

DICTIONARY AND DIGEST

OF THE

LAW OF SCOTLAND.

ABANDONING AN ACTION. It is competent to a pursuer, after the record is closed, to abandon the cause on paying full expenses to the defender, and to bring a new action if otherwise competent; 6 Geo. IV. c. 120, § 10. But this regulation only applies to the case where the abandonment is made before an interlocutor has been pronounced, assoilzieing the defender in whole or in part, or leading, by necessary inference, to such absolvitor; A.S. 11 July 1828, § 115. [See *Western Bank*, 20 March 1862, 24 D. 859; *White*, 13 July 1866, 4 Macph. (H.L.) 53.] An abandonment of the cause before closing the record, although competent, is not held to fall under the above statutory regulation; *Caledonian Foundry*, 14 Dec. 1831, 10 S. 133. [In *Hare*, 8 June 1882, 9 R. 910, the pursuer, after the record was closed, and during hearing in the procedure roll, intimated that he would not insist further in the action; and the Lord Ordinary thereupon assoilzied the defender, finding the pursuer liable in modified expenses. This was held not to be a case of abandonment under the statute. If it had been, the pursuer would have been bound to pay full expenses, as taxed by the auditor, but on the other hand he would have been entitled to bring a new action. In the course of a trial, the pursuer may abandon his action, under the conditions above mentioned, and with leave of the judge; at any time before the judge has commenced to charge the jury, or, where there is no jury, at any time before the judge has made avizandum with the evidence; 31 & 32 Vict. c. 100, § 39. In giving such leave, the judge specifies the time within which the expenses shall be paid to the defender; and if they are not paid within that time, the defender is

[entitled to be assoilzied, with expenses; *ib.* The procedure is by lodging a minute of abandonment, which must be approved by the court; *Cormack*, 25 June 1846, 8 D. 889; *Muir*, 2 Feb. 1849, 11 D. 487. An action in dependence, *i.e.*, after execution of the summons, cannot be withdrawn extrajudicially; *M'Aulay*, 13 Dec. 1873, 1 R. 307; *Nelson*, 26 June 1874, 1 R. 1093. See *Shand's Prac.* i. 343; *Mackay's Prac.* i. 539; ii. 39; *Coldstream's Procedure*, 100; *M'Glashan's Sher. Court Prac.* 320. See *Amendment. Counsel. Agent and Client.*]

ABANDONMENT. [In the law of insurance, in case of constructive total loss of the subject, *i.e.*, when it has been so far damaged by the perils insured against, that the expense of repairing it would exceed its marketable value when repaired, the owner has the right to abandon to the underwriters all interest in such portions of the subject as may be saved, and claim as for a total loss. See *Insurance.*]

[**ABATEMENT.** See *Legacy.*]

ABBEY. 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, as having been a royal residence. 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, abbots sat *ex officio* in the Scotch Parliament. *Ersk. B.* i. tit. 5, § 4.

ABBREVIATE OF ADJUDICATION; an abridgment or abstract of the decree of

adjudication, containing the names of the creditor and debtor, and of the lands adjudged, with the amount of the debt. This abbreviate used formerly to be authenticated by the signature of the Lord Ordinary by whom the decree was pronounced; but is now signed by the Extractor (1 & 2 Geo. IV. c. 38, § 18). The abbreviate must be recorded within sixty days. [The office of Keeper of the Register of Adjudications was, by 1 & 2 Vict. c. 118, § 14, conjoined with that of Keeper of Hornings and Inhibitions; and by 31 & 32 Vict. c. 64, § 17, the joint office has been united with that of Keeper of the General Register of Sasines.] The certificate of registration is written on the abbreviate. A copy of the abbreviate is also appended to the extract of the decree, on which likewise the recording is certified. An omission to record the abbreviate has the effect of postponing the adjudication, in competition with another adjudication duly recorded, but does not infer nullity in a question with the debtor. No homing against superiors can be obtained unless the abbreviate be recorded; but if infetment have followed on the adjudication, the omission to record the abbreviate is of no consequence in a question with creditors adjudging posterior to the sasine. *Ersk. B. ii. tit. 12, §§ 26, 43; 1661, c. 31; Reg. 1695, c. 24; A.S. 18 Jan. 1715; A.S. 2 Dec. 1742; A.S. 10 July 1811; Bell's Com. i. 743, 759, 781; More's Notes on Stair, ccvii.; Bank. B. iii. tit. 2, § 50; Bell's Princ. § 826; Jurid. Styles, iii. 109; Mackay's Prac. ii. 335; M. Bell's Conv. ii. 713, 1192.] See *Adjudication*.*

ABDUCTION. [It is a crime to carry off and confine any person forcibly, and without lawful authority; to abduct women for the purpose of rape or marriage, or to carry off voters to control elections, or witnesses to suppress evidence, or even to carry off and detain, from mere motives of spite, any person whatever. The punishment is penal servitude or imprisonment. As to abduction of voters, see 46 & 47 Vict. c. 51, § 2; *Douglas*, 2 July 1866, 5 Irv. 265; also *Election Law* (Corrupt Practices). As to abduction of girls, see *Criminal Law Amendment Act*. See *Hume*, i. 310; *Bell's Notes*, 86; *Alison's Princ.* 226, 642; *Macdonald*, 170, 405; *Stephen's Digest of Crim. Law*, art. 261-2.]

ABETTOR; one who incites, instigates, or encourages, or who commands or counsels another to commit felony. In most cases an abettor is considered as

much a principal as the actual felon. *Tomlins, h. t.* [See *Art and Part. Accessory*.]

ABEYANCE; an English law term, importing that a freehold or inheritance is not vested in any one, but is in expectation, and ready to descend upon him who shall first fill the character required by the particular quality of the estate. This abeyance or suspense, being repugnant to the general principles of the English law of tenure, is never allowed except when it is unavoidable. It has been compared to the *hereditas jacens* of the civil law. *Tomlins*.

ABIDING BY. In an action of reduction-improbation, where the main reason of reduction is forgery or falsehood; or in any other action where either party founds on a deed or writing to which the objection of falsehood or forgery is proponed, either by way of action or of exception, the party founding on the deed may be required by his adversary to *abide by* it,—that is, to declare judicially that he abides by the deed or writing challenged or objected to, as true and genuine. If he refuse, decree of certification will be pronounced against the writing as improbativ or false. The party abiding by the deed does so *sub periculo falsi*; i.e., at the risk of the punishment of forgery, if the forgery be proved; and regularly the abider by the deed ought to appear in court for the purpose; although, in the case of extreme age or of necessary absence from Scotland, a commission to take his declaration will be granted. It was formerly the practice to admit parties to abide by deeds *qualificate*, as it was expressed,—that is, with explanations tending to show that the deed came fairly into the party's possession. This practice, however, has gone into desuetude; but it is still competent and usual for the abider to protest that he shall be at liberty to prove facts and circumstances as to the manner in which the deed came into his hands, and as to his belief of its being genuine, which, even if it turn out to be a forgery, may free him of accession to the crime. After a party has thus abidden by a deed, he cannot be asked how the deed came into his hands; and the form of process is to make up the record in the cause, by ordering a condescendence of articles improbatory, and answers containing articles approbatory. The writ in question is also identified by the signatures of the party abiding by it, and of the judge or commissioner. See *Stair*, B. iv. tit. 20, § 19; *Ersk. B. iv. tit. 4, § 69; Bank. B. i. tit. 10, § 224; A.S.*

†1 July 1828, § 53; *Hume*, i. 151; [*Shand's Prac.* ii. 642; *Mackay's Prac.* ii. 164. See *Reduction*.]

ABJURATION, OATH OF; an oath asserting the title of the present Royal Family to the Crown of England. [This was abolished, as a separate oath, by 21 & 22 Vict. c. 48, which substituted one oath instead of the oaths of allegiance, supremacy, and abjuration, formerly required of all persons holding office in Scotland. The form of oath was further simplified by 30 & 31 Vict. c. 75; and finally by 31 & 32 Vict. c. 72, which prescribes the form now in use. See *Allegiance. Oaths*.]

ABORTION; the offence of administering medicine or applying force to a pregnant woman, in order to procure abortion, is not murder of the child *in utero*, whether quick or not. But where the mother dies from the effect of the potion or operation used to destroy or expel the *fœtus*, there seems to be room for a charge of murder against the perpetrator. [See *Reid*, 10 Nov. 1858, 3 Irv. 235; *Rae*, 3 July 1888, 2 White 62. The mother herself may be guilty of the crime of procuring abortion, if she be aware of the purpose for which the drug is administered or the force applied. The punishment is penal servitude or imprisonment. See *Hume*, i. 186, 263; *Alison's Princ.* 628; *Macdonald*, 125, 152.]

ABROAD. Persons resident abroad, that is, out of Scotland, are not, generally speaking, subject to the jurisdiction of any Scotch court. But to this rule there are several exceptions. If a party resident abroad have heritable property in Scotland, or if a jurisdiction has been created by arresting his moveables in Scotland *jurisdictionis fundandæ causa*, he may be cited (except in questions of *status*) in the Scotch courts. In the case of a landed estate, the *lex rei sitæ* is the rule; and the law presumes that the owner of such an estate, whether native or foreigner, if resident abroad, has employed some one resident in this country to look after his interests in his absence. Hence, not only in the case where there is an arrestment to found a jurisdiction, but also where there is jurisdiction *ratione rei sitæ*, edictal citation is competent against the party, to the effect of making him amenable to the Court of Session in Scotland. [See *Foreign Jurisdiction. Domicile. Edictal Citation*.] Parties resident abroad, and charged with the commission of crimes in Scotland, may also be cited as furth of

the kingdom. The effect of absconding, or going abroad for the purpose of evading payment of debt, or of escaping punishment for a crime, will be considered under other heads. [See *Absconding. Meditatio Fugæ. Fugitation. Extradition. Criminal Prosecution*.]

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

ABSCONDING. The act of absconding or fleeing, in order to evade payment of debt, is one of the equivalents of legal bankruptcy, under the act 1696, c. 5, and under the bankrupt statutes. [See 19 & 20 Vict. c. 79, § 7. *Bankruptcy. Meditatio Fugæ*. As to what constitutes absconding, see *Davis*, 31 May 1867, 5 Macph. 804; *M'Bean*, 24 Oct. 1868, 7 Macph. 23; *Nicolson*, 6 Dec. 1872, 11 Macph. 179; *Union Bank*, 5 March 1880, 7 R. 655; also *Bell's Com.* ii. 162; *Ersk. B. iv.* tit. 1, §§ 41, 42; *Murdoch on Bankruptcy*, 224. Absconding after sequestration or cessio has been granted, or within four months prior thereto, is an offence punishable under the Debtors Act (43 & 44 Vict. c. 34, § 13). See *Fraudulent Bankruptcy*.] Absconding is also one of the indications of guilt usually libelled on in indictments and criminal letters. [In civil cases, where it is expected that a witness will leave the United Kingdom before the trial, his deposition should be taken on commission to lie *in retentis*, there being no means of compelling him to remain in the country. Such commissions are not granted in criminal cases; but if either the prosecutor or the prisoner has reason to believe that one of his witnesses means to abscond, to the disappointment of justice, he may apply to the Justiciary Court to have the witness apprehended and imprisoned, until he find caution to appear at the trial. See *Hume*, ii. 375; *Alison's Prac.* 398; *Macdonald*, 431, 451; *Dickson on Evidence*, ii. § 1708; *Jurid. Styles*, iii. 890.]

ABSENCE. Where a defender, although duly cited, has failed to appear, the court, on the ground that by means of the citation he has had lawful notice of the demand, accompanied by certification of what will ensue if he fail to make appearance, is in use, on the pursuer's motion, to pronounce a decree in terms of the conclusions of the summons or libel, which is called a *decree in absence*. In order to warrant such a decree, the court must have jurisdiction over the defender, and the decree must be in terms of the libel. [Or, at least, if any alteration (other

[than a restriction) has been made upon the summons as originally laid, the amended summons must have been served upon the defender, and opportunity given him to enter appearance, if so advised; 31 & 32 Vict. c. 100, § 20. See *Amendment of Record*. When a defender does not enter appearance on or before the second day after the summons has been called, the cause may be enrolled either in the roll of undefended causes, or in the Lord Ordinary's motion roll, as an undefended cause for decree in absence; 31 & 32 Vict. c. 100, § 22. And though appearance may have been entered, if defences are not lodged on or before the tenth day after calling, the cause may be enrolled for decree in absence; *ib.* When a cause is enrolled as undefended, the Lord Ordinary, without attendance of counsel or agent, grants decree in absence in terms of the conclusions of the summons, or subject to such restrictions as may be set forth in a minute written on the summons by the agent of the pursuer; § 23. After the lapse of ten days from its date, a decree in absence may be extracted; *ib.*; but before extract the account of expenses must be taxed by the auditor; 1 & 2 Geo. IV. c. 38, § 33. Within these ten days, however, the defender may apply for recall of the decree in absence, by enrolling the cause in the Lord Ordinary's motion roll; or, if the ten days expire in vacation, by lodging defences with the clerk within that time, and moving for recall at the next sitting of the Lord Ordinary officiating on the bills; and if, when the cause is moved, the defender produces his defences, and makes payment to the pursuer of the sum of £2, 2s., the Lord Ordinary pronounces an interlocutor recalling the decree in absence, and allowing the defences to be received; 31 & 32 Vict. c. 100, § 23. This procedure is substituted for that formerly in use, viz., by reclaiming note to the Inner House, craving to be reponed, which is now incompetent; *ib.* Decrees in absence, however, may be suspended (see 1 & 2 Vict. c. 86, § 5), or they may be reduced as formerly. But where a decree upon which a charge is competent has been pronounced in absence, after personal service on the defender, or after appearance has been entered with his authority, and where such decree has not been recalled in virtue of the above-mentioned provision, such decree after extract, and upon the lapse of sixty days after the expiry of a charge upon it not brought under review by suspension, becomes entitled to all the privi-

[leges of a decree *in foro* against such defender; and a decree of declarator, or any other decree on which a charge is not competent, obtained in absence after such personal service or appearance, becomes final after the lapse of twenty years, unless before that time it has been recalled, or brought under review by suspension or reduction; 31 & 32 Vict. c. 100, § 24. In consistorial causes, decree in absence is not granted without proof. As to decree in absence in the sheriff court, see 39 & 40 Vict. c. 70, § 14.] In criminal process no procedure of the nature of trial, conviction, or sentence, can take place in absence of the accused; although, if he fail to appear on the day to which he is cited, sentence of fugitation or outlawry may be pronounced against him in his absence, whereby his person is forfeited in law, and his moveables escheated. [See *Criminal Prosecution. Fugitation*.] The effect of absence where the party has no domicile or *forum* in Scotland, or where he has lost his original *forum* and domicile by leaving the country *animo remanendi*, is, that he is not amenable to the Scotch courts in any process, civil or criminal, except under the circumstances explained in the article *Foreign*. As to the mode of providing for the management of the estate or affairs of an absent party, see *Judicial Factor*; and as to the manner in which he must sue an action, see *Mandatory*. For the mode of citing him when he has a Scotch forum, see *Edictal Citation*. On the subject generally, see *Stair*, B. iv. tit. 38, § 27; *Ersk.* B. i. tit. 2, § 16; B. iv. tit. 3, § 6; tit. 4, § 83; *Bank*. i. 461; *Hume*, ii. 269; [*Shand's Prac.* i. 305; *Mackay's Prac.* i. 417; ii. 496; *Dove Wilson's Sher. Court Prac.* 134. See *Citation. Appearance, Entering. Undefended Cause*.]

ABSOLUTE DISPOSITION; is a conveyance unqualified by any reservation in favour of the disponent or of any other party; in contradistinction to a conveyance containing *in gremio* a power of reversion, or any other limitation or qualification of the right. In Scotch law language, however, the term *absolute disposition* is generally used in relation to heritable property, and in connection with what is called a *back-bond*; that is, a right *ex facie* absolute is qualified by a separate deed declaring a trust, or importing a security, by taking the disponent bound to redispone to the disponent, or his representatives, on repayment of a particular loan or advance of money, or on being relieved of certain obligations

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contracted on the disponent's account. This is a form of security sometimes given for future advances, or for securing obligations of relief. [An *ex facie* absolute conveyance can be proved to be in trust only by writ or oath of the disponent; 1696, c. 25. But the writ need not be a probative deed: the trust may be proved by any authentic writing signed by the party, or by the tenor of several writings taken together, if their terms unequivocally import an acknowledgment of trust; *Seth*, 14 July 1855, 17 D. 1117. See *Trust*.] When the relative back-bond is published by registration in the record of sasines and reversions, it becomes, from the date of registration, a real qualification of the disponent's right, which will be effectual against the disponent's creditors and against third parties. And after such registration, or after judicial production of the back-bond, the parties cannot disburden the disponent's right merely by cancelling or restricting the back-bond. The registration of the back-bond in the record of sasines and reversions is held to be a feudal limitation of the disponent's right; and in order effectually to discharge it, the discharge, like the burden, must appear on the record. While the back-bond remains unrecorded, the disponent is exposed to the risk of the disponent's bankruptcy; and if it should never be recorded, then on the face of the records, and feudally speaking, the disponent will be the absolute proprietor, subject only to a personal obligation to denude or account, in terms of the back-bond. Although the holder of a disposition qualified by a recorded back-bond is virtually no more than an heritable creditor to the disponent entitled to redeem, yet the disponent [cannot] state himself as in right of a *debitum fundi*, to the effect of entitling him to poind the ground; that remedy not being competent to a party holding a title in virtue of which he can enter into the natural possession of the lands; *Ross's Lectures*, ii. 430; [*Scot. Herit. Security Co.* 14 Jan. 1876, 3 R. 333. An action of maills and duties is equally inappropriate; for it is only an incumbrancer that requires to use that process in order to uplift the rents; *ib.* (*per Lord Pres. Inglis*). See *Poinding of Ground. Maills and Duties*. The proper remedy of an *ex facie* absolute disponent is a declarator and removing; *Rankin*, 19 Nov. 1868, 7 Macph. 126. But see *Scot. Property Investment Co.* 31 May 1881, 8 R. 737.

