clause, it seems to be understood, 1st, That, on the failure of the highest offerer to find caution, it is optional to the exposers either to re-expose the lands, or to claim against the second offerer, although the soundness of this construction has been doubted. 2d, That, where the exposers, on the highest offerer's failure to find caution, have made their election to abide by the sale, without re-exposing, and have made a demand upon the second offerer, the second offerer has full right to the purchase, and cannot be deprived of it by any subsequent attempt on the part of the highest offerer to implement his bargain. 3d, It is now settled that the exposers' claim against the highest offerer for the difference between the amount of the first and second offer, is not of the nature of a penalty, but properly a debt arising ex contractu. Bell's Com. vol. ii. p. 318, 4th edit.

CLAUSE OF RETURN, is a clause by which the grantor of a right makes a particular destination of it, and provides that, in a certain event, it shall return to himself. A clause of this kind, where not protected by prohibitory, or by irritant and resolutive clauses, has been held to be of the nature of a simple substitution, which may be defeated by the gratuitous act of the grantee or any of the substitutes. A distinction,
however, has been attempted to be drawn between a substitution and a clause of return, the former of which, it is said, vests the right absolutely in the disponee, subject to his power of disposal, whereas a clause of return creates a conditional right, which is not defeasible, at least by any gratuitous act, on the part of the disponee or substitutes. But this distinction has not been sanctioned to the full extent, although it seems to be held that, where such a clause occurs in a gratuitous deed in favour of a stranger, or in a bond of provision by a father in favour of his children, or in any other deed importing a donation, it is considered as a condition of the grant not defeasible gratuitously. Where, however, the clause occurs in a destination in favour of the granter's heir aliquote successurus, or in a deed granted for an onerous cause, it is settled that it is to be regarded as nothing more than a simple substitution, which may be defeated by the grantee, or any of the substitutes, at pleasure. In no circumstances will a simple clause of return be effectual against onerous deeds or the diligence of creditors. See Ersk. B. iii. tit. 8, § 45. Duke of Hamilton against Douglas, 9th December 1762, Fac. Coll. Mor. p. 4358, and Mor. Dict. title Fiar Absolute, Limited. See also Substitution, Prohibitions.

CLAUSES IRRITANT AND RESOLUTIVE. These two clauses have been devised for limiting the right of an absolute proprietor, and making effectual the conditions imposed on him, which, otherwise, would infer no more than a personal obligation, ineffectual against creditors or singular successors. By the irritant clause, the deeds done by the proprietor, contrary to the conditions of the right, are declared to be void and null: and, by the resolutive clause, the right of the person contravening is resolved and extinguished. It is the union of the two clauses which accomplishes what neither of them singly can attain; and by which, in practice, the conditions of an heritable right (whether an entail or other conveyance) are rendered real and effectual against the singular successors and creditors of the disponee, as well as against himself and his heirs. Ersk. B. iii. tit. 8, § 25. See Irritancy.—Entail.
CLERGY. Before the Reformation, the clergy of Scotland were divided into regular and secular. The regular clergy had no charge of any congregation, but were bound to close residence in their monasteries; they were called regular, because they were bound to obey certain rules: These were the monks, under the direction of the abbots or priors; which order of clergy was abolished at the Reformation. The secular clergy were those who discharged the pastoral office over a certain district, as the bishops, presbyters, and deacons. But the introduction of presbyterian church government has reduced this order to presbyters alone. Ersk. B. i. tit. 5, § 3, et seq. For the form of admission of a clergyman of the church of Scotland, see Minister.—For an account of their provision, see Teinds.

CLERGY, BENEFIT OF, see Benefit of Clergy.

CLERK OF SESSION, is the title given to the clerks of the Court of Session; there are six principal clerks, six depute clerks, and six assistant clerks or closet keepers as they are sometimes called. The principal clerks are appointed by the King; and, by act of regulations 1695, to qualify them for the office, they must be either advocates or writers to the signet of three years standing; their appointment, however, disqualifies them for practice as advocates or agents before the Court of Session; 1 and 2 Geo. IV. c. 38, § 9. Their duty is to attend the Judges in the Inner-House, and under their direction to write out the judgments or interlocutors, or other orders pronounced by the Court, and to keep the books of sederunt. Three of the principal clerks attend each Division of the Court. The depute clerks officiate in the Outer-House before the Lords Ordinary, whose judgments or interlocutors they write out. By 50 Geo. III. c. 112, § 26, the nomination of the depute clerks is vested in the six principal clerks jointly, the senior clerk having a casting vote in case of equality. Each principal clerk and each depute clerk has a distinct apartment, or closet as it is called, in the Register Office, in which he keeps the processes to which he is clerk. The duty of taking charge of the Outer-House processes, of transmitting them to the Judges to be considered, and of attending at the closets of the depute
clerks to lend out the processes to the agents for the parties, is discharged by the six assistant clerks or closet keepers, who also attend in the Outer-House while the Court is sitting, and assist the depute clerks in writing out the interlocutors of the different Lords Ordinary. The principal clerks have also assistants who officiate at their apartments in the Register Office, and take charge of the processes depending before the Inner House; and, by the act 50 Geo. III. c. 112, § 13, the duty of preparing the extracts of the decrees of the Court was entrusted to the assistants of the principal clerks, but, by 1 and 2 Geo. IV. c. 38, § 17, that part of the 50 Geo. III. is repealed, and all such extracts directed to be prepared by one or other of four extractors, to be nominated by the six principal clerks (See Extractor). The principal clerks and depute clerks of Session are entitled to no fees, but have fixed salaries, the former £1000 per annum each, and the latter £400. The emoluments of the assistants are derived from small fees which they exact for lending out and receiving back processes, for lodging papers, &c.

CLERK OF THE BILLS. In the Bill-Chamber there are two principal and two depute clerks, whose duty it is to present to the Lord Ordinary on the Bills, all bills which require to be laid before him, and to write out the interlocutors thereon, and to manage the other business connected with the Bill-Chamber. By act of Sederunt, 18th February 1686, the clerks of the bills are made liable for the damage arising either from the accepting of an insufficient cautioner, or from refusing a sufficient one; but, by the act of Sederunt 14th June 1799, this act is repealed, and it is declared, that, in time coming, the clerks of the bills shall be responsible for the due performance of their duty in "receiving or rejecting cautioners according to the rules of common law and justice, applicable to the cases that may hereafter occur."

Formerly, the clerks of the bills had also to present to the Lord Ordinary all bills for summonses or diligences, &c. but, by 53 Geo. III. c. 64, § 17, the fiat of the clerk of the bills officiating for the time is declared to be a sufficient warrant for
passing such bills. (See Bill-Chamber.) The principal clerks of the bills are appointed by the King, the deputes by the two principal clerks jointly, and, in case of difference, the Lord President of the Court of Session has a casting vote. The office of assistant clerks in the Bill-Chamber is now abolished, and the principal and depute clerks appointed to discharge the duties of their respective offices personally; 50 Geo. III. c. 112, § 45. By 1 and 2 Geo. IV. c. 38, § 6, it is enacted, that in future no person shall be capable to be appointed a principal clerk to the bills except a principal clerk of Session, provided that the two principal clerks of Session who shall be appointed clerks of the bills shall not belong to the same Division of the Court. The principal clerks of Session to be appointed after the passing of this act are bound to accept of the office of principal clerk of the bills when appointed to it; and every principal clerk of Session, being also a principal clerk of the bills, is to have an additional salary of £300, but no other emoluments. The salary of the depute-clerks of the bills is fixed, by the same statute, (§ 8) at £450, with no other emolument.

CLERK TO THE COURT OF TEINDS. There is one principal clerk in the Teind Court, appointed by the King. His duty is to attend the Court, and write out, under its direction, the whole acts, orders, and decrees. In order to entitle a person to be appointed principal teind-clerk, he must be an advocate or writer to the signet of three years standing; and the appointment disqualifies him for practice before the Teind Court; 1 and 2 Geo. IV. c. 38, § 9. There are also a depute teind clerk and an extractor for that Court, appointed by the principal clerk.

CLERK OF JUSTICIARY, is the clerk of the Court of Justiciary. There are a principal and depute-clerk, and an assistant, whose duty it is to attend the sittings of the Justiciary Court in Edinburgh, to keep the books of adjournal, and to write out the interlocutors and sentences of the court. They have also an apartment in the Register Office, where they transact the business connected with the Justiciary and Circuit
Courts. Besides the principal, depute, and assistant clerks of Justiciary, there are three circuit clerks, one of whom attends the Judges on each of the three circuits, as clerk of court. The principal and depute clerks of Justiciary, and the circuit clerks, are appointed by the Lord Justice-Clerk. (See Lord Justice-Clerk.)

CLERK OF THE PEACE, is the clerk to the justices of the peace for the county. His duty is to attend the justice of peace court, and to keep the books of record, &c. The clerks of the peace in Scotland, are appointed by the Secretary of State, (1685, c. 16.—1686, c. 20.—1690, c. 28,) and the principal clerk of the county appoints the depute and district clerks.

CLERKS OF THE JURY COURT. By the stat. 55 Geo. III. c. 42, § 38, it is provided that there shall be three clerks to the Jury Court. They are appointed by the King, and must be either advocates or writers to the signet, of three years standing. The Lord Chief Commissioner is also empowered to appoint a clerk during his pleasure, who shall keep the rolls of court, and perform the other duties connected therewith; and, by the 59 Geo. III. c. 35, § 31, power is given to the King to appoint a fourth clerk and three assistant clerks or closet-keepers. There are now four principal clerks and two assistant clerks connected with this court, besides the Lord Chief Commissioner’s clerk. The duty of the principal clerks is, to prepare and adjust the issues with the counsel and agents for the parties, and to make the preparations necessary for trial; and one at least of the principal clerks must attend each sitting of the court. There are no fees exigible by the clerks of the Jury Court; the principal clerks have fixed salaries of L.600, and the assistants of L.300 per annum.

CLERKS OF COURT. It would exceed the proper limits of this work to enumerate the different clerks of inferior courts. Every court has necessarily a clerk, whose duty it is to write out the judgments, and extract the decrees of the court. In like manner, each royal burgh has a clerk chosen by the magistrates, whose duty it is to keep a record of their
proceedings, and to act as notary in giving sasine in burgage property. See Sheriff-Clerk.

CLERKS TO THE SIGNET. The Clerks to the Signet were anciently clerks in the office of the Secretary of State, by whom writs passing the King’s Signet were prepared. When the forms of the judicial procedure in this country were changed, in consequence of the introduction of clerical judges into the administration of justice, and the briefs of the old law, with jury trial, fell into disuse, the King’s Signet was open to the writs or summonses ordering attendance on the King’s Court, or to the diligence necessary for giving effect to its decrees. The new writs, which in this manner became requisite, were prepared by the writers to the signet; in consequence of which, their numbers must have considerably increased as the new system of writs extended. At the time of the establishment of the College of Justice, the writers to the signet were in the exercise of the same duties in which they are engaged at the present day; and they are recognised as a constituent part of that College; 1537, c. 59.

The duty of the clerks to the signet, or writers to the signet, as they are generally called, is to prepare the warrants of all charters of lands flowing from the crown; all summonses for citing parties to appear in the Court of Session; all diligences of the law for affecting the person or estate of a debtor, or for compelling implement of the decrees of the Supreme Court. The writers to the signet have farther the privilege of acting as agents or attornies in conducting causes before the Court of Session. Clerks to the signet, after ten years practice, and certain probationary examinations on civil law, may be appointed Judges of the Court of Session; (see Court of Session). They are also eligible to several other important offices connected with the Court of Session; and, by 1 and 2 Geo. IV. c. 38, § 12, they are the only persons entitled to act as clerks to services before the Sheriff of Edinburgh on special commission, a privilege which they formerly possessed in services before the macers, which are abolished by that act.
The Society is now under the keeper of his Majesty's Signet, who usually acts by a deputy keeper; and the affairs of the body are conducted by this deputy and certain commissioners named by the keeper, from the members, with power to them to make bye-laws for the admission of members and the regulation of their conduct.

By the laws at present in force, a person, before applying to be taken on indentures by a writer to the signet, must be at least fifteen years of age, and must have attended one of the Universities for two years. Evidence of this must be produced with his petition. The indenture continues for five years; the maximum apprentice-fee is L.210 sterling, besides which, there are paid L.20 to the widows fund, and L.50 to the library, and other smaller fees. After the expiration of the indenture, one year must intervene before he can be admitted as a member of the society; and he must have attended three classes of law, independently of his previous attendance at the University for two years. The candidate being admitted to his trials, is first examined on his knowledge of Scots law by three private examinators; and, at the distance of three months, he is examined in the hall of the society, by the public examinators, in presence of the commissioners, as to his knowledge in conveyancing. The dues of his admission are about £50, with some trifling perquisites to the officers and gown-keepers, besides a stamp on the commission.

The system of education, the time necessarily occupied in it, and the expense with which it is attended, are exceedingly well calculated to secure the admission of respectable and well informed members.

COACHES, PUBLIC, see Public Carriages.

COAL-MINE. A coal-mine is legally a part of the lands within which it is situated, and passes with a conveyance of the lands. It may nevertheless form a separate estate. Thus, a proprietor may sell or feu the surface, reserving the coals and minerals, or dispose of them, reserving the lands; and the two, thus separated, become distinct feudal estates; Ersk. B. ii. tit. 6, § 5. When a superior feu's lands under a reservation of a right
to coals, it is usual for him to come under an obligation to pay the vassal surface damage for the injury which may be done to the lands by working the coal-mines,—an obligation which, in case of a sale of the coals by the superior, will attach to the purchaser of the coal, in virtue of the principle by which every obligation affecting an heritable subject is transferred from the former to the present proprietor.

A liferenter, whose right extends merely to the fruits, *salsa rei substantia*, has no title to coal-mines without a special grant, even although they are open, and in course of being worked; nor will he be entitled to the rents of coal-mines unless the granter of the liferent shews that it was plainly his intention to include these rents in the liferent. *Bell's Com.* vol. i. p. 48, 4th edit. See *Liferenter*.

*COCKET*, a seal belonging to the King's Custom-House; or rather a scroll of parchment sealed and delivered from the Custom-House to merchants as a voucher that their goods are customed. The word also signifies the custom-house or office where goods to be transported were first entered and paid custom, and had a cocket or certificate of discharge. *Tomlin's Dict.*

*Codicil*, is a writing by which the granter bequeathes legacies out of his moveable estate, and which does not contain the nomination of an executor, nor clauses which refer to any thing but moveables, or which take effect till the granter's death. The same form of authentication is required in a codicil as in any other formal deed. Codicils are ordinarily executed in reference to a previous testament. See *Testament*.

The same name is frequently given to those writings which alter the terms of settlements *mortis causa* of any description, whether they be in the form of testaments or not.

*COGNATE*. A cognate is a relation connected by the mother's side; and as there is no succession through the mother, a cognate cannot succeed as heir to the father's property. But where there is room for a tutor-at-law, who is chosen from the relations on the father's side, or agnates, as they are called, the custody of the child is given to the mother, or, failing her, to the nearest cognate. *Ersk*. B. i. tit. 7. § 4.
COGNITION. This term was anciently applied to an action for ascertaining disputed marches. The Court of Session was in use to remit the matter in dispute to the sheriff, to be tried by a jury; but this form is now in disuse, and, in place of a remit to the sheriff, the present practice is to have the proof taken by commission, and reported to the Court of Session, who decide upon it. Ersk. B. iv. tit. 1, § 48.

COGNITION AND SALE, is the name given to a process before the Court of Session, at the instance of a pupil and his tutors, for obtaining a warrant to sell the whole or a part of the pupil's estate. In this action, the next heirs and creditors are called as parties;—the summons must contain a statement of the nature and amount of the pupil's heritable estate, and, either in the summons or in the course of the action, a full state of the pupil's affairs must be exhibited, so as to enable the Court to judge of the necessity of the sale. When the action comes into Court, a proof of the value of the property is led, and a memorial and abstract prepared, as in the case of a judicial ranking and sale; upon advising which, the Court authorises a sale, either of the whole or of a part of the property, as it may think proper, by public roup, and at an upset price, not under the value proved in the course of the process. When this warrant is obtained, the tutors may proceed to sell extrajudicially, at such time and place as they think best. In this process, of course, there is no ranking of the creditors. It may also be observed, that a summary application to the Court for warrant to sell is not competent. Ersk. B. i. tit. 7, § 17, Note.

In granting such warrants, the Court of Session acts as a court of equity; but it will not interpose unless in a case of great necessity, and where the estate is so burdened as to afford no reasonable prospect of beneficial management for the pupil without a sale. The Court, at one time, was in use to exercise a discretionary power in authorising sales, which appeared evidently advantageous to the pupil; but, more recently, a different rule has been followed, and now the Court will not interpose on any views of expediency, however clear; Fin-
layson, 22d December 1810, Fac. Coll. It was once the prac-
tice, in the case of sales by minors puberes, for the purchaser to
insist on an action of cognition and sale at the instance of the
minor and his curators, as a protection against a reduction on the
head of minority and lesion; but the Court lately, "on the
"ground that a minor and his curators could sell without ju-
dicial authority, and that no decree of the Court could pre-
vent a reduction by the minor, refused to interpose their
"authority as unnecessary;" Wallace, 8th March 1817, Fac.
Coll. See Ersk. B. i. tit. 7, § 17. Bell's Com. vol. ii. p. 300,
4th edit.

COGNITION AND SASINE, is a form of entering an
heir in burgage property. Where the ancestor died infest, one
of the bailies of the burgh, at the request of the heir, exa-
mines two or more witnesses as to his propinquity, upon whose
evidence the bailie cognosces, and declares him heir to the an-
cestor, and infests him by hasp and staple,—the symbols used
in burgh tenements. The ceremony is performed by the heir's
taking hold of the hasp and staple of the door, and entering
the house and bolting the door, and, on his coming out, he
takes instruments in the hands of the town-clerk, who always
acts as notary on the occasion. An instrument of cognition
and sasine is then extended, stating the res gesta, and closed
by the notary's docquet. The instrument of sasine, by 1681,
c. 11, must be recorded within 60 days of its date, in a partic-
ular register kept by the town-clerk. Where the heir, before
infestment, makes over the subject to another, the cognition of
the heir's propinquity, and the purchaser's infestment, may be
inserted in the same instrument; and, where the ancestor's
right was merely personal, the cognition of the heir, the re-
signation by the ancestor's author, and the new infestment in
favour of the heir, may all be inserted in the instrument of cog-
nition and sasine, which is then called a Resignation, cogni-
tion, and sasine; Jurid. Styles, vol. i. p. 553.

The form just explained seems to be the regular method
of completing an entry by cognition and sasine. By the
practice of the city of Edinburgh, however, no witnesses
are examined as to the heir's propinquitity, but, on the simple application of the party, and production of the last sasine, an instrument is returned, stating the cognition and infeftment of the heir, under the usual salvo jure cujuslibet. The same form of entry may be used by the heir of the creditor in an heritable bond over burgage subjects. The title of the heir in a burgage tenement may also be completed by precept of clare constat and infeftment, or by special service and infeftment, but the cognition and sasine is the simpler and more usual form. See Jurid. Styles, vol. i. p. 550, et seq. See also Burgage Holding.

COGNITIONIS CAUSA. Where the creditor of an heritable proprietor pursues the heir, with a view to constitute the debt against him, and the heir appears and renounces, the Court, to prevent the creditor from being deprived of the means of attaching the estate of his deceased debtor, pronounces a decree for the amount of the debt; on which account it has the title of a decree cognitionis causa; and, on this decree, ascertaining the debt, the creditor may proceed to adjudge the property of his deceased debtor. Where there is a risk that, by delay, the creditor may lose the benefit of the pari passu ranking, the Court is in use to pronounce such decrees de plano, reserving all objections contra executionem. See Adjudication.

COHABITATION. The living together at bed and board; that is, living as husband and wife, and being reputed as such, will constitute a marriage. See Marriage.

COIN, is the current money of the realm. The coining of money is a part of the King's prerogative; and he may, by proclamation, make any foreign coin lawful British money at his pleasure. The current coin of Great Britain is composed of gold, or silver, or copper. The denomination or value of the coin, is also fixed by the King's proclamation. Tomlin's Dict.

COINING. By our earlier practice, all offences against the current coin of the realm, e. g. counterfeiting, vending, disguising, or importing it, seem to have been considered treasonable, and were punished capitally, whether the coin was gold, silver, or brass. By the treason laws of England, coun-
terfeiting the King's money, or bringing false money into the kingdom, counterfeiting foreign gold or silver coin current in the kingdom by consent of the crown, or wasting, clipping, or otherwise impairing or falsifying the current coin, or possessing instruments proper for coinage, or conveying them out of the Mint, or marking, colouring, or gilding any coin or base metal, to resemble the current coin, &c. is treason; and the English treason laws having been extended to Scotland at the Union, offences of this kind must now be tried according to the forms prescribed in trials for treason; Hume, vol. i. p. 524.

But there are several offences against the coin not treasonable by the law of England, which, of course, remain on the same footing in this country as before the Union, and may be prosecuted under the Scottish statutes. 1. The coining of counterfeit brass or copper money, is not treason by the law of England; and, although it was an offence punishable capitally by our old law, the punishment by the present practice seems to be arbitrary. To constitute this crime, it is not necessary to utter, or attempt to utter the base coin, if the piece be formed so as to resemble the coin, and be likely to pass as such. The crime, however, is not committed, if the piece or medal struck have some private and peculiar device, such as must distinguish it from the current coin, and show that it was not intended for deception. 2. The knowingly uttering of false British coin, counterfeited within the realm, is not treason, and, by our practice, the punishment is arbitrary, provided the person guilty of the offence has had no concern in the fabrication, for, in that case, or if he share the profit of the adventure with the coiner, he is art and part in the crime of coining. 3. The uttering of false British coin, counterfeited in a foreign country, and imported, is not treasonable, except on the part of him who imports it, with intent to utter it. The punishment of this offence is also arbitrary. 4. The same holds with regard to the uttering of imported false foreign coin, current in this country by proclamation. 5. Coining within Britain, or lightening there, foreign money, not current by act of Parliament, but by consent of
parties merely, is a misdemeanour punishable arbitrarily. See Hume, vol. i. p. 555, et seq.

COLLATERAL SUCCESSION, is the succession, in heritage, of the brothers and sisters of the deceased. In this succession, the brother-german next youngest to the deceased succeeds; or where the deceased is himself the youngest brother of three or more, his immediate elder, and not the eldest brother-german, succeeds; and so on through all the brothers in the order of their seniority. Failing brothers-german, the sisters-german succeeds equally as heirs-portioners, though there should be brothers-consanguinean; and, failing them, brothers-consanguinean, (that is, brothers by the same father) succeed, according to the same rules with brothers-german; and, failing brothers-consanguinean, sisters-consanguinean succeed as heir-portioners. Brothers and sisters-uterine (that is, by the same mother, but by different fathers) have no right to succeed by the law of Scotland. Ersk. B. iii. tit. 8, § 8. See Succession.

COLLATERAL SECURITY, is an additional and separate security for the due performance of an obligation. Such securities of course can never be made available to any greater extent than that of securing implement of the principal obligation; but in ranking on the bankrupt estates of principal and collateral obligants, the rule is, that, while the whole debt remains unpaid, the creditor is entitled to rank for the whole upon the estate of each obligant, whether principal or collateral, whose obligation extends to the whole, to the effect of drawing full payment of the debt; Bell's Com. vol. ii. p. 282, 4th edit.

COLLATION, is a provision of the law of Scotland, by which the heritable and moveable succession of a deceased person, may, in certain circumstances, be accumulated into one mass, and distributed in equal shares amongst his next of kin. Collation may take place either between the heir in heritage and the executors, or amongst the younger children.

1. Collation between the Heir and Executor.—Where the estate of the deceased consists partly of heritage and partly of moveables, the heir in heritage has no share of the moveable estate, if there be others as near in degree to the deceased as
herself. But, although this be the provision of the law where the heir chooses to accept the heritage, yet, if he considers it for his interest, he has the privilege of claiming a share of the moveables as one of the next of kin, provided he collates the heritage with the executors, who are bound to collate the execute with him; so that the whole estate, heritable and moveable, of the deceased, may be thrown into one mass, and distributed by equal portions amongst all the next of kin. The same rule holds in collateral succession;—thus a brother who succeeds as heir may collate with his younger brothers and sisters, and claim an equal share of the whole succession. Mr Erskine seems to hold that the heir is entitled to this privilege, even although he be not one of the next of kin (Ersk. B. iii. tit. 9, § 3); but the contrary has been found by a unanimous decision of the Court; M'Caw, 28th Nov. 1787, Fac. Coll. Mor. p. 2383.

It is only the heir of line, or the heir ab intestato, who can be required to collate, in order to have a share of the moveable succession. The eldest heir portioner who succeeds to an heritable estate by an entail, or by her father's destination, is entitled on her father's death to a share of the moveables without collating; Riccart, 19th Nov. 1720, Mor. p. 2378; for, although the decision, Balfour against Scott, 15th Nov. 1787, Fac. Coll. Mor. p. 2379, is of a contrary tendancy, it does not seem reconcileable to principle, and has been disapproved of; (See report of Lord Meadowbank's speech in the case of Little Gilmour, 13th Dec. 1809, Fac. Coll.) It is settled that an heir of entail who is one of the next of kin and not heir 

\[\textit{alicui successurus},\] is entitled to a share of the moveables without collating the entailed estate, although he has succeed-ed to it through the deceased; Rae Crawford against Stewart, &c. 3d Dec. 1794, Fac. Coll. Mor. p. 2384. But an heir of entail \textit{alicui successurus} is not entitled to receive a share of the moveable estate without collating the rents of the entailed estate; Little Gilmour, 13th Dec. 1809, Fac. Coll. Where lands have been purchased and taken to a father in life-rent, and to his heir \textit{alicui successurus} in fee, with a power
of disposal in the father, the heir must collate before he can claim any share of his father's moveable succession; Baillie, 23d February 1809, Fac. Coll.; and it would also appear, that, where a father has during his own lifetime put forward his heritage to his eldest son præceptione havreditatis, the son, on his father's death, cannot claim a share of the moveables without collating the heritage so put forward; Bankton, B. iii. tit. 8, § 28. It has likewise been held, that an heir cannot claim a share of his father's moveables from the executors, without collating the heritage to which he has succeeded as heir to his father, although that heritage lies in a foreign country; Robertson, 18th February 1817, Fac. Coll. Where a father has possessed heritage on apparenery, without completing any feudal title, and his son has made up his titles by serving to the person last infeft, it has been questioned, whether the son can claim a share of his father's moveable succession, without collating the heritage possessed by his father on apparenery. In a case of this kind at present in dependance, the Court has been inclined to hold, that the heir passing by, is not bound to collate the heritage with which his immediate ancestor was not feudally vested; Waddell against Russel, 1822, First Division; and, in the case of Spalding against Farquharson, 11th Dec. 1812, not reported, but quoted in the printed papers in Waddell's case, this is said to have been expressly found.

2. Collation amongst Younger Children.—The object of this collation is to preserve equality in the distribution of the legitim, and it is confined exclusively to the children entitled to legitim. Under this provision of the law, every child claiming legitim, who has already got a provision from the father, is bound to collate that provision with the other children, and impute it in part of the legitim. Every provision given by the father falls under this collation, e. g. tocher, provisions granted to the child on his or her marriage, bonds of provision, and all sums advanced for behoof of the child, except the expense of education, or inconsiderable presents made by the father. But this collation is not required where it appears to have been the granter's intention that the child should have the provision
as a præcipuum over and above the share of the legitim. Neither is a child bound to collate a bond of provision granted to him by the father on death-bed, in so far as such provision does not exceed the deceased's part; for, although a father cannot diminish the legitim by a death-bed deed, yet he may dispose of the deceased's part, in articulo mortis, even to a stranger, and much more to his own child; Ersk. B. iii. tit. 9, § 25. Where an heritable estate is provided to a younger child, he is not bound to collate it, for such provision does not diminish the fund from which legitim is taken. This kind of collation cannot affect the rights of third parties; thus the widow cannot be required to collate legacies or donations made to her by the husband so as to increase the legitim, nor, on the other hand, are the children obliged to collate their provisions with the widow, in order to increase her jus relictæ; Ersk. B. iii. tit. 9, § 24 and 25.—Stair, B. iii. tit. 8, § 26 and 46.—Bankton, B. iii. tit. 8, § 16. et seq. See also Legitim and Jus relictæ.