[“The execution and recording of an absolute disposition of heritage, qualified by a personal contract in the form of an unrecorded back-letter, for the purpose of creating a security, has the effect of vesting the full feudal estate in the disponent, and the disponent's interest is thereby reduced to a personal right to have the estate, or the proceeds of its sale, as the case may be, reconveyed or paid to him, on payment or under deduction of the secured debts. As regards third parties, who transact with him on the faith of the public records, the powers of the disponent are not affected by the private contract, and he can sell or burden the estate, and can give a valid title to the purchaser or incumbrancer, although the creation of these rights should be in direct violation of the terms of the back-letter. But in a question with the disponent himself, or with persons who through him have acquired an interest in the estate or in the personal contract, the disponent is affected by the back-letter, and is treated as the holder of a mere security. In all such cases the rights of parties must be determined, not according to the form of the disponent's title, but according to the substance of the transaction;” *per Lord Watson in Union Bank*, 10 Dec. 1886, 14 R. (H.L.) 1. See also *Robertson*, 14 Jan. 1840, 2 D. 279. Even the recording of a back-bond does not appear to reinstate the disponent in the radical right; for it is of the essence of a title *ex facie* absolute that all the consequences lawfully deducible from it should receive effect. See *Gardyne*, 8 March 1851, 13 D. 912; in which a creditor infeft in subjects *more burgi*, on an *ex facie* absolute disposition, was held to be owner of the subjects, and so liable as vassal in payment of a ground-annual with which they were burdened, until a title was completed in another vassal, although he had put on record a back-bond, setting forth that the disposition was in security of debt only, and although he had afterwards executed and put on record a discharge and renunciation of the security. This decision was reversed by the House of Lords (1 Macq. 358), but on the sole ground that personal liability for payment of a ground-annual does not transmit against a purchaser from the original disponent. The reversal, therefore, does not affect the authority of the judgment, so far as regards the doctrine now in question. See also *M'Lelland*, 27 Feb. 1857, 19 D. 574; *Marshall's Tr.* 19 June 1888, 15 R. 762 (Lord Kinnear). In *Bartlet*, 21 Feb.

[1811, F. C., however, an *ex facie* absolute disposition, qualified by a recorded back-bond, was held not to exclude the disponent's widow from claiming terce out of the lands conveyed, on the ground that, beyond the extent of the debt secured, the infeftment of the creditor was truly the infeftment of the debtor. When a transaction is of the nature of a security, the resulting right cannot be converted into one of property without a declarator of extinction of the former proprietor's right; *Smith*, 7 March 1879, 6 R. 794. An *ex facie* absolute disponee carrying through a sale acts in his own right; whereas a creditor selling under a bond and disposition in security acts as mandatory of the owner; see *Park*, 24 Jan. 1880, 7 R. 546.

[In general, when a trust is created by an absolute disposition, qualified by a back-bond, the security covers all advances made by the trustee, either before or after infeftment on the disposition; *Riddel*, 1782, M. 1154, Ross's L. C. ii. 721. Even when the back-bond is not general in its tenor, but specifies particular obligations, in respect of which the security was granted, the trustee is entitled to retain for payment of subsequent advances made to the truster; the presumption of law being that the truster, in obtaining these subsequent accommodations, contemplated an extension of the trust, and that the trustee made the subsequent advances in reliance on the security actually held by him. But it is competent to stipulate that the *ex facie* absolute right shall be a security for certain specific obligations, and no others; and the question whether the transaction is so limited or not depends on the circumstances of each case. See *Robertson, supra*; *Nelson*, 26 June 1874, 1 R. 1093. And registration or judicial production of the back-bond restricts the security to the amount then advanced; *Keith*, 1795, M. 1163. In a recent case, a bank held a recorded absolute disposition of certain subjects, which by back-letter (not recorded) it agreed to hold "in security, and until full and final payment of all sums of money now due or which may hereafter become due." By a subsequent deed the debtor assigned to another bank, for onerous considerations, her whole right and interest and right of reversion in the subjects, and intimated the assignation to the first bank. Thereafter advances were made to her by both banks. In a competition between them, it was held that the first bank's preferable claim upon the subjects was limited to advances made

[prior to intimation of the assignation, and that the second bank had priority for subsequent advances; *Union Bank, supra*. See *Heritable Securities*. See on this subject, *Bell's Com.* i. 33, 714; ii. 223; *Bell's Princ.* §§ 912, 1367, 1994; *Ersk. B.* ii. tit. 8, § 30; *Duff's Feudal Conv.* 295; *Menzies' Conv.* 860; *M. Bell's Conv.* ii. 1173; *M'Laren on Wills*, ii. §§ 1463, 1488.]

ABSOLUTE WARRANTICE. See *Warrantice*.

[ABSOLVITOR. See *Decree*.]

ABSTRACTED MULTURES. This term is applied to that evasion of the servitude of thirlage, which consists in fraudulently or illegally carrying the grain of the servient lands to be ground elsewhere, or otherwise disappointing the right of the dominant mill. The remedy competent to the proprietor or tenant of the mill, against the proprietor or tenant of the abstracted lands, is an action for abstracted multures, which may be raised either before the judge ordinary or in the Court of Session; and the conclusion of which is alternative, either for delivery of the multure of the abstracted grain, or for a sum of money in lieu thereof. Multures prescribe in five years from the time they become due; 1669, c. 9. Where the right of thirlage is disputed this action is combined with a declarator of thirlage, which can be competently brought only in the Court of Session. See *Ersk. B.* ii. tit. 9, § 32; *Bell's Princ.* § 1030; *Jurid. Styles* (2d edit.), iii. 83; *Boyd's Jud. Proceedings*, 224; *Hunter's Landlord and Tenant*, ii. 198. [See *Thirlage. Multures*.]

ACCEPTANCE; in its general meaning, is the act whereby a party agrees to any terms, offer, or proposal made to him, or undertakes a trust, office, or duty. Acceptance in this sense may be either express or tacit, verbal or written; or provable by facts and circumstances inferring acceptance, and not reconcilable with rejection. But the evidence, whatever it may be, must amount to a clear indication of an intention to accept. Thus, the mere possession of a deed containing a condition will not be held as acceptance. But, on the other hand, the proposal or offer may be so made that, if not rejected, acceptance is implied. An order in trade does not require acceptance to bind the party giving the order; and it will also bind the party to whom it is addressed, if not rejected in course of post, if in the line of his particular trade; *e.g.*, an order for goods to a

dealer, or for insurance to an insurance broker, or the delivery of goods to a common carrier for transport to the place of its destination. [Some points decided with regard to completion of contract by acceptance of offer are noticed in the article *Offer*. See authorities there enumerated. See also *Delivery of Deeds*.]

ACCEPTANCE OF A BILL OF EXCHANGE; [is the signification by the drawee of his assent to the order of the drawer.] In common parlance the accepted bill is called an "acceptance." [The requisites of acceptance are contained in the Bills of Exchange Act, 1882, §§ 2, 17 *et seq.*, 42, 44. As to acceptance for honour, see §§ 65-67. These provisions are set forth in the article *Bills of Exchange*, pp. 110, 114, 119. See also authorities cited there. For the form, see *Jurid. Styles*, ii. 7.]

ACCEPILATION; 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. *Stair*, B. i. tit. 18, § 5; *Ersk.* B. iii. tit. 4, § 8; *Bank.* i. 490, § 20.

[**ACCESSARY**. See *Accessory*.]

ACCESSION, DEED OF; is a deed by the creditors of a bankrupt or insolvent debtor, by which they approve of a trust executed by their debtor for the general behoof, and bind themselves to concur in the fiduciary arrangement proposed for extricating his affairs. Accession to a trust for behoof of creditors may be instructed without a formal deed, by facts and circumstances inferring accession, or not otherwise explainable. [The deed of accession is a mutual contract, by which no creditor can be bound without his own consent, nor even by his subscription, until all the other creditors have also assented. But one who has acceded may not begin diligence, in order to acquire a preference; *Watson*, 1724, M. 6397. See also *Littlejohn*, 18 March 1836, 2 S. & M'L. 355. The terms of a deed of accession vary according to the nature of the arrangement with the creditors. In the ordinary case, it contains a power of arbitration, accompanied by a submission and clause of registration; a power of management, sale, and distribution; a settlement of the periods for dividends; a consent to a *supersedere* of diligence; and frequently an agreement to discharge, on a certain composition being paid by the bankrupt. See *Bell's Com.* ii. 392; *M. Bell's Conv.* ii. 808; *Goudy on*

[*Bankruptcy*, 469; *Jurid. Styles*, ii. 233. See *Bankruptcy. Trust Deed*.]

ACCESSION; as a mode of acquiring property, is either natural or artificial. 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 bank of a river (called *alluvio*) belongs to the proprietor of the land receiving this addition. *Artificial* or *industrial* accession signifies the addition made to the value of a subject by human art or labour exercised thereon. Thus trees planted, or a house built, on another's ground, belong to the proprietor of the ground, not to the planter or builder. The party who has thus built by mistake may have a claim against the owner of the ground for the value of the house, in so far as it is a melioration; but the builder is not entitled to retain possession until repaid the expense of building, and may be summarily removed. [See *Wylie & Lochhead*, 17 Feb. 1870, 8 Macph. 552; also *Recompense. Meliorations*.] See *Stair*, B. ii. tit. 1, § 34; *Bank.* i. 506, § 10; *Ersk.* B. ii. tit. 1, §§ 14, 15; [B. iii. tit. 1, § 11; *Bell's Com.* i. 786; *Bell's Princ.* § 1473; *Rankine on Land-Ownership*, 100.] See *Heritable and Moveable. Contexture. Adjunction. Specification. Commixtion. Fixtures*.

ACCESSORIUM SEQUITUR PRINCIPALE; a Roman law maxim, signifying that the accessory right follows the principal. In the law of Scotland, the principle of this maxim has been fully adopted; in so much that the maxim itself forms one of the titles in Lord Kames' *Dictionary of Decisions*, and (following him) in Morison's *Dictionary*, and Brown's *Synopsis*. See *Stair*, B. iii. tit. 1, § 17; *More's Notes*, 103; *Ersk.* B. ii. tit. 1, § 30; *Bank.* i. 506, § 10; *Kames' Princ. of Equity* (1825), 156-7; [*Broom's Legal Maxims*, 457.]

ACCESSORY. A person is said to be accessory to a crime, who aids the perpetrator with advice in the commission of it, or who assists in its execution. One who abets by previously promising protection to the criminal will be considered in law as an accessory. [The law of England recognises accession *after* the fact. See 24 & 25 Vict. c. 94, § 3. Except in the case of treason (as to which see 11 & 12 Vict. c. 12, § 8), this is not regarded by our law otherwise than as an element of evidence,

[from which previous participation may be inferred. See *Art and Part. Accomplice*.]

ACCESSORY ACTIONS; are those actions which are in some degree subservient to others. Under this class of actions are ranked Provings of the Tenor, by which the tenor of a lost deed is judicially declared, and the loss thereby supplied; and actions of Transumpt, by which copies of principal deeds are certified. *Stair*, B. iv. tit. 31; *Ersk.* B. iv. tit. 1, §§ 18, 52; *Bank.* ii. 622; [*Mackay's Prac.* i. 365.]

ACCESSORY OBLIGATIONS; are obligations adjected to antecedent or primary obligations. 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. *Stair*, B. i. tit. 17; *More's Notes*, ciii.; *Ersk.* B. iii. tit. 3, § 60; *Bank.* iii. p. 105. See *Cautionry*.

[**ACCIDENT.** See *Insurance. Act of God*.]

[**ACCIDENTALIA.** See *Essentialia*.]

ACCOLADE; a ceremony used in conferring knighthood, consisting of the king's putting his hands about the knight's neck. *Tomlins*, h. t.

ACCOMMODATION BILLS; are bills of exchange granted without value having been received by the acceptors, for the purpose of raising money by discount. Such acceptances are denominated 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 bills from the consequences of their obligation. [By the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), an accommodation party to a bill is defined to be a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person; § 28. An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not; *ib.*] On bankruptcy, 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. [See *Anderson*, 17 March 1876, 3 R. 608; *M'Kinnon*, 24 Dec. 1881, 9 R. 393.] 3d, In the case of mutual accommodation bills to the same amount, they are held to be good considerations for one another. 4th, The ordinary rules as to due negotiation do not apply to such bills. Hence, the drawer or indorser of an accommodation bill, if he has participated in the accommodation, cannot plead against the holder the want of [presentment for payment], or of notice of dishonour. Where, however, 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; [*Goldschmidt*, 26 May 1814, F.C.; *Shepherd*, 1 March 1870, 8 Macph. 619. See the act of 1882, §§ 46, 50; also *Goudy on Bankruptcy*, 554. See the article *Waring, Ex parte*. On the subject generally, see *Bell's Com.* i. 449; ii. 420; *Bell's Princ.* § 346; *Thomson on Bills*, 229, 235, 373, 397; *Ross's L. C.* i. 141, 508. See *Bill of Exchange*.]

ACCOMPLICE; a *socius criminis*, or associate with another, or with others, in the commission of a crime. An accomplice is an admissible witness against his associates in the crime, his credibility being a matter for the jury. [See *Rae*, 3 July 1888, 3 White 62, and cases there cited.] By the mere act of calling an accomplice as a witness, the public prosecutor discharges all title to molest him for the future concerning the crime in question. [See *King's Evidence*. In general, the evidence of *socii criminis* requires to be corroborated by unsuspected testimony; *Campbell*, 4 Oct. 1855, 2 Irv. 232. If one of two panels pleads guilty, he is a competent witness for the other; *Brown*, 23 Dec. 1856, 2 Irv. 577; 15 Vict. c. 27, § 1. But if both panels go to trial on the same charge, the one cannot be examined as a witness for the other; *Hagan*, 28 Dec. 1853, 1 Irv. 342. Hence, the court is frequently asked to separate the trials, in order that the one panel may have the benefit of the other's testimony. Such an application is competent, but will be granted only if it be specially shown that this course is necessary to the ends of justice; see *Criminal Prosecution*. See *Hume*, ii. 175, 367, 402; *Bell's Notes*,

[182, 260; *Alison's Prac.* 240, 452; *Ersk.* B. iv. tit. 4, § 97; *Macdonald*, 463, 466, 475, 516; *Dickson on Evidence*, ii. § 1560; *Kirkpatrick*, §§ 165, 195. See *Art and Part. Accessory. Evidence.*]

[ACCOUNTANT. See Remit. Report.]
[ACCOUNTANT IN BANKRUPTCY; an officer appointed by the Crown under the Bankruptcy Act, 1856 (19 & 20 Vict. c. 79). His duties are regulated by §§ 156 to 163 of that act. He keeps a register of sequestrations; takes cognisance of the conduct of trustees and commissioners in sequestrations; superintends their annual returns, and frames an annual report to the Court of Session showing the state of each depending sequestration returned to him; and in case of disobedience or misconduct, reports to the court, or gives information to the Lord Advocate. He can hold no other Government office, and may not, directly or indirectly, by himself or any partner, be engaged in practice before any court, nor have any intromission with money of any bankrupt estate under charge of any court. See also A.S. 22 Dec. 1882 (anent cessios). The salary is £850. See *Mackay's Prac.* i. 155; *Goudy on Bankruptcy*, 419. See *Sequestration. Cessio.*]

[ACCOUNTANT OF COURT; an officer appointed by the Crown under the Pupils Protection Act, 1849 (12 & 13 Vict. c. 51). His duties are regulated by §§ 9 to 23 and §§ 33 to 36 of that act. He superintends generally the conduct of all judicial factors, and tutors and curators coming under the provisions of the act; and in case of misconduct or failure in duty, he reports to the court, or lays a case before the Lord Advocate. He lodges an annual report to the court of all judicial factories under his charge. The Accountant of Court is also custodian of all bank deposit receipts and other vouchers for sums of money placed in bank under authority of the court, or in reference to the business thereof, and other documents of a like nature. The salary is £600. The Accountant can hold no other official situation in the court, and may not, directly or indirectly, by himself or any partner, be engaged in practice, nor have any intromission with money of any estate under charge of the court. But judicial remits are made to him to examine and report upon any matter depending before the court, not connected with his official duties; and for such business he is entitled to reasonable remuneration. See *Mackay's*

[*Prac.* i. 154. See *Judicial Factor. Tutor. Curator.*]

ACCOUNTS. Merchants' accounts suffer a triennial prescription by the act 1579, c. 83. 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. [Tutorial and curatorial accounts prescribe in ten years from the termination of the guardianship; 1669, c. 9. See *Prescription.* By the Bankruptcy Act (19 & 20 Vict. c. 79), §§ 49, 50, where a debt claimed rests upon an open account, the creditor is required to produce at the meeting of creditors, or in the hands of the trustee, along with his oath, the account and vouchers necessary to prove his debt. If he be not in possession of them, he must state why they are not produced, and in whose hands he believes they are; he shall then be entitled to have a dividend set apart till a reasonable time be afforded for production of them, or otherwise establishing his debt; but he shall not be entitled to act or vote, till such production be made, or the debt established. See *Bell's Com.* ii. 309;] *Ersk.* B. iii. tit. 2, § 24; tit. 7, §§ 17, 25; *Bell's Princ.* §§ 585, 629, 635; [*Dickson on Evidence*, §§ 484, 1225. See *Sequestration. Count and Reckoning.*]

ACCRETION; takes place when a right, originally imperfect or defective, is completed in the person of the holder by some posterior act on the part of him from whom the right is derived. The term is usually applied to the titles of heritable property, and may be best illustrated by an example. Thus, if one having a good personal right to lands, but not infeft, sells the lands, and grants the purchaser a precept of sasine on which infeftment is taken, such infeftment, as flowing *a non habente potestatem*, will vest the purchaser with no feudal right. But if the seller should afterwards perfect his own feudal right by infeftment, his posterior infeftment, *jure accretionis*, will validate the prior precept, and the sasine following thereon, in favour of the purchaser, and thus complete the purchaser's feudal right to the lands. The maxim which applies to such a case is *Jus superveniens auctori accrescit successoris*; and the principle is said to be the principle of warrandice, express or implied; the law doing what the granter of the right is otherwise bound to do. [A doubt is expressed by

[Prof. Bell (*Princ.* § 882), whether accretion takes place in the case of a disposition granted by one who at the time has no right at all to the subject, but who acquires a right by a subsequent title. This doubt, however, has been negated by the decisions in *Glassford's Exrs.* 9 March 1850, 12 D. 893, and *Swan*, 22 March 1866, 4 Macph. 663. The doctrine applies to gratuitous, as well as to onerous deeds; *M'Gibbon*, 5 March 1852, 14 D. 605. But the infetment of an heir does not accresce to a right granted by his ancestor, who died uninfet; *Keith*, 1792, M. 2933, 7767. Nor does the infetment of assumed trustees accresce, so as to validate a right granted by trustees who died uninfet; *Martin*, 3 Feb. 1841, 3 D. 485. See also *Norton*, 6 July 1813, F.C.; *Redfean*, 7 March 1816, F.C. The doctrine does not hold against a bare consenter to a disposition if he has not expressly bound himself in warrandice; for no warrandice can be fixed by implication against a consenter, whose implied obligation can only be understood to bar him from objecting to the disposition upon any right then in his person; *Forbes*, 1668, M. 6524; *Stuart*, 1681, M. 7762. See *Consenter*. Accretion validates infetments according to the priority of their dates; and even when the title is completed on the application of one of the competitors, and with the intention of validating his right alone, it will nevertheless accresce to the other, if his sasine be prior in date; *Neilson*, 1738, M. 7773; *Paterson*, 1742, M. 7775, Ross's L. C. iii. 304; *Henderson*, 5 July 1821, 1 S. 104. On this principle, when one having only a personal right to land grants securities thereon, and thereafter becomes bankrupt, if the trustee on his sequestrated estate makes up his title through the bankrupt, by completing the title of the latter, the securities will be validated not *pari passu*, but according to the dates of infetment. It is therefore advisable that the trustee should so complete his title as to leave the bankrupt out of the process. See *Miller*, 5 July 1836, 14 S. 1087; *Edmond*, 26 Feb. 1858, 3 Macq. 116; *Goudy on Bankruptcy*, 259; but see *Bell's Com.* i. 738.] See on this subject, *Stair*, B. iii. tit. 2, § 1; *Ersk. B.* ii. tit. 7, §§ 2, 3; *Bell's Com.* i. 737; *Bell's Princ.* §§ 852, 881; *More's Notes on Stair*, ccxciii.; *Bank.* i. 390, 588; ii. 194; [*Menzies' Conv.* 660; *M. Bell's Conv.* ii. 741, 1141. As to accretion in destinations, see *Survivorship. Legacy.*]

ACCUMULATE SUM; is the sum for

which decree of adjudication is pronounced, composed, in the general adjudication, of the principal sum of 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. There is no instance, however, of a special adjudication being carried into effect. See *Adjudication*.

[ACCUMULATION. Under the Thellusson Act, a direction in a will to accumulate income beyond a certain period is void. See *Thellusson Act.*]

ACKNOWLEDGMENT. This term is frequently applied to a written admission or acknowledgment that a certain sum of money has been paid to the party granting the acknowledgment. [In general, such acknowledgment is held to import the constitution of a debt, and an obligation to repay; and this presumption can only be rebutted by proof that the payment acknowledged was in extinction of a debt previously constituted; *Ogilvie*, 1703, M. 11,510; *Ross*, 24 Nov. 1809, F.C. See *Loan.*] Where the acknowledgment is meant as a mere voucher of payment, equivalent to a receipt, it will be effectual, subject only to a penalty under the stamp laws if it has not been written on a proper receipt stamp. But where the acknowledgment is given as the voucher of a loan, care must be taken not to include in the acknowledgment a promise to pay, or to repay the money when required, or against any specified future time, as such an engagement converts the acknowledgment into what law holds equivalent to a promissory note, which is not actionable unless written on a proper bill stamp, the want of which cannot be supplied by getting the writing afterwards stamped. See *Promissory Note*. [In English law, a ratification by a married woman is called an acknowledgment. See *Sweet's Law Dict.*]

[ACQUIESCENCE. Consent to an act, or course of action, is often inferred from acquiescence, so as to bar challenge of what would otherwise have been an infringement of rights. Thus, "where great cost is incurred by operations carried on under the eye of one having a right to stop them, or where, under the eye and with the knowledge of him who has the adverse right, something is allowed to be done which manifestly cannot be undone, the law will presume an agreement or conventional permission as a fair ground of right;" *Bell's Princ.* § 946. Acquiescence means more

[than mere silence; knowledge of the acts done is essential, otherwise consent could not be inferred. Acquiescence must be specially pleaded in defence; and the facts and circumstances from which it is to be inferred must be set forth on record. See *Cowan*, 15 Dec. 1865, 4 Macph. 236; and other cases mentioned in *Rankine on Land-Ownership*, 329, 396. See also *Pollock on Contract*, 548. See *Taciturnity. Mora. Homologation.*]

ACQUITTAL; signifies a deliverance from a charge of guilt. Acquittal by the jury has no force until the Court has given judgment upon the verdict; but after such judgment the person acquitted cannot be again tried for the same offence. *Tomlins' Dict.* [See *Res Judicata.*]

ACQUITTANCE; a release or discharge in writing of a sum of money or debt. The word is rather an English than a Scotch law term. *Tomlins.* See *Discharge.*

ACRE; the principal denomination of land-measure in Great Britain. The English standard acre, now the imperial acre of Britain, is a square raised from the basis of the chain of 66 feet, or 22 yards, or 1-80th of a mile. Ten of these squares form the acre, which thus contains 4840 square yards. This is divided into *roods*, of which there are four in the acre, and into *poles* or *perches*, of which there are 40 in each rood. The Scotch acre is considerably larger than the imperial. It is raised from the chain of 24 ells, and it was formerly the practice of land surveyors to measure with a chain of 74 feet and 4-10ths of a foot in length, the ell having been erroneously estimated at 37 inches and 2-10ths of an inch, whereby the Scotch acre came to about 6150 square yards,—i.e., a Scotch acre was equal to 5 quarters and a fraction imperial. By 5 Geo. IV. c. 74, the imperial acre is declared the standard throughout the United Kingdom of Great Britain and Ireland. See *Encyc. Brit. h. t.*

ACRE-DALE, or **AIKER-DAILL**; a term sometimes met with in old deeds and writings, signifying lands in the neighbourhood of villages or towns let in small portions of an acre or so. *Wood's Hist. of Parish of Cramond*, p. 98.

ACT AND COMMISSION; is the judicial act, whereby, in the Court of Session, a commission is granted to a special commissioner for taking a proof, or examining havers, in a depending action. See *Evidence. Commission.*

ACT OF ASSEMBLY. The acts of the General Assembly of the Church of

Scotland, 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 (Act ix. Ass. 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 a majority of 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. [But, by an Act of Assembly of 1848, no overture can be converted into an interim act, which involves any essential alteration of the existing law or practice of the church. See *Cook's Styles*, 288; *Hill's View of the Constitution*, 110; *Mair's Church Laws*, 36. See *Church Judicatories. Overture.*]

ACT OF BANKRUPTCY. In the law of England, there are certain ostensible indications of insolvency on the part of a debtor, which are sufficient to bring the debtor within the operation of the bankrupt laws. [By the English Bankruptcy Act (46 & 47 Vict. c. 52), § 4, the following acts or defaults on the part of the debtor are acts of bankruptcy:—(1) Having made an assignment of his property in trust for his creditors generally. (2) Having made a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof. (3) Having made a conveyance amounting to a fraudulent preference. (4) Having, with intent to defeat or delay his creditors, departed out of England, or,

[being out of England, remained out of England; or having absented himself; or begun to keep house. (5) Having suffered execution on his goods. (6) Having filed in the Bankruptcy Court a declaration admitting his inability to pay his debts, or having presented a bankruptcy petition against himself. (7) Having neglected to pay or secure a judgment debt after service of a bankruptcy notice. (8) Having given notice to any creditor of suspension of payment. See *Wharton's Lex. h. t.*] The expression "act of bankruptcy" is unknown in Scotch legal phraseology; but in the definition of notour bankruptcy, under the acts 1696, c. 5 [and 19 & 20 Vict. c. 79], an enumeration of the indications of bankruptcy, analogous to the English acts of bankruptcy, will be found. See *Bankruptcy*.

ACT OF GOD; in law language, signifies any inevitable accident occurring without the intervention of man; such as from storms, lightning, tempests, &c. Losses arising from these and similar 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 [carriers] from their obligation under the edict, *Nautæ, cauponæ, stabularii*. [Loss by accidental fire, however, is excepted from this rule by 19 & 20 Vict. c. 60, § 17. The act of God does not necessarily mean such an occurrence as could not possibly have been foreseen and prevented, but such as the carrier could not reasonably have been expected to foresee and prevent. See *Nugent*, 1876, 1 C.P.D. 423; *Nitrophosphate Co.* 1878, 9 Ch. D. 503. See *Anson on Contract*, 273; *Pollock on Contract*, 366; *Macnamara on Carriers*, 40;] *Bell's Com.* i. 409, 606. [See *Nautæ. Carriers. Charter Party. Damnum Fatale.*]

ACT OF GRACE. The act 1696, c. 32, for the aliment of poor prisoners incarcerated for non-payment of debt, is called the Act of Grace. The original object of this enactment was to relieve royal burghs of this expense; but, practically, it has mitigated the severity of the law of imprisonment for debt. By 6 Geo. IV. c. 62, the older statute has been amended and improved; and the following are now the leading provisions of the law on the subject: No keeper of a jail is entitled to receive a prisoner to be confined for civil debt, until the incarcerating creditor, or some one on his behalf, deposits in the jailor's hands

ten shillings for aliment of the prisoner. Where aliment is afterwards awarded to the prisoner under the act 1696, c. 32, the jailor is bound to pay the aliment at the rate allowed, out of the deposit of ten shillings, from the date of the imprisonment until the money is exhausted. Where the prisoner is refused aliment, the ten shillings are to be returned to the depositor; or where the prisoner does not apply for aliment for thirty days after commitment, the ten shillings are also to be returned. So also, where aliment has been awarded, but the ten shillings are not exhausted at the debtor's liberation, the unexhausted balance must be returned. And finally, where, before the prisoner can avail himself of the act 1696, the creditor consents to his liberation without payment of any part of the debt, the ten shillings are to be returned to the depositor, under deduction of the prisoner's aliment during his confinement, at the lowest rate usually allowed by the magistrates of the particular burgh. Every prisoner petitioning for the benefit of the Act of Grace must, when desired, execute a disposition *omnium bonorum*, in favour of the incarcerating creditor, for behoof of the other creditors, and at the expense of the creditor demanding the disposition. If, after being duly required, in writing, to execute such disposition, the debtor refuses or delays, he is entitled to no aliment while so refusing. A prisoner who desires the benefit of the Act of Grace must apply by petition to the magistrates of the burgh, and must swear that he has no means of subsistence. He must also be actually in prison at the time. He cannot apply while at large, on a sick bill; and his application, when made, must be intimated to the incarcerating creditor or creditors, by service of the petition. The term allowed to the creditor either to provide an aliment, or to consent to liberation, is ten days from the service of the notice; and if within that time aliment be not lodged, the debtor may be liberated. [See *Thomson*, 23 Jan. 1878, 5 R. 561.] He may be liberated on the tenth day; and where the incarcerating creditor lodges a sum with the jailor, to be applied in payment of the aliment awarded, the debtor will be liberated if the creditor fail to lodge a further sum, before the sum in the hands of the jailor is actually exhausted. It was at one time thought, that where the debt in respect of which the debtor had been incarcerated was a debt arising *ex delicto*, he was not entitled to the benefit of the

ACT OF SEDERUNT

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act. But this is a mistake. Whatever be the origin of the debt, if it be of the nature of a civil debt due to a private party, whether *ex contractu* or *ex delicto*, the debtor is entitled to the benefit of the act. On the other hand, where the debt is a fine imposed *in modum pœne*, for the public interest, the debtor cannot claim the benefit of the Act of Grace against the public prosecutor, on the plea of inability to pay the fine; but must be alimented from the public fund appropriated to the aliment of prisoners *ex delicto*. [But the Crown is bound to aliment a prisoner confined for non-payment of taxes; *Mags. of Inverness*, 29 Jan. 1856, 18 D. 366.] A prisoner incarcerated for not performing an act within his own power, or *ad factum præstandum*, is not entitled to the benefit of the act. The *quantum* of aliment awarded varied in different burghs, but was in general very moderate; and in fixing it, the magistrates acted subject to the review of the Court of Session. [But, by the Civil Imprisonment Act, 1882 (45 & 46 Vict. c. 42), § 8, the jailor or other person in whose hands the sum of ten shillings shall have been deposited, in terms of the act 6 Geo. IV. c. 62, as a means and security for the aliment of any civil prisoner, shall, as from the date of his imprisonment, pay out of the same the aliment of the said prisoner, at the rate of not exceeding one shilling *per diem*; provided that, if such prisoner shall not apply for or shall not be found entitled to aliment, any sum expended under this enactment shall be a debt due by him to the incarcerating creditor.] Where the debtor has an aliment from any source, no matter under what restrictions it may have been given, he must either surrender that aliment to the incarcerating creditor, or forego the benefit of the act. A debtor who has obtained the benefit of the Act of Grace, and who has been liberated in consequence of the creditor's failure to lodge aliment, may be afterwards reincarcerated under the same diligence; although this is a power which a creditor would not be permitted to use oppressively. See *Bank. iii.* 20, § 8; *Ersk. B. iv. tit. 3*, § 28; *Bell's Com. ii.* 445; *Bell's Princ.* § 2320; [*Goudy on Bankruptcy*, 583; *Shaw's Digest, h. t.* See *Cessio. Imprisonment.*]

ACT OF PARLIAMENT. An Act of Parliament is a law passed by all the three branches of the legislature; the King (or Queen), the Lords Spiritual and Temporal, and the Commons, in Parliament assembled.

This is the highest legal authority known in the constitution; and a statute so enacted cannot be altered, repealed, or suspended, except by the same authority, or (in Scotland) 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 in the baron courts. This mode of promulgation, however, was gradually dropped as the use of printing became common; and, by 1581, c. 128, the publication at the market-cross of Edinburgh was declared to be sufficient. British statutes require no formal promulgation. See *Statute Law. Assent, Royal. Desuetude. Parliament.*

ACT OF SEDERUNT; an ordinance of the Court of Session, made originally under authority of the act 1540, c. 93, whereby the judges are empowered to make such statutes as may be necessary for the ordering of processes, and the expediting of justice. The power thus conferred was occasionally exceeded; and it became necessary, accordingly, to ratify several of the Acts of Sederunt in the Scotch Parliament. In so far, however, as Acts of Sederunt are confined to declarations of the purpose of the court to decide in a particular way on an occurrence of similar circumstances, they seem to amount to little more than authoritative announcements of the intention of the court to adhere judicially to certain precedents. The Acts of Sederunt which partake most of the legislative character are the acts 24 June 1665, as to pro-tutors, 28 Feb. 1662, as to executors-creditors, and 14 Dec. 1756, as to the removing of tenants. But with these exceptions, the Acts of Sederunt of the Court of Session have been confined, for the last two centuries, almost exclusively to the regulation of judicial procedure, and to matters therewith connected. In recent statutes, express power is given to the Court of Session to pass Acts of Sederunt for carrying the purpose of the legislature into more complete effect. The old quorum of nine judges is requisite in passing an Act of Sederunt; 48 Geo. III. c. 151, § 11. [See *Alexander's Abridgment of the Acts of Sederunt*, with supplements for those passed prior to December 1851; and *Adam's Acts of Sederunt* for those passed between that date and October 1886.] See also *Ersk. B. i. tit. 1*, § 40; *Stair, B. i. tit. 1*, § 16; *Bank. i. p. 28*; [*Shand's Prac. i.* 45. See *Books of Sederunt.*]

ACT OF WARDING; is a warrant issued by the magistrates 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 a registered protest of a bill. The privilege of granting such warrants is peculiar to the magistrates of royal burghs. It has been traced (erroneously it is believed) to the 2d stat. Robert I. c. 19, *Reg. Mag.* p. 361; and was for long the only direct execution for payment of debt known in Scotland; imprisonment 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; 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*, i. 255, there are some interesting historical speculations connected with this subject. [This form of diligence, as well as hornings and captions, has been superseded by the simpler forms introduced by the Personal Diligence Act. See *Diligence*.] See *Bell's Com.* ii. 430; *Stair*, B. iv. tit. 47, § 1; *Bank.* iii. 1, § 2; *Kames' Stat. Law Abridg. voce Personal Execution*.