COLLATION OF BENEFICES. Collation was a form of introducing a parochial minister to his church, during the times of Episcopacy. It was done by a writing under the hand of the bishop, approving of the person presented, and conferring on him the vacant benefice, and requiring the inferior clergy to induct him to the church. For the form of admitting a parochial minister, see Minister.

COLLEGE OF JUSTICE. The term College, which, in general, is applied to a society of learned men associated for scientific purposes, has been applied to the Supreme Civil Court, composed of the Lords of Council and Session, and of the members and officers of Court. This Court receives the title of College of Justice in the act 1537, c. 36, and the Judges of it that of Senators, 1540, c. 93. The Judges consisted originally of seven churchmen and seven laymen, with a President; the abbot of Cambuskenneth being the first President: And, from the act 1579, c. 93, it appears that, at the institution of the Court, the President must have been a clergyman. By the treaty of Union, art. 19, no person can be appointed a judge of this court who has not served as an advocate or prin-
cipal clerk of session for five years, or as a writer to the signet for ten; and in the case of a writer to the signet, he must undergo the ordinary trials on the Roman law, and be found qualified two years before he can be named. The Judge must be at the least twenty-five years of age. The admission is made by the Judges, in consequence of a letter directed to them by the King, requiring them to try the qualifications of the person, and to admit him. The form of trial is laid down by an act of Sederunt of the Court of Session, July 31. 1674. It consists in hearing, and reporting, and delivering an opinion on causes depending in Court. And although the very nature of trials infers a power of rejecting the candidate, yet the Court are deprived of the power of rejecting the presentee, by the act 10 Geo. I. c. 19.

Besides the fifteen ordinary Lords, it was anciently the practice to name extraordinary Lords; and they were increased to no less a number than seven or eight, whose influence it is obvious must have materially affected the decisions of the Court. James VI. by a letter recorded in the books of Sederunt, March 28. 1617, promised to restrict himself to the nomination of only three or four, in terms of the act 1537; and it was not till the 10 Geo. I. that the power of naming these extraordinary Lords was renounced. The proper number of Judges is therefore fifteen. Ersk. B. i. tit. 3, § 12, et seq. See Court of Session.

Besides the Judges, the College of Justice, by act of sederunt 23d February 1687, includes the advocates; clerks of session; clerks of the bills; writers to the signet; deputes of the clerks of session who serve in the Outer-House; their substitutes, one in each clerk's office; the depute clerks of the bills; the clerks of Exchequer; the directors of chancery; their depute, and two clerks; the writer to the privy seal, and his depute; the clerks to the general registers of sasines and homings; the macers of the court of session; the keeper of the minute-book; the keeper of the rolls of the Inner and Outer-House; one clerk to each of the Judges; one clerk to each advocate; the extractors in the Register Office; and the keeper of
the Advocates Library. The Barons and members of the Scots Court of Exchequer are members of the College of Justice by 6 Anne, c. 26, § 11; the Lords Commissioners and officers of the Jury Court, by 59 Geo. III. c. 35, § 36; and the keeper of the judicial records of the Court of Session; the six assistants to the principal clerks of session; the auditor of the Court of Session; and the collector of the fee fund; are, by 1 and 2 Geo. IV. ex officio members of the College of Justice.

The privileges of the College of Justice, according to several acts of the Scots Parliament, consisted in a general immunity from taxation. No such immunity, however, is now claimed; and the privileges, according to the present practice, founded on the act of sederunt 23d February 1687, consist of an exemption from watching and warding; from payment of the annuity for ministers stipends; from all the city imposts on goods carried to or from the city; and, lastly, from the civil jurisdiction of the magistrates, and also from all jurisdictions inferior to the Court of Session; 1555, c. 39. In so far as the privileges of the College of Justice entitle the members to exemption from police assessments for watching, cleaning, and lighting the city of Edinburgh, they have been renounced by the members, and, by the present police statute, the assessment is levied from them in the same manner as from the rest of the inhabitants.

COLLEGIATE CHURCH, was a church founded by a person of property, at his private expense, in which certain canons or prebendaries officiated under a head praepositus or provost.

COLLIERS AND SALTERS. The workmen at coal-pits and salt-works in Scotland, were formerly in a state of servitude, similar to that of the adscripti of the Romans, and the ancient nativi, or bondmen of this country. Colliers and salters were bound by the law itself, independent of pactio, merely by entering to a coal-work or salt-work, to perpetual service there; and, in case of sale or alienation of the ground on which such works were situated, the right to the service of these workmen passed to the purchaser as fundo annexum,
without any express grant; Ersk. B. i. tit. 7, § 61. But by
the stat. 15 Geo. III. c. 28, it is declared, that, after the 1st
July 1775, they shall be no otherwise bound than as other
workmen, and the benefit of the act 1701 is extended to them;
but the object of this statute having been in a great measure
defeated, partly by the nature of its provisions, and partly by
transactions between the workmen and their masters, by which
their bondage was continued, it was provided by the act 39
Geo. III. c. 56, that all the colliers in Scotland who were
bound colliers at the time of the act 15 Geo. III. should be
free from their servitude, and all action is denied to coalmasters
for money advanced to colliers prior to or during their service,
with a view to their engagement at the works, except only
sums advanced during their service for the support of their fa-
milies in case of sickness, for which advances the coalmaster
may retain from their weekly wages one-twelfth part of the
sums so advanced, till the principal sum and interest be repaid;
and the master has action for the balance in case the term of
service end before the advance is repaid. Persons seducing, or
attempting to seduce colliers from Great Britain, are to be
punished in the same manner as persons seducing manufac-
turers. The laws against unlawful combinations are also ex-
tended by this statute to colliers. In questions under the act
no coalmaster or lessee of coals can act as a justice.

COLLISION of SHIPS, is the collision of one vessel
against another, whereby the ship or cargo suffers damage.
The question, whether the collision has been caused by acci-
dent, or by design, or through negligence, must necessarily de-
pend upon the circumstances under which it happens; but
where it is clear that a fault has been committed, it is settled
that the owners of the vessel in fault must answer for the da-
mage resulting from it, at least to the value of the ship. Where
the loss or damage arises from pure accident, or the act of God,
as it is termed, the rule is, that the loss falls where it lights.
Where there may have been a fault, but it is impossible to say
to whom the blame attaches, the case seems to be considered
as one of average loss, or contribution, in which both ships are
to be taken into account, so as to divide the loss equally, although there is some difference amongst authorities as to whether the ships are to contribute equally, or in proportion to their respective values; but however that question may be determined, it rather appears to be fixed that the contribution is confined exclusively to the ships, and that no share either of the benefit or the loss arising from the contribution falls upon the cargo.

In questions between the owners of the ship and the owners of the cargo, it is clear that, if the damage has arisen from the fault of the master or mariners, the shippers are entitled to claim indemnification from the master and owners. On the other hand, it is equally clear, that, if the loss be accidental, it is a mere peril of the sea, which forms an exception in the charter party, and must fall where it lights. In like manner, if the injury to the cargo has arisen from an inscrutable accident which, as between the ships, gives rise to a claim for contribution, it is settled, in so far as the cargo is concerned, that this also is a mere peril of the sea within the exception in the charter-party. See, on this subject, Bell's Com. vol. i. p. 489, et seq. 4th edit.

COLLUSION, is a deceitful or fraudulent agreement between two or more persons to defraud a third party of his right. When proved, it has the effect at common law of voiding any transaction in which it occurs. Arrangements between bankrupts and their creditors on the eve of bankruptcy afford the most frequent instances of collusion; and, as the proof in such cases is necessarily difficult, our bankrupt statutes have created certain legal presumptions of collusion which cannot be defeated. Such are the provisions of the act 1621, c. 18, as to alienations to conjunct and confident persons, and of the act 1696, c. 5, regarding securities granted within 60 days of bankruptcy, by which presumptions of collusion and fraud are established. Independently, however, of those statutes, wherever collusion can been proved, or where the transaction is of such a nature as necessarily to imply fraud or collusion, it is reducible at common law; such are convey-
ances omnium bonorum to the prejudice of creditors, or such conveyances as necessarily render the debtor insolvent; anticipation of payment to a favoured creditor on the approach of bankruptcy; securities given on the approach of bankruptcy, accompanied with concealment or false appearances; arrangements for granting preferences, by circuitous transactions or otherwise;—these, and all similar transactions in which there is either direct evidence of collusion, or conclusive real evidence in the nature of the transaction itself, are reducible at common law, although they should not fall within the letter of any of the bankrupt statutes. See Bell’s Com. vol. ii. p. 255, et seq 4th edit. Stair, B. i. tit. 9, § 12, et seq. Ersk. B. iii. tit. 1, § 16; and B. iv. tit. 1, § 27, et seq. Bankton, B. i. tit. 10, § 72. See also Circumvention, Fraud.

COMBAT. Single combat was anciently admitted as a legal mode of proof, both in criminal and civil actions; and this kind of evidence appears to have been received as far down as the reign of Robert III. in questions regarding capital crimes; Ersk. B. iv. tit. 2, § 2. See Duelling.

COMBINATION. A combination amongst workmen to raise their wages, when attended with tumultuary assemblages or violence, is undoubtedly a crime at common law; and it is also now pretty well settled, that a combination, although unaccompanied with any outrage, and enforced merely by a sudden striking of work by numbers at the same time, and by a refusal to hold intercourse with those workmen who have not joined the confederacy, is criminal and punishable by our common law; Hume, vol. i. p. 485, et seq. On the same principle, combinations or contracts between masters for reducing wages, or altering the usual hours of working, ought to be criminal at common law, although there is no instance of a conviction in this country for such a combination. By the statute 39 and 40 Geo. III. c. 106, justices of peace are vested with power to punish summarily by fine and imprisonment, combinations, whether on the part of workmen against their masters, or of masters against their workmen; but it is very doubtful whether or not that statute extends to Scotland.
COLUMBARIA, see Pigeon-House.

COMEDIAN, an actor or actress. The salary of a comedian is held to be alimentary, and cannot be attached, except in so far as it exceeds what is necessary for subsistence; although the debtor may be incarcerated for the debt, and thus forced to bargain with his creditors; Bell's Com. vol. i. p. 75, 4th edit. It is not hamesucken to assault a comedian in a play-house; Hume, vol. i. p. 308. By 10 Geo. II. c. 28. every actor for hire, who has no legal settlement where he acts, and no licence from the King or the Lord Chamberlain, shall be deemed a rogue and vagabond, and punished as such, or forfeit L.50: and plays acted in any place where liquors are sold shall be deemed to be acted for hire. A copy of every new play must be sent to the Lord Chamberlain 14 days before it is acted, by whom it may be prohibited. Tomlin's Dict.

COMES, or Earl, was an ancient officer with territorial jurisdiction; Ersk. B. i. tit 4. § 1.

COMITAS, as used in international law, signifies the courtesy of nations, by which effect is given in one country to the laws and institutions of another, in questions arising between the natives of both. Among the many intimate connexions and relations of small states with each other on the continent, such questions are frequent; and many treatises have been written on the Conflictus Legum, and the Comitas, by which they are reconciled. This, however, is a subject into which it is quite unnecessary to enter at large.

COMMENDATOR. During Popery the commendator was the person by whom the fruits of a benefice were levied during a vacancy. He was properly a steward or trustee; but the Pope, who was entitled to grant the higher benefices in commendam, abused the power, and gave them to commenda tors for their lives. This abuse led to a prohibition of all commendams, excepting those granted by bishops for a term not exceeding six months; 1466, c. 3. Ersk. B. i. tit 5. § 4.

COMMISSARIES. The commissaries or officials were anciently the delegates of the clergy, for judging in those questions which fell within the ecclesiastical jurisdiction. By the
acts 1560, and 1567, c. 2, all jurisdiction depending on papal authority was abolished. But the Commissary Court of Edinburgh, consisting of four commissaries, was erected by Queen Mary, under a grant dated February 8. 1563. The Commissary Court of Edinburgh has a double jurisdiction; one diocesan, which it exercises over the special territory contained in the grant, viz. the counties of Edinburgh, Haddington, Linlithgow, Peebles, and a part of Stirlingshire (although, in practice, this jurisdiction is confined to the three Lothians); another universal, by which it confirms the testaments of all who die in foreign countries, or who die in Scotland without a fixed domicile, and reduces the decrees of inferior commissaries. There was but one commissary in each diocese until the erection of the Commissary Court of Edinburgh, after which, inferior commissaries were established under a commission from James VI. in most of the principal towns in Scotland. The number of inferior commissariats is at present twenty-three; but it is proper to observe, that a bill has been introduced into Parliament for abolishing the inferior Commissary Courts, and vesting their jurisdiction in the sheriffs.

The Judges of the Commissary Court of Edinburgh are appointed by the King, and chosen from the Faculty of Advocates. This Court has a privative or exclusive jurisdiction in declarators of marriage, actions of adherence or divorce, the executions of testaments, and declarators of bastardy during the life of the bastard; but an action for having it declared that one deceased was a bastard, and that his estate is fallen to the King, as ultimus heres, is competent before the Court of Session only. Their cumulative jurisdiction, or that which they enjoy along with other courts, extends to actions of aliment by wives against their husbands,—actions for sealing up repositories,—actions for verbal injuries arising from hasty words uttered unpremeditatively and in passion,—actions of slander and defamation,—the authenticating of tutorial and curatorial inventories,—and civil actions in absence to the extent of L. 40 Scots, and to a greater amount, if their jurisdiction is prorogated by consent of parties. By stat. 49 Geo. III. c. 42, § 2, the regi-
stratification of probative writs, &c. and of protests on bills, is taken from the commissaries.

The Commissary Court may review the judgments of inferior commissary courts, if the reduction be brought within one year from the date of the decree. The inferior commissaries have no jurisdiction in actions of nullity of marriage, of bastardy, or of adherence, nor in actions of divorce. See Ersk. B. i. tit. 5. § 25, et. seq. and Act of Sederunt, 28th February 1666.

COMMISSION OF OYER AND TERMINER. See Oyer and Terminer.

COMMISSION OF THE PEACE. See Justices of Peace.

COMMISSION TO TAKE A PROOF. See Act and Commission.

COMMISSIONER. The Lord High Commissioner to the General Assembly of the Church of Scotland represents the King in that assembly. The Royal sanction is necessary to the meeting of the assembly, and the King’s Commissioner has the power of dissolving it. In 1746 and 1760, when by accident the King’s Commission had not arrived, the assembly met on the day appointed and elected a moderator, but did not proceed to business until the commission arrived; Ersk. B. i. tit. 5, § 6, note. See Church Judicatures.

COMMISSIONER OF CUSTOMS. See Customs.

COMMISSIONER OF EXCISE. See Excise.

COMMISSIONERS OF JUSTICIARY. The Justiciary Court consists of the Justice-General, the Justice-Clerk, and five Judges of the Court of Session, who are commissioned by the King in place of the assessors formerly given to the Justice-General. In this Court the Justice-General is president, or, in his absence, the Justice-Clerk. See Circuit, Justiciary.

COMMISSIONERS OF SUPPLY. The Commissioners of Supply are named in the acts imposing the land-tax, and are authorised to act within their respective counties. They must, in order to qualify them to act, be possessed of £100 Scots of yearly valued rent, in property, superiority, or livery; and the same lands may give a qualification to more than one;
as where one commissioner is the superior and another the vassal in the lands; Gordon against Anderson, 21st January 1766, Mor. p. 2444. Every person acting without that qualification, though named in the act as a commissioner, incurs a penalty of L.20 sterling, and his vote will not be reckoned in any division of the commissioners. The exceptions in regard to qualification are two: one in favour of the eldest sons or apparent heirs of those possessed of a legal qualification to vote in the election of member of parliament, the other of the bailies and magistrates of royal burghs. Before proceeding to act, the commissioners are required, under a penalty of L.20 sterling, to take the oath of allegiance and abjuration, and to subscribe the assurance appointed to be taken by persons holding offices and public trust in Scotland.

The Commissioners of Supply are entitled to name a convener; and where this has been omitted, the sheriff of the county, on application to the Court of Session, will be authorized to call a meeting of the commissioners; or any private commissioner, where there is no convener, may call a meeting; Pultney, 24th December 1767, Fac. Coll. Mor. p. 2444. The commissioners are also entitled to appoint a collector and clerk, to whom they may assign reasonable salaries. The first meeting of the commissioners is appointed by the act; and they are ordered to name the subsequent diets of their meetings; and the commissioners present at these meetings (without any regard to a quorum) form a legal meeting. Wight on Elections, p. 194.

The principal duty of the commissioners is to assess the land tax; and they necessarily proportion and divide the valuation (by which the tax is imposed) whenever a division of property makes such a division requisite. This division is made upon an application from a feuair or purchaser, who has acquired right to a portion of an estate that formerly was entered in the cess-books in a slump sum; and on a proof led, in which the real value of the respective lands is proved, a division of the cumulo valuation is made in just proportion to the real value of the respective portions, on which a decree is given out.
and extracted by the clerk to the commissioners. This judgment is subject to review in the Court of Session; Wight, p. 184, and appendix, p. 28.

By 1 Geo. III. c. 53, it is enacted, that two general meetings of the justices of the peace and commissioners of supply shall be held yearly to order matters concerning the highways. The first meeting is appointed to be held on the same day, and at the same place, that the commissioners of supply meet to assess the land tax, &c. ; the second on the day of the Michaelmas Head Court; and conveners of the shires are to give the same notice of such meetings as are given of ordinary general meetings of commissioners of supply. Any five, or, in the shires of Kinross, Clackmannan, and Cromarty, any three, whether commissioners of supply or justices of the peace, are a quorum, for the purposes of this act. Under the militia acts the commissioners of supply have also power to assess for failures to make up the quota for allowances to the families of militiamen, &c. See Hutcheson's Justice of the Peace, B. v. c. 4.

COMMISSIONERS OF TEINDS. Several expedients to provide the reformed clergy with proper stipends, having failed, a commission of Parliament was appointed by 1617, c. 3, to plant churches and modify stipends out of the tithes of every parish within the kingdom. Other commissions were afterwards granted, with powers to unite or disjoin parishes, to value and sell tithes, &c. The last of these commissions was authorised by 1693, c. 23; and, by 1707, c. 9, the powers of it and of all former commissions were transferred to the Judges of the Court of Session, who, since that time, have continued to exercise the powers thus conferred on them, as a parliamentary commission under the name of the Teind Court, or "the Commission for Plantation of Kirks and Valuation of Teinds." This court is quite unconnected with the Court of Session, having a distinct jurisdiction and a separate establishment of clerks and officers. The whole judges sit in one chamber, and act in one body, nine judges being a quorum; and the Court meets every second Wednesday during the sittings of the Court of Session, beginning with the second Wed.
nesday after the meeting of the Court for the summer or winter sessions; 48 Geo. III. c. 138, § 15.

The jurisdiction of the Court extends to all matters in which the former commissions were authorised to judge, e.g. valuations and sales of teinds, augmentations of stipends, prorogations of tacks of teinds, and (with consent of three-fourths of the heritors of the respective parishes) the disjunction or annexation of parishes, and the building of new churches, &c. An appeal lies from this Court to the House of Lords.

The Teind Court has no power to put its decrees in force; this is done by the Court of Session on a bill presented at the Bill-Chamber, craving a warrant for letters of horning, which is granted, of course, and the letters pass the signet in the usual manner on induciae of ten days; 1633, c. 19. All summonses before this Court also pass under the signet of the Court of Session; but they, as well as the diligences on the decrees of the Teind Court, instead of being subscribed by a writer to the signet, are subscribed by the clerk of the Teind Court. See Ersk. B. i. tit. 5. § 21, et. seq. Ivory's Form of Process, vol. i. p. 394, et. seq. See also Augmentation. Summons. Teinds.

COMMISSIONERS OF THE JURY COURT. See Jury Court.

COMMISSIONERS, private factors. A commissioner, or factor, is a person who holds a power from his constituent to manage his affairs, either generally, or in a particular department, with full authority to act as he himself might do if present. Extensive land estates are generally placed under the management of a commissioner or commissioners. See Factor.

COMMISSIONERS ON A SEQUESTRATED ESTATE. By 54 Geo. III. c. 137, § 34, it is directed that, "at the meeting after the last examinations of the bankrupt, "the majority in value of the creditors present shall name any "three of the creditors as commissioners for the purpose of "auditing the trustee's accounts, settling his commission, con- "curring with him in submissions and compromises, and giv- "ing their advice and assistance to him in any other matters "relative to the management of the bankrupt or trust estate."
subject always to the control of general meetings." A majority of the commissioners may empower the trustee to compound, either by submission or compromise, all doubtful claims due to the estate, or made against it, or due out of other bankrupt subjects, or questions of ranking and preference, and all contingent debts and securities due to or by the estate, which it may be expedient to settle in this manner, to expedite a final distribution; sect. 55 of stat. A majority, with the trustee, is to fix the upset price and conditions of sale of any property directed by the general meeting to be sold by public voluntary roup; § 42. A majority is to audit the trustee's accounts, and by a minute under their hands to fix his commission; to ascertain the net proceeds of the estate recovered at the end of the first ten months; and to prepare in the same manner for each dividend; § 45 and 46. They are to ascertain the sum to be left in the bank for contingent expense (§ 45); and, if authorised by four-fifths of the creditors in number and value, at a general meeting, to give any allowance to the bankrupt, they and the trustee have a discretionary power respecting the allowance to be paid; § 63.

Disputes about the election of the commissioners are to be reported to, and summarily advised by the Court of Session, or Lord Ordinary on the Bills, in the same manner as in disputed elections of the interim factor or trustee. The commissioners (§ 35.) may meet at any time they think fit for the purpose of ascertaining the situation of the bankrupt estate, or examining the acts or transactions of the trustee; and they may make such reports as they, or any of them, may think proper, to a general meeting of the creditors, which they, or any of them, are empowered to call by advertisement in the Edinburgh Gazette on fourteen days' notice. A person conjunct or confident with the bankrupt cannot be a commissioner, nor a creditor having a material interest adverse to the other creditor, nor one residing beyond the jurisdiction of the Court, nor, in general, any one exposed to the objections which disqualify a person for the office of trustee (see Trustee). Neither is a person who acts at the meetings as agent for a creditor eligible.
as a commissioner. But the trustee on another bankrupt estate, to which estate the bankrupt is indebted, may be elected as being not an agent but a creditor. The whole nomination of commissioners does not fall by the death or failure to act of one of them; the Court will authorise the creditors to meet and supply the vacancy. Commissioners are disqualified in the same manner as the trustee from purchasing any part of the estate or effects of the bankrupt; M'Kellar, 8th March 1817, Fac. Coll. Commissioners are entitled to no salary, commission, or allowance of any kind from the bankrupt estate. See Bell's Com. vol. ii. p. 414, et seq.

COMMITMENT FOR TRIAL. After the declaration of an accused person, and the precognition have been taken, if there be reasonable grounds of suspicion against him, the magistrate grants warrant to commit him to prison to abide the result of his trial for the crime charged against him. This warrant, by 1701, c. 6, must be in writing, and duly signed. It must specify distinctly the particular offence charged, and it must proceed on a signed information. This information is generally in the form of a petition or complaint at the instance of the procurator-fiscal, by whom it is signed, although it would seem that a less formal application is a sufficient compliance with the statute; such, for example, as an affidavit, or signed declaration, or even a letter by the party concerned, or having cause of knowledge, provided it properly describe the fact, and be duly referred to in the warrant of commitment; Hume, vol. ii. p. 84. But, in whatever shape the information is, it must contain a direct charge of facts, not a vague statement of suspicions. The officer executing the warrant, before imprisonment, must serve the accused party personally with a copy of the warrant. The ordinary practice is to subjoin the warrant to the information, and to serve the prisoner with a full copy of both. Commitment for trial on a warrant, defective in the statutory requisites, exposes the granter, the officer executing it, and the keeper of the prison, to the pains of wrongous imprisonment; 1701, c. 6 (see Wrongous Imprisonment). There is an exception in the statute in favour of ins
ferior magistrates, justices of the peace, &c. empowering them to take security for good behaviour and to keep the peace, as they were in use to do before the passing of the act 1701; and also to commit for trial for indignities done to themselves, or to imprison vagabonds, &c. or for riots, batteries, pickeries, &c.; the persons so committed, however, having the benefit of the statute, in so far as concerns bail, and the expediting of trial. It is also provided by the statute, that the Privy Council, or any five of them, in case of imminent or actual invasion, rebellion, or insurrection, may commit, upon suspicion of accession thereto, without being liable to the penalties of the statute; the person so committed having his relief for trial or liberation under this act; stat. 1701, c. 6.—See Hume, vol. ii. p. 82, et seq.—See also Arrestment. Bail.

COMMITTEE, are those to whom the consideration or management of any matter is referred by some court or assembly to whom it belongs. The powers of a committee must of course depend upon the particular authority given to them by their constituents. In the House of Commons there are certain standing committees appointed by each new parliament, viz. the Committee of Privileges, of Religion, of Grievances, and of Trade; but of these the Committee of Privileges is the only acting one. The House is also in use, when it thinks proper, to appoint Select Committees, as they are termed, for particular purposes; Tomlin's Dict.

One of the most important committees of the House of Commons is that for deciding upon disputed elections. This committee is chosen for the particular case, under a system of rules and regulations calculated to insure impartiality in the decision of the question referred to them. Election committees cannot be formed until at least one hundred members are present. The names of all present are then written on slips of paper, and put in equal numbers into six glasses, and the clerk draws out a name alternately from each glass to the number of forty-nine. Lists of the forty-nine are then delivered to the counsel for the parties, who have each the privilege of striking off alternately one from the list until the number is reduced
to thirteen. Where there are two parties only, each names an additional member from those present at the ballot, or, failing such nomination by the parties, two additional names are drawn from the glasses, which complete a committee of fifteen, who are then sworn to try the matter in dispute. If there are more than two parties, no nomination is made by the parties, but the list of thirteen choose two members who have been present at the ballot, and not drawn, to act along with them, and complete the fifteen. Nothing but absolute necessity, proved upon oath, can excuse absence from this committee; and, if more than two members are absent, the committee must adjourn; and if, by death or otherwise, their number is reduced below sixteen, the nomination becomes void, and a new committee must be chosen. The Court thus constituted, and the parties, may obtain the Speaker's warrant for enforcing the attendance of witnesses, or the production of papers, records, &c. thought necessary for deciding the matter at issue. See the regulations for election committees fully stated in Bell's Treatise on Election Law, p. 466. See also art. Election Laws.

COMMIXTION, is a species of specification, including under it commixtio, properly so called, which is the mingling of solids; and confusio, which is the mixing of liquids. It may be proper to distinguish between that commixtion which produces a new subject, and that which mingles without altering the nature of the subjects, as in the case of two parcels of grain, or the mixing of two quantities of wine. 1. Where, from the commixtion of two or more substances of different kinds, a new substance is produced, which does not admit of the materials being restored to their original state, the person by whom the new property has been made becomes the sole proprietor, and he must consequently be liable to the owners of the materials for their value. 2. Where it is a mixture of the same substances, and no new one is formed, the original right of property remains; and whether the mixture has happened through accident, or has been made by design, the right of property in the materials will render the subject a common
property, divisible amongst the parties according to the value of their respective shares. *Ersk.* B. ii. tit. 1, § 17.

**COMMODATE**, is a species of loan gratuitous on the part of the lender, by which the borrower is obliged to restore the same individual subject which was lent, in the same condition in which he received it; *Ersk.* B. iii. tit. 1, § 20, *et seq.* See *Loan. Mutuum. Borrowing.*

**COMMON LAW.** The term common law is used by many of the writers on the law of Scotland, and in some of the acts of the Scots Parliaments, to signify the Roman law; but, in its proper acceptation, it means our consuetudinary law, whether founded on the Roman law, the feudal customs, or the ancient unwritten law of the country from whatever other source derived; *Ersk.* B. i. tit. 1, § 28.