ACTILIA; armour, weapons, harnessing. See *Skene, De Verborum Significatione*.

ACTIO DIRECTA ET CONTRARIA. Contracts and obligations in the Roman law gave rise to two actions: the *actio directa*, for enforcing implement of the essential obligation; and the *actio contraria*, for enforcing the counter obligation. Thus, in the contract of commodate, the *actio directa* was competent to the lender against the borrower, to compel him to return the thing lent; and the *actio contraria* to the borrower, to enforce his counter claims arising out of the contract. So the *actio tutelæ directa* was competent to the minor, on the expiration of the tutory, against the tutor, for compelling him to account and pay. The *actio contraria* to the tutor against the minor, for reimbursement of the expense necessarily disbursed in the pupil's affairs. And, generally speaking, in all contracts, the leading and essen-

tial obligation produced the *actio directa*, the counter obligation the *actio contraria*. *Stair*, B. iv. tit. 3, § 37; *Ersk.* iii. tit. 1, § 24.

ACTIO QUANTI MINORIS. See *Quanti Minoris*.

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 that, if the buyer had been made acquainted with it, he would not have become a purchaser. [See *Warranty*.]

ACTION. An action is the judicial process, whereby legal rights and obligations, whether personal or real, heritable or moveable, are asserted and ascertained, and vindicated or made effectual by the competent tribunals for determining the question at issue, and warranting the appropriate execution. Actions are either *civil* or *criminal*. Civil actions properly so called, are those which, whether founded on a civil right or obligation, or on a crime or delict, are prosecuted merely *ad civilem effectum*, for enforcement of the right or reparation of the private injury. Criminal actions, on the other hand, are actions in which the offender is prosecuted *ad vindictam publicam*; or for the punishment of his offence against the public. In the practice of the law of Scotland, although these two classes of actions occasionally present themselves in something of a mixed form, yet, generally speaking, the line of demarcation is sufficiently distinct for all practical purposes; as is explained under separate articles. In the Court of Session, civil actions are classified by institutional writers, as *actions of the first instance*, including petitory, possessory, declaratory, rescissory, and accessory actions, and summary actions, such as petitions, or petitions and complaints under particular statutes, or for contempts of court, or against members of the College of Justice for malversation or misconduct, or the like; and *actions of the second instance*, such as advocations, suspensions, and reductions of decrees. The nature of these several actions is explained under their respective heads. In Scotland, there is no classification of actions according to certain inflexible formulas. Such an arrangement, however captivating

in theory, is not adapted to the exigencies of actual business, and to the blended and complex character which questions of civil right frequently assume. Hence, there is hardly any combination of circumstances, and no involution of conflicting claims either of right or of *status*, which may not be explicated in the Court of Session, by means of an action founded on the special circumstances of the particular case; and concluding for the proper legal remedy or redress. In the inferior courts this is not always attainable, their jurisdiction being limited, not only in territorial extent, but also with respect to the description of actions which may be competently brought before them. On the subject of civil actions, as comprehending not only the judicial processes, but the executorial, or *diligences*, as they are termed in the law of Scotland, whereby civil rights are made effectual, and enforced by legal execution, see *Stair*, B. iv. tit. 3; *Bank*, B. iv. tit. 23; *Ersk.* B. iv. tit. 1; [*Shand's Practice*; *Mackay's Practice*.]

ACTOR; a counsel or advocate. The term is still used by the clerks of the Court of Session, who, in prefixing the *partibus* or minute of appearance to interlocutors, designate the respective counsel for the parties *Actor* and *Alter*.

ACTOR SEQUITUR FORUM REI; a Roman law maxim, importing that the pursuer of an action must follow the *forum* of the defender; *i.e.*, if the defender is not amenable to the courts of Scotland, the pursuer must raise his action against him in the country to the laws of which he is subject. See *Abroad*. [*Foreign*.]

ACTORNATUS; according to Skene, is he who makes answer for another in judgment, specially for the defender; as *prolocutor* is he who speaks for the pursuer. Also an attorney or procurator for another. See *Skene*, *De Verb. Sig.*

ACTUS; one of the Roman law rural servitudes of passage or way. The servitude *iter*, in that law, signifies the dominant proprietor's right to a foot and horse passage for himself, his family, and tenants, through the servient proprietor's lands; and the servitude *actus* superadds to the *servitus itineris* the right also of using the road for carriages drawn by men, and for driving cattle. *Ersk.* B. ii. tit. 9, § 12; *Stair*, B. ii. tit. 7, § 10; *Bank*, i. 678. See *Road*. *Iter*. *Via*.

[**ADEMPITION**. See *Legacy*.]

ADHERENCE, ACTION OF. By the act 1573, c. 55, where either of the spouses

deserts the other without a reasonable cause, and remains in his or her "malicious obstinacy" for four years, the injured party may raise an action of adherence before the judge ordinary. By the former practice, if the pursuer obtained decree of adherence, and the defender disobeyed the sentence, letters of horning might be obtained under the signet, to enforce the decree. If this failed, the church was directed to admonish the defender to adhere, on pain of excommunication; and if these several steps proved unavailing, the injured party might raise an action of divorce on the ground of desertion. [But by the Conjugal Rights Act, 1861 (24 & 25 Vict. c. 86, § 11), the decree of adherence, as well as the presbyterial admonitions, are dispensed with as preliminaries to an action of divorce on the ground of desertion; which may proceed at once, on desertion for four years. An action of adherence, however, is still competent, and generally contains conclusions for aliment as well as for adherence. Such action must be brought before the Court of Session; 13 & 14 Vict. c. 36, § 16. It is barred by cruelty or adultery on the part of the pursuer; see *A. B.*, 3 Dec. 1853, 16 D. 111; or by the subsistence of an order of protection, under the Conjugal Rights Act, § 3.] See *Ersk.* B. i. tit. 6, § 44; *Lothian's Consist. Prac.* 96; *More's Notes to Stair*, xxvi.; *Bank*, i. 139; [*Fraser on Husband and Wife*, ii. 867; *Mackay's Prac.* ii. 282; *Jurid. Styles*, iii. 157.] See *Desertion*. *Divorce*.

ADJOURNAL. See *Books of Adjournal*.

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 court has power to adjourn a jury trial, but this is only exercised in case of necessity. See *A.S.* 16 Feb. 1841, § 25; *Macfarlane's Jury Prac.* 245; *Mackay's Prac.* ii. 55. A proof before a Lord Ordinary may also be adjourned on special cause, under 29 & 30 Vict. c. 112, § 1. In the Court of Justiciary, a trial may be adjourned to a day fixed, but not *sine die*. See *Hume*, ii. 275; *Macdonald*, 459. See *Continuation of Diet*. As to adjournment of parliament, see *Parliament*.]

ADJUDICATION FOR DEBT. Adjudication is the modern real diligence for attaching land and other heritable estate in satisfaction of debt. It has been substituted for the apprising, which seems to have been originally a very summary proceeding, by which, where the debtor was not possessed of sufficient moveable pro-

perty, the sheriff was authorised to give him notice to sell his lands within fifteen 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 1469, c. 36, 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 was 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, apprising appears to have been conducted for some time with a due regard to the mutual interests of the parties; but the execution of the act, in the country, having fallen into the hands of messengers-at-arms, abuses arose, which were attempted to be remedied by conducting the apprising in every case in 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 enacted, that the legal reversion of seven years should not run against minors. The act 1661, c. 62, prorogated the legal reversion of apprisings from seven to ten years, and provided that all apprisings within year and day of the first effectual one should rank *pari passu*; defining the first effectual apprising 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 apprising is also declared by that statute to be common to all who shall take benefit by it. It was, however, by the act 1672, c. 19, that the modern adjudication was introduced. That statute, after narrating the various abuses of the old system of apprisings, enacted that, in place of apprising, a process should be raised in the Court of Session against the

debtor, in which the court should adjudge from him a part of his lands, or other estate in use to be appraised, 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 was put by being obliged to take land instead of money. The value of the land so to be adjudged was to be ascertained by a proof of the rental or profits, to be led by the debtor (if he chose) and the creditor before the court. Upon the decree of adjudication thus obtained the creditor was entitled immediately to enter into possession; and as the land so set apart was considered as of the nature of a *surrogatum* for the debt, the creditor was 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 was called a *special adjudication*, was made five years after the date of the decree; and it was declared that after the creditor had attained possession under the decree, he should have no farther execution against his debtor by arrestment, caption, or otherwise, except in the case of eviction under the warrantice. But as these statutory provisions proceeded on the supposition that the debtor was to produce a sufficient progress of titles, and to ratify the decree of adjudication, and cede summary and quiet possession to the creditor, it was farther enacted that, where the debtor did not comply with these requisites, it should 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 was the *general adjudication*; and it concluded only for the principal sum, interest, and penalty, but not for a fifth part more; A.S. 26 Feb. 1684. In the case of a special adjudication, the creditor could not also resort to personal and other diligence against the debtor, but he was under no such restriction in the case of the general adjudication. [See also *Articulate Adjudication*.]

The action of adjudication introduced by 1672, c. 19, could not proceed until the debt had been constituted either by a decree ascertaining its precise amount, or by a liquid ground of debt; and the summons of adjudication, after stating the manner in which the debt was constituted, and narrating the statute 1672, concluded alternatively for a special or general adjudi-

cation. This alternative conclusion was necessary, because, although there is hardly an instance of a special adjudication, yet it was only on the debtor's refusal to avail himself of the first alternative, that the court was authorised by the statute to pronounce a decree in the general adjudication. [But it is now unnecessary to conclude for special adjudication, and general adjudication is concluded and decreed for without any such alternative; 10 & 11 Vict. c. 48, § 18; 31 & 32 Vict. c. 101, § 59.] The decree in the action adjudges the lands, &c., to the creditor [for payment and satisfaction to him of the principal debt and interest down to the date of decree, and also of interest on the accumulated sum during the not redemption of the said lands, &c.] 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 sixty days, in a register appointed for the purpose. See *Abbréviate*. [A trust estate may be adjudged, for expenses decreed for against the trustees in a litigation in which the trust estate was alone concerned; *Stewart*, 8 Feb. 1888, 15 R. 383.]

The subjects which may be adjudged, are heritable estate in its most extensive signification, including not only feudal rights, but all rights or interests affecting or connected with land, such as heritable bonds and real securities, or burdens or faculties of all kinds, as also annuities and all rights having a tract of future time, liferents, reversions, rights of tack where assignees are not excluded, heirship moveables, heritable offices of dignity or jurisdiction, personal rights to lands, personal bonds excluding executors, rights of patronage, stock of any chartered bank where the diligence of arrestment is excluded, the husband's right to the rents of his wife's estate, rights to reduce *ex capite lecti*, fair, harbour and ferry dues, entailed estates during the life of the heir, and the like. As the adjudication is a diligence, the summons contains no conclusion for expenses of process; although, where decree is unduly opposed, it would seem that the court may award expenses; decree for which, in such a case, ought to be taken in name of the agent disburser. The debt on which the adjudication proceeds must be liquid, and legally vested in the pursuer's person, by direct obligation, or by assigna-

tion, or by confirmation; and cannot be constituted in the process of adjudication itself, except in the case of adjudication *contra hæreditatem jacentem* (which see), [and in the case of an action against an unentered heir, in which the conclusions for constitution and adjudication may be combined, *ut infra*.] Formerly by the mere citation of the debtor the subject to be adjudged became litigious; [but now, by 31 & 32 Vict. c. 101, § 159, litigiosity does not take place until registration of a notice of the signeted summons; see *Litigiosity*.] By 54 Geo. III. c. 137, § 9, [re-enacted by 19 & 20 Vict. c. 91, § 5,] the Lord Ordinary before whom the first process of adjudication is called, ordains intimation thereof to be made in the Minute-Book and on the walls 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 twenty sederunt days are allowed. At the expiration of the twenty days, those who can produce instructions of their debts, with summonses of adjudication, labelled and signeted, are conjoined in one and the same adjudication. This procedure is proper to the first adjudication only. In the action of constitution with a view to adjudication, where delay might exclude the creditor from the *pari passu* ranking, the Lord Ordinary will pronounce decree of constitution at once, reserving all objections *contra executionem*; and with the same view, the court, on a special petition, will dispense with the *induciae* and calling of the summons, and with the reading of the decree in the Minute-Book. But this indulgence will only be granted to secure the *pari passu* ranking, within year and day of the first effectual adjudication. After the lapse of the year it becomes a race of diligence, as against the residue, and no such favour can be shown to any one creditor. As to the form of process, so far as affected by the Judicature Act, 6 Geo. IV. c. 120, the regulation is, that in processes of adjudication, it is in the power of the court and of the Lord Ordinary to require the parties to proceed according to the forms applicable to ordinary actions, in so far as it shall appear fit or expedient to apply these; but in so far as compliance with these rules is not specially required, the forms in use before the passing of the statute remain in force; except only as to the review of interlocutors, which is regulated by the general rule of the Judicature Act, and relative Act of Sederunt (11 July

1828, § 103). An ordinary adjudication is rarely opposed to the effect of rendering a record necessary. In a work such as the present, the minute practical details connected with this important step of real diligence would be out of place; but they will be found fully digested in [*Shand's Prac.* ii. 692; *Parker on Adjudications*, 23;] *Jurid. Styles*, iii. 101; *Bell's Styles*, vi. 393.

[By 19 & 20 Vict. c. 91, § 6, "in order to fix more clearly in time coming what diligence is necessary to make an adjudication effectual," it was declared that "the lodging of a draft charter and note in the office of the Presenter of Signatures" (now of the Sheriff of Chancery; see 31 & 32 Vict. c. 101, § 64; 37 & 38 Vict. c. 94, § 57), "when the holding is of the Crown, or the executing a charge of horning against superiors when the holding is of a subject, and recording a copy of such note, and an abstract of such draft charter or such charge in the Register of Abbreviates of Adjudications, shall be held in all time coming as the proper diligence for the purpose aforesaid." This procedure is still competent, but has been superseded by the following enactments. By 31 & 32 Vict. c. 101, § 62, as amended by 37 & 38 Vict. c. 94, § 62, a decree of adjudication, or of constitution and adjudication, whether for debt or in implement, is equivalent to a conveyance, by the person *in titulo* to grant such conveyance, of the lands or subjects therein contained (excepting the case of heritable securities); and the adjudger may complete feudal titles to the lands by infestment on such decree as a conveyance, or by using it, for the purpose of infestment, as an assignation of an unrecorded conveyance. Under the act of 1874, such infestment also implies entry with the superior. When the subjects adjudged are heritable securities, the adjudger may complete his title by recording the abbreviate or the extract decree of adjudication; 31 & 32 Vict. c. 101, § 129, as amended by 37 & 38 Vict. c. 94, § 65.] 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 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 the dates of recording the abbreviates; 1661, c. 31. The first effectual adjudication, being thus the criterion of the *pari passu* preference,

is held not merely as a private diligence belonging to the user, but as a general diligence in which all the adjudging creditors of the debtor have an interest; nor, relatively to the other adjudications, will it lose its legal character of the first effectual adjudication, although the debt on which it proceeds may have been paid off, and the adjudication thus extinguished as an individual diligence; *Bell's Com.* i. 755. [Under the Bankruptcy Act, sequestration is equivalent to a decree of adjudication of the heritable estates of the bankrupt; and when the sequestration is dated within year and day of any effectual adjudication, the estate is disposed of under the sequestration; 19 & 20 Vict. c. 79, § 107. See *Sequestration*. And, by 49 Vict. c. 23, § 3, winding up of a company, by or under supervision of the court, is equivalent to a decree of adjudication. See *Joint Stock Company*.]

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 of declarator 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 eminent lawyers have doubted how far the rule is a proper one. See *Bell's Com.* i. 744. A charter of adjudication

and infetment, followed by forty years' possession, forms a good irredeemable title without a declarator of expiry of the legal; *Robertson*, 10 May 1815, 3 Dow 114. [But a decree of adjudication, with infetment thereon, even when followed by a decree of declarator of expiry of the legal, does not constitute "an *ex facie* valid irredeemable title to an estate in land," in the sense of § 34 of the Conveyancing Act of 1874; and therefore the shortened period of prescription introduced by that section does not apply to the case of possession following upon such a title; *Hinton*, 6 July 1883, 10 R. 1110. See *Prescription*. Until decree of expiry of the legal, the debtor remains vassal; and the adjudger's right is not one of property, but a mere *pignus praetorium*; *Cochrane*, 25 March 1850, 7 Bell's App. 65.