**COMMON PASTURAGE**, is a known servitude in Scots law, by which the owner of the dominant tenement is entitled to pasture a certain number of cattle on the grass grounds of the servient tenement. The right is established either by grant or by prescription. When constituted by grant, the mere consent expressed in the deed, followed by possession, will render the servitude real and effectual against singular successors. Where the right is constituted by prescription, the possession must have continued for 40 years uninterruptedly. See *Pasturage.*

**COMMON AGENT**, is an agent or solicitor before the Court of Session, employed to conduct a cause in which several parties have a common interest; as the common agent in conducting a process of multiplepounding, or a process of ranking and sale. He is elected by the parties interested, or their agents duly authorised; and his election being reported to the Lord Ordinary, he approves of it, and administers the oath of *de jure.* See *Act of Sederunt,* 11th July 1794. See also *Judicial Sale and Ranking.*

**COMMON DEBTOR.** Where the effects of a debtor have been arrested, and there are several creditors claiming a share of them, the debtor, as being debtor to all the claimants, is distinguished by the name of the common debtor in the pre-
ceedings which take place in the competition. Ersk. B. iii. tit. 4, § 2.

COMMON PROPERTY, is property either heritable or moveable, belonging to more than one proprietor pro indiviso. The common proprietors are mutually bound to communicate the profit, or to bear the loss arising from their common property in proportion to their respective shares in it. Where the common property is heritable, and the proprietors wish a division of it, this may be done either extrajudicially, or on a brieve of division directed to the Sheriff; Bankton, B. i. tit. 8, § 38 (see Brieves, Heirs Portioners). Where the heritable subject is not divisible, e. g. a brew-house or other indivisible subject, any one of the common proprietors may require the others either to purchase his share at a certain price, or to sell him their shares at the same rate, or to concur in exposing the whole to public roup; Milligan, 8th February 1782, Fac. Coll. Mor. p. 2486. Moveable subjects held in common may be divided, when divisible, in an action before the Judge Ordinary; or, in case the subject is not divisible, as a ship, a majority of the common proprietors may sell it by public roup; or any one of them may oblige the others to take his share at a fixed price, or to sell him their shares at the same rate, by an action of sett before the High Court of Admiralty; Bankton, B. i. tit. 8, § 49; Stair, B. i. tit. 16. § 4, and B. i. tit. 7. § 15; Ersk. B. iii. tit. 3. § 56. See also Scit.

COMMONS, HOUSE OF. See Parliament.

COMMONTY. A common or commonty is a piece of ground belonging to one or more persons, and in general burdened with sundry inferior rights of servitude, such as pasturage, feal and divot, &c. in which last respect a commonty differs from common property held pro indiviso. There being no regular method, at common law, of ascertaining the rights of parties in a commonty, and dividing it among them, the act 1695, c. 38, makes all commonties, except those belonging to the King and to royal burghs, divisible at the instance of any having interest by an action in the Court of Session against all parties concerned. The Court is empowered
by this statute to discuss the relevancy, and to determine on the rights and interests of the parties, to grant commission for perambulating and taking all necessary proof, and to divide the common amongst the parties concerned. It is also declared that the interest of the heritors having right to the common shall be estimated according to the valuation of their respective lands and properties, and that the portion of the common adjacent to the property of each heritor be adjudged to him; with power to the Court also to divide the mosses in the common; or, in case they cannot be conveniently divided, that they shall remain common with freeish and entry, whether divided or not.

A right of servitude over a common is a sufficient title to pursue a division; but it has been doubted whether the statute extends to lands held in property by one person, but burdened with servitudes in favour of others. The decisions on this point have varied; but it seems now to be settled that, where the property of a sole proprietor is affected with servitudes, the several rights of servitude over the surface may be divided in terms of the statute, without prejudice to the right of property; Ersk. B. iii. tit. 3, § 57. It has also been held that, although a sole proprietor, burdened with servitudes, has no claim to a praecipuum in the division of the surface, yet that he has right to the coals, mines, and minerals, and other fossils under the surface; Henderson, 21st February 1782; Fac. Coll. Mor. p. 2487.

In questions amongst the common proprietors, the valuations of their respective properties afford the statutory rule of division; but in questions between the proprietors of the common and those having rights of servitude merely, the division is regulated, not by the valued rent of those claiming servitudes, but according to the number of cattle they are entitled to pasture on the common, or according to the value of their interests in the common, whatever they may be; Maitland, 11th August 1772, Mor. p. 2485. Ersk. B. iii. tit. 3, § 58.

COMMUNION ELEMENTS. The Teind Court, in modifying a stipend to a minister, make an allowance for com-
munion elements, payable out of the teinds of the parish, but the Judges do not consider themselves to be at liberty to en-
croach on the stock where the teinds are exhausted. Ersk. B. ii. tit. 10, § 50.

COMMUNION or GOODS. See Goods in Communion.

COMMUNITY or CORPORATION. A corporation is composed of a number of persons erected by proper author-
ity into a body politic, with certain rights and privileges. Cities, burghs, hospitals, scientific or professional associations, &c. may be thus incorporated. Corporations cannot be legally constituted, except by the King's patent or by act of Parlia-
ment. Voluntary associations have no persona standi in judi-
eio. But, by special statute, 33 Geo. III. c. 54, it is made lawful to establish societies for raising funds for the mutual re-
lief and maintenance of the members or their families in old age or sickness. The regulations of such societies are directed to be exhibited to the quarter sessions of the justices of the peace, by whom they are to be confirmed. The stat. 35 Geo. III. c. 3, extends the benefit of the former act to institutions for relieving the widows and families of the clergy and others in distressed circumstances.

A corporation is held in law to be one person, and, being in general established for a perpetuity, the legal person never dies; for, although the individuals composing it die out by degrees, yet those who come in their places, either by succession or by election, or by the nomination of the founder, according as the charter is conceived, preserve the corporation entire. In general, by the charter of erection, a corporation may sue or be sued in its corporate name; it may hold heri-
table property, and contract debt, which will be effectual against the property and funds of the corporation. A supe-
rior, however, is not bound to give an entry to a corporation, as to an ordinary purchaser, on payment of a year's rent; Hill, 17th January 1815, Fac. Coll. (see Composition.) Com-
munities have also, in the ordinary case, authority under their charter to elect magistrates, directors, or other office-bearers, to represent the whole community, and bind it in the matters which the charter of incorporation allows to be entrusted to
their management. Independently of an express clause in the charter, there are certain *naturalia* of a corporation which are implied in its erection. Thus, the corporation *may* acquire moveable property, and be sued for the price of it; it may have a common seal; *may* assemble to deliberate on its affairs; and has a power to make bye-laws for the administration of the affairs of the community, provided such bye-laws are not inconsistent with the laws of the realm.

Communities are dissolved, 1. By the expiration of the time to which their constitution limits them; 2. By act of Parliament; 3. By forfeiture, when they abuse their powers; in which last case, although the members necessarily suffer in their political capacity, yet no prosecution lies against such of the individuals as have had no accession to the crime. After a community is dissolved, the individual members are not, in the general case, bound even *subsidiarie* for sums borrowed by the incorporation. The estate of the corporate body, as being the fund on the faith of which the creditor contracted, is the only one to which he can look for repayment. *Ersk. B. i. tit. 7, § 64; Bankton, B. i. tit. 2, § 18, et seq.* See also *Burgh Royal.*

Public trading companies, incorporated by a Royal grant, or by an act of Parliament, are also proper corporations, which endure in continual succession during the time appointed by their charter. But private copartnerships do not fall under this description; and being intended merely for the private interests of the copartners, they may be constituted without the authority of the King or Parliament. See *Public Companies.*

**Society.** Bank.

**COMPANY.** See *Society.*

**COMPANY, PUBLIC.** See *Public Companies.*

**COMPARATIO LITERARUM.** The comparison of hand-writings. This is one of the means resorted to for proving the truth or falsehood of an allegation of forgery: and where genuine subscriptions or writings are brought to prove that a subscription or writing is truly not of the hand-writing of the person whose it is said to be, much weight is given to this species of evidence. But when the
comparatio literarum is resorted to, to prove that a particular writing has been written by the accused, it is considered as a much more doubtful species of evidence. Ersk. B. iv. tit. 4, § 71. See also Hume, vol. i. p. 160, vol. ii. p. 381.

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

COMPENSATION, is a provision of the law of Scotland, by which, where two parties are mutually debtors and creditors, their debts, if equal, extinguish each other, and, if unequal, leave only the balance due. Compensation, except by way of action, was unknown in our practice until 1592, c. 141, which provides, that compensation de liquido ad liquidum may be pleaded by way of exception or defence before decree, but not by way of suspension or reduction after decree. Although compensation does not operate ipso jure by our law, but must be pleaded, yet, where it is pleaded and sustained, the mutual debts are held to have been extinguished as at the time of concourse; and, from that time downwards, the currency of interest on either side is stopped.

In order to found compensation, it is necessary, 1. That each party be debtor and creditor in his own right: hence a tutor cannot compensate a debt, properly due to himself, with a sum for which he is creditor tutorio nomine. An executor confirmed, however, is held in this respect to be the same person with the deceased; and, therefore, where he owes a debt proprio nomine, he may plead compensation upon a debt due to the deceased; and, on the other hand, a debt due to one who afterwards becomes executor to a person deceased, may be compensated with a debt due by the defunct to the executor’s debtor. 2d, The parties must be debtors and creditors to each other at the same time: hence, if, before the concourse, one
of them has regularly assigned his debt to a third party, compensation cannot be pleaded against the assignee, on any debt afterwards arising between the original parties, although, where the conourse has taken place before the assignation, the debtor may effectually plead compensation against the assignee, upon the debt due by the cedent; Ersk. B. iii. tit. 4, § 14. 3d, The debts to be compensated must be of the same species and quality; hence, a sum of money cannot be compensated with a quantity of corn, because, until the price is fixed at which the corn is to be converted into money, the two debts are incommensurable; yet, in this case, some short time would probably be allowed for ascertaining the conversions, in order to make such a debt a proper subject of compensation; Ersk. ibid. § 15. It would also appear that, where a person is indebted to a bankrupt estate in a specific sum, and has, at the same time, an unascertained claim for damages against the bankrupt, for failure to deliver goods, there is room for a plea of compensation on the part of the debtor; Bell's Com. vol. ii. p. 133, 4th edit. It is proper to observe, however, that the cases referred to by Mr Bell, in support of this doctrine, do not admit of such a construction. 4th, A debt already due, and payable, cannot be compensated with a conditional debt, or one, the term of payment of which has not arrived; Ersk. ibid. But this holds only where the parties are solvent; for, if one of them is bankrupt, the other may plead compensation on a debt which may become due at a future time; Bell's Com. ibid. 5th, In strictness, compensation ought not to be admitted where the mutual debts are not clearly ascertained, either by the writ or oath of the adverse party, or by the decree of a judge. But, by invariable practice, if a debtor in a liquid sum pleads compensation upon a debt due to him by his creditor, but not actually constituted, the rule "quod statim liquidari "potest pro jam liquido habetur" is applied, and sentence delayed ex aequitate, until the ground of compensation be made effectual. This rule has been applied not only where the counter-claim was offered to be instantly proved by writ or oath, but even where the constitution of the debt required a proof
by witnesses (Ersk. ib. § 16); and although a debtor might not, in the ordinary case, be allowed to avoid the payment of what is liquid and payable during a long litigation on an illiquid counter-claim, yet there is an exception even to this rule in balancing accounts on bankruptcy; for a solvent debtor will not be compelled to pay the liquid debt, and rank for his own illiquid claim, but may plead compensation; Bell's Com. ib. p. 134. 6th, From the exuberant trust implied in deposit, compensation is not pleading by the depositary against the depositor. Nor can it be pleaded against the holder of a note payable to the bearer by the debtor upon a debt due to the debtor by any former possessor of the note,—a doctrine extended to indorsed bills of exchange which the acceptor cannot compensate against the holder by debts due to the acceptor by any of the indorsers; Ersk. ibid, § 17. Neither is compensation admitted upon a debt extinguished by the long prescription at the time compensation is pleaded, even although at the time of concourse the prescription had not run; Carmichael, July 1719, Mor. p. 2677. This rule holds also with respect to the shorter prescriptions, where the debtor is dead: But, where the debtor is alive, the debt seems not to be in a worse condition than an unliquidated debt, which may be instantly liquidated by reference to oath; Bell's Com. ib. p. 134. 7th, Where the concourse is made by the debtor acquiring right to a debt due by his creditor, compensation is not admitted, either where the acquirer is presumed to have had a bad intention, or where the compensation, if sustained, would void the diligence of third parties. Thus, a factor who is sued by his constituent for intromissions cannot plead compensation upon a debt due by the constituent, to which the factor has acquired right, after receiving the rents sued for. Nor can the debtor of a deceased person, who, after his creditor's death, has acquired right to a debt due by the deceased, plead compensation on such debt in a question with the creditors of the defunct; Ersk. ibid. § 18. Nor, indeed, can compensation be pleaded in any case on a debt which has been acquired mala fide to gain any undue advantage; Bell's Com. ib. p. 135.
Lastly, Compensation may be pleaded not only by the principal debtor, but by any one having an interest, as by a cautioner, or by a competing creditor who has an interest to enlarge the fund for division, by extinguishing the debt of one of the claimants; Bell's Com. ibid. p. 136.

By the act 1592, c. 141, if compensation has not been pleaded by way of exception in the course of an action, it cannot be pleaded after decree, either by way of suspension or reduction. But, if it has been pleaded, and unjustly repelled, it may be again insisted on, either in a suspension or a reduction, where these forms of process are not otherwise incompetent. Decrees in absence, whether of inferior judges or of the Court of Session, are held to be decrees in the sense of the statute; although Mr Erskine seems to think that, as the act of regulations 1672, c. 16, provides, that all defences competent in law may be pleaded against a decree in absence in the same manner as if there had been no decree, so the defence of compensation ought in no case to be excluded by such a decree; Ersk. ibid. § 19. But where the decree in absence has followed upon a summons against one of many debtors included in the same summons, this has been held a sufficient specialty to allow compensation to be pleaded in a suspension; Corbet, 20th March 1707, Mor. p. 2642; A. against B. 25th February 1747, Kilk. Mor. p. 2648. So also where the decrees have been set aside on some legal nullity, or the charge has been turned into a libel, compensation is still pleadable; Wright, 25th July 1676, Mor. p. 2640. Neither do baron decrees, nor summary decrees on a clause of registration, exclude compensation; Bankton, B. i. tit. 24, § 6, par. 27. But it has been found, that, after a decree of forthcoming, compensation cannot be pleaded by way of suspension by an arrestee against the arrester, on a debt due to the arrestee by the common debtor, although the decree of forthcoming was pronounced in absence of the arrestee; Cunningham, Stevenson, and Company, 17th January 1809, Fac. Coll. This decision, however, seems to have proceeded chiefly on the ground, that the decree of forthcoming operated as a transfer of the debt to the arrester, who was
entitled to trust to his arrestment and forthcoming; see Note 5, *Bell’s Com.* vol. ii. p. 144, 4th edit.

When a pursuer is creditor to a defender by a separate debt not included in the libel, he may elide the defender’s plea of compensation, by pleading recompensation on the separate debt. The rules applicable to recompensation and to compensation are the same; and when recompensation is pleaded, the matter generally resolves into an action of count and reckoning; *Ersk. ibid.* See on the subject of compensation, *Stair*, B. i. tit. 18, § 6, *et seq.* *Bank.* B. i. tit. 24, § 4. *Ersk.* B. iii. tit. 4, § 11. *Bell’s Com.* vol. ii. p. 129, *et seq.* See also Retention.

COMPETENT AND OMITTED. Those pleas which might have been maintained in the course of a suit, but which have not been stated, are said technically to be competent and omitted. By the stat. 1672, c. 16, § 19, it is enacted, “that decreets in foro contradictorio before the Lords of Session be not again suspended upon reasons competent to have been proponed, or which were repelled in the former decreet.” But a final decree in foro of the Court of Session may be reversed by that Court when it labours under essential nullities, e. g. where it is ultra petita, or disconform to its warrants, or where there is an error calculi, &c. And, in the opinion of our greatest law authorities, the Court of Session may also reduce their own decrees upon the emerging of any new fact, or written voucher, not formerly pleaded upon, provided it appears that such fact or document was not known to the party before decree, and wilfully omitted in order to protract the litigation; *Ersk.* B. iv. tit. 3, § 3; *Stair*, B. iv. tit. i. § 44, 50, *et seq.* The rule as to pleas competent and omitted is not effectual against a minor, although, if the plea has been proponed for the minor and repelled, he cannot open up the decree; *Bankton*, B. iv. tit. 36, § 16, *et seq.* *Stair, ut supra*, § 44.

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

COMPETITION OF BRIEVES. See Service of an Heir.

COMPLAINT, see Petition and Complaint.

COMPLAINT, SUMMARY, see Summary Applications.

COMPLETING AN ADJUDICATION. An adjudication may be completed for different purposes; thus, it may be completed in order to enable it to compete with other heritable rights, in which case it must be completed by charter of adjudication and sasine: or it may be completed to the effect of rendering it the first effectual adjudication, under the statute 54 Geo. III. c. 137, § 11. See Effectual Adjudication.

COMPOSITION BY A BANKRUPT. The creditors of an insolvent person are said to accept of a composition when they agree to give him a discharge in full, on his paying them a part instead of the whole of the debt he owes them. Extrajudicial agreements of this kind may be entered into either with a single creditor, or with the whole creditors. In the former case, the agreement will be valid, whatever may be the consideration agreed upon between the creditor and the debtor. Where the agreement is entered into with the whole creditors, it is a mutual contract proceeding on two implied conditions;
the one, that all the creditors are dealt with equally; the other, that all shall concur, and that no one shall be bound unless all are bound. The proper evidence of an agreement of this kind, is a regular deed on stamped paper, although less formal evidence may bind the parties; Bell's Com. vol. ii. p. 596, 4th edit.

In extrajudicial arrangements for settling by composition, no creditor, of course, can be required to accept the composition offered unless he pleases. But, by 54 Geo. III. c. 137, § 59, a bankrupt whose estate has been sequestrated may, at the meeting after his second examination, or at any subsequent meeting called by the trustee, and a majority of the commissioners, make a proposal of composition to his creditors; and if he offers caution for the composition to the satisfaction of nine-tenths of the creditors assembled, the trustee is empowered to appoint and intimate another meeting for deciding upon the offer, at the distance of not less than three weeks; and if, at the meeting so appointed, nine-tenths of the creditors in number and value there assembled accept of the offer, the trustee shall transmit a report of the proceedings to the clerk of the sequestration for the approbation of the Court of Session; "and if the Court, upon considering said report, and hearing any objections that may be stated by opposing creditors, shall find the proposition reasonable, and that the same has been assented to, not only by nine-tenths in number and value of the creditors who attended by themselves, or others authorised by them at the meeting last mentioned, but by nine-tenths of all the creditors who have produced grounds of debt, or oaths of verity, an act or order shall be pronounced to that effect, and the bond of caution, which must be previously lodged in the clerk's hands, shall then be given up to the trustee for behalf of the creditors, the whole expense attending the sequestration being at the same time paid or provided for, to the satisfaction of the court, by the bankrupt or his friends; after which all proceedings in the sequestration shall cease, and the act or order shall declare the trustee exonnered and the bankrupt discharged, except as
to the payment of the composition." The statute (§ 60) declares, that all private transactions or compromises between the bankrupt and particular creditors, with the view to obtaining their assent to a composition under the statute, are illegal and void, and the parties concerned may be complained of to the court at the instance of any one having interest, and made answerable for all consequences; and if any creditor shall be proved to have privately accepted a gratuity or higher composition for giving his concurrence, he shall forfeit his debt, and be liable in restitution of what he has received, which shall go into the general fund of division. The bankrupt may also be required to make oath that he has used no undue means with any of his creditors to obtain their concurrence. In case a proposal for composition has been made in terms of the statute, and has failed, it is enacted by § 61 of the statute, that "no proposal of a similar nature shall be attended to by the trustee, or be of any effect, unless proof is made that the same has been assented to by every creditor without exception."

If the bankrupt and his cautioners fail to pay the composition, the creditors will be entitled to rank upon the bankrupt for the whole original debt, and on the cautioners for the amount of the composition. But the sequestration will not be held to revive on such failure; although, in competition with new creditors, the old creditors will be entitled to rank for their whole debt, deducting only what they have received from the bankrupt or his cautioners, as if it had been a mere payment to account. It would appear, however, that, in the event of a second bankruptcy, where payment of the composition to the creditors under the first has been delayed only for a short time, the cautioners or the new creditors may tender the stipulated composition, and so exclude the first set of creditors from farther competition; Bell's Com. vol. ii. p. 500, 501, et seq. 4th edit. See in general on the subject of compositions, Bell's Com. ibid. p. 481, et seq.

COMPOSITION TO A SUPERIOR, is the name given to the entry money paid to the superior by a singular successor. The amount of this composition is sometimes fixed, or
taxed, as it is termed, in the original charter; but where that is not the case, the superior is legally entitled to demand a year's rent of the subject. The superior's right to this exaction is founded on the acts 1469, c. 37,—1669, c. 18,—and 1681, c. 17, by which superiors are bound to enter appraisers, adjudgers, and purchasers at judicial sales, on payment of a year's rent. There was formerly no direct mode of compelling a superior to enter a voluntary purchaser; but as this might always have been accomplished indirectly, under those statutes, by means of adjudication on a bond, the practice prevailed of entering purchasers by private consent, for the same composition which was legally exigible from adjudgers; and the stat. 20 Geo. II. c. 50, by providing, that heirs or purchasers may force an entry from the superior on payment to him of such fees or casualties "as he is by law entitled to receive upon the "entry of such heir or purchaser," is held to have placed purchasers and adjudgers in the same situation with respect to entry money.

By the present practice in settling the composition for a singular successor, the following rules seem to be fixed: 1. In the case of a land estate, the superior is entitled to a year's rent, as the lands are let to tenants, under deduction of feu-duties, public burdens, and annual burdens imposed with the superior's consent. 2. In the case of houses built in a village on ground feu'd, the same rule applies, with the additional deduction of a reasonable sum for repairs of houses, or other perishable subjects; Aitchison, 14th February 1775, Fac. Coll. Mor. p. 15,060. 3. Where the vassal has granted a sub-feu at a fair feu-duty, and not for an elusory payment, or with the view merely of defeating the superior's right, it is now settled, that the purchaser or adjudger of the vassal's right is entitled to an entry on payment of one year's sub-feu-duty. This last point was very deliberately decided in a late case between the superior and a vassal who had sub-feued ground on which part of the New Town of Edinburgh is built; the superior demanded a full year's rent of the houses built by the sub-feuars; but the Court held that the vassal's
singular successors were entitled to an entry on paying one year's sub-feu-duty, that being a year's rent of the subject to which the singular successors were to acquire right; Cockburn Ross against Heriot's Hospital, 6th June 1815, Fac. Coll.; affirmed on appeal.

In strict law, the composition by an adjuder is due to the full extent, without regard to the amount of the debt on which the diligence is led, but, *ex aequitate*, it is frequently modified below its true value; Baird, 18th July 1633, *Mor.* p. 15,054; and, where the adjuder is excluded by a liferenter, he is not bound to pay the composition while the liferent subsists. If the right adjudged be a bare superiority, it was decided long ago that a year's feu-duty is all to which the superior is entitled as composition, because the feu-duty is the only rent to which the adjuder acquires right by his diligence; Monkton, 15th February 1634, *Mor.* p. 15,020. Where several adjudgers charge the superior to enter them, he is not entitled to more than one year's rent for the whole, for all of their rights make but one right to the land adjudged. In lands holden of the Crown, the composition payable by an adjuder is regulated, not according to the rent of the lands, but by a per centage on the amount of the principal sum adjudged for; *Ersk.* B. ii. tit. 12, § 24. Where the subject adjudged is an annualrent holden base of the debtor, he is bound to receive the adjuder *gratis*. In like manner, magistrates of royal burghs, being merely the Crown's officers, are bound to enter adjudgers, and even voluntary purchasers, without exacting any composition; *Bankton*, B. ii. tit. 4, § 32. It has been found that, where a corporation had adjudged, the superior was bound either to enter the corporation as his vassal, on payment of the usual composition of a year's rent, or to pay the value of the lands adjudged; Church and Bridge Work of Aberdeen, 11th December 1712, *Mor.* p. 15,034; University of Glasgow, 24th July 1713, *Mor.* p. 9296 and 15,075. But the decision in the last of these cases was reversed on appeal; and it has been lately held that the superior is not bound to receive a corporation as his vassal; Hill, 17th January 1815, *Fac. Coll.*
the last case, the Court did not dictate any particular arrangement for the parties, and doubts were expressed by the highest authority on the Bench, as to whether the Court had the power to compel the superior to receive a corporation on any terms. The expedients suggested by some of the Judges, were either the entry of a trustee for behalf of the corporation on payment of the usual composition, or an entry of the corporation itself, with a provision for a duplication of the feu-duty every twenty-five years. See on this subject, Stair, B. ii. tit. 3. § 41, and B. ii. tit. 4. § 32. Ersk. B. ii. tit. 4. § 11. and B. ii. tit. 12. § 24. Bankton, B. ii. tit. 4. § 11. and B. iii. tit. 10. § 15.

The superior is bound to enter an heir of entail, who is likewise heir of the former investiture, for a mere duplicando of the feu-duty; and he is also bound to enter the institute, when not heir of line, on payment of the usual composition due by a singular successor; but it is not held to be settled whether, when the heir of entail is not also heir of line, the superior is entitled to a year's rent. In two cases in which superiors insisted on having a clause inserted, declaring their right to a composition of a year's rent whenever the heir of entail was not also heir of line to the last vassal, the Court held that the superior is not entitled to insert such a clause, but that he may insert a reservation of his right to make the claim when the separation takes place; McKenzie, 4th July 1777, Mor. p. 15,053, and App. Superior and Vassal, No. 2. Duke of Argyll, 19th November 1795, Mor. p. 15,068. See Entry of Heirs.

COMPROMISE is, in English law, understood to be a mutual promise of parties to submit matters in dispute to arbitration. In Scotland, the terms submit or refer are generally used; and a power to compromise is understood to be a power to adjust and settle a difference. Doubtful claims connected with a sequestrated estate may be compromised by the trustee and a majority of the commissioners; 54 Geo. III. c. 137, § 55. See Commissioners. Arbitration.
COMPRISING was the ancient form of diligence used for attaching land for debt. See Adjudication. Diligence. Apprising.

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

COMPURGATOR, one who bears testimony to the credibility of another. Of old, a man's credit, in courts of law, depended on the opinion which his neighbours had of his veracity; and a party swearing was accompanied with a certain number of his neighbours to attest his credibility.

COMPUTATION of TIME. The question, whether or not a particular period of time has legally expired, may have very important effects on the rights of parties; and it is, therefore, of importance to attend to the rules by which time is computed. The following points seem to be fixed: 1. Where time is computed by years, as in the prescriptions, the years will be reckoned from the nominal day in one year to the same nominal day in the following year. Thus, if a debt be payable on the 15th May 1800, the 15th May 1840 will be the last day of the long prescription, and an interruption on that day will be effectual. Where a right is made to depend upon the expiration of a single year, a day is generally added in majorem evidentiam; hence the expression "year " and day;" and the running of any part of the additional day completes the period. In this case, the brocard dies inceptus pro completo habetur, is applicable. Thus, a marriage contracted on the 1st January 1800, will be held to have subsisted year and day to the effect of giving the husband right
to the tocher if the wife should die on the morning of the 2d January 1801; Waddel, 25th February 1680, Mor. p. 3465. In reckoning the year and day for the pari passu ranking of adjudications, if the first adjudication were dated 1st January 1800, an adjudication dated 2d January 1801 would have the benefit of the pari passu ranking; Bangour, 26th January 1681, Mor. 3467. 2d, In computing by days, the days are reckoned from midnight to midnight. Thus, where an imprisoned debtor applies for liberation under the act of grace, the ten days will not be held to have expired until twelve o'clock, P. M. of the tenth day; Blair, 11th November 1704, Mor. p. 3468; Hood, Henderson, and Company, 14th December 1813, Fac. Coll. Where the granter of a deed challenged under the law of death-bed lived for 59 days and three hours, computed de momento in momentum, after executing the deed, the Court held the deed to be reducible, on the ground that the law requires the granter to have lived for 60 days, without counting the day on which the deed was executed; Ogilvie, 10th December 1793, Fac. Coll. Mor. p. 3336. This decision was affirmed on appeal; and in the note of the judgment of the House of Lords, the House is said to have held, that, if, exclusive of the day of executing the deed, the granter had lived until the morning of the sixtieth day after, the maxim dies inceptus pro completo habetur would have applied; and, accordingly, it has been so decided; Mitchell, 3d February 1801, Fac. Coll. Mor. App. voce Deathbed, No. 4. On the same principle, the sixty days before bankruptcy, under the act 1696, c. 5, and the sequestration statutes, are reckoned backwards, exclusive of the day of the bankruptcy, the first of the sixty days commencing from the midnight preceding the bankruptcy, and being held as concluded the moment the sixtieth day begins; Blaikie, 21st January 1809, Fac. Coll.; Anderson, 2d March 1813, Fac. Coll. In citations and in computing the inducæ of diligence, it is also settled that the action cannot be called, or a horning denounced, until after the midnight of the last day of the citation or charge; Bell's Com: vol. ii. p. 184, Note, 4th edit. In computing the sixty days
within which an instrument of sasine must be recorded, the day of taking the infeftment, as being the *terminus a quo*, is not counted, and registration at any time on the sixtieth day after that, will be effectual; *McKenzie's Obs. on Stat.* p. 353. In computing the reclaiming days in the Court of Session, the twenty days are reckoned exclusive of the day on which the interlocutor is signed; *Act of Sederunt 7th February 1810.*

**CONCEALING CRIMES.** The protection of a criminal *after* the commission of a crime, by concealing him from justice, knowing his guilt, is a distinct offence, which may be punished arbitrarily. Where, however, the protection is given in consequence of an agreement entered into *before* the commission of the crime, such concealment will found a charge against the concealer of art and part in the principal crime; *Ersk. B. iv. tit. 4, § 13.*

**CONCEALMENT or PREGNANCY.** If a woman "shall conceal her being with child during the whole period of "her pregnancy, and shall not call for or make use of help or "assistance in the birth; and, if the child shall be found dead "or be amissing, the mother, being lawfully convicted thereof, "shall be imprisoned for a period not exceeding two years;" 59 Geo. III. c. 14. See *Child-Murder.*

**CONCLUDED CAUSES.** A cause is said to be a concluded cause where a proof has been allowed, and the term for proving elapsed; it is then called before an Ordinary on the acts; the proof is declared to be concluded; and a state of the process is prepared by the assistant to the Inner-house clerk under the authority of the Lord Ordinary on concluded causes. This state is printed and distributed amongst the Judges, for decision in the Inner-house; *Ersk. B. iv. tit. 2, § 32.* This form is now almost entirely superseded by the institution of the Jury Court. See *Jury Court.*

**CONCOURSE of ACTIONS.** By the Roman law, different actions were competent on the same ground of right; but, by the law of Scotland, there is no civil action in which the pursuer has this privilege; for although, in some actions,
partly of a penal nature, the pursuer may insist either for the actual damage, or for violent profits; yet, if he once make his election and claim simple restitution only, he cannot afterward sue for violent profits. But our law admits a concourse of actions, in the special case, of facts which may be prosecuted either civilly or criminally; for a prosecution to satisfy public justice is entirely different, both in its nature and object, from a mere prosecution *ad civilem effectum*, and even although, in the criminal prosecution, the accused may have been acquitted, yet it is still competent for the private party to institute a civil action against him, founding on the same facts, which, in a civil process, where a debt or damages only are sought, may be referred to the defender's oath, a mode of proof inadmissible in a criminal prosecution. *Ersk.* B. iv. tit. 1, § 64.

**CONCOURSE OF THE LORD ADVOCATE.** Although a private party, who has a proper interest, may institute a criminal prosecution at his own instance, concluding for the ordinary pains of law, against the accused person; yet, by ancient and invariable style, such prosecution at the instance of a private party must be raised with concourse of the Lord Advocate. This concourse is necessary to every libel in the Court of Justiciary, whether the full pains of law, or pecuniary reparation only, be concluded for; and, even in the ordinary civil action of reduction improbation, which *fictione juris* is laid upon criminal grounds, but which is pursued *ad civilem effectum* only, the Lord Advocate's concourse is necessary. It would rather appear that, although the Lord Advocate may no doubt exercise his discretion in refusing his concourse, where the proposed prosecution is manifestly absurd or illegal, or at the instance of a party whose title to prosecute is evidently defective, yet that, in the ordinary case, he is not entitled to exercise any such discretion, but must give his concourse when required, and that, even if he were formally to recall it in Court, the prosecution might still proceed at the private instance. In mutual libels at the instance of the private parties founded on the same facts, the Lord Advocate must give his
concourse to the action of each party; *Hume*, vol. ii. p. 122. See *Criminal Prosecution*.

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

**CONCURSUS DEBITI ET CREDITI.** See *Compensation*.

**CONCUSSION.** See *Force and Fear*.

**CONDESCENDENCE,** is the name given to one of the written pleadings in a process before the Court of Session. Condescendences may be either what are termed condescendences on the grounds of the action, or condescendences in terms of the act of sederunt, and neither of them can be put in unless expressly ordered by the Lord Ordinary or the Court. A condescension on the grounds of the action is a pleading at large on the merits of the case, embodying the various statements, pleas, and arguments of the party by whom it is put in,—it is followed by answers, and frequently by replies and duplies, before the Judge makes avizandum in order to decide the cause. This pleading is generally ordered when the statements of the parties are circumstantial and contradictory. A condescension in terms of the act of sederunt is ordered when the parties differ as to the facts on which the decision of the cause depends, in which case no proof will be allowed, until "a distinct statement of the disputed facts and allegations shall have been made in the form of a condescendence and answers, or mutual condescendences; which papers shall be so framed as to contain no argument or discussion of any kind, nor even any recital of the proceedings; but, taking it for granted, that the nature of the cause is already understood from the libelled summons, defences, and pleadings, shall only state, under distinct heads or articles, the special facts and circumstances pertinent to the cause which are alleged and offered to be proved on either side, in order that the same may as nearly as possible be brought to a precise issue, and may (so far as thought material) be admitted to proof in that form, either before answer to the relevancy, or after determining upon it, as the case may require."
Act of Sederunt, 11th March 1800. "If the answers to the "condescendence, besides explicitly admitting or denying the "facts stated in the condescendence, shall contain counter aver- "ments, the Lord Ordinary shall ordain parties to revise both," "so that the parties may explicitly meet each other on the "facts mutually set forth;" and "the condescendence and an- "swers (so revised if necessary) shall absolutely foreclose both "parties as to every averment in point of fact, except on "proof of noviter veniens ad notitiam, or unless such fact be "formally set forth in a supplementary condescendence, to be "received only with the special leave of the Lord Ordinary," "and under such order as to expenses as the Lord Ordinary "may judge proper." Act of Sederunt, 7th February 1812.

CONDICTIO INDEBITI, was an action in the Roman law for repetition of money paid to a person under the belief that there was a debt due to him when there was in reality no debt due; and, by the law of Scotland, action is also given for recalling a payment made through mistake or ignorance. Writers on the civil law, founding on the maxim, "ignorantia juris neminem excusat," have made it a question, whether a sum paid through a mistake in law is recoverable by this action; but the Court of Session, on the ground that this is an equitable relief, has held that a mistake, whether in law or in fact, is a sufficient reason for recalling a payment; Carrick, 5th August 1778, Mor. p. 2931. Bank. B. i. tit. 8. § 23. et seq. From this rule there are the following exceptions: 1. Payment made under a natural obligation, though the law would not have enforced it, cannot be recalled. 2. If the person by whom the payment was made knew at the time that no debt was due; for in that case the person must have been presumed to have given the money in a present; Ersk. B. iii. tit. 3. § 54. A payment made in consequence of a compromise, and in order to put an end to a law-suit, cannot be recalled, though it may afterwards turn out that the claim so compromised was unfounded. Oliver, 16th May 1798; not reported, but noted Ersk. ibid.
A creditor who had obtained a preference in a ranking to which he was not entitled, was found liable to repetition, although he had got no more than payment of his debt; Keith, 14th November 1792, Fac. Coll. Mor. p. 2933.

**CONDICTIO causa data causa non secuta**, was also an action received in the Roman law, by which things given with the view to a certain event might be reclaimed if that event did not take place. The example of this, commonly given, is that of presents made in contemplation of a marriage which does not take place. But if the expected event has been prevented by a cause not imputable to the receiver, no action lies, unless he unduly delayed when he might have performed. *Ersk. B. ii. tit. 1. § 10.*

**CONDITION SI SINE LIBERIS DECESSERIT.** By the Roman law, if one made a donation of all or the greater part of his estate, when he had no children, and came afterwards to have children, the gift became void, upon the presumption, that, if the donor had thought of having children of his own, he would not have made it. There is no example of this implied condition in our law, where the donation was *inter vivos*, and perfected by delivery; but, in testamentary settlements or donations *mortis causa*, it rather appears that the doctrine is recognised in our practice, if the testator leaves a child of whose existence *in utero* he is not presumed to have known. But if the children have been actually born during the testator's life, and if notwithstanding he allows the settlement to remain for a reasonable time unrevoked, it would rather seem that it cannot be set aside, especially if it was not of the whole, or the greater part, of his estate, and provided it does not prejudice the child's legal or conventional provisions. *Bankton, B. i. tit. 9, § 5, et seq. Ersk. B. iii. tit. 8, § 46.*

**CONDITIONS IN FEUDAL GRANTS.** Where particular conditions or stipulations are inserted in feudal grants, with the view either of more effectually securing, or of modifying in some respect, the rights of parties, it is an important inquiry whether such stipulations are to be considered as mere personal obligations, binding upon the parties and their heirs,
or as real qualifications or conditions of the grant effectual against singular successors. It seems to be settled that an obligation on the part of the vassal to take infeftment on the charter within a certain time; or not to dispone before he has himself entered; or not to disappoint the superior of an entry by sub-feuing, or any similar obligation; although it may serve as the grounds of diligence, or of an action against the vassal or his representative, will have no effect against singular successors. But, if the stipulation be set down as a condition of the grant, it has been thought that it will not only qualify the vassal's right as long as the right remains personal, but that, if the condition be inserted in the instrument of sasine, and so appears in the record, it will operate as a real qualification effectual against purchasers and creditors, as being, on strict feudal principle, a condition without compliance with which, the superior is not bound to give an entry; Bell's Com. vol. i. p. 27, 4th edit. Notwithstanding this authority, however, it seems to be deserving of consideration, whether such stipulations can, under any circumstances, affect singular successors, merely by being declared conditions of the grant. According to Erskine, they must at least be protected by an irritant clause; Ersk. B. ii. tit. 3, § 13, and tit. 5, § 28.; and to whatever extent they may be made effectual, it is quite settled that the stipulations in themselves must be neither illegal nor contra bonos mores. Hence it may be reasonably questioned whether any legal obligation can be created by a stipulation, sometimes inserted in feudal grants, by which it is provided, that the superior's law agent shall pass the infeftments on the various transmissions of the right. Such a condition has been in general reprobated as a discreditable attempt to infringe the ordinary rules of professional practice, and a question as to its legality is at present in dependance; Campbell against Dunn, &c. 1822, First Division. See Burdens. Clause of Pre-emption. Clause de non alienando. Prohibitions.

CONDITIONAL OBLIGATION. A conditional obligation is an obligation depending on the existence of a condition. Such an obligation has no force until the condition exist, or be
purified, as it is termed, because it is in that event only that the party declares his intention to be bound; hence the condition of an uncertain event suspends not only the execution of the obligation but the obligation itself. An obligation of this kind is held to be but "an obligation in hope till the condition be existent;" Stair, B. i. tit. 3. § 7.; but the granter is so far bound that he cannot revoke the hope he has given. Creditors may attach conditional debts; and, if the obligation does not depend on the life of the particular individual, it is transmitted to heirs in case the creditor should die before the existence of the condition. All obligations depending on uncertain events are properly conditional; thus, an obligation depending on the arrival of a day which may possibly never arrive is conditional; hence a provision payable to a child on his arrival at a particular age falls if the child die before reaching that age; and the same rule is also extended to legacies, although a contrary doctrine at one time prevailed; Ersk. B. iii. tit. i. § 6 and 7, and note.

Conditions adjetted to obligations are divided into possible and impossible; the former are such as may naturally and legally happen; the latter such as either naturally or legally cannot come to pass, for what is contrary to the law, or contra bonos mores, is held to be legally impossible. Possible conditions are distinguished into potential or potestative, i.e. such as are within the power of the party burdened with them; and casual, being such as depend upon an uncertain event over which the party has no control. Contracts are null if illegal or impossible conditions are annexed, it being presumed that the parties are not serious. But such conditions adjetted to legacies, are simply held pro non scripto, and the legacy remains pure, for nemo presumitur ludere in extremis, and the testator is presumed to have seriously intended to give the legacy. The same rule holds in bonds of provision by parents to children in implement of the natural obligation, illegal or irrational conditions annexed to them being held pro non adjectis; Bankton, B. i. tit. 4, § 17. It was formerly held that this rule was also applicable to unfavourable conditions, such, for example, as a condition that the grantee should not inter-
marry with a particular person, or without the consent of certain individuals; but the rule at present established seems to be different, for although these and such like conditions are not strictly enforced if unreasonably insisted on, yet they are to a certain extent held to be effectual. Thus, if consent to a suitable marriage is unreasonably withheld by the parties whose consent is made a condition, the provision will be effectual even although the marriage is contracted without the consent, and this whether the provision comes from a father or from a stranger; Ersk. B. iii. tit. 3, § 85. And, in general, it may be observed, with regard to all potestative conditions, that they shall be held to be fulfilled if the grantee has done all in his power to fulfil them: thus, if the condition be that the grantee shall intermarry with a particular person named, the condition will be purified by the grantee's paying his addresses to that person, although he is rejected, provided he has not unduly delayed doing so; Ersk. *ibid*. Conditions depending merely on accident, must, of course, be purified before the obligation can be enforced; but, if the arrival of the condition has been prevented by the act of the debtor, or of any other person unduly interested in preventing its arrival, it shall be held as purified, on the principle that no man can profit by his own wrong; Ersk. *ibid*.

Although an uncertain day annexed to an obligation renders it conditional, it is to be observed, that an uncertain day is not merely a day, the arrival of which is uncertain, but the very existence of which is uncertain. Thus, the day on which a person shall arrive at a particular age may never exist, but the day of his death must certainly arrive; the former, therefore, is an uncertain day, which creates a condition; the latter creates no condition; and an obligation to take effect on the day of a person's death is not in law a conditional obligation, although its operation is suspended until that event arrives. This distinction ought to be kept in view in applying the maxim "dies incertus pro conditione habetur." Ersk. B. iii. tit. 1, § 6. Bankton, B. i. tit. 4, § 19. Stair, B. i. tit. 3, § 7, et seq.
CONDITIONAL LEGACY. The doctrine explained in the preceding article applies to the case of a conditional legacy. See Legacy.

CONDITIONAL INSTITUTE. Under the destination in tailzies, those who are entitled to take up the succession as the immediate disponees of the grantor are called institutes, in contradistinction to the substitutes who succeed as heirs to such persons. Frequently, however, the institution of particular persons is, by the terms of the deed, made contingent upon certain events. Thus, several persons in succession may be constituted institutes conditionally, upon the failure of others prior to the period when the destination will take effect. This is the most common species of conditional institution, and, in such cases, the survivancy of any of the conditional institutes at the period when the succession opens cuts off entirely all right of succeeding on the institutes postponed to him, and opens the descent to the substitutes, if any be named in the deed, and, if not, then to the institute’s own heirs. In the event that none of the institutes survive, the succession descends through the institute last named to the substitutes, if there be any, and, if not, then to the last institute’s own heirs.

The distinction between a conditional institute and the substitutes often depends upon the nicest construction of the terms of the destination; and several questions have occurred on that point. The distinction is of the greatest importance, not only in so far as it enters deeply into the question as to the proper form of making up the title, but also as a criterion on which the rights of the parties called by the destination may depend. See Tailzie.

CONFESSION, the acknowledgement or avowal of a fact. A confession or declaration of guilt made by a criminal, in presence of a judge, is not admitted of itself as evidence against him; but it affords a presumption; and being proved to the jury on the trial, by those present at the time when the confession was made, to have been truly the voluntary confession of the criminal, it will be held to be evidence, in terms of the act 1587, c. 91. The evidence required for establishing the fact of the
acknowledgement having been made by the pannel, is that of two concurring witnesses. But this declaration is not equivalent to a confession by the pannel in presence of the jury; nor ought it by itself to be received by the jury as a proof of the crime. It will necessarily affect their minds in weighing the evidence in the cause, but it ought to do no more. *Hume*, vol. ii. p. 310, et seq.

A confession, before ecclesiastical courts, of adultery, or of any other offence which gives church scandal, being held as extrajudicial as to prosecutions on the same grounds before other courts, is no proof against the party either as to civil or criminal effects, even although it be followed by public church censure. *B ankton*, B. iv. tit. 33, § 20.

In ordinary civil actions, a party may be called upon to confess or deny any relevant matter of fact, and, if he refuse, he shall be held as confessed; *Act of Sederunt, 1st February 1715*, § 6. And by Act of Sederunt, 7th February 1810, it is declared that, when a fact is averred by one party in his condescension, "and not explicitly denied by the other party, he shall be held as confessed in terms of the Act of "Sederunt 1715, § 6, and the fact as definitely proved against "him." See *Calumny, Oath of*.

CONFIDENT PERSON. In the sense of the act 1621, a confidential person may be defined generally to be an intimate and confidential friend. The term seems applicable in particular to a partner in trade, a factor or steward, a confidential man of business, or a servant or other dependant. The deeds of an insolvent person in favour of those so connected with him, if granted without a just and necessary cause, and a price *bona fide* paid, are reducible at the instance of his prior creditors, under the act 1621, c. 18. The proof of the confidential situation of the grantee lies, of course, with the challenger of the deed, and that being proved, the person founding on the deed challenged has the burden of proving that it does not fall under the act; for a conveyance to a confidential person is not null *praesumptione juris et de jure*. *Bell's Com.* vol. ii. p. 198, 4th edit. See also *Conjunct Persons. Collusion*. 
CONFIRMATION, CHARTER OF. The modern form of a disposition to a purchaser includes the clauses of a charter a me as well as de me; and when the disponent has taken infeftment on the precept of sasine contained in a disposition with this double manner of holding, such infeftment will not only constitute a valid base right in the person of the disponent, from the date of the infeftment, but the superior may also declare that infeftment to be equivalent to infeftment on a precept of sasine granted by himself, and thus render the right public. This is accomplished by a charter of confirmation from the superior, so called because it ratifies and confirms the right granted to the purchaser, and the sasine following upon it. The charter of confirmation narrates and specially confirms the whole conveyances and infeftments since the last public infeftment, and declares them to be as effectual as if they had been verbatim ingrossed in the charter of confirmation, or as if it had been granted before taking the infeftment. The other clauses do not materially differ from those in an original grant, except that, as infeftment has been already taken, the charter of confirmation contains no precept of sasine. The confirmation in the ordinary case operates retro to the date of the infeftment, and renders it as effectual as if it had proceeded from the first on the superior’s precept.

A charter of confirmation is one of the most ordinary methods of completing a purchaser’s title; at the same time, where the progress is intricate, unless particular attention be paid to the state of the titles, serious mistakes may be committed. Suppose, for example, that A, who stands publicly infeft in lands holden of the crown, dispones to B, who takes infeftment on A’s precept, and then dispones to C, by disposition containing procuratory and precept; and that C applies for a charter from the crown, which is expedite in the following manner: Resignation is made on the procuratory in A’s disposition to B, which remained still unexecuted, and B’s base infeftment is confirmed: Upon feudal principles, this charter is void, because the confirmation of B’s base infeftment rendered it public from the date of the sasine, and so totally divested A
both of property and superiority, and consequently left nothing to be resigned on his procuracy. In the case now supposed, the proper method of completing C's title by confirmation, would be to infeft C upon B's precept, and then to confirm the two dispositions and sasines. When the disponee wishes to confirm intermediate base rights, and to resign on the procuracy of his immediate author, so as to complete his own title, by a charter of resignation from his superior, care ought to be taken that the confirmation ends with the sasine in favour of the granter of the procuracy, on which the resignation is intended to proceed, for, by confirming the disponee's own sasine, his right becomes public, and his author's procuracy useless, as in the case supposed; Jurid. Styles, vol. i. p. 433, 524.

It is proper to observe here, that although the disposition to a purchaser in its ordinary form contains a double manner of holding, that is, a holding either a me de superiore meo, or de me, yet it may so happen that a holding a me only is inserted. In that case, a mere infeftment on the precept will carry nothing until confirmed by the superior; and in the event of double rights to the same subject being granted by dispositions containing holdings a me only, the preference will depend, not on the date of the registration of the sasine on the rights confirmed, but on the date of the confirmation, because, as such rights are imperfect without confirmation, the right first perfected must be preferable; Ersk. B. ii. tit. 7, § 14; and on the same principle a charter of resignation proceeding on the procuracy in a disposition containing such single manner of holding, will carry the property in preference to an unconfirmed sasine on the precept. An improper use of the charter of confirmation, or a neglect of due attention to its effect, may give occasion to questions of great nicety and difficulty in the completing of titles. See Consolidation. Base Right. Public Right. Charter. Resignation.

Where a disponee dies base infeft, his heir may complete his title by a charter of confirmation and precept of clare constat contained in the same deed, whereby the superior, in the first
place, confirms the ancestor's base infestment, and then grants a precept for infesting the heir. See Clare Constat.

CONFIRMATION OF EXECUTOR, is the form in which a title is conferred on the executor of a person deceased to intromit with, and administer the defunct's moveable effects, for behoof of the executor himself, or of those interested in the succession.

There are only two cases recognized in our law, where the interposition of judicial authority is in this respect dispensed with, viz.—1st, With regard to those effects, of which the next of kin (as hæredes in mobilibus), when not excluded by a preferable title, can obtain actual possession; and, 2d, With regard to those which the deceased has specially conveyed to another, either per expressum, or by reference to an inventory, an exception from the general rule introduced by the act of Parliament 1690, c. 26. It is said in some of our law books, that there are other two cases of exception, viz.—1st, As to legitim and jus relictæ, both of which vest without confirmation; and, 2d, When the deceased's representative obtains from the debtor a bond of corroboration of the sum due. It will be observed, however, with regard to the first of these cases, that the legitim and jus relictæ do not vest jure representationis, but are due to the children and the widow in their own rights, which only emerge and apply on the decease of the father or husband; and, as to the corroboration, it is obvious that the case forms no proper exception to the common rule, but is rather an instance of confirmation being rendered unnecessary by the substitution of a new obligation.

In every other instance, except those which have been mentioned, confirmation is required. It must be expede before the Commissary Court of the district in which the deceased had his principal domicile, or, if he had no fixed domicile, in that where he had lived for the forty days preceding his death. In the case of those to whom this rule will not apply, from the want of a proper domicile, and of those who have died abroad, and who went there animo remanendi, the confirmation proceeds at Edinburgh as the commune forum.

In confirming executors the commissary is bound to follow
certain prescribed rules both as to the order of preference and the form of procedure.

1. As to the order of preference.—Failing a special assignee, the executor nominate, or person whom the deceased has himself appointed to the office (though he has done so merely in a simple testament, and without any relative assignation), is always preferred in the first place. The executors next preferred are called executors dative, the office not being conferred on them by the deceased, but given to them by the judge; and among these executors themselves, the rules of preference observed are as follows, viz. 1mo, A person holding a general disposition of moveables from the deceased (executor, qua general disponee). 2d, The deceased's nearest of kin, (executor, qua nearest of kin). 3d, His relict (executor, qua relict). 4th, His creditor, in a liquid ground of debt (executor creditor). 5th, His special legatee; and, lastly, failing all of those (which, however, will seldom happen), the procurator-fiscal of court; 1695, c. 41.

2. As to the form of proceeding.—This is simplest in the case of an executor nominate. He lodges with the clerk of court the deed which contains his nomination, and an inventory of the deceased's moveable property. He then finds caution de fideli administratione, and receives an extract containing the inventory, a copy of the deed, and the act of confirmation by the judge; and thus his title is fully completed. This is called the confirmation of a testament testamentary.

In the case of an executor dative, the person who begins the procedure receives from the Court what is called an edict, which is published on indiciae of nine days, by an officer of Court, or messenger-at-arms, on a market day, at the market cross of the head burgh of the county where the deceased lived, and at the parish church door at the dismissal of the congregation on a Sunday. The edict is then called in Court; and, if there be a competition, the Judge is guided by the rules already mentioned,—if there be none, the mover of the edict is preferred. The office of executor is bestowed by the decree dative, which thus becomes quite analogous in its effect to a nomination by the deceased. The executor then lodges an
inventory of the deceased's moveables, finds caution, and is confirmed by an act of Court, the extract of which (forming his title) contains the inventory and act of confirmation. This is called the confirmation of a testament dative. Where the edict has been moved by one of the nearest in kin, or by a creditor, any other of the nearest of kin in the one case, or any other creditor properly entitled, in the other, may be conjoined in the office on application.

By the existing statutes regulating the duties on moveable succession, it is now incumbent on every person who applies to be confirmed executor, whether testamentary or dative, to give up a full inventory of the deceased's moveable estate, so far as known to him; but his doing so infers no obligation on him to confirm the whole of its amount. It may often happen, that a mere partial confirmation will serve the purpose; and, in such a case, a note is lodged with the clerk, mentioning what part of the inventory is wished to be confirmed, and, accordingly, the confirmation will be restricted to that part, and it alone will be engrossed in the act of confirmation. Any articles omitted either thus, or from the inventory itself, may be afterwards added by what is called an eik, or any other person duly authorised may, on citing the executor already confirmed, confirm these omitted articles, and any others that may have been undervalued (though included in the inventory) by what is called a confirmation ad omissa vel male appretiata. For a more ample account of the forms of confirmation, reference is made to the Jurid. Styles, vol. ii. p. 488, et seq. 2d edit.; and it may be proper, on the same subject, to consult the appendix to that volume, relative to the duties on moveable succession, which are now intimately combined with the confirmation of executors.

It is proper shortly to take notice here of certain legal rules applicable to this subject; 1mo, A mere nomination of executor, or a mere decree dative, vests no right whatever except a title to pursue. 2do, A total confirmation vests the executor with the complete right, so as to entitle him in all cases to recover and discharge,—to transmit the right to
his own representatives, and to the representatives of the nearest of kin, when he acts for their behoof, and is himself decerned executor in any other character. *Stio, The same consequences follow from a partial confirmation, *but as to the effects included in it only,* the remaining effects being held to remain in bonis defuncti, and so to be susceptible of subsequent confirmation, either by eik or ad omissa. A decision, apparently inconsistent with this rule, appears to have been pronounced in the case of Murray, 4th December 1744, *Mor.* p. 3902, in which it was found, that, when the nearest of kin confirms a part merely, that confirmation transmits to them the whole succession, and makes it effectual to their creditors. Later authorities have limited the effect of this judgment to the mere *transmission* of the whole execucry; but it seems to deserve consideration how far that limitation is warranted by the facts of the case, or how far the judgment can in any sense be reconciled with subsequent decisions. See the cases of Sloan Laurie, 27th July 1779, *Mor.* p. 3918; Fraser, 10th February 1784, *Mor.* p. 3921; and Alison against Scollay's Creditors, 26th May 1802, *Mor.* p. 3922. It seems however to be held that, by a partial confirmation of the nearest of kin, an universal representation is incurred; but that a confirmation of an executor creditor, (and it is presumed of any other executor except the nearest in kin,) infers no passive title *ultra bona inventarii.* See the case of Lee against Jones, 17th May 1816.