[When an action of adjudication is to be brought against the heir of a deceased debtor, if the heir has entered, the debt must first be constituted against him by action of constitution. If the heir was unentered, it was necessary, prior to 1847, to execute letters of general charge, under the signet, charging him to enter within forty days, with certification that if he failed, the creditor should have action against him in the same manner as if he had entered. If the heir failed to enter, an action of constitution was raised; and after decree was pronounced therein, letters of special charge, where the ancestor was infet, or letters of general special charge, where he was not infet, were executed against the heir, failing compliance with which an action of adjudication might be raised. See *Charge*. If the lands were to be adjudged for the heir's own debt, the preliminary letters of general charge were unnecessary, but otherwise the same procedure was followed. Letters of general and special charge, however, were abolished, and a simpler procedure substituted, by 10 & 11 Vict. c. 48 and 49, the provisions of which were re-enacted by the Consolidation Act of 1868. By § 60 of that act, the citation on and execution of the summons in an action of constitution of an ancestor's debt or obligation, against his unentered heir, is declared to be equivalent to a general charge, and to infer the like certification. And in an action of adjudication, whether for debt or in implement, following on such decree of constitution, or in an action of adjudication against an unentered heir founded on his own debt or obligation, the citation on and execution

[of the summons is declared to be equivalent to a special charge, or general special charge, as the circumstances may require, and to infer the like certification. The same section (re-enacting provisions of the Titles Acts of 1858 and 1860) declares that, in actions of constitution and adjudication against an unentered heir on account of his ancestor's debt or obligation, for the purpose of attaching the ancestor's heritable estate, both actions may be combined in one summons, whether the heir renounce the succession or not; and the citation on and execution of the summons are equivalent to a general charge (where the heir is to renounce), or to a general charge and a special charge (where the heir is not to renounce, and the ancestor was infet), or to a general charge and a general special charge (where the heir is not to renounce, and the ancestor was not infet), and infer the like certification. In all these cases the *induciae* expire with the *induciae* of the summons, and the same procedure is adopted as if the summons had been preceded by letters of charge, as formerly. When the heir renounces, decree of constitution is pronounced *cognitionis causa*, and thereafter decree of adjudication *contra haereditatem jacentem* (see next article). By § 61 of the act of 1868, actions of constitution and adjudication against an apparent heir may be insisted in at any time after the lapse of six months from the date of his becoming apparent heir. By § 12 of the Conveyancing Act of 1874, an heir is not liable for his ancestor's debt beyond the value of the estate. If he renounce, the creditors of the ancestor have the same rights against the estate, as upon a renunciation before the passing of the said act; and the heir is only liable to the extent of his intromissions.]

See *Stair*, B. iii. tit. 2, § 14; B. iv. tit. 51; *More's Notes*, cxciv.; *Bank*. ii. 217; *Ersk.* B. ii. tit. 12; *Bell's Com.* i. 740; *Bell's Princ.* §§ 823, 2299; *Kames' Stat. Law Abridg. h. t.*; *Kames' Princ. of Equity* (1825), 244-5, 282, 296-7, 390-9; [*Parker on Adjudication*; *Shand's Prac.* ii. 656; *Mackay's Prac.* ii. 327; *Menzies' Conv.* 873; *M. Bell's Conv.* ii. 1191; *Goudy on Bankruptcy*, 520; *Jurid. Styles*, iii. 101; *Ross's L. C.* i. 133.]

ADJUDICATION CONTRA HAEREDITATEM JACENTEM. When the debtor's apparent heir, who has been charged to enter, renounces the succession, the creditor obtains a decree *cognitionis causa*. The heir, in respect of his renunciation, is

assolized, but the *hæreditas jacens* of his predecessor is subjected to the creditor's diligence; and the decree is called a decree *cognitionis causa tantum*, because its purpose is to ascertain the amount of the debt, so that adjudication may proceed against the heritage of the deceased. In cases where it is expected that the heir is to renounce the succession, a conclusion for adjudication is introduced into the summons of constitution; and, when the heir renounces, decree of adjudication *cognitionis causa* is pronounced. This adjudication carries right to the rents [accruing since the death of the party last infeft, and] due prior to the date of the decree, and is redeemable within seven years by any co-adjudging creditor, either of the deceased debtor or of the heir who has renounced; but the heir himself can neither be restored against his renunciation, nor redeem, unless on the head of minority; although, if it be an object to the heir to redeem, it may be accomplished indirectly by a simulate bond to a confidential person, who will redeem as a creditor of the heir. The superior of the lands thus adjudged was under the same obligation to enter the adjudger as in the case of apprisings by 1669, c. 18. The adjudication *contra hæreditatem jacentem* was in use before 1672, c. 19; and hence, as the exclusion of inferior courts applicable to adjudications substituted by that statute for apprisings does not apply, the adjudication *contra hæreditatem jacentem* may proceed before the sheriff court, provided that the subjects are within the sheriff's jurisdiction. No special or general special charge was necessary or competent after the heir's renunciation. This adjudication not being founded on the act 1672, the first alternative of that statute could not be concluded for, the adjudication *contra hæreditatem jacentem* being always a general adjudication. See *Ersk. B. ii. tit. 12, §§ 47, 53; Stair, B. iii. tit. 2, § 45; More's Notes, cccxvii.; Bank. ii. 220; [Bell's Com. i. 751; Bell's Princ. § 2304; Parker on Adjudication, 70; Ross's L. C. i. 304; Shand's Prac. ii. 689; Mackay's Prac. i. 207; ii. 343.]* See *Renunciation. Annus Deliberandi. Charge. Apparent Heir.*

ADJUDICATION ON DEBITUM FUNDI. Where there is a real burden, but no personal obligation, or where the personal obligation is ineffectual, as in the case of an heritable bond by a married woman, or where the object is to make the interest on interest equally preferable with

the principal sum, decree is, in the first place, taken in a process of poiding the ground. And the letters of poiding the ground having been executed, an adjudication, narrating the ground of debt, decree of poiding the ground, and execution of the letters is raised. This adjudication can affect no lands but those in the security; whereas the adjudication, when there is a personal obligation, may affect the whole heritable property of the debtor. Adjudications on *debita fundi*, as being preferable in respect of a real right, are not affected by the *pari passu* ranking of the act 1661, c. 62, which applies only to adjudications for personal debts. See *Bank. ii. 238; Bell's Styles, vi. 445; [Shand's Prac. ii. 687; Mackay's Prac. ii. 330.]* See *Debitum Fundi. Poiding the Ground.*

ADJUDICATION IN SECURITY. The adjudication in security is not founded on the above-cited statutes, but has been introduced and sanctioned by the court from equitable considerations. It is the form to be followed where the claim of debt is contingent, future, or uncertain in amount. To authorise such an adjudication, the debtor must be *vergens ad inopiam*, or other creditors must be adjudging. If it be a first adjudication, it must be intimated in common form (54 Geo. III. c. 137, § 9); and under 1661, c. 62, may compete *pari passu* with ordinary adjudications. The adjudication in security is completed like an adjudication for payment; but it has no legal, and may be redeemed at any time. It would seem that an ordinary adjudger may restrict his adjudication to a security; and with that view, in one case, the Lord Ordinary was held entitled to recall his interlocutor adjudging, and to adjudge *de novo* in security only; *Ker, 5 Feb. 1838, 8 S. 462.* See *Bell's Com. i. 332, 752, 777; Ersk. B. ii. tit. 12, § 42; More's Stair, cccxcvii.; Bell's Princ. §§ 832, 2305; Bell's Styles, vi. 488; Jurid. Styles, iii. 105, 126; [Shand's Prac. ii. 720; Parker on Adjudication, 63; Ross's L. C. i. 287; Mackay's Prac. ii. 344.]*

ADJUDICATION IN IMPLEMENT. Where a party has granted a conveyance to heritable property, [which is imperfect in its feudal clauses;] or where the grantee's right stands on a missive of sale, or [on any mere personal] obligation to convey; and where the granter or his heir refuses, or is unable, voluntarily to supply the defect, an action of adjudication in implement is competent. This action is directed against the granter, or the debtor in the obligation to

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convey, or his heir. The summons libels on the deed or writing containing or importing the obligation to convey, and the defender's refusal to implement it; and concludes that, in implement of the obligation, the subject ought to be adjudged from the defender, and declared to belong to the pursuer; that the defender should clear the subject of incumbrances, burdens, &c., or make payment to the pursuer of a sum necessary for that purpose; that he should deliver to the pursuer the title deeds of the subject; and, finally, that he should pay expenses of process. In this adjudication there is no legal and no *pari passu* ranking, because the action being pursued for the purpose of completing the pursuer's right to a special subject, the subject necessarily must be carried irredeemably (if such be the nature of the right); and for the same reason the title so completed, if otherwise unobjectionable, necessarily must be exclusive. But this form of action is competent only when there is an obligation to convey, express or implied; and the obligation must be duly constituted against the defender, as in the case of adjudication for debt. The adjudication in implement does not require to be intimated when called in the course of the rolls, since no other adjudication can be conjoined with it; but an abbreviate must be recorded. [The provisions of the Conveyancing Acts of 1868 and 1874, with reference to completion of title by adjudgers, are applicable to adjudication in implement as well as adjudication for debt; and the procedure appropriate to an adjudication against the debtor's heir, or against a debtor who is an unentered heir, is the same, whether the action be for debt, or in implement. See *Adjudication for Debt*.] In competitions of adjudications in implement, the first infetment gives the preference, without regard to the date of the decree, or diligence thereon; [see *Macgregor*, 9 March 1843, 5 D. 888; *Watson*, 22 Jan. 1868, 6 Macph. 258. By 19 & 20 Vict. c. 79, § 102, the confirmation of a trustee in a sequestration is equivalent to a recorded decree of adjudication in implement; see *Laurie*, 10 March 1854, 16 D. 860.] See *Stair*, B. iv. tit. 51, § 9; *More's Notes*, cccv.; *Bank*. ii. 233; *Ersk.* B. ii. tit. 12, § 50; *Bell's Com.* i. 782; *Bell's Princ.* § 835; *Jurid. Styles*, iii. 113, 139; *Kames' Equity*, 286; [*Parker on Adjudication*, 79; *Shand's Prac.* ii. 721; *Mackay's Prac.* ii. 345; *Menzies' Conv.* 787; *M. Bell's Conv.* ii. 816; *Ross's L. C.* i. 119.]

ADJUDICATION ON TRUST-BOND.

The expedient of adjudging on a trust-bond, is a mode of making up titles to heritage, where an heir is apprehensive about incurring a representation of his predecessor; or when he wishes to challenge adverse deeds, which, if he incurred a formal representation of his predecessor, he might be bound to implement. According to Professor Bell, this expedient was invented by Sir Thomas Hope, and ever since his time the device has had the sanction of the court and of the profession. The form is for the apparent heir to grant a bond to a confidential person, for a sum exceeding the value of the estate; the fiduciary nature of the transaction being explained by a back-bond, containing an obligation by the simulate creditor, to denude of the property when the adjudication is completed. The creditor in this bond then charges the heir to enter to his predecessor in common form; and, [on his refusal,] adjudication, in favour of the fictitious creditor, follows in the usual way. The simulate creditor is then in a condition to set aside any deeds granted by the predecessor of the granter of the bond, on all the grounds which a creditor or singular successor may plead, although the heir himself, had he entered, might have been barred from availing himself of these pleas; and if by this expedient the trustee succeeds in acquiring the property as nominal creditor of the apparent heir, he fulfils his back-bond, by conveying it, free of these adverse deeds or claims, to the heir, as disponee of the creditor. To prevent the bad consequences resulting to creditors from this device, it was provided by 1695, c. 24, that, if an heir, without being served, shall possess any part of his ancestor's estate, or purchase any right, redeemable or irredeemable, or any legal diligence affecting it, otherwise than as highest offerer, without collusion, at a judicial sale, such possession or sale shall be deemed behaviour as heir. [See *Beveridges*, 1793, M. 5296; *Craigie*, 1808, M. App. Adjud. 16; *Bellenden*, 17 June 1825, 1 W. & S. 381.] See *Ersk.* B. iii. tit. 8, §§ 72, 94; *Bell's Princ.* §§ 834, 1859; [*Sandford on Herit. Succession*, ii. 9, § 16; *Duff's Feudal Conv.* § 489; *Menzies' Conv.* 807; *M. Bell's Conv.* ii. 1115; *McLaren on Wills*, i. § 207; *Ross's L. C.* i. 348; *Shand's Prac.* ii. 725; *Mackay's Prac.* ii. 347. See *Passive Titles*.]

ADJUDICATION ON TRUST-DISPOSITION. This, like the adjudication

on a trust bond, is another simulate device for completing a title to heritage. It is effected by the apparent heir granting a disposition of his predecessor's heritage, *ex facie* absolute, with a back-bond declaring a trust, or granting at once a trust-disposition of the subjects. The heir is then charged by the trust-dispensee to enter, and on his failure, a decree of adjudication in implement is taken against him, which forms the tentative title. But this mode of making up a title was held to be incompetent in *Dunlop*, 31 March 1824, 2 S. App. 115. See *Bank*, ii. 354; [*Shand's Prac.* ii. 729; and authorities cited in preceding article.]

ADJUDICATION, DECLARATORY.

A declaratory adjudication is a very useful form of action, appropriately classed with adjudications. Where, for example, the radical right under a trust, or under an heritable security, is in a party indicated by the deed, but not feudally vested, the court, more than a century ago, suggested the expedient of a declaratory adjudication. In the case in which the suggestion was made, the right of the trustee was in the first place declared to have been merely fiduciary: it was further declared that the radical right of property was in the party beneficially interested; and this was followed by a decree declaring the trust at an end, and ordaining the superior to grant charters with precepts, for infetting the party to whom the property had been adjudged. At the same time the court declared that they would follow the like course in all time coming; and the precedent thus established was accordingly followed in analogous cases. See *Dalzell*, 1756, M. 16,204; *Drummond*, 1758, M. 16206; [*M. Ailsa*, 15 Feb. 1859, 21 D. 492; *Miles*, 16 Feb. 1867, 5 Macph. 402, 409. Now, however, a beneficiary in a lapsed trust may complete his title by petition under § 14 of the Trusts Act, 1867 (30 & 31 Vict. c. 97).] See *Bell's Princ.* § 1993 (6); [*Bell's Com.* i. 785; *M. Bell's Conv.* ii. 1004-6, 1110; *Parker on Adjudication*, 82; *M'Laren on Wills*, ii. § 1646; *Ross's L. C.* i. 320; *Shand's Prac.* ii. 733; *Mackay's Prac.* ii. 348; *Jurid. Styles*, iii. 113, 146.]

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

grounds 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. See *Accession*.

ADJURNATUS; an obsolete French word, adopted in the older Scotch law, signifying summoned, or called to a certain day. See *Skene, De Verb. Sig.*

ADJUSTMENT; in the law of insurance, is the settling and ascertaining the exact amount of the indemnity to which, under the policy, the insured is entitled, after all proper allowances and deductions have been made; and fixing the proportions to be borne by the underwriters respectively. Before any adjustment is made, the underwriters require to be satisfied that a loss within the terms of the policy has occurred; and in the ordinary case the duty of making the requisite inquiries is devolved on the underwriter who has first subscribed the policy. In complicated cases of average loss the papers are usually submitted to a professional referee, to calculate and adjust the percentage rate of loss. After an adjustment has been once made and signed, it is not usual for the underwriters to require further proof, but at once to pay the loss. It is not, however, conclusive and binding on the underwriters; where the extent of the loss is disputed, the adjustment operates merely as a transfer of the *onus probandi* from the insured to the underwriters. See *Bell's Com.* i. 659; *Bell's Princ.* § 498; [*Smith's Merc. Law*, 389; *Marshall on Marine Insurance*, 499; *Arnould on Marine Insurance*, 198, 1091. See *Insurance*.]

[**ADJUSTMENT OF RECORD.** See *Record*.]

ADMINICLE; is a term used in the action of proving the tenor of a lost deed; and signifies any writing, draft, or scroll, tending to establish the existence or terms of the deed in question. [Professor Bell's restricted definition of adminicles,—viz., "authentic writings which of themselves make faith without the aid of parole evidence"—is not now observed; see *Guthrie's Bell's Princ.* § 883 (g).] See *Stair*, B. iv. tit. 32, § 6; *More's Notes*, cccxxxvi; *Ersk.* B. iv. tit. 1, § 55; *Bank*, ii. 642, § 3; [*Mackay's Prac.* ii. 321.] See *Proving of Tenor*.

[**ADMINISTRATION, HUSBAND'S RIGHT OF.** By most of the institutional

[writers this right has been confounded with the *jus mariti*. But Lord Fraser has shown that the two rights are quite distinct. "The right of administration may be defined to be (in opposition to the *jus mariti*), not a right of property, but a right of managing property, whereby the husband's consent must be obtained to every act of administration,—to suing debtors, drawing the rents of heritage, granting discharges, executing dispositions;" *Fraser on Husband and Wife*, i. 676, 796. See *Marriage*.]

[ADMINISTRATION, LETTERS OF.]