As to the rules to be observed by executors in the administration of the effects, see *Executors.*

**CONFISCATION** is a forfeiture of lands or goods to the Crown, being part of the punishment of certain crimes. See *Stair,* B. iii. tit. 3, § 1, et seq.

**CONFORM, DECREES.** See *Decree Conform.*

**CONFORM, LETTERS.** See *Letters Conform.*

**CONFUSIO** is a kind of specification, and is used to express the mixture of liquids or fluids; *Ersk.* B. ii. tit. 1, § 17. See *Commixtion.* A debt again is said to be lost *confusione,* where the debtor succeeds to the creditor, or the creditor to
the debtor, so that the same person becomes both debtor and creditor. See the following Article.

CONFUSION, is one of the modes by which obligations may be extinguished. It takes effect where the debt and credit meet in the same person, either by succession or by singular titles; for, as one cannot be a creditor or a debtor to himself, the law holds the debt to be extinguished confusioné whenever a person stands in that predicament, whether he has succeeded as heir or has acquired right by assignation. But, although this be the general rule, there are certain modifications and exceptions which must be kept in view in applying it. 1. Where a cautioner for a debt succeeds to that debt, or acquires right to it, his cautionary obligation is of course extinguished; but the principal obligation remains as effectual as ever. 2. Where a creditor in a moveable debt succeeds to the heritable estate of his debtor, the debt is not extinguished. It is not lost confusioné by that succession; for, though the heir in heritage be liable, it is only subsidiarie, and, therefore, he may demand the debt from the executor, who is primarily liable in personal debts. 3. Where an executor acquires right to an heritable debt, the debt, in like manner, is not extinguished, but may be made effectual against the heir in heritage. 4. A debt affecting the ancestor’s estate, acquired by an apparent heir after the death of the ancestor, is not extinguished confusioné by being vested in the person of the apparent heir, for the heir, while unentered, does not represent the debtor, and, consequently, the debt and credit do not meet in the same person. Upon the same ground, a debt purchased by the debtor’s heir, who is liable præceptione haereditatis, is not extinguished in the person of the heir; a præceptio haereditatis not being considered as conferring such an universal active title as renders the heir eadem persona cum defuncto. 5. The conveyance of a debt affecting an entailed estate in favour of one of the heirs of entail and his heirs whomsoever, may not have the effect of extinguishing the debt confusioné. The debt, indeed, is dormant during the life of the heir of entail to whom it was conveyed, but if the next heir of entail is not also
heir of line to his predecessor, the debt will revive in the person of the heir whomsoever against the heir of entail; Gordon, 1st December 1757, Fac. Coll. Mor. p. 11,161; Crawford, 11th March 1809, Fac. Coll. The general rule seems to be, that a debt does not become extinguished confusione, when the succession to the fund or subject liable for it happens to be afterwards divided from the succession to the debt itself. See Ersk. B. iii. tit. 4, § 23, et seq. Stair, B. i. tit. 18, § 9. Bankton, vol. i. p. 496, et seq.

CONGE D'ELIRE, is the name given to the King's licence, or permission, sent to a dean and chapter, to proceed to the election of a bishop, when any bishopric becomes vacant. Tomlin's Dict.

CONJOINING OF PROCESSES. Where two or more processes in the Court of Session, relating to the same subject matter, and in which the same parties are interested, are in dependence, and it appears expedient that they should be discussed together,—the Lord Ordinary before whom they depend, on the motion of the parties, may pronounce an interlocutor conjoining the processes, after which they are proceeded in as one process. The processes at the time of being conjoined, must be in dependence before the same judge; where, therefore, they have been originally brought before different Lords Ordinary, it is necessary that they should be remitted ob contingentiam to the leading process, before an interlocutor conjoining them can be pronounced. Ivory's Form of Process, vol. ii. p. 52. See Contingency of a Process.

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

Conjunct rights to Strangers.—Where a right is granted in favour of two persons, strangers to each other, “in conjunct “fee and liferent and their heirs,” the two are equal sharers during their joint lives; on the death of either of them, the survivor has the liferent of the whole, and after the survivor’s death, the fee divides equally between the heirs of both. Where the right is taken “to two jointly and their heirs,” the conjunct sharers enjoy the subject equally during their lives;
and on the death of either, his share descends to his own heir. Where the right is taken "to two jointly, and the longest liver and their heirs," the expression "their heirs," is understood to mean the heirs of the longest liver; and, therefore, although the creditors of either of the conjunct siars may attach their respective shares while both are alive, yet, upon the death of either, the survivor has the fee of the whole, exclusive of the heir of the predeceased, in so far as the predeceased's share is not exhausted by his debts. Where the right is taken "to A and B jointly, and to the heirs of B," B is the only siar, and A's right resolves into a simple liferent; Ersk. B. iii. tit. 8, § 35.—Stair, B. ii. tit. 6, § 10.

Conjunct rights to Husband and Wife.—In questions between husband and wife, where the right is taken to them, "in conjunct fee and liferent, and the heirs of their body," or "their heirs" indefinitely, the general rule is, that the husband is sole siar, and the wife a mere liferenter; "their heirs," therefore, are held to be the heirs of the husband, and his creditors may attach the right, subject only to the wife's liferent. But this general rule suffers several exceptions, founded on the presumed intention of the parties, as arising out of the different circumstances of particular cases. Thus, where the subject comes from the wife, or her relations, and the expression is not such as to indicate a preference in favour of the husband, the wife is siar, the husband merely liferenter, and his creditors cannot attach the subject. The wife, however, cannot convey it, nor can her creditors attach it, without a reservation of the husband's liferent. The wife is also siar on her survivance, if the fee is destined to the survivor. Where the destination is to husband and wife, and the survivor, and "their heirs," if the husband predecease, the fee will be held to be in the wife, and her heirs, not in the heirs of the marriage. But where the subject so destined belonged originally to the husband, it would seem that, during his life, he may alienate it, or his creditors may attach it; Ferguson, 22d July 1739, Kilk. Mor. p. 4202; Riddels, 6th November 1747, Kilk. Mor. p. 4203. Where the subject has come from the
wife as tocher, and has been destined to the husband and wife in conjunct fee and liferent, the strongest expressions of preference in favour of the wife will be required, in order to vest her with the fee; Bruce Henderson, 20th January 1790, Fac. Coll. Mor. p. 4215, where the fee was held to be in the husband. If the wife's heirs are preferred in the destination, the fee is also in the wife. It is to be observed, however, that it is not a proper criterion of this preference that the wife's heirs are last named in the substitution, unless there be no intermediate substitutes between the heirs of the marriage and them; for where there are such substitutes, that spouse is deemed far where heirs are first called after the heirs of the marriage; Ersk. B. iii. tit. 8, § 36.—Bell's Com. vol. i. p. 42. et seq.—Stair, B. ii. tit. 6, § 10.

Conjunct Rights to Parents and Children. Where rights are taken to a father in liferent, and to his children nasciturī in fee, the fee is in the father, and the children have a mere spes successionis, defeasible by the father's creditors; Frog's Creditors, 25th November 1795, Mor. p. 4262. But where the children are in existence, and the right is taken to the child or children nominatim in fee, the fee is held to be in the child named, even although the right has been acquired by the father, and destined to the child gratuitously; M'Intosh, 28th January 1812, Fac. Coll. Even where the children are not yet born, if the right be taken to the father in liferent, "for his liferent use alleinarily, and to his children nasciturī in fee," this form of expression will limit the father's right to a mere fiduciary fee for behoof of the children, which cannot be affected by the father's debts or deeds; Newlands, 9th July 1794, Fac. Coll. Mor. p. 4289, affirmed on appeal; Watherstone, 25th November 1801, Fac. Coll. Mor. p. 4297; Harvey, 26th May 1815, Fac. Coll. But the words, in order to exclude the father, must be clearly taxative; a destination of the subject to the father "during all the days of his life, and to the child dren in fee," will import a full fee in the father; Lindsay, 9th December 1807, Fac. Coll. Mor. App. voce Fiar; Robert-
son, 20th November 1806, Fac. Coll. Mor. App. Fiar, absolute, limited. It is quite settled, that, where a subject is conveyed to trustees for behoof of a certain person in liferent, and of his children nascituri in fee, the father is not fiar; Seton, 6th March 1793, Fac. Coll. Mor. p. 4219. Where a subject was taken to husband and wife, "and longest liver of them two in conjunct fee and liferent, for her liferent use allenerly, and to their son nomination in fee," with a reserved power of disposal to the father, the fee was found to be in the father, on the ground apparently that, by the terms of the destination, there was a fee actually vested in him; Wilson, 14th December 1819, Fac. Coll. See on this subject, Stair, B. ii. tit. 6. § 10. Ersk. B. iii. tit. 8. § 35. et seq. Bankton, vol. i. p. 575, and vol. ii. p. 337. Bell's Com. vol. i. p. 43, et seq. 4th edit.

CONJUNCT or CONFIDENT PERSONS. By the Act of Sederunt 12th July 1620, ratified and approved as law by stat. 1621, c. 18, the Court of Session declares, that, in all actions pursued by any "true creditor for recovery of his just debt, or satisfaction of his lawful action and right, they will decreet and desern all alienations, dispositions, assignations, and translations whatsoever, to any conjunct or confident person, without true, just, and necessary causes, and without a just price really paid, the same being done after the contracting of lawful debts from true creditors, to have been from the beginning, and to be in all time coming, null, and of no avail, force, or effect, at the instance of the true and just creditor, by way of action, exception, or reply, without further declarator." And in case any one shall have bona fide purchased the subject from the conjunct or confident person for a fair price, or shall have obtained it in satisfaction of a just debt, in that case, "the right lawfully acquired by him, who was nowise partaker of the fraud, shall not be annulled in manner foresaid, but the receiver of the price of the said lands, &c. from the buyer, shall be holden and obliged to make the same forthcoming to the behoof of the bankrupt's true creditors in payment of their lawful debts. And it shall be sufficient probation of the fraud intended against the cro.
"ditors, if they, or any of them, shall be able to verify by writ
"or oath of the party receiver of any security from the dy-
"vour or bankrupt, that the same was made without any just
"and necessary cause, or without any true and competent price;
"or that the lands and goods of the dyvour and bankrupt be-
"ing sold by him who bought them from the said dyvour, the
"whole or the most part of the price thereof was converted, or
"to be converted, to the bankrupt's profit and use."

In the sense of this act, conjunct persons are brothers, sis-
ters, sons, sons in law, uncles by consanguinity or affinity, step
sons, sisters or brothers in law, and, in general, all persons who,
by their relationship to the insolvent person, would be legally
incapable of acting as witnesses or judges in a cause in which
he was concerned. A confident person is a confidential and
intimate friend, e.g. a partner in trade, or a factor, or steward,
or confidential man of business, or a servant, or other depen-
dant. See Confident Person.

With regard to this statute, which has given rise to questions
of construction of considerable difficulty, it may be observed in
general, that it was intended to aid the common law, by which,
independently of statute, all fraudulent alienations by insolvent
persons, to the prejudice of their lawful creditors, are reducible.
The chief benefit indeed conferred by the act 1621 seems to be
that of creating certain legal presumptions, which have the
effect of throwing the burden of disproving fraud on the par-
ties concerned in the transaction, wherever they are so connec-
ted as to give rise to strong suspicions of collusive or fraudu-
lent proceedings; and it would rather appear that, with refer-
ence to this object, the statute has been liberally interpreted.
It is not meant to detail here the various difficulties which
have occurred in the application of this act, but the following
points, in the construction of it, are deserving of attention.

1. The challenging creditor must have been a creditor at
the date of the alienation challenged; or, at least, his debt
must have had its origin prior to the date of the alienation, or
he must have lent money to pay off prior creditors, so as to
come into their place. It is sufficient, however, that the debt
of the challenging creditor is conditional, or even gratuitous. And, where the challenge is at the instance of a trustee for creditors, it is enough if the debt of any of his constituents is prior to the alienation. 2. The deeds liable to challenge are all conveyances or obligations, direct or indirect, which may confer on the grantee property belonging to the debtor, or which may enable the grantee to claim in competition with onerous creditors, or save him from a demand for payment of a debt due by him to the debtor. 3. The proof of conjunct or confidant lies, of course, with the challenging creditor; but, if that be proved, the presumption of law is, that the debtor was insolvent at the time of granting the deed, and that it was granted without value; and, in order to support it, the person founding on it must prove, either that the granter was solvent at the time of granting it, or that a just price or some other onerous consideration was given for it. 4. With regard to the consideration, it must be a fair price paid bona fide, and not collusively, to answer the debtor’s purposes. It is not necessary, however, that the consideration should be a payment in money; it will be a sufficient onerous cause to support the deed challenged, if it has been granted in consequence of a legal obligation undertaken during solvency, or if it be a deed in implement of an antenuptial contract of marriage. It is a more difficult question where the deed has been granted in implement of a mere natural obligation, as in the case of provisions made for a wife or children in a postnuptial contract; but even in such a case it would seem that the marriage will be regarded as a sufficient onerous cause, to support moderate provisions, provided they are not struck at by the act 1696, c. 5. nor are otherwise objectionable; Ersk. B iv. tit. 1. § 33. et seq. 5. It is a sufficient defence against a challenge under this act, that the debtor was solvent at the time of granting the deed challenged; Ersk. ibid. § 32. 6. The challenge is competent before the Court of Session only; and, by invariable practice, it is made in the form of an action of reduction, although that form is not indispensible. 7. The effect of a decree of reduction is a restitutio in integrum as between the parties to
the fraud; but where a third party has bona fide purchased from the conjunct or confident person without being aware of the nullity to which his title was exposed, the sale will be effectual, the challenger's remedy in that case being a claim against the bona fide purchaser for the price if not paid, and, if paid, an action against the receiver of the price for restitution. Lastly, The benefit of the legal presumptions created by this act may be lost by undue delay, or mora, in bringing the challenge. See the subject of this article fully treated, Bell's Com. vol. ii. p. 189. et seq. 4th edit. See also Collusion. Diligence.

CONJUNCTION OF AN ADJUDICATION. When a first adjudication is called in Court, the process must be intimated on the walls and in the Minute-Book, in terms of the statute 54 George III. c. 137, § 9, that those ready to adjudge may be conjoined. For this purpose, 20 sedentum days are given, that those who have liquid grounds of debt, and summonses of adjudication libelled and signed, may produce them in the clerk's hands, and be conjoined in the adjudication. See Adjudication.

CONJUNCTLY AND SEVERALY. When two or more persons are bound conjunctly and severally to perform an obligation, they are liable singuli in solidum, and it is in the option of the creditor to exact performance, either from each of them proportionally, or to enforce the obligation to the full extent against any one of them, leaving him to seek his relief from the rest. See Beneficium divisionis.

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

Succession of Conquest.—Those heritable rights to which the deceased has succeeded as heir to his ancestor, are sometimes termed heritage in a strict sense, in contradistinction to conquest, which term is applied to such heritable rights as the deceased has acquired right to by singular titles, as by purchase, donation, or even excambion. When left to the desti-
nation of the law, heritage, as thus limited, descends to the heir of line, and conquest to the heir of conquest. There is room for this separation in the succession, however, only where the deceased has died without lawful issue, leaving brothers both older and younger than himself, or the issue of such brothers, or two or more uncles, elder and younger than the father of the deceased, or the descendants of such uncles. In such cases, heritage descends to the immediate younger brother of the deceased, or to the next younger brother of his father, but conquest ascends to the immediate elder brother or uncle. Where the deceased is the youngest brother, and leaves two elder brothers, the youngest surviving brother is heir both in heritage and conquest; and a fortiori where the deceased leaves but one brother, he is heir both of line and of conquest. In conquest as in heritage, the whole blood excludes the half blood. Conquest can ascend but once; thus, where one who has acquired an estate by singular titles dies, although this estate may ascend to the heir of conquest, yet in his person it becomes heritage, and will descend to his heir of line. Where a father puts forward an heritable subject to his son, who, at the date of the gift, is heir alioquí successurus, it will not be conquest in the son. But such a grant in favour of an heir presumptive merely, seems to be conquest,—if the right was granted, for example, by a person having no lawful issue in favour of his brother, it is conquest in the brother, unless it be made over to him expressly as the granter's successor; Ersk. B. iii. tit. 8, § 15. See also Short, 13th February 1771, Fac. Coll. Mor. p. 5615. All rights to lands and other heritable rights which require saisine to complete them, fall under conquest, including heritable bonds; but rights to teinds, leases, annuities, pensions, and personal bonds, excluding executors, descend to the heir of line; Ersk. ibid. § 16; Stair, B. iii. tit. 5, § 10. See Succession.

Provision of conquest in a contract of marriage.—In contracts of marriage, the conquest acquired during the marriage, or a certain proportion of it, is frequently settled either on the heir or on the issue of the marriage; and in giving effect to a prov.
vision of this kind, it is to be observed, that conquest, in this sense, means only such an accession of fortune as renders the husband locupletior, and does not, therefore, necessarily include all that has been acquired during the marriage by singular titles. A subject purchased with money acquired by industry or economy, is conquest in this sense; but land or any other subject purchased with borrowed money, is not conquest of the marriage, except in so far as the subject may be of greater value than the price paid for it. A clause of this kind will be regarded as little more than a simple destination, so that the provision may be defeated, not only by onerous or rational deeds, but even gratuitously to a certain extent, although a deed merely gratuitous, alienating the whole or a considerable proportion of the conquest, would be reducible as granted in fraudem of the provision. The father retains, however, during his life, the uncontrolled right of fee in the conquest; and notwithstanding the dissolution of the marriage, to the issue of which the conquest is provided, no action lies at the instance of any of the children for enforcing the provision; so that the conquest quoad the father must be computed, not as at the time of the dissolution of the marriage, but at the time of his death; Ersk. B. iii. tit. 8, § 43. The question, as to what subjects fall under a clause of conquest, will be determined by the expressions used in the particular clause out of which the question arises. Without an express provision to that effect, it will not include what devolves on the husband by succession; Stair, B. iii. tit. 5, § 52. Thus, legacies to a wife stante matrimonio falling to the husband jure mariti, were found not to be conquest under such a clause generally expressed; Rae, 23d January 1810, Fac. Coll. But, on the other hand, where the clause conveyed "all heritages, goods, "gear, debts, sums of money, or other moveables which should "be acquired during the standing of the intended marriage," it was held to carry leases acquired during the marriage, although leases do not, in their own nature, fall under the denomination of conquest; Duncan, 15th February 1810, Fac. Coll. See Kames’ Elucidations, article 6.
CONSANGUINITY, is the relationship of persons descended from the same ancestor; it is either lineal or collateral. Lineal or direct consanguinity, is that formed between the persons generating and generated; and is either descending, as in the case of parent and child,—or ascending, as from the child to the parent. Collateral consanguinity, termed also transverse or oblique, is that which subsists between persons descended from the same common ancestor, but not from one another, as brothers, uncles, and nephews. See Heir.

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

CONSENDER. Where one signs as consender to a deed by which land is conveyed, his consent is held to amount to a total conveyance of his right to the subject, whatever that right may be; or, at least, such consent will import a valid obligation on the consender to grant such a conveyance. But where a person, who holds an heritable security over lands, signs as consender to a disposition of those lands, his consent imports merely that he is not to use his security to the prejudice of the disponee's right, not that he is to cut himself off from all claim for the debt against the debtor personally; Ersk. B. ii. tit. 3, § 21. A mere consender is not liable in any implied warrandice, for he is not the seller, and only gives
his consent at the purchaser's desire; and, although he thus resigns his own right entirely, he incurs no obligation to warrant the right conveyed, unless his warrandice is made matter of express stipulation; Ersk. B. ii. tit. 3, § 25.

CONSEQUENTIAL DAMAGES. See Damage.

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

CONSIDERATION, is the name given to the cause or reason of granting a deed, or of entering into a contract. The consideration may be either onerous or gratuitous. Where value in money, or goods or services, has been given in return for the deed, the consideration is said to be onerous;—where the deed is granted without value, and from mere love and favour to the grantee, the consideration is termed gratuitous. But where the deed is granted in implementation of a natural obligation, such, for example, as the natural obligation on a husband to make a rational provision for his wife or children, it would seem that, although the consideration for such a deed does not fall properly under the denomination of onerous, as above explained, yet that it differs essentially from a consideration merely gratuitous; Ersk. B. iv. tit. 1, § 33. By the law of Scotland, a deed granted for a gratuitous consideration, where not struck at as a fraud against onerous creditors, is as effectual as a deed granted for a valuable consideration or in implementation of a valid legal obligation. See Conjunct and Confidential. Collusion.

CONSIGNATION, is the depositing in the hands of a third party of a sum of money about which there is either a dispute or a competition. Consignation may be made where the existence or amount of the debt is questioned by the debtor, as in a suspension; or where the creditor refuses to receive his money, as in wadsets and other redeemable rights; or where
it has not been finally determined to whom the money is to be paid, as in the case of consignation of the price of subjects bought at judicial sales. The general rules of law in regard to consigned money are, 1. That the risk of loss, either from the failure of the consignatory, or the loss of interest, or the expense of consignation, lies with the consigner, where he ought to have made payment, and not consignation, or has consigned a part only, or has chosen as consignatory, a person neither authorised by law nor named by the parties; Ersk. B. iii. tit. 1, § 31. 2. The charger or other creditor runs the same risk if he has charged for sums not due, or has, without good reason, refused payment when offered, by which refusal the consignation became necessary; Ersk. ibid. Where, indeed, the creditor has unwarrantably refused to take the money when tendered to him, consignation in the hands even of a private party who is solvent, not only stops the currency of interest against the debtor, but is held in law to be equivalent to payment of the debt; Ersk. B. iii. tit. 4, § 5. 3. It is the duty of the consignatory to keep the money in safe custody until called for; if, therefore, he puts it out at interest, he does so at his own risk; but, for the same reason, he has right, according to Erskine, to the interest he draws, without being liable in interest to the consigner; Ersk. B. iii. tit. 1, § 31. This doctrine, however, appears to be questionable; and in practice it is usual to consign money in a public bank, so that the party entitled to it receives it with bank interest, for the time it has remained consigned. 4. By 1695, c. 6, the purchaser at a judicial sale is entitled, a year after the decree of sale, to consign the price of the lands, and interest due to the date of consignation, in the hands of the Town Council of Edinburgh or their Treasurer; but, by 54 Geo. III. c. 137, § 6, this statute is so far repealed, and it is made lawful for the purchaser at a judicial sale, at any term of Whitsunday or Martinmas after the term of payment of the price, to lodge the same with the interest due on it, in the Royal Bank, or the Bank of Scotland, or the Bank of the British Linen Company, at such interest as can be procured for it; and by doing so, and intimating it to the agent in the sale, the purchaser shall be discharged of the
price. By the same section of the statute, the Court of Session is empowered, upon the application of any of the creditors, to order the purchaser to lodge the price and interest in one of those banks, at any of the foresaid terms after the term of payment, sufficient intimation of such application being given to the purchaser and the common agent.

5. The effect of consignment in terms of this statute seems to be, that each creditor's right, whether previously secured over the lands heritably or not, becomes merely personal, and may be attached by the diligence applicable to moveables; Bell's Com. vol. ii. p. 9, 4th edit. In wadsets money consigned for the redemption remains heritable until declarator of redemption; Ersk. B. ii. tit. 8, § 23. And, on the same principle, consignment made in terms of the clause of redemption in an heritable bond, will not have the effect of rendering the sum moveable until redemption.

CONSIGNMENT. In mercantile law, the term consignment is generally applied to goods delivered over or transmitted by one merchant to another, or by a merchant to a mercantile agent or factor for sale, or for some other specific purpose. The bankruptcy of either the consigner or the consignee, may give occasion to questions of considerable difficulty, both in regard to reputed ownership, and on other points connected, with the rights of the parties, or their creditors. But these are questions which must obviously depend in a great degree on the circumstances under which they arise, so that it would be difficult to comprehend them under any general rule. One very ordinary transaction, however, is for the consignee to make advances, either in money or bills, to a certain extent, on the faith of the expected sales of the goods consigned; and, in such a case, the following general rules seem to be fixed:—1. If the consignee should fail, and the consigner be obliged to pay the bills granted to him for such advances, the consigner may demand back his consignment in so far as unsold. 2. That, if the consigner should fail, the consignee has a lien over the consignment to the amount of all engagements on the faith of the goods consigned. 3. When both parties fail, the holder of
such bills may rank upon both estates for the full amount of the bills, provided he does not draw more than 20s. in the pound on his debt; Bell's Com. vol. i. p. 212, 4th edit. See Factor.

CONSISTORIAL COURT. This term is now applied to the Commissary Court, which came in place of the Bishops Court; and the Bishops Court derived the term from the courts held by the Roman Emperors. See Commissaries.

CONSOLIDATION. This is a term in Scots law used to signify the re-union of the property and superiority of landed property after they have been separated. By the law of Scotland, a proprietor may sub-feu his lands to be held of himself as superior. The sub-feu is called a base right, and carries what is denominated the dominium utile, or property; that which remains with the granter of the sub-feu, is termed the dominium directum or superiority. When the sub-vassal wishes to reconvey the property to his superior, he does it by a resignation ad remanentiam in the superior's favour, a mere renunciation of the sub-feu not being held sufficient to accomplish this object. By such resignation, the dominium directum and the dominium utile will be again united or consolidated as one property in the person of the superior.

Where the superior succeeds to the dominium utile, as heir to the vassal, it will be necessary for him to complete his title to the property by a precept of clare constat, granted by himself in his character of superior, to himself as heir to his vassal, on which precept he will be infecit. Being thus infecit on his own precept of clare constat, he will hold the superiority under his former titles, and the property under the precept of clare constat and infeftment, the two estates, although vested in the same person, being entirely separate and distinct. In order to unite them, the proprietor must, in the double capacity of superior and vassal, resign the dominium utile in his own favour ad remanentiam, and in this, as in the former case, consolidate the two estates of property and superiority. In like manner, if the vassal should succeed to the superiority, it would be necessary for him, after having completed his title to
the superiority, to consolidate the two estates in the same manner, by resignation ad remanentiam. The same rule holds where, by adjudication or otherwise, the two estates have come to be vested by separate titles in the same person.

According to our more ancient practice, it was considered incongruous for the same individual to act in the double capacity of superior and vassal to himself, so that wherever the two estates came to be vested in the same person, an ipso jure or virtual consolidation was held to have taken place. But it would appear that the practical inconvenience attending this ipso jure consolidation, and, in particular, its prejudicial effect on the security of the records, led to the adoption of a different opinion; and it was at last settled, by an almost unanimous decision of the Court, that consolidation could not be effected ipso jure, or without resignation ad remanentiam; Bald against Buchanan, 8th March 1786, Fac. Coll. Mor. p. 15,084; affirmed on Appeal.

The separation of property and superiority may take place not only by a regular sub-infeudation, but also where a conveyance has been made by a disposition containing a double manner of holding. If, for example, the disponee were to die after taking infeftment on the precept of sasine in such a deed, and his heir were to make up his title by serving heir in general to his ancestor, so as to carry the unexecuted procuratory of resignation, and were then to expede and be infeft on a charter of resignation on the procuratory to which he had thus acquired right, he would carry the mid superiority merely, and would leave the property in hereditate jacente of his ancestor. In order to complete his titles and unite the property and superiority, it would be necessary for him to grant a precept of clare constat to himself as heir to his ancestor in the property, and afterwards to consolidate the two estates by resignation ad remanentiam in his own hands. Without due attention, therefore, to the effect of base infeftments, and of charters of resignation and of confirmation, as well as to the law in regard to consolidation, as established in Bald against Buchanan (supra cit.), it may happen that the rights of onerous creditors or purchasers are
set aside, or the intentions of the makers of family settlements entirely defeated.