The right to administer the personal estate of a deceased intestate, who was domiciled in England, is constituted by letters of administration, granted by the Court of Probate. Such letters of administration, when produced in the commissary (now sheriff) court of Edinburgh, and indorsed by the commissary clerk, have the effect of confirmation granted by that court; 21 & 22 Vict. c. 56, § 14. See also 50 & 51 Vict. c. 69, § 5, quoted under *Notarial Instrument*. In like manner, when the deceased was domiciled in Scotland, and had personal estate in England, a Scotch confirmation, when sealed by the Court of Probate, has the effect of letters of administration; 21 & 22 Vict. c. 56, § 12. See also 22 Vict. c. 30. See *Confirmation of Executor. Probate*.]

ADMINISTRATOR-IN-LAW. By the law of Scotland the father is what is called administrator-in-law for his children. As such, he is *ipso jure* their tutor while they are pupils, and 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 by the donor or grantor under the charge of special trustees or managers. This power in the father ceases by the child's discontinuing to live 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. See *Stair*, B. i. tit. 5, § 12; [*Ersk.* B. i. tit. 6, § 54]; *Bank*, i. 153, § 2; *Bell's Princ.* § 2068. [See *Parent and Child*.]

ADMIRAL. By the act 1681, c. 16, the act 1609, c. 15, was 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 declared the High Admiral to be the King'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 had 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 concerned in the same; and all other judges were prohibited from interfering with the decision of such causes in the first instance. The act also subjected the decrees and acts of all inferior courts of Admiralty to the review of the High Court of Admiralty; it gave power to the High Court of Admiralty to review its own decrees; prohibited advocations of its judgments; and prescribed the form in which they might be suspended. The Judge-Admiral required to have been an advocate, in practice for three years; 26 Geo. III. c. 47, § 5.

ADMIRALTY, COURT OF. The jurisdiction and powers of the ancient Court of Admiralty in Scotland, were fixed by the statutes referred to in the preceding article. Its jurisdiction was both civil and criminal. In civil matters the Judge-Admiral was judge in the first instance 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 to any act to be performed within the bounds of his jurisdiction; he had jurisdiction also in all actions for recovery of goods, or their value, when the goods had been sent by sea from one port to another; [and even in other mercantile matters, in no degree maritime, such as questions relating to bills of exchange, he appears to have acquired by prescription a right of cognisance.] In criminal matters he had exclusive cognisance in the crimes of piracy and mutiny on shipboard; but in the case of murder, and in general in all cases where the crime did not offend against the laws of navigation, this jurisdiction was not exclusive, even although the crime had been committed on shipboard. The Admiralty jurisdiction in Scotland was ratified and confirmed by 5 Anne, c. 7, § 19; regulated by 1 & 2 Geo. IV. c. 39; and finally abolished by 1 Will. IV. c. 69. By this last statute the civil jurisdiction of the Admiralty Court was transferred to the Court of Session, except in cases not exceeding £25 in value, which are made competent in the first instance in an inferior court in the manner directed, and with the exception specified in 1672, c. 16; and all applications of a summary nature, connected with such causes, may now be made to the Lord Ordinary on the Bills. The criminal juris-

diction of the High Court of Admiralty is merged in that of the Court of Justiciary and sheriff courts; 1 Will. IV. c. 69, §§ 21, 22. By the Judicature Act, the jurisdiction in questions of prizes and captures, and in the condemnation of vessels, at one time exercised by the High Court of Admiralty in Scotland, is entirely taken away, and vested exclusively in the High Court of Admiralty in England; (see 6 Geo. IV. c. 120, § 57). The Court of Session summonses in admiralty or maritime causes are not different from ordinary summonses; [1 & 2 Vict. c. 118, § 29.] Such actions are exempted from the fee-fund of the Court of Session, and the other Court of Session exactions; and the agents conducting them are bound to charge according to the rate of charges in the High Court of Admiralty; 1 Will. IV. c. 69, § 40. See *Stair*, B. ii. tit. 2, § 5; B. iv. tit. 1, § 37; *Ersk.* B. i. tit. 3, § 33; *Bank.* ii. 538, § 1; *Bell's Com.* i. 546, 641; *Kames' Stat. Law*, h. t., and *voce Jurisdiction*; [*Kames' Law Tracts*, 219;] *Smith's Maritime Prac.* 12; *Boyd's Admiralty Proceedings*; [*Shand's Prac.* i. 14, 413; *Mackay's Prac.* i. 43, 82, 189.] See also *Sett. Ship*.

ADMIRALTY COURT, in England; has jurisdiction in maritime causes, whether civil or criminal. The Court of Admiralty is twofold: 1st, The *Instance Court*, which has civil jurisdiction generally in marine contracts, and other questions of maritime right, such as disputes amongst part-owners of vessels, and questions relating to salvage, collision of ships, and the like. 2dly, The *Prize Court*, which has exclusive jurisdiction in all matters, civil and criminal, relating to prize of war; i.e., all acquisitions made, whether at sea or on land, by a naval force. [*Wharton's Lex.* The Court of Admiralty is now merged in the Probate, Divorce, and Admiralty Division of the High Court of Justice. See *High Court of Justice*.]

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. [In the Established Church, this act formerly proceeded upon the presentation of the patron; but the right of electing and appointing ministers was vested in the congregations by the Patronage Act, 1874. Should the congregation, however, delay to appoint beyond six months after a vacancy, the right of appointment belongs to the presbytery, in virtue of the

[*jus devolutum* which they enjoy. See *Patronage*.]

ADMISSIONS. [An admission by a party on record, in a civil cause, is generally both competent and conclusive evidence. See 6 Geo. IV. c. 120, § 13. But in consistorial causes, admissions do not obviate the necessity for proof; 1 Will. IV. c. 69, § 36. See *Muirhead*, 28 May 1846, 8 D. 786.] In ordinary civil actions, a party may be called upon to confess or deny any relevant matter of fact, and if he refuse, he will be held as confessed. By A.S. 11 July 1828, § 105, where a statement in point of fact, within the opposite party's knowledge, is averred on the one side, and not denied on the other, he shall be held as confessed. [See also A.S. 1 Feb. 1715, § 6; 10 July 1839, § 66. As to whether judicial admission is proof *scripto*, in a question regarding the triennial prescription, see *Cullen*, 12 July 1853, 15 D. 868; *Rankin*, 6 March 1845, 7 D. 595. An extrajudicial admission is not conclusive, and its value as evidence varies according to circumstances. In jury trials, "when parties are disposed to make admissions in regard to matters of fact, or to admit the authenticity of writings, a note of the admissions is to be made in writing, signed by the party's counsel or agent, and lodged in process, and certified by the clerk; and all admissions so made may be used and read in evidence at the trial, if otherwise competent;" A.S. 16 Feb. 1841, § 22. When the admission bears directly on the matter in dispute, it is frequently prefixed to the issue. When an admission is founded on, it must be taken with any qualification adjoined to it, without regard to the distinction between intrinsic and extrinsic qualifications, as in oath on reference. See *Campbell*, 23 Jun. 1843, 14 D. 1086; *Dowdy*, 8 Dec. 1859, 22 D. 181; *Picken*, 19 July 1872, 10 Macph. 987; *Gelstons*, 20 July 1875, 2 R. 982. The qualification, however, may be disproved; see *Miller*, 7 March 1843, 5 D. 856; *Couper*, 28 Nov. 1849, 12 D. 190. See *Ersk.* B. iv. tit. 2, § 11; *Bell's Princ.* § 2218; *Dickson on Evidence*, i. §§ 276-313; *Kirkpatrick's Digest*, §§ 9, 40 et seq., 93; *Stephen's Digest*, art. 15 et seq.; *Macfarlane's Jury Prac.* 71; *Mackay's Prac.* i. 433. See *Evidence. Oath on Reference. Confession. Pro Confesso. Error*.]

ADOPTION. By the Roman Law, one who had no children of his own might adopt the child or children of another, whether related to him or not. The ceremony by

which this was accomplished was called adoption; and its legal effect was, that the adopted child, after having been emancipated, or taken from under the *patria potestas* of his natural father, was received under the *patria potestas* of the adopter. When the adopted person was already under the *patria potestas*, it was proper adoption. If he was *sui juris*, it was termed arrogation; but adoption, as a generic term, applies to both. The adopted son possessed the same right of succession to his adopter, which a child born in wedlock would have enjoyed. Adoption is not recognised in the law of Scotland, although, where one wishes to confer on another the patrimonial advantages of inheritance, he may attain his object by conveying his property, whether heritable or moveable, to the party favoured; and that either *mortis causa*, or by a deed *inter vivos*, reserving his own liferent; and subject, of course, to the legal rights of the grantor's heirs-at-law, which are to a certain extent indefeasible. *Stair*, B. iii. tit. 4, § 34; *Bank*. i. 19, § 42.

ADPROMISSORS or CAUTIONERS.

In the Roman law, the cautionary engagement was undertaken by a separate act from that by which the principal obligant was taken bound; he was therefore termed adpromissor. *Ersk.* B. iii. tit. 3, § 61; *Bell's Princ.* § 245.

ADSCRIPTI VEL ADSCRIPTITII

GLEBÆ, among the Romans; were a kind of slaves perpetually attached to, and transferred along with, the land which they cultivated. Their situation was very similar to that of the workmen employed in collieries and salt-works in Scotland, before the passing of 15 Geo. III. c. 28. See *Ersk.* B. i. tit. 7, §§ 60, 61; [*Stair*, B. i. tit. 2, § 11.] See *Colliers and Salters*.

ADULTERY; is the sin of incontinence in a married person. The older law of Scotland made a distinction between simple and notour adultery; *notour* being where issue is procreated between the adulterers; or where they live openly together at bed and board; or where they give scandal to the church, and have been excommunicated; *simple*, being the act unaccompanied by any of those aggravations. By 1551, c. 20, notour adultery is punishable by escheat of moveables; and by 1563, c. 74, it is made a capital offence. Both of these statutes are now in desuetude, although the records of the Court of Justiciary show that capital punishment was, in former times, frequently inflicted for this crime. The punishment of simple adultery was, in those

times, arbitrary. Now, the offence is not prosecuted as a crime, but may be the ground of an action of divorce, and also of a civil action of damages, although that species of reparation for this injury seems to have been unknown in the law of Scotland until a comparatively recent period. By 1600, c. 20, a marriage between a person divorced on the ground of adultery, and the person with whom the adultery is judicially declared to have been committed, is declared null and unlawful, and the issue of such marriage incapacitated to succeed to their parents. See *Divorce*. [When a husband kills an adulterer in the act of adultery with his wife, without deliberation, he is chargeable only with culpable homicide.] See *Stair*, B. i. tit. 4, §§ 7, 18; *More's Notes*, xxvii., xxxix.; *Bank*. i. 132; *Ersk.* B. i. tit. 6, § 43; *Hume*, i. 453; *Bell's Princ.* §§ 1526, 1531, 1622, 2033; *Kames' Equity* (1825), 312; [*Fraser on Husband and Wife*, ii. 1142. See *Marriage*.]

ADVENT; a time embracing about four weeks preceding Christmas, or the nativity of our Saviour. It begins on the Sunday falling on St Andrew's day (30th November), or next to it. In former times, this was held as a season of great sanctity, and many secular duties were laid aside. It was also one of the periods during which, in England, the solemnisation of marriage, except by special licence, was prohibited. *Tomlins, h. t.*

ADVENTURE. See *Joint Adventure*.

ADVERTISEMENT; generally applied to a notice published in the newspapers, or by handbills or placards. Advertisements may have important legal effects in many different ways; either as notifying the terms on which parties are willing to treat; or describing the subjects of sale, location, &c.; or, as of the nature of offers to be completed by acceptance on the part of those who choose to avail themselves of the terms. [See *Pollock on Contract*, 12.] Public notifications of this kind are also necessary under various statutes, as preliminary to the exercise of statutory rights, or as qualifications for statutory privileges or immunities; *e.g.*, under road and bridge acts, the bankrupt statutes, and many others. In the case of public carriers, advertisements are distinctly of the nature of offers, which will bind the carrier to those who send goods, in terms of the advertisement. In like manner, an advertisement of a general ship for a particular voyage places the master on the footing of a public

carrier, ready to receive goods for the port to which the vessel is advertised to sail. Such an advertisement entitles a merchant to bring his goods to the vessel, and to insist on their being received, unless the ship be already full, or the entire freight engaged. In this case also, the advertisement, and the shipping of the goods in reference thereto, completes the contract of affreightment between the owners and the shippers. *Bell's Com.* i. 589. See *Charter-Party. Carrier. [Gazette. Offer.]*

AD VITAM AUT CULPAM. An office is said to be held *ad vitam aut culpam*, when the tenure of the possessor is determinable only by his death or delinquency; or, in other words, which is held *quamdiu se bene gesserit*.

ADVOCATE; the patron of a cause, who assists his client with advice, and who pleads for him. In Scotland, the barristers practising before the supreme court are called advocates; and the same description is taken by the procurators or solicitors before the inferior courts in Aberdeen. The Faculty or Society of Advocates in Edinburgh is coeval with the institution of the College of Justice (A.D. 1532); and the profession of an advocate was known much earlier, provision being made, in the stat. 1424, c. 45, for securing the assistance of advocates for the poor. At the institution of the College of Justice the number of advocates was limited to ten, but there is now no limit. [The Dean, Vice-Dean, and Treasurer of the Faculty are elected annually, but in practice they are generally re-elected.] Before being admitted a member of the Faculty, it is necessary to undergo certain probationary trials. With that view the applicant for admission presents a petition to the court, stating his wish to become an advocate, and intimating his readiness to undergo a trial of his skill. This application is remitted by the court to the Dean of Faculty, [and by him to the private examiners, to make trial of his fitness in general scholarship, and in law. The examination is conducted under the regulations as to intrants adopted by the Faculty on 11 Nov. 1866, 16 Dec. 1874, 14 Jan. 1880, and 18 Jan. 1882. The examiners are nine members of Faculty, nominated by the Dean, of whom three go out of office annually, three others being appointed in their place. The vote as to the sufficiency of the trials of intrants is not by ballot, but by open voting. The senior member of Faculty present is chairman of the examin-

[ators, and four constitute a quorum. In examining as to general scholarship, the examiners are directed to select, to be assessors to themselves, persons of learning, accustomed to conduct examinations, by whom, as well as by the examiners, the intrant is examined. The assessors report in writing as to the intrant's qualifications, and the examiners thereupon, after giving due weight to their reports, decide whether or not the trials be approved of. In conducting the law examination, the examiners are assisted by the law professors of the University of Edinburgh; and such of the latter as are members of Faculty are entitled to vote as examiners. An intrant is deemed duly qualified in general scholarship, if he produce evidence that he has obtained (1) the degree of Master of Arts of any of the Scottish Universities; or (2) the degree of Bachelor of Arts or Bachelor of Civil Law of the Universities of Oxford or Cambridge, or Bachelor of Arts of Trinity College, Dublin; or (3) the degree of Bachelor of Arts of the University of Durham; or (4) the degree of Master of Arts or Bachelor of Laws of the University of London; or (5) the degree of Master of Arts of the Queen's University of Ireland; or such degree of a foreign University as shall, in the opinion of the Dean and his council, be evidence of the same amount of scholarship as that afforded by the degree of Master of Arts of a Scottish University. Failing such degree, the intrant is examined in (1) Latin; (2) Greek, or, in the intrant's option, (a) any two of the following languages—French, German, Italian; or (b) natural philosophy, and any one of the three modern languages mentioned; or (c) chemistry and any one of these languages; or (d) the history of the United Kingdom, and any one of these languages; (3) Ethical and metaphysical philosophy; (4) Logic, or, in the intrant's option, mathematics. The examiners fix upon and publish (with concurrence of the Dean) the names of the books on which the examination shall be made, giving due notice of any change. When the intrant fails in one or more of these subjects, his examination in the remaining subjects shall be carried through, leaving him to come up again for examination in the subjects in which he has failed. On the expiry of a year after the intrant has been found qualified in general scholarship, his examination in law may be proceeded with. But with the view of securing to him a period of undisturbed application to the study of the law before

[being admitted to practice, he may not be examined in law, unless, during the year before such examination, he shall not have engaged in any trade, business, or profession, either on his own account or as assistant to or in the employment of another. Before examination, the intrant must also produce evidence that he has attended, during at least one session, the following classes: the classes of Scots Law and Conveyancing in a Scottish university; the classes of Civil Law, Public or International Law, and Constitutional Law, in any such university as may be approved of by the Dean and his council; and the class of Medical Jurisprudence in a university, or in a school recognised as qualifying for university degrees. Having complied with these conditions, the intrant is examined in (1) Civil Law, (2) Private International Law, and (3) Scots Law. The examination is made on the following works, viz., in civil law, the Institutes of Gaius and of Justinian; in private international law, the 5th, 8th, 12th, and 17th chapters of Story's Conflict of Laws; and in Scots Law, Bell's Principles; or on such other works as may from time to time be approved of by the examiners (with concurrence of the Dean), due notice being given of any change. If the intrant have obtained the degree of LL.B. from a Scottish university, he will be held qualified in general scholarship and law, without examination or other evidence thereof, and may at once proceed to his public examination; provided always that during the year immediately before presenting his diploma to the examiners, he shall not have been engaged in any trade, business, or profession, either on his own account, or as assistant to or in the employment of another; and provided also that he shall have duly presented his petition for admission to the Faculty, and appeared before the examiners, prior to the commencement of such year. There are five diets for the private examination of intrants in each year, viz., (1) the last Friday in October; (2) the last Friday but one before the Christmas recess; (3) the last Friday but one before the rising of the court in March; (4) the last Friday in May; (5) the last Friday but one before the rising of the court in July. Intrants must present themselves on one or other of these days and no other, except on special leave given by the Dean and the examiners, who also have power, if they see fit, to fix a diet for any private examination in vacation. The regulations as to public

[examination are these:—The Dean, on receiving the certificates of the private examiners, pronounces an order assigning a title of the Pandects to the intrant for the subject of a thesis, to be lodged with the clerk of intrants on a particular day, naming the following Saturday for the diet of his public examination. The thesis, on being lodged, is submitted by the clerk to two of the members of Faculty who have examined the intrant on civil law; and they, if satisfied, affix their *Impugnetur*. At the diet of public examination, the thesis is impugned, and defended by the intrant before the Faculty. The question as to his admission is then decided by the Faculty, voting by ballot; and on admission, the oath of allegiance is taken before a Lord Ordinary. In the event of a member of any other branch of the legal profession in Scotland seeking admission to the Faculty, he must, before presenting his petition to be admitted, resign as a member of that branch of the legal profession to which he may belong; Resolution of Faculty, 27 Oct. 1880.] There is a statutory widows' fund belonging to the Faculty; [see 11 Geo. IV. c. 41 (loc. and pers. acts); and it is not lawful to remit any intrant to his civil law trials, unless he have produced to the clerk of the Court of Session, or other officer duly authorised by the court, the collector's receipt for the payment of the entry-money to the widows' fund. The fees of admission to the Faculty amount to £343, 1s.; of which £264, 9s. is payable on presentation of the petition, and £78, 12s. is payable before the examination in law. Of these sums £55 constitutes the entry-money to the widows' fund; £50 is stamp duty payable under 33 & 34 Vict. c. 76; and the remainder goes to defray the expenses of the Faculty, including the expenses of the library. Besides the sums mentioned, intrants require to pay an examination fee of £1, 1s. for each subject in which they are examined; and an age-tax (for the widows' fund) of £6, 12s. for each year of their age over 24, at the time of admission to the Faculty.]