It is proper to observe that, in the case where the disponee, in a disposition containing a double manner of holding, has first taken infeftment on the precept without taking a charter of confirmation, and has afterwards resigned upon the procura-
tory, and obtained a charter of resignation, it has been doubt-
ed whether the property and superiority are to be held as separated. This doubt has been thought to be supported by the doctrine of Stair, as well as by the history of the modern disposition to a purchaser. See *Stair, App.* p. 787, and *Bell's Treatise on the Conveyance of Land*, p. 297, *et seq.* See also *Confirmation. Resignation. Disposition. Charter.*

**CONSTAT, Precept of Clare.** See *Clare Constat.*

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

**CONSTABLES** are the officers of the justices of the peace, entrusted with the execution of their warrants, decrees, or orders. They are appointed by the justices at their quar-
ter sessions, two at least for every parish, and more if thought necessary. In Royal burghs, constables are appointed by the magistrates. It is the duty of constables, without any special warrant from a justice of the peace, to apprehend offenders against the peace, vagrants, and such as can give no account of themselves, and take them to the next justice. It is also their duty to suppress riots, and apprehend the rioters; but, after the riot is over, a constable is not authorised to appre-
hend *brevi manu* any person concerned in it, unless one has been dangerously wounded in the fray. See 1617, c. 8; 1661, c. 38; *Ersk.* B. i. tit. 4, § 16.

**CONSTITUTION, Decree of.** Every decree by which the extent of a debt or obligation is ascertained may be called a decree of constitution; but the term is generally applied to those decrees which are requisite to found a title in the person of the creditor, in the event of the death of either the debtor or the original creditor. Thus, where the debtor dies, the creditor must obtain a decree, constituting the debt against the heir of the debtor, before he can proceed with diligence to attach the debtor's heritable or moveable estate, unless the heir shall renounce; in which case, a decree of cognition is pronounced. See *Cognitionis Causa. Bond of Corroboration. Adjudication.*

**CONSTRUCTURE.** See *Contexture.*

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

**CONTEMPT of COURT.** This term is generally applied to any disrespect or indignity offered to Judges, while sitting in judgment, or on account of their proceedings in their judicial capacity; including personal violence, or indecorous expressions towards the court or its members, libellous attacks written or spoken against the judges, or their mode of administering justice, and contumacious or illegal disobedience to the orders of the court, or to the rules prescribed by the court, for the conduct of business before it. Outrageous contempts, such as striking or threatening judges for their proceedings as such, or committing an assault in open court, are offences punishable either capitally or by very severe arbitrary pains; 1593, c. 173; 1600, c. 4. (See *Beating of Judges*). Inferior acts of insult or contempt, although they may not fall under any statutory enactment, are nevertheless punishable at common law; the de-
faming of judges, or casting imputations upon the integrity of the court, are offences of this description; and if committed in the course of a process in dependence, or which has been lately in dependence, they may be punished summarily by the court to which the insult has been offered, on its own motion. See Case of Jameson, Acts of Sederunt 17–28th January 1815. In like manner, every court must necessarily be vested with the power of inflicting punishment summarily for all disorders, or acts of contempt, committed during the sitting of the court. Where the contempt has not been committed in the immediate presence of the court, but has relation to a matter in dependence, or recently before the court, the proper form seems to be, to bring the offence under the notice of the court by summary complaint at the instance of the public prosecutor. In a recent instance, in which a gross contempt of this description had been committed in the course of a depending process in the the Court of Session, the court remitted the matter to the Lord Advocate, by whom it was brought under their cognizance by summary complaint, and the punishment of fine and imprisonment inflicted; Lord Advocate against Hay, February 1822. See also Hume, vol. i. p. 399, et seq. vol. ii. p. 135, et seq.

CONTEXTURE, is a mode of industrial accession, borrowed from the Roman law. It takes place "where things " belonging to one, are wrought into another's cloth, and are " carried therewith as accessory." It is similar to construc-
ture, whereby, if a house be repaired with the materials of ano-
other, the materials accrue to the owner of the house, full repara-
tion, however, being due to the owner of the materials. If the materials have been obtained mala fide, the person using them will be liable for their value according to the owner's oath in litum, or he may be prosecuted for theft, according to the circumstances under which he has acquired them. It would also appear that, where there has been mala fides, the former owner may estimate the materials per pretium affectionis; Stair, B. ii. tit. 1. § 39. Bankton, B. ii. tit. 1. § 17. See Adjunction.
CONTINGENCY of a PROCESS. "Where two or "more processes are so connected that the circumstances of "the one are likely to throw light on the rest, the process "first enrolled is considered as the leading process, and those "subsequently brought into Court, whether before the same "Division or not, may be remitted to it ob contingentiam;" Ivory's Form of Process, vol. ii. p. 51. The remit is usually made on a simple motion at the bar. The effect of remitting processes in this manner is merely to bring them before the same Division of the Court, or the same Lord Ordinary; in other respects they remain distinct; the pleadings may be unconnected; and no step taken in the one will prevent the others from sleeping; Ivory, ibid. Where an action has been brought into the Court of Session, and a process between the same parties in relation to the same subject matter is depending in an inferior court, it is usual to bring the case from the inferior court, into the Court of Session, by an advocatio ob contingentiam; and, in such a case, the advocatio is competent at any stage of the inferior court process; 50 Geo. III. c. 112, § 36. See Conjoining.

CONTINGENT DEBTS are debts due provisionally in a certain event. Creditors in such debts are, by the law of Scotland, entitled to rank upon the estate of a bankrupt, to the effect of having security found for the payment of their debts, proportionally with those of the other creditors, on the emerging of the contingency. A discharge obtained under the sequestration statute operates against such debts, as well as against debts due at the time of the bankruptcy, although it would appear that in England the rule is different; Bell's Com. vol. i. p. 243, 4th edit. A contingent creditor, however, is not entitled to concur as a creditor in the petition for sequestration, or to vote in the election of the interim factor, or of the trustee, or in the other steps of procedure; 54 Geo. III. c. 137, § 24. The trustee is bound to rank contingent debts as if the condition were purified, and to set apart dividends; but, instead of paying them to the creditor, the trustee is directed to deposit them in a bank, or to lend them out on heritable
security at the sight of the creditor, the interest going to the general fund for division until the contingency shall be declared, when the dividends so deposited shall belong to the creditor, or go to the general fund, according to the terms of the obligation; same stat. § 48. In the concurrence of creditors requisite by the statute to authorise a discharge, the contingent debts must be counted in ascertaining the four-fifths, notwithstanding the provision in § 24. See Bell's Com. vol. ii. p. 469, 4th edit.

CONTINGENT LEGACY, is a legacy the existence of which depends upon an uncertain future event, as where a legacy is given provided the legatee shall arrive at a certain age. See Conditional Obligation. Legacy.

CONTINUATION OF THE DIET. The summons in a civil process authorises the defender to be cited to appear on a certain day, "with continuation of days," and may be brought into Court, either on the day named, or later, as the party chooses, unless it be forced on by protestation. (See Calling of a Summons. Protestation.) But in a criminal prosecution the diet is peremptory, and the libel must be called on the precise day, and, in some way or other, disposed of, otherwise the action falls, and cannot be resumed. The diet may be continued, however, by an act of Court, made in the presence of a single Judge, and in the absence of the parties. Such an act is not even signed by the Judge, but merely entered in the books of adjournal by the clerk, in the Judge's presence; Hume, vol. ii. p. 255. See Dict. Criminal Prosecution.

CONTRABAND GOODS, are those goods which are imported to this country, or exported from it, without paying the duties imposed by law. Contracts for smuggling, or for the delivery of goods known to be contraband, found no right of action; and no party participant in the smuggling, or by whom the contraband goods have been delivered in this country, can legally claim under the contract. But foreigners, or even native Scotchmen settled abroad, selling and delivering goods which are afterwards smuggled into this country, have

Vol. I.
action here for the price, even although the seller suspected or knew that the buyer meant to smuggle the goods into Britain; provided the seller was not himself accessory to the smuggling; Cullen and Company, 15th May 1793, Fac. Coll. Mor. p. 9554; Reid, same date, Mor. p. 9555. Where the buyer of contraband goods knows them to be contraband, he has no claim for delivery, or no action of damages for breach of contract, the maxim being that, in all demands upon illegal contracts, potior est conditio possidentis et defendentis. It seems, however, to have been thought at one time that, where a bill was granted for the price of contraband goods, action or diligence was competent on the bill; but more recently action has been refused where the bills were in the hands of the original parties or of their trustees. See Bell’s Com. vol. i. p. 286, 4th edit.; and Mor. Dict. voce Pactum Illicitum, p. 9538, et seq.; and App. same title, No. 1.

CONTRACT. A contract is "the voluntary agreement of two or more persons, by which something is to be given or performed upon one part, for a valuable consideration, either present or future, on the other part;" Ersk. B. iii. tit. 1, § 16. Consent of parties being implied in all contracts, persons incapable of consent, such as idiots, pupils, persons absolutely drunk, &c. cannot contract. Persons who have been compelled to give their consent by force or fear, or who have been induced to consent by means of fraud or deception, cannot be said to have legally consented at all; and all contracts, therefore, exposed to such objections, are null and reducible. In like manner, error in the essentials, e. g. either in regard to the contracting parties, or the subject matter of the contract, will vacate the agreement. A contract, by which the parties, or any of them, become bound to perform what is naturally impossible, or to do any illegal act, or in which stipulations contra bonos mores are inserted, can found no action; and the contracting parties are neither liable in performance nor in damages for non-performance. But all facts, in themselves legally possible, are the subjects of obligation, although beyond the power of the contracting party, who is
liable in damages if he cannot perform; Ersk. B. iii. tit. 3, § 83, 84. Things exempted from commerce, either by nature, by destination, or by statute, cannot be the subject of obligation. Under this class may be ranked stolen goods, which acquire such a vitium reale by the theft, that they fall no longer under commerce; Ersk. ibid.

The degree of negligence which throws the blame on a contracting party, so as to make him liable for the damage suffered by the other party from the non-fulfilment of the contract, seems to be settled by the following rules: 1. Where the contract is entered into for the benefit of both parties, as in sale, each party is bound to exercise the middle degree of diligence, such as a man of ordinary discretion uses in his own affairs. 2. Where only one of the parties is benefited by the contract, as in commodate, the party so benefited is bound to that degree of diligence which is exercised by a man of the most consummate prudence; while the other party, who is no gainer, is only liable for fraud, or for gross omissions. 3. Where one bestows less care on the subject of any contract which implies exuberant trust, than he is known to employ in his own affairs, such negligence is accounted dole, even although the party has used diligence as exact as a man of ordinary prudence would have used; Ersk. B. iii. tit. 1, § 21.

The nominate contracts in Scots law are, loan, commodate, deposite, pledge, sale, permutation, location, society, and mandate,—for which, see the separate articles. There are also in our law, as well as in the civil law, a great variety of contracts which, not having been distinguished by special names, are termed innominate, all of which are obligatory on the contracting parties from their date; so that neither party can resile, even although one has, and the other has not, performed his part of the contract; Ersk. B. iii. tit. 1, § 35; Bankton, vol. i. p. 328. Breach of contract of course subjects the party guilty of it not only to an action for enforcing it, but also to a claim for damages. See Damages. Feu-contract. Lease. Marriage.

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

1. Antenuptial Contract.—The object of these contracts generally is to make some modification on the legal rights of the parties and their children, and more effectually to guard against the risk of the husband’s insolvency. An antenuptial contract is held to be strictly an onerous deed, by which either a real security, or a jus crediti, may be constituted in favour of the wife or children, which will, in the one case, give them a preference, and, in the other, entitle them to rank as creditors. 1. With regard to the wife.—Instead of her legal provisions of terce and jus relictœ, the husband may become bound to infest her in liserent in certain lands; and infestment on the contract will render her right real. Lands thus set apart for the wife are called locality lands: Or he may secure her by infestment in an annuity, which is termed a jointure: Or he may bind himself to invest money in real security for her behoof, or to provide her in a certain annuity: All which obligations, if expressed with sufficient precision, will vest a jus crediti in the wife, which, in case of the husband’s insolvency before they are made real by infestment, will entitle her to rank as a creditor for such provisions. By contract of marriage, the jus mariti may be excluded as to a particular subject, but it cannot be excluded per aversionem, e. g., an annuity may be purchased by the husband for the wife for her aliment, or a bond may be taken, payable to her, excluding the jus mariti, provided this is done by an antenuptial deed; for, after marriage, all such provisions between husband and wife are revocable as donations. The terce is excluded by a conventional provision to the wife, unless the contrary be expressed (1681, c. 10.) The rule is different with regard to the jus relictœ, which requires an express exclusion, even where conventional provisions are made.

2. Provisions in favour of Children, in an antenuptial contract, are also held to be onerous deeds; but it depends entirely upon the manner of expressing the provisions, whether they
shall confer either a preference or a *jus crediti*. In the ordinary case, the contract makes the children merely heirs, having an expectancy or *spes successionis*, and nothing more. Where the property is settled on the children *nascituri* in fee, or the provisions made payable after the death of the father, the children cannot compete with onerous creditors, although they may reduce gratuitous alienations to the prejudice of their provisions. In order to confer a *jus crediti*, the children must be vested with the character of creditors, during their father’s life, which may be done by an obligation to pay the provisions, or the interest on them, at a term which either must or may happen during the father’s life. Where it is intended to give the heir or children a preferable right, to be effectual against onerous creditors, it may be done by the father, in an antenuptial contract, binding himself not to contract debt, or to infest the heir against a determinate day, or by a clause restricting his own right to a mere liferent; and such obligations, though granted *liberis nascituris*, when secured by proper diligence, and perfected by sasine, found a preference against all posterior deeds of the father. See *Ersk. B. iii. tit. 8, § 40*.

Where the husband or wife’s titles are not complete, or where any other obstacle prevents the execution of a regular antenuptial contract, antenuptial marriage articles may be entered into, under which a *jus crediti* may be effectually vested in the parties; and any deed after marriage in implement of these articles, if it does not fall within the bankrupt statutes, and if it be otherwise unobjectionable, will be effectual.

2. *Postnuptial Contracts.*—After marriage, the wife and children must follow the fate of the husband, and can take nothing in competition with his creditors, which he cannot legally give away. Postnuptial contracts must always be construed with reference to this principle, in so far as creditors are concerned; and, in so far as regards the husband and the wife, they are exposed to the risk of revocation by either of the parties as *donationes inter virum et uxorem*, (see *Ersk. B. i. tit. 6, § 29.*) As to the wife’s provisions under such a contract, it has been held, in questions with creditors, that a mo-
derate provision granted to her during her husband's solvency will be effectual; and to the extent of a moderate aliment, even after the contraction of debt by the husband (see *Conjunct and Confident*). And, as to children, it is held that provisions to them made in a postnuptial contract, after contraction of debt, are ineffectual, although granted in implement of the natural obligation to aliment. Where insolvency does not follow, and where the provisions are reasonable and proper, the rights of the parties (with the exceptions above mentioned) may be effectually settled in a postnuptial contract of marriage.

It may be proper to observe here, that, where a separation has taken place between husband and wife, without a dissolution of the marriage, whether the separation has been judicial, or by decree arbitral, or by voluntary contract of separation, the husband may, in such a case, vest his wife either with a *jus crediti*, or a preference for her aliment or other stipulated provision, according as his obligation is personal, or completed by infeftment in security, provided such provision is made during solvency. The provisions of such contracts are of course revoked by a reconciliation and return to the marriage state; *Bell's Com.* vol. i. p. 556, 4th edit.

The framing of a contract of marriage so as to provide for the various events contemplated by that deed, and to secure the fulfillment of the different stipulations, is one of the most important and difficult duties of a conveyancer; and, as it is a duty requiring much professional circumspection, it may not be improper to close the present short notice of this important deed, by the following references to authorities on this subject; *Stair*, B. ii. tit. 3, § 41; *Ib. tit. 6, passim.*; *Ib. B. iii. tit. 5, § 19*; *Ib. tit. 8, § 45*; *Ersk. B. i. tit. 6*; *Ib. B. iii. tit. 3, § 30*; *Ib. tit. 8, § 38, et seq.*; *Bankton, B. i. tit. 5, § 1*; *Bell's Com.* vol. i. p. 549, et seq. 4th edit.; *Jurid. Styles*, vol. i. p. 167, et seq.; vol. ii. p. 203, et seq. 2d edit. See *Marriage.*

**CONTRACT OF COPARTNERSHIP.** See *Society.*

**CONTRAVENTION,** may be defined generally to be any act done in violation of a legal condition or obligation by which the contravener is bound. The term, however, is most fre-
quently applied to an act done by an heir of entail in opposition to the provisions of the deed, whereby a forfeiture of the contravener's right may be incurred; or to acts of molestation or outrage committed by a person in violation of lawborrows, whereby the contravener exposes himself to the penal action of contravention of lawborrows. See Tailzie. Lawborrows.

CONTRIBUTION, takes place where several parties pay their share of a common expense. The term, in a legal sense, is generally applied to contributions made for equalizing the loss arising from sacrifices made for the common safety in sea voyages, where the ship is in danger of being lost or captured. The basis of our law upon this subject is the celebrated Lex Rhodia de jactu, the natural equity of which has led to its adoption in the maritime law of most European states. The general rule in this country seems to be that, where any part of the ship or cargo has been sacrificed to save the rest, the loss is to be adjusted by a contribution from all who have partaken of the benefit. In this contribution, or general average as it is also termed, the most valuable goods, though their weight should have been incapable of putting the ship in hazard, such as diamonds or other precious stones, are to be estimated at their just price, on the ground that they could not have been saved but for the ejection of the other goods. Persons on board, however, bear no share in the contribution, quia liberi corporis nulla est aestimatio. The ship's provisions are also exempted from contribution; but wearing apparel is estimated, and pays in proportion to its value. In this estimation the goods ejected are valued at prime cost, and the goods saved at the price they would bring at the port of arrival, freight, duties, &c. deducted. If a mast has been cut away, or an anchor parted with, in order to save the ship, contribution takes place; but, if they have been lost in a storm, the loss falls on the ship alone; Ersk. B. iii. tit. 3, § 55; Bankton, vol. i. p. 233.

In order to found the right to contribution, it is necessary that the goods shall not have been rashly or unnecessarily sacrificed, but after such consultation as the exigencies of the occasion may admit of; and, in case of difference in opinion
amongst the crew as to the necessity of the sacrifice, a majority shall determine. In such a case, the opinion of the master, where he had no adverse interest, would be entitled to great weight. In all cases in which a part either of the ship or cargo has been sacrificed for the common benefit, an account of the circumstance under which it happened ought to be entered in the log-book, with a specification of the articles thrown overboard, or otherwise destroyed, to which affidavit should be made at the first port, otherwise the presumption will be against the master and crew; Bell’s Com. vol. i. p. 495, et seq. 4th edit. where the subject of this article is treated of very fully. See also Salvage. Collision of Ships. Jactus Mercium.

CONTUMACY, is a wilful disobedience to any lawful summons or judicial order. In a criminal process, the punishment of contumacy in the accused person is sentence of fugitation, (see Fugitation.) In a civil action, the only consequence of the defender’s contumacy, in refusing obedience to the citation, is, that the Judge will take cognizance of the cause, and decern in his absence; Ersk. B. iv. tit. 1, § 7. See Decree in Absence. Contempt of Court.

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

CONVENTION of ROYAL BOROUGHS. By the act 1487, c. 111, the Royal Burghs are ordered to meet once a
year, by commissioners, to treat of the "welfare of merchan-
dise, the gude rule and statutes for the common profite of
"burrows, and to provide for remeid upon the skaith and in-
juries sustained within the burrowes." And these powers
are renewed by later statutes; in consequence of which, com-
misioners from each borough meet annually in Edinburgh, to
treat of the subjects committed to their charge. The powers,
however, of this convention were never understood to be final
or uncontroulable; consequently, its deliberations excite little
interest; and are in general directed to matters of no public
importance. See, on this subject, Ersk. B. i. tit. 4, § 23;

CONVENTIONAL OBLIGATIONS, are obligations
resulting from the special agreement of parties. The term is
generally used in contradistinction to natural or legal obliga-
tions, which arise from the operation of the law itself; inde-
dependently of contract. See Obligations. Contract.

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

CONVEYANCING. The literal meaning of this term is
the preparing of conveyances: and, in professional language,
the word conveyancer is sometimes used as contrasted with
that of agent, the one being regarded as a preparer of deeds,
and the other as a conductor of law-suits. It rather appears,
however, that, in its proper acceptation, the term conveyancing
includes, not only the preparation of all voluntary deeds con-
stituting, transmitting, or extinguishing rights or obligations,
but that it extends to those forms prescribed by law for accom-
plishing the same objects, when the party is either unwilling or
unable to do so by a voluntary act.

It is evident that, in every country, the science of convey-
ancing must keep pace with the progress of improvement.
Hence, in a rude state of society, the evidences of rights are
generally as defective, as the means of securing them are pre-
carious. As civilization advances, those evidences become
more definite in their nature, and more perfect in their cha-
racter, until they are at length systematized and adapted on fit principles to all the exigencies of practice. The nature of those evidences will be found in most instances to vary with the character of the subject to which they relate; thus, when applied to land rights, they are in general more strictly regular and formal than when applied to commercial transactions or to moveables; and, in some instances, the evidence of the constitution or transmission of a right is found to be conveniently left to parole testimony, without the necessity of any writing whatever.

With regard to voluntary written deeds, it may be observed in general, that the object of all of them is to express the purpose of the parties in such a manner as to insure its being carried into full effect. But it is quite obvious that, if it were left to each individual to express his intentions according to his own caprice, the most serious inconveniences would follow; and, accordingly, the law of every civilized country, and in particular the law of Scotland, has sanctioned certain technical forms, without regard to which the object of the parties cannot be easily attained. One important end of the science of conveyancing is to teach the proper use and application of those technical forms; and, as practice and adjudged cases have attached certain determinate meanings to many of the terms employed in deeds, it is necessary that a conveyancer should be intimately acquainted, not only with the various deeds themselves, and the clauses peculiar to each, but that he should be fully aware of the legal import of every clause or expression which he may have occasion to use, in giving effect to the intentions of the parties.

In Scotland, as in every other country of Europe, the forms of the deeds which relate to land rights have been very much modified by the feudal system; and, by a concurrence of circumstances partly accidental, the forms of that system have in this country been combined with an institution of records remarkable both for its completeness and utility; and which has tended to bestow on the rights of landed property in Scotland a degree of security, of which probably no other European
country can boast. The deeds by which, in our practice, the rights to moveable property are proved, are in general simple and natural; and the authentication or testing of all formal deeds, whether relating to heritable or moveable property, is regulated by a statutory enactment, calculated, as far as seems practicable by human ingenuity, to guard against fraud or interpolation. These, however, as well as the forms of voluntary and judicial conveyancing, are subjects which are necessarily treated of in separate articles. See, in particular, Charter. Disposition. Sasine. Bond. Assignation. Adjudication. Ranking and Sale. Records. Registration. Testing Clause, &c.

The present very general notice will serve to show that the profession of a conveyancer is one of the greatest importance, requiring extensive legal and historical knowledge, on the proper exercise of which the security of property, and the happiness of individuals, must very materially depend. It accordingly holds an honourable place in public estimation; and the Society of Writers to the Signet, to whom that department of practice chiefly belongs, have shown a laudable anxiety to promote the study of it, as a qualification for admission to their body.

CONVICT, is a person found guilty of a crime. Convictions generally proceed on the verdict of a jury; but our law also admits of summary convictions, without the intervention of a jury, in certain circumstances, as in cases of contempt of court, of attempts to corrupt or withhold evidence, of malversation by persons entrusted with the criminal police of the country, of certain offences against the revenue laws provided for by special statute, and in proceedings before sheriffs and justices of the peace for minor offences. See Hume, vol. ii. p. 135, et seq.

CONVOCATION OF THE LIEGES. See Mobbing.

CONVOY, is the name given to the ship or ships of war appointed by government to accompany merchant vessels during war, as a protection against capture. During the late wars with France, merchant ships were prohibited by statute to sail without convoy. The obligation to sail with convoy is an im-
plied condition of the contract of affreightment; and, in case of insurance, it is a warranty in the contract with the underwriters. It is sufficient implement of this obligation if the vessel join the convoy at the usual place of assembling, and accompany it as far as it goes on the destined voyage, provided it is the only convoy appointed for vessels destined to that port. If, however, the convoy have sailed, the vessel cannot legally endeavour to overtake it, although, if the vessel have sailed with convoy, and is driven back, she need not wait for new convoy, but may proceed on the voyage. The convoy must be the naval force appointed for the purpose, and the vessel must continue with it, unless driven off by stress of weather or other inevitable accident. It is not sufficient to sail with any ship of war about to undertake the same voyage, unless such ship be also appointed a convoy. See Bell's Com. vol. i. p. 466, 4th edit.

CO-PARTNERSHIP, is a contract by which the several partners agree concerning the communication of loss or gain arising from the subject of the contract. See Society.

CO-PARTNER, is a member of a co-partnership. He may be either an ostensible partner known to the public as such, or a latent or sleeping partner, as he is colloquially termed; and in either case he is liable in all the legal obligations arising out of the contract of society or co-partnership. See Society.

COPY-HOLD, is a tenure in English law for which the tenant has nothing to show but the copy of the rolls made by the steward of the Lord's court, on the tenant's being admitted to the possession of the subject as a part of the manor. It is also called base tenure. Copy-hold property cannot be now created, for the foundation on which it rests is, that the property has been possessed, time out of mind, by copy of court roll, and that the tenements are within the manor; Tomlin's Dict. This tenure is unknown in the law of Scotland.

COPY-RIGHT, is the exclusive right of printing and publishing any literary work; extended also to engravings and music. See Literary Property.

CORONER. In England the coroner is an officer who possesses both judicial and ministerial authority. In his judi-
tial capacity, he takes inquisitions in cases of violent deaths; it is his duty also to inquire after the lands and goods of murderers, treasure trove, wreck of the sea, deodands, &c. The coroner acts ministerially in the execution of the King's writs, when the sheriff is disqualified by relationship to the parties, or interest in the suit, or otherwise. Coroners are chosen by the freeholders in the county courts; and four are usually named for each county; Tomlin's Dict. The office of coroner was also known in Scotland formerly. See Hume, vol. ii. p. 24. Note.

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

**CORPORATION**, or **COMMUNITY**, is a fictitious person or body politic, enduring in perpetual succession, with power to take and grant, to sue and to be sued. See *Community*.

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

**CORPSE.** See *Dead Body*.

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

CORREI DEBENDI. Two or more persons, who are bound as principal debtors to pay or to perform, are termed in the Roman law correi debendi. Where the obligation is indivisible, e.g. an obligation for the delivery of a special subject, the co-obligants are bound singuli in solidum; but, where the obligation is to deliver a certain quantity of corn or money, the obligation may be divided into parts, and each obligant can be sued only for his own share, or pro rata, unless the obligants are expressly taken bound conjunctly and severally. From this rule, however, there are excepted, 1st, Contracts importing a copartnership; and, 2d, Bills of exchange; in both of which cases the co-obligants are bound singuli in solidum, whether the obligation be so expressed or not; Ersk. B. iii. tit. 3. § 74.

CORROBORATION, BOND OF. See Bond of Corroboration.

CORRUPTION OF JUDGES. By a variety of acts of the Scots Parliaments, and, in particular, by 1579, c. 93, and 1540, c. 104, Judges, whether of the Court of Session, or in inferior courts, who, through corruption or partiality, use their authority as a cover for injustice or oppression, are punishable with confiscation of moveables, loss of honour, fame, and dignity, besides an arbitrary punishment in the person. See Hume, vol. i. p. 401.

CORRUPTION OF BLOOD. When a person has been attainted of treason, his blood is said to be corrupted; and neither his children nor any of his blood can be heirs to him or any other ancestor. If the attainted person be a nobleman, he and his posterity are by the attainder rendered base and ignoble. Corruption of blood cannot be entirely removed, except by act of parliament; for the King's pardon does not restore the blood, so as to make the attainted person "capable, either of inheriting others, or being inherited himself by any
"one born before the pardon." Tomlin's Dict. See also Bankton, vol. ii. p. 275.