An advocate thus admitted is entitled to plead in every court of Scotland, civil, ecclesiastical, or criminal, superior or inferior, unless when debarred by special statute (as in the small-debt acts); and also before the House of Lords, [and the Judicial Committee of the Privy Council.] Advocates are answerable for their official conduct to the Court of Session. [The

[law as to the powers and obligations of advocates in relation to their clients, is treated of in the article *Counsel*.]

The library of the Faculty of Advocates, founded in the year 1682 by Sir George Mackenzie, is the most valuable library in Scotland. It is one of the libraries entitled to a copy of every book entered at Stationers' Hall; [see 5 & 6 Vict. c. 45, §§ 8-10.] The supreme judges in Scotland are now invariably selected from the Faculty, as well as the sheriffs-depute of the several counties. The Faculty of Advocates has been, from time immemorial, considered as an incorporation, although no charter of incorporation now exists. Advocates are also members of the College of Justice, and as such entitled to its privileges. [See *Shand's Prac.* i. 73; *Mackay's Prac.* i. 102.]

[ADVOCATES' CLERKS. In former times, an advocate had generally two clerks, "one who takes care of his clients' affairs, and one who waits on his person;" see *Spottiswode*, p. 50. Advocates' First Clerks were entitled by their letter of appointment to act as agents. But by A.S. 4 Dec. 1850, the Advocates' First Clerks were amalgamated with the Solicitors before the Supreme Courts. Advocates' Clerks do not now act as law agents, unless admitted as such. Their fees, which are exigible from the client, are regulated by A.S. 15 July 1876. See *Shand's Prac.* i. 98; *Mackay's Prac.* i. 120.]

ADVOCATE, LORD, or KING'S (QUEEN'S) ADVOCATE. The Lord Advocate is the principal Crown lawyer in Scotland, and one of the great Officers of State of Scotland. Prior to the Union he sat in Parliament *ex officio*, without election. He is appointed by the Crown, and his duty is to act as public prosecutor, and to plead in all causes in which the Crown is interested, particularly in criminal cases. Originally it would seem that the Lord Advocate had no power to institute criminal proceedings, except at the instance of the injured party; but for the last three hundred years the Lord Advocate has been vested with a discretionary power in the prosecution for crimes, so far as regards the public interest. At the same time, when a private party has been injured, and when the Lord Advocate declines to prosecute, the private party, with the Lord Advocate's concurrence, may prosecute, not only for reparation of the individual injury, but *ad vindictam publicam*. [See *Concourse of Lord Advocate*.] The

Lord Advocate's powers are very extensive. He may issue warrants for arrestment and imprisonment in any part of Scotland; and he possesses other powers, which are purely discretionary, and not very well defined. In the law courts, he is entitled to plead within the bar, and, if so inclined, to plead with his hat on; although that is an exhibition now in desuetude. [The privilege is said to have originated in the time of Sir Thomas Hope, Advocate to King Charles I., who had two sons on the bench, Sir John, his eldest, and Sir Thomas, Lord Kerse; see *Tait's Index*, p. 500.] The Lord Advocate and the Solicitor-General are the only members of the Scotch Bar who have seats within the bar; [see 1537, c. 37. They have also the distinction of wearing silk gowns.] Both of these officers, in addition to their official duties, accept of ordinary bar practice. In the discharge of his duties as public prosecutor, the Lord Advocate has the aid of the Solicitor-General, and of four junior barristers appointed by the Lord Advocate, and called Advocates-Depute. Since the Union the Lord Advocate has usually been returned to Parliament, generally by one of the Scotch constituencies; and in Parliament, as first law officer of the Crown of Scotland, he is presumed to be able to answer inquiries concerning Scotch matters, and expected, [along with the Secretary for Scotland,] to take the superintendence of the legislation for that portion of the kingdom. [The act 48 & 49 Vict. c. 61, creating the office of Secretary for Scotland, and defining its functions, does not affect the powers or duties of the Lord Advocate (§ 9). See *Secretary for Scotland*. When the Lord Advocate resigns, he and his deputes continue in office until their successors receive their appointments; and indictments raised by him continue in force notwithstanding his resignation, and may be proceeded with by his successor; 50 & 51 Vict. c. 35, § 3. If a Lord Advocate dies, or is removed from office, his indictments may be proceeded with by the deputes and procurators-fiscal, and new indictments may be raised in name of the Solicitor-General, until a successor is appointed; *ib.* The Lord Advocate enters upon his duties immediately on receiving his appointment, and may take the oaths of office before any Secretary of State, or any Lord Commissioner of Justice; *ib.* As to the Lord Advocate's title to pursue processes in behalf of the

[Sovereign, see *L. Dunglas*, 24 Dec. 1836, 15 S. 314.] See *Ersk. B. iv. tit. 4, § 2*; *Hume*, i. 9; ii. 118; *Kames' Stat. Law*, voce *King's Advocate*; [*Alison's Prac.* 84; *Macdonald*, 278, 457; *Shand's Prac.* i. 195, 639; *Mackay's Prac.* i. 119, 295.] See *Concourse. Criminal Prosecution. Bail.*

ADVOCATES-DEPUTE; are four advocates appointed by the Lord Advocate to aid him in the discharge of his duties as public prosecutor. Their duty is to consider precognitions sent to them by the Crown agent; to determine whether there is sufficient matter for an indictment; and if so, to prepare the indictment. The advocates-depute attend and assist, generally as juniors, at trials before the High Court of Justiciary at Edinburgh; the Lord Advocate, or the Solicitor-General, leading. One of the depute advocates attends as sole public prosecutor at each of the circuits of the Court of Justiciary; and at these circuits the depute exercises all the discretionary powers of the Lord Advocate as to bringing on the trial, abandoning or restricting the libel, and so forth. [Since the separation of the two court-rooms at the Glasgow Circuit (authorised by 11 & 12 Vict. c. 79), a supernumerary depute has been appointed to officiate in one of these court-rooms; and another supernumerary is appointed to assist in prosecutions in the inferior courts.] The office is not incompatible with ordinary bar practice. See *Criminal Prosecution. Circuit. Advocate, Lord.*

ADVOCATION, [to Court of Session; a form of process, formerly in use, by which a cause was removed from an inferior to the supreme court, in order that a judgment pronounced in the inferior court might be reviewed, or that the farther procedure in the cause might be conducted in the Court of Session. Advocation was abolished, and appeal substituted as the mode of review, by the Court of Session Act, 1868, §§ 64, 65, 76. See *Appeal to Court of Session.*]

ADVOCATION, [to Court of Justiciary; a process of review in criminal cases, now rarely used. It is strictly the appropriate remedy for errors that occur during the course of the trial, and before final judgment, in the inferior court; but more recently it has also been used after final judgment. Advocation is competent, when an inferior judge improperly dismisses a complaint as irrelevant, or improperly

[refuses expenses, or otherwise fails to give the decree to which the advocate is entitled. See *E. Kinnoull*, 15 Dec. 1859, 3 Irv. 501; *Smith*, 7 Feb. 1848, Arkley, 427; *Prentice*, 19 June 1843, 1 Broun, 561. When the judgment is *condemnator*, the proper mode of review is suspension. The supreme court will not interfere *pendente processu*, except in extraordinary circumstances; see *Jameson*, 3 Dec. 1855, 2 Irv. 273; *List*, 24 Dec. 1867, 5 Irv. 559, 6 Macph. 185. Advocation is competent only before the High Court of Justiciary. It proceeds on a bill addressed to the Lords of Justiciary, praying for letters of advocation, and for transmission of the proceedings to the Clerk of Justiciary. One judge may pass a bill of advocation, but the ordinary quorum of three judges is necessary, if it is to be refused. When the bill is passed, the practice is to discuss the whole merits of the case upon the bill, without expediting letters of advocation. A quorum of judges is necessary for the disposal of the case. During the discussion on the bill of advocation, the personal presence of the parties is not required; except in the case of a complainer sentenced to imprisonment, and liberated on caution, who must appear personally, under 38 & 39 Vict. c. 62, § 10. The procedure is substantially the same as in suspensions. See *Hume*, ii. 509; *Bell's Notes*, 306; *Alison's Prac.* 26; *Macdonald*, 539; *Moncreiff on Review in Crim. Cases*, 163; *Jurid. Styles*, iii. 894. See *Suspension. Justiciary Court.*]

ADVOCATIO ECCLESIAE; an old law term, signifying the right of patronage, or the title and right to present to a vacant church. *Skene, h. t.*

ADVOWSON; an English law term, signifying the right of presentation to a church or benefice. *Tomlins, h. t.*

ÆDIFICATUM SOLO CEDIT; a Roman law maxim, usually applied to the case where one has built a house on the property of another; and importing that the building belongs to the proprietor of the ground on which it is built. See *Adjunction. Accession.*

ÆMULATIO VICINI. A proprietor is entitled to make every lawful use of his property, however detrimental to his neighbour, provided the offensive or injurious act be not done *in æmulationem vicini*. But no man is entitled, without profit or benefit to himself, to exercise his right of property wantonly to his neighbour's prejudice. *Ersk. B. ii. tit. 1, § 2*; *Bell's*

Princ. § 964; *Kames' Princ. of Equity* (1825), 36, 89; [*Rankine on Land-Ownership*, 319.] See *Property*.

AFFIANCE; the plighting of troth between a man and a woman upon an agreement of marriage. *Tomlins, h. t.*

AFFIDATIO; used in the *Regiam Majestatem* to signify mutual faith and obligation to fidelity, as between husband and wife, superior and vassal, and the like. *Skene, h. t.*

AFFIDAVIT; an oath in writing, or a declaration to the truth of which an oath is sworn before a person legally authorised to administer an oath. Voluntary affidavits are not, generally speaking, admissible as evidence [on the merits of any issue, being emitted *ex parte*, and without opportunity for cross-examination. Contrast *Mags. of Aberdeen*, 1813, Hume, 502, and *Glyn*, 5 Dec. 1834, 13 S. 126, with *Lauderdale Peerage*, 22 July 1885, 10 App. Ca. 692, 706. An affidavit is required by statute as *prima facie* proof on some matters; e.g., the Bankrupt Statute requires claimants to lodge their claims with affidavits, or oaths of verity; [19 & 20 Vict. c. 70, §§ 21–25, 58, 147. See also the Entail Acts, 11 & 12 Vict. c. 36, § 6, and 16 & 17 Vict. c. 94, § 17, and the Confirmation of Executors Act, 21 & 22 Vict. c. 56, § 17.] So also, according to the form of process in jury trial, in disposing of certain motions for delaying the trial, examining old or absent witnesses, and the like, the court may require an affidavit by the agent for the party as to the truth of the facts on which the application rests; [A.S. 16 Feb. 1841, §§ 17, 25.] At common law, an affidavit is required in applications for *meditatio fugæ* warrants, and in several other cases. Such affidavits are what are called matters of voluntary jurisdiction, and consequently the magistrate administering the oath may do so, at common law, beyond the limits of his territorial jurisdiction. [See *Kerr*, 12 June 1854, 1 Macq. 736. But by 5 & 6 Will. IV. c. 62, § 13, it was made unlawful for any justice of the peace or other person to administer or receive any oath or affidavit touching any matter in which he has no jurisdiction. This provision, however, does not apply to oaths or affidavits in matters touching the preservation of the peace, the prosecution of offences, or any proceedings before Parliament, nor to affidavits required to give validity to writs to be used in foreign countries. Nor does it apply to any oath or affidavit in any judicial proceeding in any court of justice; *ib.* § 7; nor

[to judicial ratifications by married women; 6 & 7 Will. IV. c. 43. Every affidavit should bear that, at the place and on the day named, in presence of the magistrate (correctly named and designed), appeared the party (correctly named and designed), “who, being solemnly sworn, depones,” &c.; and it should conclude thus, “all which is truth, as the deponent shall answer to God.” It must be signed by the deponent and by the magistrate. If the deponent was not in fact sworn, the affidavit is invalid; *Blair*, 8 Jan. 1889, 16 R. 325. For other fatal irregularities, see cases in *Dickson*, § 1539. See *Dickson on Evidence*, ii. § 1534; *Kirkpatrick's Digest*, § 207; *Bell's Com.* ii. 361. See *Evidence. Oath.*]

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. That species of connection has received the name of *affinitas affinitatis*, a term borrowed from the Roman law; and is not by our law an impediment to marriage in any circumstances, although it was so by the Roman law, when the parties were in the direct line. *Stair*, B. i. tit. 9, § 15; *More's Notes*, xv.; *Ersk.* B. i. tit. 6, §§ 8, 9; *Bank. j.* 118, 133; ii. 646; *Bell's Princ.* § 1527. [See *Marriage.*]

AFFIRMANTI INCUMBIT PROBATIO; a Latin maxim, inferring that the negative of an assertion is presumed to be true, and that the *onus probandi* lies on the party making the averment. This abstract proposition, however, is controlled by the operation of various legal principles and presumptions. Hence, nothing is more common than for a party to rest his case on an averment which is not legally incumbent on him to prove, but which, on the contrary, it lies on his antagonist to redargue. *Stair*, B. iv. tit. 39, § 4; [*Dickson on Evidence*, i. § 26.] See *Presumptions*.

AFFIRMATION. [By the Oaths Act, 1888 (51 & 52 Vict. c. 46), any person objecting to be sworn, and stating as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, may make his solemn affirmation, instead of

[taking an oath, in all places and for all purposes where an oath is or shall be required by law. Such affirmation is of the same force and effect as an oath, and, if false, infers perjury; § 1. Such affirmation shall be as follows: "I, A. B., do solemnly, sincerely, and truly declare and affirm," and then proceed with the words of the oath prescribed by law, omitting any words of imprecation or calling to witness; § 2. Every affirmation in writing shall commence "I, —, of —, do solemnly and sincerely affirm," and the form in lieu of *jurat* shall be "affirmed at —, this — day of —, 18 . Before me;" § 4. See *Oaths*.]

AFFRAGMENTMENT. See *Charter-Party*. [*Bill of Lading*.]

AGE. A person is said to be of lawful age when he or she attains majority, or the age of twenty-one years complete. The earlier period of life is described generally as minority, but is sub-divided into *pupilarity*, which extends in males to fourteen years, and in females to twelve years; and *puberty*, which extends from the termination of pupilarity until the attainment of majority. A minor who has attained puberty may make oath and give evidence as a witness. No one under the age of twenty-one years can vote at an election for member of Parliament, or be elected a member. *Stair*, B. i. tit. 5, § 2; B. iv. tit. 43, § 7; *More's Notes*, cccxi.; *Ersk.* B. i. tit. 7, § 36; *Bank.* i. 47, 113; ii. 645; iii. 47. See *Minor. Pupil. Tutor. Curatory. Evidence*.

AGENT. An agent may be defined generally as one whom another puts in his place, and authorises or delegates to transact business for him, and, within the limits of the particular business to which the agency or mandate extends, to bind his constituent. [See *Mandate. Principal and Agent. Factor. Agent and Client. Law Agent*.]