COSTS OF SUIT. See Expenses.

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

COUNCIL, PRIVY. See Privy Council.

COUNSEL, is an advocate or barrister retained to act for a party in the conduct of a law-suit, or to aid him with legal advice. A counsel is not responsible for the result of the advice he gives, provided he gives it honestly and to the best of his judgment; Bankton, vol. iii. p. 76. By the criminal law of Scotland, the accused party is allowed the benefit of counsel, who, if not retained by the party, will be nominated by the Court to undertake the defence, an advantage which, it would seem, is not enjoyed in England, except in cases of treason. Hume, vol. i. p. 5, and vol. ii. p. 276.

COUNSELLOR OF A ROYAL BURGH. The affairs of a royal burgh are entrusted to the direction of a provost, magistrates, dean of guild, and counsellors. The number of counsellors, and the manner of their election, are fixed by the sett of the burgh. See Burgh Royal.

COUNT AND RECKONING, is the technical name given to a form of process, by which one party may compel another to account with him, and to pay the balance which may appear to be due. The summons in this process calls on the defender to produce a full statement of his accounts and intrusions, so that the balance may be ascertained; and it also concludes for a random sum as the amount of the supposed balance; for which sum a decree will be given, in case the defender declines to appear, or to render the statement required. The act of sederunt, 22d November 1711, makes various regulations for expediting the discussion of processes of this de-
scription in the Court of Session; but, as that act is not much regarded in practice, it is unnecessary to detail its provisions. According to the present practice, the process is introduced to the Court in the ordinary manner, and a day assigned to the defender for producing his accounts and vouchers. When these are produced, the pursuer is allowed to see them, and to put in objections, which are usually followed by answers, replies, and duplies. The cause is then advised by the Judge, and, if necessary, remitted to an accountant to prepare a state of the accounts. The report of the accountant may also be discussed in objections, answers, replies, and duplies, after which the Lord Ordinary pronounces an interlocutor, which may be brought under his own review, and that of the Court, in the usual manner. The same procedure takes place in every other process, which, although originally of a different kind, yet in its course resolves into a count and reckoning; Act of Sede-runt, 22d November 1711, § 2. See Ivory's Form of Process, vol. i. p. 270, et seq.

COURT. The Courts of Scotland have been divided into superior, inferior, and mixed. The Courts of Session and Exchequer are superior,—their jurisdiction in all civil and revenue causes is universal over the whole kingdom, the sentences of all the inferior courts of Scotland being subject to the review of one or other of them, unless where special statute interposes. The Court of Justiciary is the Supreme Criminal Court of Scotland. Inferior courts are those of which the sentences are subject to the review of one or other of the Supreme Courts, and whose jurisdiction is confined to a particular territory, as the sheriff court, bailie court, justice of peace court, &c. The courts possessed of a mixed jurisdiction are the High Court of Admiralty, the Commissary Court of Edinburgh, both of which have an universal jurisdiction over Scotland, by which they review the decrees of inferior admirals and commissaries; but, because their own decrees are subject to the review of the Courts of Session or Justiciary, they are in that respect inferior courts; Ersk. B. i. tit. 2, § 5 and 6.

COURT OF SESSION. The Court of Session is the
Supreme Civil Court of Scotland, consisting of the President and fourteen Senators of the College of Justice. The institution and nature of the College of Justice has been explained in another article (See College of Justice.) With regard to the Court itself, it is proper to mention here, that, by stat. 48 Geo. III. c. 151, it was divided into two chambers; the Lord President with seven of the ordinary Lords forming the First Division; and the Lord Justice-Clerk and the remaining six ordinary Lords forming the Second Division. By stat. 50 Geo. III. c. 112, the three junior ordinary Judges of the First Division, and the two junior ordinary Judges of the Second Division, are relieved from attendance in the Inner-House, and appointed to sit as Permanent Lords Ordinary in the Outer-House, the quorum of Judges in each Division being declared to be three. By 53 Geo. III. c. 64, it is enacted, that the junior or last appointed Judge of the First Division shall, in time of Session, officiate as Lord Ordinary on the Bills, and that, to the same Judge, shall be made all remits from the Teind Court, and all remits from the Court of Session in matters relating to sequestrations or bankruptcy, and in such other matters as to either Division may seem proper; and, by 1 and 2 Geo. IV. c. 38, § 5, all remits in processes of reduction, after great avizandum, to discuss the reasons of reduction, are to be made to the Lord Ordinary on the Bills, without prejudice to the power of the Court, on the ground of contingency, or any other sufficient cause, to remit to any of the Permanent Lords Ordinary.

Upon a vacancy arising in the Inner-House of either Division, any one of the Judges sitting in the other Division may, if he desire it, be removed to the Division in which the vacancy has occurred; and the vacancy, thus created in the Division which such Judge has left, shall be supplied by the senior Permanent Lord Ordinary; and if no Inner-House Judge, in the Division in which the vacancy has not arisen, shall desire to be transferred, then the vacancy shall be supplied by the senior Permanent Lord Ordinary, whether he belongs to the Division.
in which the vacancy has occurred or not. When a vacancy arises amongst the Permanent Lords Ordinary, the senior Ordinary, if he desire it, may be transferred to that Division in which the vacancy has arisen; if he shall not desire it, then the next Permanent Lord Ordinary in point of seniority may be transferred, if he shall desire it; and upon a vacancy amongst the Permanent Lords Ordinary of the Second Division, the junior or last appointed Ordinary of the First Division shall be appointed to sit as junior of the two permanent Lords Ordinaries of the Second Division; 59 Geo. III. c. 45, § 1 and 2.

In cases of importance and difficulty, it is competent for the Judges of either Division to state in writing questions of law arising in such cases, and to require the opinions of the Judges of the other Division; and, in all such cases, the opinions of the five Permanent Lords Ordinary are also to be communicated; 48 Geo. III. c. 151, § 10.—53 Geo. III. c. 64, § 15. In all cases of reports by the Lord Ordinary on the Bills, to either Division, where there is a difference in opinion and an equality of voices, the Lord Ordinary on the Bills has a vote; and in all other cases where the Judges are equally divided in opinion, if the question has previously depended before any Lord Ordinary of the same Division, such Lord Ordinary is called in, without regard to any rotation, to be present at the discussion, and to vote; 1 and 2 Geo. IV. c. 38, § 3. In other cases of equality of voices in either Division, the Permanent Lords Ordinary of that Division are called in, in rotation; 53 Geo. III. c. 64, § 13.

Each Division of the Court is vested with the same duties, powers, and functions, and enjoys the same authority and privileges, which were formerly possessed by the whole Court; the proceedings in the one Division being in no respect dependent upon those of the other, or subject to any review except that of the House of Lords; 48 Geo. III. c. 151, § 6. But, in framing acts of sedenunt, and in the exercise of all the powers and duties not affected by those statutes, the Court of Ses-
sion remains the same as before its division, the former quorum of nine being necessary to sanction its acts and proceedings; same statute, § 11.

With respect to the jurisdiction of the Court of Session, see Jurisdiction.

COURT OF JUSTICIARY. See Justiciary Court.
COURT OF EXCHEQUER. See Exchequer.
COURT OF ADMIRALTY. See Admiralty.

COURT-MARTIAL, is a court for trying the military offences of officers and soldiers. Military courts-martial are either regimental or general. The latter must consist of at least thirteen judges, all commissioned officers, the president being a field officer. The jurisdiction of these courts is limited to points of military discipline, e.g. mutiny, desertion, neglect of duty, beating or insulting an officer or fellow-soldier, &c. In all other matters, both officers and soldiers are amenable to the ordinary courts of law. No capital punishment can be inflicted by a military court-martial, unless nine of the judges present shall concur. Where these courts do not exceed their powers, no appeal lies to any other court; the only remedy resting with the King, to whom their sentences are reported, before they are promulgated. But, if they exceed their powers, the party injured may obtain redress in the civil court. The rules by which military courts-martial are to be guided, are explicitly stated in the mutiny act and the articles of war; and the laws in relation to naval courts-martial were reduced into one act, 22 Geo. II. c. 33, explained and amended by 19 Geo. III. c. 17. See also 24 Geo. III. st. 2, c. 56; 37 Geo. III. c. 140; 55 Geo. III. c. 156; and 56 Geo. III. c. 5. On this subject, it may be proper to consult "Tytler's "Essay on Military Law," "Adyes' Treatise on Courts-"Martial," and "McArthur on Naval Courts-Martial."

COURTESY, or CURIALITY. The courtesy of Scotland, as it is termed, is a liferent conferred by the law on the surviving husband, of all the heritage in which the wife died infbeit as heir to her predecessors. It is essential to the existence of this right, 1. That there shall have been a living
child born of the marriage, and heard to cry, otherwise courtesy is not due, however long the marriage may have subsisted; 2. That the child shall be the mother's heir. Thus, if there be a child of the wife in existence by a former marriage, who is her heir, courtesy is not due to the second husband while such child exists, although there be also children of the second marriage. Hence, it has been said, that courtesy is due to the surviving husband, rather as the father of an heir, than as the widower of an heiress. In order to confer the right, however, it is not necessary that the child survive; it is enough that it was once in existence, although it should have died immediately after its birth; Ersk. B. ii. tit. 9, § 52, et seq.; Stair, B. ii. tit. 6, § 19.

The heritage, to which courtesy extends, is that to which the wife succeeds as heir of line, tailzie, or provision, to her ancestor, whether the succession opens to her before the marriage or during its subsistence. But it does not extend to conquest, that is, the heritage acquired by purchase, donation, or other singular titles, unless where the heritage has been put forward to the wife by her ancestor praeceptione hereditatis, in which case the courtesy extends to the property so put forward; Primrose, 10th December 1771, Fac. Coll. Mor. App. Courtesy, No. 1.; Stair, ut supra, and Bankton, vol. i. p. 663. Burgage property also falls under the courtesy, although it is excluded from terce. Ersk. ibid. § 54; Stair, ibid.

The wife's sasine is the measure of the courtesy; hence any real burden or infestment, preferable to her sasine, excludes the courtesy; and, as the husband enjoys the liferent of the wife's estate titulo lucrativo, he is considered as her temporary representative, and, as such, is liable, not only for all annual burdens affecting the lands, but also for the current interest of her personal debts while his right subsists, in so far, at least, as he is lucratus. But he will have recourse against the wife's executors, or her heirs succeeding in such property, as does not fall under the courtesy, for the personal debts which he may thus pay. In this respect, courtesy differs from the widow's terce, which is in no degree affected by the husband's
personal debts. The two rights also differ in this, that a widow, whose right of terce has been declared by service, transmits to her executors the right to receive the rents falling under the terce, and not drawn during her life; whereas, if a husband has not exercised his right of courtesy, during his life, by drawing the rents, his executors will have no right to receive them; the courtesy being held as a privilege personal to the husband, who will be understood to have renounced it in favour of the heir, if, during his life, he has suffered him to draw the rents; Ersk. B. ii. tit. 9, § 55.

The courtesy vests in the husband ipso jure; and, immediately on the wife's death, he may enter into possession of her lands without service or any other legal formality; and, in virtue of this right, he enjoys, not only during the marriage, but after the wife's death, the right of electing and being elected to Parliament on her freehold; 1681, c. 21; 12 Anne, c. 6, § 5. But it has not been decided whether a liferenter by courtesy is entitled to any of the casualties of superiority; Ersk. ibid. § 54. It would rather appear, however, that, as the person entitled to those casualties must be infeft, the husband, who is not infeft, can have no right to them under the courtesy; but he is entitled to the feu-duties, although these do not fall under terce; Bankton, vol. i. p. 663. See Terce.

CREDIT, LETTER OF. See Letter of Credit.

CREDULITY, OATH OF. See Oath of Credulity.

CRIME. A crime may be defined to be any act done in violation of those duties which an individual owes to the community; and for a breach of which the law has provided that the offender shall make satisfaction to the public, besides repairing, where that is possible, the injury done to the individual. Dole, or corrupt and evil intention, is essential to the guilt of any crime. It is not necessary, however, for the prosecutor to prove the intention to commit the particular offence out of enmity to the individual injured; it is enough that the act be attended with circumstances indicating a corrupt or malignant heart, regardless of order and social duty. Thus,
it is murder if A be killed by mistake instead of B, unless the killing of B would have been justifiable or excusable. So also it is murder to fire without legal cause into a crowd and kill a person; *Hume*, vol. i. p. 21, et seq.

In order to constitute a crime, there must always be an act done in prosecution of the criminal purpose. This gives rise to several difficult questions, as to how far an attempt to commit a crime is punishable; and the general rule seems to be that, where unequivocal acts indicating the criminal intention are proved, they are punishable, but not to the same extent as the completed offence; but, on the other hand, the law takes no cognizance of remote acts of preparation, even although they be pretty distinctly referable to a criminal purpose. See *Hume*, *ibid*.

Where dole is wanting either entirely or to a certain extent, there is, in the one case, no crime at all, and, in the other, a proportional mitigation of the punishment. Thus pupils under seven years of age are legally incapable of crime,—in like manner, insane persons are held to be incapable of dole. But, on the other hand, pupils above seven years of age, and minors who have reached puberty (which in this question is fourteen both in males and females), are held to be capable of dole, and are, consequently, punishable for the greater crimes, of the guilt of which they must be presumed to be aware. Minors under sixteen years of age, however, except in very flagrant cases, seem hardly liable to capital punishment. With regard to defect of intellect, if it amount to mere weakness or craziness, it is not sufficient to exempt from punishment, but may be the ground of an application for mercy.

The defence of compulsion, where *vis major* has been used, will be sustained (see *Compulsion*). But it will be no defence, that the crime was committed by a wife or child under the influence of subjection to the husband or father, if it be one of the greater crimes, although such subjection may perhaps be successfully pleaded in minor delicts. The subjection of a servant to his master affords no defence whatever
to the servant who has committed a crime, unless he can prove coercion, or the fear of violence, against which he had no protection at hand. Magistrates or officers of the law acting bona fide in the administration and execution of the law, unless perhaps there be gross ignorance or carelessness,—and soldiers acting under the orders of their officers in the known and customary line of their duty, are not liable to a criminal charge for acts done under such circumstances. The compulsion of extreme want is held to be no excuse for a crime; but it may be the ground of an application for mercy. See, on the subject of this article, Hume, vol. i. p. 21 to p. 55.

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

CRIMEN VIOLATI SEPULCHRI. See Dead Body.

CRIMEN REPETUNDARUM. By the Roman law, all judges and magistrates, who accept bribes to pervert judgment, were said to be guilty of this crime, and punished accordingly. With us, this offence is known by the name of baratry or bribery. See Baratry. Bribery. Corruption of Judges.

CRIMINAL PROSECUTION, includes the whole form of process by which a person accused of a crime is brought to trial; and it seems proper here shortly to trace the procedure from its commencement to its close. When a crime has been committed, the first step is to arrest the supposed offender; and this may be done under authority of any sheriff, justice of peace, or other magistrate. Those magistrates may grant warrant to arrest persons charged with offences, in the trial of which they have themselves no jurisdiction. Thus, a sheriff may commit for treason, or the magistrate of a royal burgh for pleas of the Crown.

The warrant for apprehension must be granted on sufficient information, written or verbal; but the oath of the informer, even where he is a private party, is not indispensable; and,
when the procurator-fiscal applies for the warrant, his oath is never required. The warrant must be dated, and under the hand of the magistrate in whose name it runs. It would seem that it may be general as to the nature of the crime to be charged; but it must not be general in the description of the person or persons to be apprehended, or leave any discretion to the officer to arrest all suspected persons. The warrant may be to bring the accused before either the granter of the warrant, or some other competent magistrate; and it may be addressed, either generally to the officers of the magistrate who grants it,—or to messengers at arms,—or even, in case of need, to a private individual, who is thus invested, pro hae vice, with the powers, privileges, and protection given to an officer, provided the person entrusted with it proceed regularly in the execution of the warrant.

In executing the warrant, it is necessary that the officer should attend, 1st, Not to execute it beyond the jurisdiction of the granter, without the indorsation of a magistrate within the jurisdiction into which the offender has fled. See Backing of a Warrant. 2d, He must communicate to the party the import of the warrant; and if the officer be acting beyond his ordinary bounds, he must show the warrant on demand, but he is not bound to part with it. 3d, The officer has no authority to break open doors, unless he has intimated to those within the purpose of his errand; and after that, and on refusal to open, he may break open the door, and take the party against whom the warrant is directed, or the person whom he has probable reasons for believing to be the person meant. 4th, Having taken the person, the officer cannot, on his own authority, commit him to jail, but must take him before a magistrate to be dealt with according to law; except in the case where the warrant contains authority to commit de plano, as is the case with Justiciary warrants, under which, of course, the officer is in safety to commit the accused to prison at once.

In the case where the party is brought before a magistrate for examination, it is the duty of the magistrate, 1st, To see that the
prisoner is in a fit state to undergo an examination. 2d, That he is warned of the use which may be made of what he says; and, 3d, That the declaration is taken down in writing, in the presence of credible witnesses, who will sign it along with the magistrate and the prisoner, in order that, if necessary, they may be able, at the trial, to authenticate it, and to swear to what passed. When the prisoner cannot or will not sign his declaration, the magistrate may sign it instead of him.

Unless the magistrate see reason immediately to release the prisoner, his next step is to commence an inquiry, or precognition, as it is termed, concerning the grounds of suspicion, in which he will take the declarations of such persons as have cause of knowledge of the offence, and the prisoner's participation in it. This is necessary, not only in order that speedy justice may be done to the accused, but also for the information of the public prosecutor, so as to enable him to lay his charge properly. While the precognition is going on, the magistrate may, if necessary, commit the accused to prison for farther examination, or to abide the result of the precognition; and in that case the prisoner is not entitled to bail under the act 1701, c. 6, although it is not unusual to liberate him on bail at this stage of the proceedings. The magistrate of course must proceed with the precognition without undue delay, otherwise he will be liable at common law for malversation and oppression.

Witnesses may be compelled to attend the precognition by letters of first and second diligence; and, in extreme cases, the witnesses may be examined upon oath, although that is not usual. If the witnesses refuse to attend or to swear, they may be imprisoned. Neither the accused nor his friends are entitled to be present at the precognition; nor can they insist for a copy or for a perusal of the declarations of the witnesses. The precognition must be finished before the libel is executed, because, after the execution of the libel, the process has commenced; and all intercourse with the witnesses after that is suspected, and "utterly forbidden." In whatever way the examinations of the witnesses at the precognition are taken,
whether by oath or simple declaration, they never can be used in any shape against the witnesses, who may insist on having them destroyed, before they give their testimony on the trial. Articles, to be founded on as proving the crime, ought to be identified at the precognition, either by the subscription of the judge and witnesses, or by some other mark, and a reference to the declaration of the witnesses; and such articles ought to be put in safe custody. The entire charge of conducting precognitions is now committed to the sheriff, justices of the peace, and other inferior magistrates, although formerly precognitions were sometimes conducted by the Lord Advocate, in presence of the Lords of Justiciary. See Precognition.

The precognition being concluded, and the facts being such as to warrant a commitment, the accused is then committed for trial on a regular written warrant, specifying the offence for which he is committed, and proceeding on a signed information. With regard to the form of a warrant of commitment, and the steps necessary to be taken in order to obtain bail, or liberation under the act 1701, c. 6, see Commitment for Trial.

Bail. Liberation.

The right to prosecute for a crime is vested, by the law of Scotland, either in the party injured, or in the Lord Advocate, who is the only prosecutor for the public interest, the popular actions of the Roman law being unknown in our practice. A criminal prosecution by the private party embraces not only the private interest and damages, but the full pains of law. But, in order to support the private instance, the party must be able to shew some substantial and peculiar interest in the issue of the trial; not a mere remote interest as a member of the community, or even as the member of a portion or class of it which has been particularly injured. It does not appear to be quite fixed what degree of relationship to an injured party entitles a private party to prosecute; but perhaps the right is vested in the next of kin, however remote in degree; Hume, vol. ii. p. 121. But every libel at the private instance must be raised with concourse of the Lord Advocate. See Con-
The Lord Advocate is the public accuser, who insists, in the King's name, and for his Majesty's interest, in the execution of the law; and he is vested with an uncontrolled right to exercise his discretion, either in commencing or in following forth a trial; and, at any time in the course of it, either before or even after the return of the verdict of the jury, he may, in the case of a capital offence, restrict the libel to an arbitrary punishment. See Lord Advocate.

The trial of an accused party proceeds before the Court of Justiciary, either on indictment or on criminal letters. The process by indictment is the exclusive privilege of the Lord Advocate, in whose name, as public prosecutor, it proceeds. Criminal letters resemble a summons in a civil action; they proceed in the King's name, and, like the summons, they are addressed to messengers and other executors of the law, who are commanded to cite the accused. (See Indictment, Criminal Letters.) The form of indictment is commonly used where the accused is in prison, and that of criminal letters where he is at large, either on bail or otherwise, although there is no invariable rule on that subject. The indictment or criminal letters must be executed against the accused by a messenger at arms, or by a macer of the Court of Justiciary, or other officer properly authorised, who must serve the party with a copy of the libel, and a copy of citation, charging him, on inducias of fifteen days, to appear on a day certain to take his trial. The accused must, at the same time, be served with a list of the witnesses who are to be examined against him, and of the whole assize of forty-five out of which the jury is to be selected. If the accused cannot be found, he must be cited in the same form at his dwelling-place, and at the market cross of the head burgh of the county in which he resides. When he is abroad, an edictal citation of sixty days at the market cross of Edinburgh, and the pier and shore of Leith, is necessary.

The diet to which the accused is cited in a criminal process is peremptory; (see Calling of Diet.) And, on the day fixed, the accused and the prosecutor, whether public or private,
must appear in Court, the Lord Advocate having the privilege of appearing by his deputy, but the personal presence of the private party, where he is the prosecutor, being indispensable. The accused must also be present, otherwise the trial cannot proceed; and, if he is wilfully absent, sentence of fugition will be pronounced. (See Fugitation.) When both parties are present, and the trial is not adjourned, the Court, upon the prosecutor's application, and on cause shown, may desert the diet pro loco et tempore; after which the accused may be served with a new libel; or the prosecutor may desert the diet simpliciter, which puts an end to all farther prosecution for the same offence; *Hume*, vol. ii. p. 270.

When both parties are present in Court at the calling of the diet, and there is no desertion, this is the proper time, in limine of the process, to state all objections to the execution of the citation of the party. If no such objection be stated, the presiding judge calls on the accused to attend to the libel which is read aloud to him; and he is then asked for his plea of guilty or not guilty, which is immediately entered on the record. If he plead guilty, this plea is not decisive of the issue, until the jury is empannelled, when, if he does not retract his plea, the jury will find him guilty on his own confession. Where, in addition to the general plea of not guilty, the accused means to insist on some special defence, he must, at this stage of the proceedings, either by himself or his counsel, state generally the nature of the course of defence he means to adopt. By 20 Geo. II. c. 43, it is required that, in such a case, the accused shall, on the day before his trial, lodge with the clerk of court a written statement or defence, signed by himself or his counsel, of the facts he alleges, and the heads of the objections or defences he means to maintain; and, where such a defence is not lodged, it would seem that the prosecutor may at least insist on having an outline of the course of defence on the day of trial; and, accordingly, in all cases where such special defence is pleaded, it is usual either to lodge defences, or to explain the nature of the defence in the outset of the trial.
This is followed by the objections to the relevancy of the libel, if there be any such objections; and, after a *viva voce* debate, that question is disposed of by the Court, either by an immediate decision, or by an order for farther pleadings in the shape of printed *informations*; and, in that case, the trial is of course adjourned. If the libel be found relevant to infer punishment, if proved, the presiding judge then names a jury of fifteen persons from the assize of forty-five, the prosecutor and the accused having each of them five peremptory challenges to the jurors so named, and of course an unlimited number of challenges upon cause shown; see *Challenge of Jurors*. As to the mode of citing the jury, see *Jury*. The jury thus selected are then sworn in, and the trial proceeds,—the prosecutor, in the *first* place, leading evidence in support of the libel, after which the exculpatory evidence is adduced.

After the proof on both sides has been concluded, the counsel for the parties address the jury on the import of the evidence, the counsel for the accused, except in cases of treason, having the last word; *Regulations* 1672, No. 10. The presiding judge then sums up the evidence, commenting upon its import, and stating the law of the case to the jury. Formerly, no verdict of a jury was good, if made up in open court without retiring; but now, by 54 Geo. III. c. 67, the Court of Justiciary and Circuit Courts are authorised to receive verdicts from the jury by the mouth of their chancellor, on a consultation in the jury-box, provided the whole jurymen are agreed in their verdict; and, even when the jury retire, the Court is authorised, by the same statute, to receive *viva voce* verdicts, provided the jury are all agreed in the verdict, and that the judges are then sitting in Court. When, therefore, the jury wish to retire to deliberate, the practice is for the Court to pronounce an interlocutor ordaining them to be instantly inclosed in an adjoining apartment, and to return their verdict *viva voce* as soon as they are all agreed, provided the Court be then sitting; or, if there be a difference of opinion amongst the jury, or the Court be adjourned, to make up their verdict in writing.
before separating, and to return it on the following day, or at some other time, when the whole jurymen are ordered to attend, and until which time the diet is adjourned. From the time that the jury are sworn until their verdict is agreed upon, they must remain entirely by themselves.

It is not necessary that the jury, in a criminal trial in Scotland, shall be unanimous; and, in case of difference of opinion, the majority decides. The verdict must be returned to the Court by the chancellor of the jury, in presence of the accused, and of the whole jury; and, being engrossed in the record, and read aloud, it is then sealed up, in terms of the regulations 1672, No. 9, and deposited with the clerk of Court, never to be opened again but by order of the judges. The verdict, when in writing, is authenticated by the subscriptions of the chancellor and clerk of the jury, and accompanied with a list of the names of the jurors, and a state of the vote of each individual, "whether condemning or assailing;" Regulations 1672, No. 9. See Verdict.

If the verdict be not guilty or not proven, or in any other way amount to an absolvitor of the crime libelled, the accused is immediately dismissed from the bar. If the verdict be condemnatory, the prosecutor then moves the Court to apply it, when, if there be no pleas stated by the accused in arrest of judgment, sentence is pronounced by the presiding judge, and afterwards read out by the clerk from the record, and subscribed by all the judges present.

In Scotland, a sentence importing capital punishment cannot be carried into execution within less than thirty days after its date, if pronounced to the southward of the Forth, or within less than forty days if to the north of that river. Inferior corporal punishments may be carried into execution after the lapse of eight or twelve days from the passing of the sentence, according as it is pronounced on the south or north of the Forth; 11 Geo. I. c. 26, and 3 Geo. II. c. 32. And the Court of Justiciary has a power to interfere in altering the day for the execution of sentences, when particular circumstances render such an interference necessary; Hume, vol. ii. p. 454.
The sentences of the Court of Justiciary are not subject to review, or to appeal to the House of Lords; and, unless the royal mercy be interposed, execution will follow in terms of the sentence; *Hume*, vol. ii. p. 486. See *Pardon*.

The account of criminal process, which has now been given, has reference to proceedings in the High Court of Justiciary, at Edinburgh, and in the Circuits of that Court, where the forms of process are almost precisely similar. See *Circuit Court of Justiciary*. But there are also other criminal jurisdictions in Scotland; the next in importance to the Court of Justiciary being the High Court of Admiralty, which has jurisdiction in all maritime and seafaring causes, whether civil or criminal, and before which criminal proceedings are conducted at the instance of the public prosecutor, or of the private party, in a form differing in no essential particular from that which has just been explained. See *Admiralty Court*. The sheriff also has a very extensive criminal jurisdiction, extending to the trial of many of the higher crimes by means of a jury, and entitling him to convict summarily without the intervention of a jury in minor offences; the privilege of summary conviction being a branch of the criminal jurisdiction of the sheriff, which he shares with justices of the peace and the magistrates of royal burghs. See *Sheriff. Justice of Peace. Burgh Royal*. With regard to those inferior jurisdictions, including that of the Court of Admiralty, it may be observed in general, that, where express statute does not interfere, the criminal proceedings in all of them are subject to the review of the High Court of Justiciary. See *Review. Bill of Advocation. Bill of Suspension. Circuit Court*.

The Court of Session, partly by usage and partly by statute, may take cognisance of the crimes of forgery, perjury, defacement, fraudulent bankruptcy, contempts, &c. This Court tries and punishes those offences without the intervention of a jury; its sentences are not subject to review in the Court of Justiciary; *Hume*, vol. ii. p. 490. But the criminal jurisdiction of the Court of Session is never exercised unless where the offence has been committed or discovered in the course of pro-
ceedings in a civil action before it; and, even in that case, the practice now is to remit the criminal part of the case to the Court of Justiciary. See Jurisdiction of the Court of Session. Contempt of Court.

CRIMINAL LETTERS. In the preceding article it has been stated that a criminal process may be brought into the Court of Justiciary either by criminal letters or by indictment. In form, criminal letters resemble a summons in an ordinary civil action. They run in the King’s name, state the charge laid against the accused, and the conclusions founded on the charge, and they conclude with the King’s will commanding the officers of the law to summon the accused party to appear on a day named, and find caution to underlie the law. They also contain a warrant for citing the witnesses and the jury, according to correct lists which accompany the criminal letters. These letters pass the signet of the Court of Justiciary, on a bill presented to the Court, in which the tenor of the criminal letters is engrossed at large. The bill is signed by the Lord Advocate, or some of his deputies, when he is the sole prosecutor; and, when the prosecution is at the instance of a private party, the bill must be signed by the party, with the Lord Advocate’s concourse. A deliverance on the bill, signed by one of the Justiciary Judges, authorises the criminal letters to be raised, and is the warrant for their passing the signet of the Court; Hume, vol. ii. p. 149. As to the form of executing criminal letters, see Criminal Prosecution. See also Concourse. Indictment.

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

CROSS BILLS. See Accommodation Bills.

CROWN CHARTER. See Charter from the Crown.

CROWN DEBTS. By the English law, debts due to the Crown have a preference over all other debts affecting the personal estate; and as long, therefore, as the property remains in the debtor, the Crown’s execution excludes that of a subject. The act 33 Henry VIII. c. 39, gives this preference in every
case where the other creditors have not obtained judgment for their debts before the commencement of the Crown's process; and the act 6 Anne, c. 26, which establishes the Court of Exchequer in Scotland on the model of the English Court of Exchequer, introduces the English revenue laws, and provides that the same forms of process for the recovery of Crown debts shall be followed in both countries. But this statute contains an important exception of heritable property in Scotland, as to which the Scots law is left on its former footing, according to which, in competitions between the diligence of the Crown and the diligence of a subject, the preference is determined by precisely the same rules which regulate competitions between subject and subject. Hence, the Crown will be altogether excluded from ranking on the heritable estate, unless the proper diligence of our law for attaching that estate has been used; and where the Crown has used such diligence, the ordinary rules of ranking will apply; Bell's Com. vol. i. p. 643, et seq.

In competitions between the Crown and a landlord under his right of hypothec over the tenant's effects, it seems to be settled, 1st, That the general right of the landlord, although preferable to the diligence of subjects, is not available against the Crown; and, 2dly, That even after sequestration of the effects by the landlord, and a warrant to sell, there is no pledge thereby constituted in favour of the landlord; and the Crown will be preferable, if its claim be made before the sale of the effects is reported, and the landlord's process finally closed; until which time there is not a "judgment," in the sense of the English law; Bell on Leases, p. 307, et seq. 3d edition.

But, in order to secure the Crown's preference over the movable estate of the debtor, it is necessary, under the statute of Henry VIII. that the Crown's process shall have commenced before judgment has been given in favour of the competing creditor; and, in interpreting the term judgment, as used in that statute, it is held in Scotland to signify a final order of execution, which requires no farther judicial interference to render it complete; Robertson against Jardine, 6th July 1802, Mor. p. 7891.
Mercantile sequestration under 54 Geo. III. c. 137, has no effect against the Crown's claims; and, consequently, a discharge under that statute is not effectual against the Crown; Bell's Com. vol. ii. p. 367 and 481. But where, on bankruptcy, a writ of extent is anticipated, it has been suggested, as an expedient to defeat the Crown's diligence, that the Court of Session should, on application, pronounce an adjudication of the estate and effects in favour of the sheriff-clerk, with an order on the bankrupt to assign the effects; and such an adjudication, followed by a transference of the possession, it has been thought, might defeat the Crown's preference, without being exposed to any legal objection, as being a mere device to accomplish this purpose. See Bell's Com. vol. ii. p. 389. The sanctuary of Holyroodhouse affords no protection to the King's debtor; Ersk. B. iv. tit. 3, § 25; Bell's Com. Ib. p. 564. As to the manner in which Crown debts are made effectual, see Extent.

CROWN, PLEAS OF. The crimes of murder, robbery, rape, and wilful fire-raising, according to our ancient practice, were cognizable by the Justice and his deputies only, and are now cognizable by the Court of Justiciary; hence they are called the four pleas of the Crown. But, even by our ancient law, the jurisdiction of the sheriff in regard to the crimes of murder and robbery interfered to a certain extent with the exclusive jurisdiction of the Court of Justiciary in the trial of those crimes; Hume, vol. ii. p. 58. See Sheriff.

CRUIVES AND ZAIRES; a contrivance used in salmon fishings. They consist of an inclosure made in a river by stakes or hecks, so as to allow the young salmon or fry to escape, and only to confine the larger fish. There is an entry into the cruive; but the salmon, having once entered, are confined there, and are thus easily caught by the fishers. The width of the hecks is regulated by several old acts of the Scots Parliaments; and there must be what is called the Saturday's slop, i.e. the hecks must be drawn up the height of an ell from the bottom of the river from Saturday evening at sunset until Monday morning at sun-rise. This mode of fishing is
prohibited in that part of a river where the sea ebbs and flows. The statutes are 1424, c. 11, 1477, c. 73, 1489, c. 15, 1581, c. 111, 1685, c. 20; and the oldest of those statutes refers to preceding regulations on the same subject; Stair, B. ii. tit. 3, § 70; Bankton, vol. i. p. 574; Ersk. B. ii. tit. 6, § 15. See Salmon Fishing.

CULPA LATA, levis, et levissima. These are the terms by which, in the Roman law, the three degrees of negligence or omission were distinguished. Culpa lata is gross or supine carelessness or omission which the law construes into dole. Culpa levis is that degree of negligence which a person attentive to his own affairs may be supposed to fall into; and Culpa levissima is that slighter degree of neglect which may be fallen into by a man who manages his affairs with consummate prudence. Where a contract is entered into for the mutual benefit of the contracting parties, each party is bound to exercise the middle degree of diligence, the neglect of which is called culpa levis or culpa. Where only one party is benefited by the contract, as in commodate, the party benefited is bound to exercise the utmost degree of diligence in regard to the subject of the contract, the neglect of which is called culpa levissima; while the other party, who has no benefit by the contract, is accountable only for gross omissions, amounting to dole or culpa lata. Where the contract implies exuberant trust, as deposit, the depositary will be accounted guilty of dole if he bestows less care on the subject than he is known to bestow on his own affairs, even although the diligence he has actually employed be as exact as a man of ordinary prudence would have used. The equitable rules of the Roman law on this subject have been adopted in the law of Scotland; Ersk. B. iii. tit 1, § 21; Bankton, vol. i. p. 469. In the criminal law, culpa lata equiparatur dolo. Hence a judge, for example, who condemns a man to death through gross and inexcusable ignorance of the law, will be held guilty of murder; Hume, vol. i. p. 26. See Diligence.

CULPRIT; is an English law term signifying a prisoner accused for trial; Tomlin's Dict.
CUNINGHARES, rabbit warrens. See Rabbits.

CURATORY. To persons who are themselves incapable of managing their affairs, the law affords the means of doing so by the appointment of curators. The powers and duties of curators differ according to the nature of their appointment, and the condition of the parties to whom their curatory extends. Their several denominations may be classed under these heads:—

1. Curator to a minor.
2. Curator to an idiot.
3. Curator bonis.
4. Curator ad litem.

1. Curator to a minor.—A minor, until he arrives at the age of puberty, is understood to have no persona standi in judicio; and, therefore, during his pupillarity, both his person and his property are placed under the guardianship of tutors. (See Pupil, also Tutor.) At the age of puberty, which in males is fourteen and in females twelve years, a minor, although he becomes invested with certain powers in the management of his own affairs, is still held to be a proper object of the protection of the law against the deceptions which might be practised upon his inexperience and unripe judgment. The father, therefore, while alive, is held to be the natural guardian and administrator in law for his lawful children who are minors; the father’s guardianship comprehending the characters of tutor to his children while they are pupils, and of curator to them after they become puberes, and until their majority, which, in both sexes, is fixed at twenty-one years of age.

The natural guardianship of the father, however, is restricted by the Scots law to those children who are not forisfamiliarised. (See Forisfamiliarition.) It vests in the father without any form of legal process; and, from the confidence which the law reposes in the father, he is exempted from the observance of certain formalities, as well as from the strict responsibility required of other curators. 1. A father is not bound to take the oath de fidelit administratione; nor, 2dly, To make up inventories; nor, 3dly, To find caution; unless where he
is in embarrassed circumstances; and, 4thly, He is not held liable for omissions.

Although the curatory of the father may, with his own consent, be superseded by the minor pubes making choice of other curators in the manner to be afterwards explained, yet this cannot be done by the minor, more than any other act of administration of his affairs, without the concurrence of his father as curator. But the father's office of administrator in law is excluded, 1st, Where the minor is forisfamiliiated, and earning his own subsistence; 2dly, Where property has been left to the minor under other administrators, or exclusive of the father's administration, his guardianship will be to that extent restricted. 3dly, Upon the marriage of a daughter, the curatorial office is, by law, transferred from the father to the husband, if he be major, although it will revert to the father if the husband die before his wife attain majority; and, 4thly, When the minor has a claim against his father, a curator ad litem may be appointed to him.

Those powers of administration, which the common law had conferred upon fathers, have been extended by the statute 1696, c. 8, by which a father is empowered, while in liege poustie, to name tutors and curators to act for his children after his own death. The powers conferred on curators so nominated are as extensive as those possessed by the father himself; but the curators accepting the office subject themselves to the same formalities and responsibility which are required of other curators, except that they are not bound to find caution; and, under the statute, their nomination may contain a declaration that they shall not be liable for omissions nor singuli in solidum, but each for his own actual intromissions only. But this power of dispensation is limited by the statute to the means and estate descending from the father himself. The effect of the statute being to confer authority upon the father to delegate and continue his own curatorial power, a nomination by him, like his own right of administration, precludes any choice of curators by the minor himself, unless with the consent of the curators named by his father; Pitcairn,
February 1731, Mor. p. 16,339; Drumore, 27th January 1744, Kilk. p. 586, Mor. p. 16,349; Ersk. B. i. tit. 7, § 11. A father, however, has not the same power to name curators to his natural children, who are in law regarded as strangers to him; Wilson, 10th March 1819, Fac. Coll.

The nomination of curators by the father has been termed necessary curatory, in contradistinction to another form of appointment, by which the minor, where the father has died without making a nomination, may voluntarily make choice of curators for himself, such curators being thereby invested with a general power of administration of the minor's property. A minor whose father has not named curators may either take the management of his estate upon himself, or he may put himself under the direction of curators in the manner prescribed by the act 1555, c. 35. This act, as it has been interpreted by decisions of the Supreme Court, requires that the minor shall cite at least two of his nearest of kin on the father's side, and two on the mother's side, personally, or at their dwelling places, and all others having interest, edictally at the head borough of the jurisdiction within which the minor's lands lie, to appear before his own Judge Ordinary; Wallace, 29th July 1674, Mor. p. 16,290. In case the minor has no heritable property, the publication of the edict is made at the head borough of his own domicile. On the day of appearance, the minor, in presence of the Judge, chooses his curators; and such of them as are willing to undertake the office sign their acceptance, take the oath de fidei administratione, and give security to account for their intromissions. Upon this being done, the Judge interposes his authority to the appointment, and an act of curatory is thereupon extracted, which is sufficient to vest the legal powers in the curator.

Curators, whether nominated by the father or chosen by the minor, are required by the act 1672, c. 2, to make up a complete inventory of the minor's estate, of which inventory three copies, all signed by the curators and the next of kin on both sides, must be judicially produced before the minor's Judge Ordinary; and, after being signed by the clerk of court, one
copy is given to the next of kin by the father, another to those by the mother, and a third to the curators. (see Inventory). In case of neglect to comply with this requisite, the statute declares, 1st, That the curators shall not be allowed credit for any expense incurred in the minor's affairs, which, by act of Sederunt 25th February 1693, has been explained to mean such expenses as have been laid out in law-suits and legal diligence: 2d, That they shall be liable for omissions, a liability to which it may be observed that they are at any rate subject by common law: And, 3dly, That they may be removed from their office as suspect. The statute farther declares that curators shall have no power to act until the inventories be made up. Yet a payment made to a curator who had not made up inventories was sustained; Logan, December 1722, cited in Ersk. B. i. tit. 7, § 23. When a minor names curators, it is usual for him to declare them exempt from liability singuli in solidum; but it seems to be doubtful whether or not the law will give effect to such a declaration by a minor.

There is still another mode by which minors in the management of their property may be put under the direction of administrators, which, although it does not appear to fall properly under the character of curatory, yet it has been treated in our law books under that title. A person making a gratuitous conveyance of property to a minor is held to be entitled to appoint curators for him, to the effect of managing on his behalf the property so conveyed. Such an appointment can only infer a partial power of administration, which, although it excludes the management of ordinary curators as to the property so conveyed, is not incompatible with the existence of proper curators either by the father's nomination or the minor's choice. A stranger has no power either at common law or by statute to appoint curators to a minor; but, on the other hand, any one in gifting his property is entitled to annex to the gift whatever legal conditions he may think proper as to the administration or management of it. And, as the deed under which administrators appointed in this manner are to act, must itself shew the extent of the property placed under their management, it seems
not to be clear that curators so appointed (if they can be called curators) are bound to make up inventories, or to comply with the other statutory requisites. It rather appears that they are to be regarded as ordinary managers liable to be called to account by the proper curators of the minor. Accordingly, it has been held that a nomination of this kind does not prevent the minor from choosing curators for himself. This was decided in a case where the minor was a natural child, and where the nomination of administrators was made by the reputed father; Wilson, 10th March 1819, Fac. Coll.

Before stating the nature of the powers and duties of curators, it may be proper to observe that, although, after curators have been appointed, their consent is essential to the validity of every act of the minor, yet a minor to whom no curators have been nominated, and who has not chosen curators for himself, may do every act which the consent of curators, if he had any, would warrant; and the interposition of curators will not protect the acts of the minor from any challenge to which they could be liable had they flowed from a minor without curators. Thus, in both cases, the deeds of a minor may be reduced on the head of lesion. See Minor.

Curators, whether nominated by the father or chosen by the minor, must be governed as to their manner of proceeding by the tenor of their appointment. In general, the majority are entitled to act, unless a certain number has been declared to be a quorum, or one of the curators named sine quo non.

The object of the curatorial office, being the control and management of the minor's affairs, it is the duty of the curators to advise with the minor as to all deeds required to be granted by him, and to concur with him in such as are proper; and any deed granted, or contract entered into, without their consent, is null, by way of exception, in so far as the minor is concerned, although, if beneficial for the minor, it may be held obligatory on the other contracting party; for a minor, even without the consent of his curators, may better his condition, although he may be repented against transactions which make it worse; Ersk. B. i. tit. 7, § 33; Stair, B. i. tit. 6, § 33. On the other hand, the cura-
tors cannot act for the minor, who is himself vested in the right of his own property; they can merely authorise his acts by their consent. If, however, the minor will not act as his curators advise, they may apply for exoneration from their office. It is not the duty of curators to dispose of the minor's property unless under circumstances of necessity, or where the transaction is for the manifest advantage of the minor; and, in such circumstances, curators have frequently applied to the Court of Session for their sanction to any extraordinary step of this kind, but the Court have refused to interpose their authority as "unnecessary," on the ground that "the minor and his curators could sell without judicial authority, and that no decree of the Court could prevent a reduction by the minor;" Wallace, 8th March 1817, Fac. Coll.

Such is the rule of law so far as relates to the disposal or transference of the minor's property; but, in the general management of the minor's affairs, a wider power seems to be entrusted to curators. Thus, although they cannot by themselves grant discharges for money which has been invested on behalf of the minor, it rather appears that they may of themselves receive the interest; and farther, when the money has been uplifted, they are solely entrusted with the disposal and reinvestment of it. In like manner, they are entitled to uplift rents falling due from the minor's estate, and even to grant leases. There is this distinction, however, to be observed, that a lease granted by curators alone necessarily determines with their office,—Resoluto enim jure dantis resolvitur jus accipientis; Ersk. B. i. tit. 7, § 16; while a lease by a minor himself, with consent of his curators, will be as effectual for the whole stipulated period of endurance, as it would be if granted after majority, provided there be no objection on the head of lesion.

It is the duty of curators to see that the title-deeds and writings belonging to the minor are preserved, and his titles completed; such of his moveables as cannot be preserved must be disposed of; and the curators will be liable for any damages arising from neglect in either of those points. The curators must pay off all burdens affecting the estate of the
minor, and perform the acts which the minor is bound to perform: They must see the minor's money lent out on good securities, and draw the interest of the money and rents of the heritage regularly as they fall due; and, in so far as those exceed the annual expense of the minor, the surplus must be lent out on proper securities; and where the minor has received interest, rents, or principal sums from his debtors, without the curators' consent, they must prosecute the debtors for payment, as if no such payments had been made to the minor, unless the money has been profitably employed for the minor's use; Ersk. B. i. tit. 7, § 33; Stair, B. i. tit. 6, § 33. The rule with regard to the laying out of money recovered by the curators seems to be this,—when the money arises from moveables sold, a year is allowed for recovering the price, and procuring proper securities; where rents are payable in grain, the same period is allowed; where the rent is payable in money, half a year only is given; but, although the growing interests on money lent, over and above what is necessary for a pupil's annual expenses, must be brought into a capital sum, either before or at the expiration of the office of tutory, curators are under no such obligations. It is sufficient that the money remain in the hands of the debtors undrawn by the curator,—if it have been drawn, it ought to be laid out within a reasonable time. Curators may better the minor's condition by converting moveable debts into heritable; but they cannot, by any act in which the minor does not take a part, make any change on the nature of the succession to the minor: Such debts will remain moveable as to succession; Ersk. B. i. tit. 7, § 18. See also Ross, 31st January 1793, Mor. p. 5545; Graham, 6th March 1798, Mor. p. 5599, and Morton, 11th February 1813, Fac. Coll.

Curators are allowed to employ not only the annual income of the minor's estate on his education and maintenance, but, should it be requisite, they may encroach on the principal in order to put the minor into a profession, or to establish him in life; Ersk. B. i. tit. 7, § 24.

Curators have no controul over the minor's person. A minor pubes may marry without the consent of the curators, but
cannot make any conventional provisions by marriage contract without their concurrence. A minor may also bequeath his moveable estate by testament without the consent of his curators; but he cannot, even with their consent, make a settlement of his heritage; Ersk. B. i. tit. 7, § 14 and 33.

Curators are liable singuli in solidum for their intromissions and for diligence, unless where this responsibility is taken off in the manner already explained. They are entitled to no salary or allowance for their trouble; but it has been held that they may appoint a factor with a proper salary; Ersk. ibid. § 16; Lord Macdonald, 13th November 1780, Mor. p. 13,437. In no case can a curator be auctor in rem suam. Ersk. ibid. § 19.

Any one of full age may competently be appointed to the office of curator, excepting married women, who by law are themselves placed under the curatory of their husbands; Ersk. B. i. tit. 7, § 12.

Pro-curators, that is persons who, without any legal title, have taken upon themselves to act in the capacity of curators, are, by Act of Sederunt 10th June 1665, subjected to the same liability in all points with proper curators; Ersk. ibid. § 28. See, on the subject of this article, Stair, B. i. tit 6, § 29, et seq.; Bankton, vol. i. p. 174, et seq.; Ersk. B. i. tit. 7, § 11, et seq. See also Minor.

2. Curator to an idiot or to an insane person.—Idiots or insane persons are another class to whom the law of Scotland provides curators. It does not appear, however, that the parents of such persons have ipso jure any right of administration for them beyond their majority. Neither is there any instance of a testamentary nomination of such curators, although Erskine seems to think this competent in our law, as it was in the Roman law; Ersk. B. i. tit. 7. § 49. The method pointed out by our law for declaring fatuity or furiosity, is by a briefe issuing from Chancery, directed to the Judge Ordinary of the territory within which the person resides. The judge is directed to hold an inquest, for inquiring, 1st, Into the state of mind of the person; and, 2dly, Who is the next male agnate on whom the office of curatory may be conferred. The person
to be cognosced must be brought before the inquest (Dewar, 25th February 1809, Fac. Coll.); and, by the act 1475, c. 66, the verdict of the jury must state, not only his present condition of mind, but how long he has been fatuous or insane. The same statute declares that no alienation made by him, after the time fixed by the inquest as the commencement of his distemper, shall be valid. It may be observed, however, that the verdict of the inquest, fixing retrospectively the date of the insanity, will not preclude a person interested in any deed falling within the period from proving that, at the date of that particular deed, the granter was of sane mind. The only effect of the verdict seems to be, to reverse the ordinary presumption of sanity, and to lay the burden of proving the sanity of the granter on the person who founds on the deed.

The next male agnate of 25 years of age, who is himself capable of managing his own affairs, is the person entitled to the office; 1474, c. 52, and 1585, c. 18. And here it may be observed, that, although the guardianship of insane persons be generally treated of under curatory, yet it seems rather to correspond with tutory. The curator to an idiot is entrusted with the charge of the person, as well as the estate of his ward; and a person under such guardianship, being incapable of will or consent, the curator must transact every thing in his own name. In every other respect, the powers and duties of the office are similar to those which have been already explained in treating of curators to a minor. The persons entitled to institute proceedings for having a curator appointed to an insane person are his next of kin; and the curator at law is the nearest male agnate, except where a wife is fatuous, in which case, the husband, as her administrator in law, excludes agnates; Haliburton, June 1791, Mor. p. 16,379. See also Ersk. B. i. tit. 7, § 50.

3. Curator Bonis.—Where an heir is deliberating whether or not he shall enter,—or where an infant is without tutors,—or where a succession opens to one who is resident abroad,—or where a person is labouring under some temporary incapacity to conduct his own affairs,—and in other cases of a similar description, the Court of Session may appoint a curator bonis
to manage and preserve the property, until the person to whom it belongs is in a situation to act either for himself, or by means of other managers. Curators bonis are also named for the management of trust estates, where the trustees have all declined to accept, or cannot legally do so. The office of curator bonis is conferred by the Court on a summary application; and the curator so appointed is subjected to all the rules prescribed by the Act of Sederunt 13th February 1730, relative to judicial factors. See Bankton, vol. i. p. 179; Ersk. B. ii. tit. 12, § 58.

4. Curator ad litem.—Judicial proceedings, in which a minor is interested, may be of so serious importance to him, that, in every case, our law requires that a curator for the minor be made a party. Where the minor has already curators, they are of course his proper advisers in the law-suits in which he may be engaged, and must be cited along with him; McTurk, 7th February 1815, Fac. Coll. Where the minor has no tutors or curators, it is necessary not only that tutors and curators be cited edictally, but also, when appearance is made for the minor, that a curator ad litem be appointed for him; and, if this be omitted, any decree in foro against the minor will be reducible on that ground. In like manner, if a minor be engaged in a law-suit with his tutors or curators, a curator ad litem must be appointed to conduct the process. The appointment is made, on the motion of either party, by the judge before whom the process depends. The appointment is confined to the particular suit in which it is made; and the curator ad litem, who is generally the law agent employed, appears at the bar, and takes the oath de fidei administracione, of which proceeding a minute is made by the clerk of Court, which completes the curator’s title. A curator ad litem, having no authority to intromit with the minor’s estate, is not under the necessity of finding caution. Where a motion for the appointment of a curator ad litem is not made by either party, the judge ought to make the appointment ex proprio motu: Ersk. B. i. tit. 7, § 13; see also Stair, B. i. tit. 6, § 31, and Bankton, vol. i. p. 175.
CURATORIAL INVENTORY. See Inventory.
CURIALITY. See Courtesy.
CURSING OF GOD. Those who, "not being distracted, ed in their wits," rail upon, or curse God, or any of the persons of the Blessed Trinity, are, by 1661, c. 21, punishable with death; Hume, vol. i. p. 560.
CURSING OF PARENTS. The statute 1661, c. 20, provides the punishment of death for every child above the age of sixteen years who, not being distracted, shall curse or beat a parent. Children under that age, and past pupillarity, who may be guilty of this offence, are punishable arbitrarily. It seems to be a good defence against the capital charge that the parent has provoked the injury by treating the child with unreasonable harshness and severity. Hume, vol. i. p. 318.
CURSING AND SWEARING. The offence of profane cursing and swearing is punishable by certain pecuniary penalties proportioned to the rank of the offender, and, on failure to pay, by imprisonment, or setting in the stocks, or, in cases of obstinate perseverance in the offence, by banishment. The statutes imposing the penalties are 1551, c. 16, and 1581, c. 103. The more recent statutes are 1661, c. 19, and 1661, c. 38, § 25, by which the execution of those laws is particularly committed to justices of the peace; and, by 1696, c. 31, it is made competent for any person to pursue; Hume, vol. i. p. 562.
CURSING, LETTERS OF. Letters of excommunication were anciently termed letters of cursing. Those letters passed on the decrees of church courts; and, if the person against whom they were directed remained for forty days contumacious and unrepentant, letters of caption were issued against him at the King's instance, not on account of his failure to pay or perform in terms of his obligation, but as a punishment for his impious contempt of the censures of the church. At the Reformation, letters of cursing were abolished along with the ecclesiastical system, of which they formed a part; and afterwards, on the establishment of the Commissary Courts in 1563, the place of letters of cursing was supplied by letters of
horning and caption, which the Court of Session was directed
by Queen Mary to award on the decrees of the Commissaries;
Ross's Lectures, vol. i. p. 100 and 269. See also Balfour's
Practicks, p. 564.

CUSTOM or CUSTOMARY LAW; is the unwritten
law of the country founded on immemorial custom, in contra-
distinction to the statutory or written law, as it is termed. Cu-
tomary law derives its force from being considered as the im-
plied ordinance of the legislative power. Uniform custom has
in some respects the same effect with express statute; thus, it
will afford a rule in interpreting statutes contrary to the words
of the enactment; and an immemorial and uniform custom to
the contrary will even have the effect of abrogating a statute;
See also Desuetude. Usage.

CUSTOMS; are duties imposed by authority of Parlia-
ment on the importation and exportation of certain commodi-
ties. Those duties depend upon the particular statutes in force
at the time, and vary with the exigencies of the state, or with
the views of policy which may render it expedient to encourage
or discourage particular exports or imports. By the treaty of
Union, the laws in relation to customs are made the same in
Scotland as in England.

CUSTOS ROTULORUM; the keeper of the rolls or re-
cords of the county; the officer entrusted with the custody of
the rolls of the sessions of the peace, and also of the com-
mision of the peace. He is always a justice of the peace of the
quorum of the county, and generally some person of quality.
He is appointed by a writing signed by the King, which is a
warrant to the Lord Chancellor to put him on the commission.
He may execute his office by deputy, and has power to appoint
the clerk of the peace; Tomlin's Dict. This office is not now
in use in Scotland, although it is mentioned in the statutes
1617, c. 18, and 1661, c. 38, and also in Cromwell's instruc-
tions to the justices of the peace; Hutcheson's Justice of Peace,
B. i. c. 1, § 10.