AGENT AND CLIENT. [The relation of agent and client is in general constituted without any special contract, written or verbal, and may be proved *prout de jure*; *Bell*, 18 Dec. 1863, 2 Macph. 336. But in a question with the opposite party in an action, the agent may be required to produce a written mandate; *Taaffe*, 22 Feb. 1822, 1 S. 319. The general mandate authorises the agent to do all that is necessary or usual for the business in which he is employed, subject, of course, to the instructions of his client. In litigation, when the case is in the hands of counsel, "the

[agent is bound to act according to his directions, and is not answerable to his client for what he does *bona fide* in obedience to such direction;" *Batchelor*, 30 June 1876, 3 R. 914. Without the direction of counsel, or the express authority of his client, an agent seems to have no power to abandon, refer, or compromise a suit; see *Urquhart*, 12 June 1857, 19 D. 853; *Black*, 4 July 1844, 6 D. 1254; *Cormie*, 30 Jan. 1863, 1 Macph. 357. A contrary view, however, founded mainly on English decisions, is indicated in *Begg on Law Agents*, 95. A mandate to carry on a lawsuit in one court does not imply authority to appeal to a higher court; *Macqueen*, 4 July 1826, 4 S. 786; *Robertson*, 9 Feb. 1860, 22 D. 714; *Stephen*, 17 Dec. 1863, 2 Macph. 287. An agent is not liable in damages for having given erroneous advice; but gross negligence, or want of reasonable skill, infers liability; *Landell*, 10 March 1845, 4 Bell's App. 46; *Hamilton*, 27 Nov. 1868, 7 Macph. 173; *Blair's Trs.* 8 Nov. 1884, 12 R. 104; *Raes*, 29 June 1886, 13 R. 1036; 20 July 1888, 15 R. 1033; *Oastler*, 29 Oct. 1886, 14 R. 12; *Stirling*, 7 Dec. 1886, 14 R. 170; *Stewart*, 22 July 1887, 15 R. (H.L.)

1. An agent, to whom money on deposit in bank is entrusted for investment, ought not to uplift it until the investment is ready, and, in particular, ought not to mingle money so uplifted with his own funds; *Lee*, 20 Oct. 1884, 12 R. (J.C.) 2. An agent is not entitled to accept a gift from his client, so long as the relation continues; and such gift may be rescinded; see *Logan's Trs.*, 13 Jan. 1885, 12 R. 1094; *Begg*, 304.] In addition to his claim against his client for payment of his account of expenses, a law agent has a preference, of the nature of hypothec, over the expenses of process, where awarded or likely to be awarded against the opposite party in the suit, of which right the agent cannot be deprived by any arrangement between the parties to the cause. The agent has also a preference by retention over the papers and title deeds of his client, which have come lawfully into his custody, until satisfied for the amount of his business or professional account. [See *Hypothec. Retention*.] See *Ersk.* B. iii. tit. 3, §§ 33, 37; B. iv. tit. 2, § 25; [*Bell's Com.* i. 489; ii. 34, 107; *Bell's Princ.* §§ 154, 219 (7), 1388, 1438; *Begg on Law Agents*; *Mackay's Prac.* i. 136; ii. 570. See *Law Agent. Confidentiality. Expenses*.]

[**AGGRAVATION**, of *Crime*. See *Theft. Assault. Previous Conviction*.]

AGISTMENT; in the law of England, is where other men's cattle are taken into any ground to pasture at so much *per week*. *Tomlins, h. t.* See *Grass-maill*.

AGNATE. Agnates, in the law of Scotland, are those related through the father, as cognates are those related through the mother. [In the Roman law, a man's agnates were those of his kinsmen who were subject to the same *patria potestas* as himself, or would have been had the common ancestor been still alive; *Muirhead's Roman Law*, 123.] See *Stair*, B. iii. tit. 4, § 8; *Ersk.* B. i. tit. 7, § 4; *Bell's Princ.* §§ 2078, 2111.

AGREEMENT; a mutual bargain or contract. In a legal sense, this term may be applied generally to all those contracts in which two or more parties mutually consent to perform any lawful act, or to implement towards each other such engagements as the law will enforce. [See *Anson on Contract*, 3; *Pollock on Contract*, 1.] See *Consent. Contract. Obligation*.

[**AGRICULTURAL HOLDINGS ACT**, 1883; 46 & 47 Vict. c. 62. The main purpose of this act is to alter the rule of the common law which denies to an outgoing tenant compensation for improvements made by him during his lease. See *Lease*. The act came into force on 1st January 1884, which day is referred to as "the commencement of the act" (§ 34). It does not apply to any holding "that is not either wholly agricultural or wholly pastoral, or in part agricultural, and as to the residue pastoral, or in whole or in part cultivated as a market garden" (see *Mackintosh*, 18 Dec. 1886, 14 R. 282); nor to "any holding let to the tenant during his continuance in any office, appointment, or employment of the landlord" (§ 35).

The leading provision of the act (§ 1) is in these terms:—Subject as in this act mentioned, a tenant who has made on his holding any improvement specified in the schedule hereto, shall, from and after the commencement of this act, be entitled, on quitting his holding at the determination of a tenancy, to obtain from the landlord as compensation under this act for such improvement such sum as fairly represents the value of the improvement to an incoming tenant: provided always, that in estimating the value of any improvement in the schedule hereto there shall not be taken into account, as part of the improve-

[ment made by the tenant, what is justly due to the inherent capabilities of the soil. The general effect of this enactment is to confer on the tenant, when he leaves at the end of his lease, a claim to compensation for improvements. But this claim (besides the restriction expressed in the proviso quoted, and further qualifications enacted by subsequent sections) is limited to certain kinds of improvements which are enumerated and classified in the schedule, as follows:—

PART I. Improvements to which consent of landlord is required; (1) Erection or enlargement of building; (2) Formation of silos; (3) Laying down of permanent pasture; (4) Making of water meadows or works of irrigation; (5) Making of gardens; (6) Making or improving of roads or bridges; (7) Making or improving of watercourses, ponds, wells, or reservoirs, or of works for supply of water for agricultural or domestic purposes; (8) Making of permanent fences; (9) Reclamation of waste land; (10) Weiring or embanking of land and sluices against floods.

PART II. Improvement in respect of which notice to landlord is required; (11) Drainage.

PART III. Improvements to which consent of landlord is not required; (12) Boning of land with undissolved bones; (13) Claying of land or spreading blaes upon land; (14) Liming of land; (15) Marling of land; (16) Application to land of purchased artificial or other purchased manure; (17) Consumption on the holding by cattle, sheep, or pigs of cake or other feeding stuff not produced on the holding.

Improvements executed before 1st Jan. 1884. Compensation under this act shall not be payable in respect of improvements executed before the commencement of this act, with these exceptions, namely,—(1) where a tenant has, within ten years before the commencement of this act, executed an improvement specified in the third part of the schedule hereto which he was not under an express obligation to make, and he is not entitled under any contract or custom to compensation in respect of such improvement; or (2) where a tenant has executed an improvement mentioned in the first or second part of this schedule within ten years previous to the commencement of this act, and he is not entitled under any contract or custom to compensation in respect of such improvement, and the landlord, within one year after the commencement of this act, declares in writing his

[consent to the making of the improvement. In either of these cases the tenant, on quitting his holding at the determination of the tenancy after the commencement of this act, may claim compensation under this act in respect of the improvement which he has executed, in the same manner as if this act had been in force at the time of the execution of such improvement; § 2.

Improvements executed after 1st Jan. 1884. Compensation under this act shall not be payable in respect of any improvement specified in the first part of the schedule hereto, and executed after the commencement of this act, unless the landlord, or his agent duly authorised on that behalf, has, previously to the execution of the improvement, and after the passing of this act, consented in writing to the execution of such improvement; and any such consent may be given by the landlord unconditionally, or upon such terms as to compensation, or otherwise, as may be agreed upon between the landlord and the tenant; and in the event of any agreement being made between the landlord and the tenant, the compensation payable thereunder shall be deemed to be substituted for compensation under this act; § 3. Compensation under this act shall not be payable in respect of any improvement specified in the second part of the schedule hereto, and executed after the commencement of this act, unless the tenant has, not more than three months and not less than two months before beginning to execute such improvement, given to the landlord, or his duly authorised agent, notice in writing of his intention so to do, and of the manner in which he proposes to do the intended work, and upon such notice being given, the landlord and tenant may agree on the terms as to compensation or otherwise on which the improvement is to be executed; and in the event of an agreement being made, that the improvement is to be executed by the tenant, the compensation payable thereunder shall be deemed to be substituted for compensation under this act, or the landlord may undertake to execute the improvement himself, and unless the notice is previously withdrawn, proceed to do so in any reasonable and proper manner which he thinks fit, and charge the tenant with a sum not exceeding £5 per cent. per annum on the outlay incurred in executing the improvement, or not exceeding such annual sum, payable for a period of twenty-five years, as will repay such outlay in the said period,

[with interest at the rate of 3 per cent. per annum, such annual sums to be recoverable as rent. In default of any such agreement or undertaking, and also in the event of the landlord failing to comply with his undertaking within a reasonable time, the tenant may execute the improvement himself, and shall, in respect thereof, be entitled to compensation under this act. Where, in the case of a tenancy under a lease current at the passing of this act (25 August 1883), there is in such lease, or in any relative writing made prior to the passing hereof, an express stipulation limiting the outlay on any improvement specified in the second part of the schedule hereto, the tenant shall have no claim to compensation under this act for any such improvement in excess of the sum provided for in such stipulation. The landlord and tenant may, if they think fit, dispense with any notice under this section, and come to an agreement in terms of the lease or otherwise between themselves, in the same manner and of the same validity as if such notice had been given; § 4. Where, in the case of a tenancy under a lease current at the commencement of this act, any agreement in writing or custom provides specific compensation for any improvement specified in the schedule hereto, compensation in respect of such improvement, although executed after the commencement of this act, shall be payable in pursuance of such agreement or custom, and shall be deemed to be substituted for compensation under this act. Where, in the case of a tenancy under a lease beginning after the commencement of this act, any particular agreement in writing secures to the tenant, for any improvement specified in the third part of the schedule hereto, and executed after the commencement of this act, fair and reasonable compensation, having regard to the circumstances existing at the time of making such agreement, then in such case the compensation in respect of such improvement shall be payable in pursuance of the particular agreement and not under this act. The last preceding provision of this section relating to a particular agreement shall apply in the case of a tenancy under a lease current at the commencement of this act in respect of an improvement specified in the third part of the schedule hereto, specific compensation for which is not provided by any agreement in writing or custom; § 5.

Regulations as to Compensation. In the ascertainment of the amount of the com-

[pensation under this act payable to the tenant in respect of any improvement, there shall be taken into account in reduction thereof:—(a) any benefit which the landlord has given or allowed to the tenant in consideration of the tenant executing the improvement; and (b) in the case of compensation for manures the value of the manure that would have been produced by the consumption on the holding, according to the rules of good husbandry or according to the terms of any written contract specifying such rules, of any crops sold off or removed from the holding within the last two years of the tenancy, or other less time for which the tenancy has endured, except in so far as a proper return of manure to the holding has been made in respect of such produce so sold off or removed. The amount of compensation payable to the tenant shall be subject to deduction of any sums due to the landlord:—(1) for rent payable in respect of the holding; (2) for any taxes, rates, or public burdens, or interest, moneys payable in respect of drainage, premiums of insurance payable in respect of the holding, for which the tenant is liable as between him and the landlord; (3) for the breach of any stipulation of the lease, or of any contract relative to the lease, committed by the tenant; (4) for any deterioration committed or permitted by the tenant. There shall be added to the tenant's compensation any sum due to the tenant for compensation in respect of a breach of any stipulation of a lease, or other contract relative to a lease, committed by the landlord. Nothing in this section shall enable a landlord to obtain under this act compensation in respect of deterioration by the tenant or of breach of any stipulation by the tenant committed or permitted in relation to cultivation or management more than four years before the determination of the tenancy; § 6.

Procedure. The enactments in regard to procedure must be explained more briefly. A tenant intending to claim compensation under the act must give notice in writing to the landlord at least four months before determination of the tenancy. See *Hunter*, 13 May 1886, 13 R. 883; *Strang*, 16 March 1887, 14 R. 637. On receiving such notice the landlord may, at any time within fourteen days after determination of the tenancy, give a counter-notice to the tenant of any claim for compensation (under § 6, *supra*). Such notice and counter-notice must state the particulars and amount of the claim; § 7. If the

[parties do not agree as to the amount, mode, and time of payment of compensation, the difference is to be settled by a reference to a single referee, or to two referees and an oversman (the latter to be appointed either by the two referees, or, on application of either party, by the sheriff); §§ 8–10. Delivery to a referee of his appointment is deemed a submission by the party delivering it; and neither party can revoke a submission or appointment without consent of the other; § 11. The referees and oversman have power to call for production of documents, administer oaths, &c., and may proceed in absence of either party; §§ 12, 13. The form of award, and time within which it must be pronounced, are prescribed by §§ 14–16. The last clause of § 16 deals with the ascertainment and award of substituted compensation under §§ 3, 4, 5. The award shall not find due or decern for a sum generally for compensation, but shall, as far as reasonably may be, specify — (a) the several improvements, acts, and things in respect whereof compensation is awarded, and the several matters and things taken into account in reduction or augmentation of such compensation; (b) the time at which each of the improvements, acts, or things was executed, committed, permitted, or omitted; (c) the sum awarded in respect of each improvement, act, matter or thing; and (d) where the landlord desires to charge his estate with the amount of compensation found due to the tenant, the time at which, for the purposes of such charge, each improvement, act, or thing in respect of which compensation is awarded is to be deemed to be exhausted; § 17. The award may decern for payment of the whole or any part of the expenses by one party to the other, and shall fix a day, not sooner than one month after delivery of the award, for payment of the whole sum decerned for; §§ 18, 19. Where the sum claimed for compensation exceeds £100, either party may, within seven days after delivery of the award, appeal against it to the sheriff on all or any of the following grounds:—(1) that the award is invalid; (2) that the award proceeds wholly or in part upon an improper application of, or upon the omission properly to apply, the special provisions of §§ 3, 4, or 5 of this act; (3) that compensation has been awarded for improvements, acts, or things, or for breaches of stipulations or agreements, or for committing or permitting deterioration in respect of which the party claiming was

[not entitled to compensation; (4) that compensation has not been awarded for improvements, acts, or things, or for breaches of stipulations or agreements, or for committing or permitting deterioration in respect of which the party claiming was entitled to compensation; and the sheriff shall hear and determine the appeal, and may, in his discretion, remit the case to be reheard as to the whole or any part thereof by the referee or referees or oversman, with such directions as he may think fit. If no appeal is so brought the award shall be final. The decision of the sheriff on appeal shall be final; § 20. If the requirements of the statute, such as those of §§ 3 and 4 in regard to written consent and written notice, have not been observed, the Court of Session may interfere, and prevent a reference from proceeding; *Sinclair*, 17 Dec. 1887, 15 R. 185.

By §§ 24–26, power is given to a landlord, with authority of the sheriff, to charge the holding (or the estate of which it forms part) with compensation money payable by him. The payment of compensation in respect of Crown lands, and of ecclesiastical and charity lands, is regulated by §§ 31, 32. Limited owners may consent or agree or act in relation to improvements in respect of which compensation is payable under the act, as if they were absolute owners; § 33. Any contract or agreement made by a tenant by virtue of which he is deprived of his right to claim compensation under this act in respect of any improvement specified in the schedule hereto (except an agreement providing such compensation as is by this act permitted to be substituted for compensation under this act) shall, so far as it deprives him of such right, be void; § 36. See *Strang, supra*. Where an incoming tenant has, with the consent in writing of his landlord, paid to an outgoing tenant any compensation payable under or in pursuance of this act in respect of the whole or part of any improvement, such incoming tenant shall be entitled on quitting the holding to claim compensation in respect of such improvement or part in like manner, if at all, as the outgoing tenant would have been entitled if he had remained in the tenancy, and quitted the holding at the time at which the incoming tenant quits the same; § 37. A tenant shall not be entitled to claim compensation by custom, or otherwise than in manner authorised by this act, in respect of any improvement for which he is entitled to compensation under this act;

[but where he is not entitled to compensation under this act he may recover compensation under any agreement or custom in the same manner as if this act had not passed; § 38. A tenant who has remained in his holding during a change or changes of tenancy shall not thereafter, on quitting his holding at the determination of a tenancy, be deprived of his right to claim compensation in respect of improvements by reason only that such improvements were made during a former tenancy or tenancies, and not during the tenancy at the determination of which he is quitting; § 39. Except as in this act expressed, nothing in this act shall take away, abridge, or prejudicially affect any power, right, or remedy of a landlord, tenant, or other person vested in or exercisable by him by virtue of any other act or law, or under any custom of the country, or otherwise, in respect of a lease or other contract, or of any improvements, deteriorations, away-going crops, fixtures, tax, rate, teind, rent, or other thing; § 40. A written consent or agreement does not require the statutory formalities applicable to deeds; § 41. By the interpretation clause (§ 42), “lease” is defined as “a letting of or agreement for the letting land for a term of years, or for lives, or for lives and years, or from year to year” (excluding, therefore, a lease at will, or for less than a year); “determination of tenancy,” as “the termination of a lease by reason of effluxion of time, or from any other cause;” “landlord,” as “any person for the time being entitled to receive the rents and profits of, or to take possession of any holding” (including, therefore, a tenant who has sublet); “tenant” as “the holder of land under a lease;” “landlord” or “tenant” includes “the executors (the heir being apparently omitted *per incuriam*), administrators, assignees, legatees, donees, or next of kin, husband, guardian, *curator bonis*, or trustees in bankruptcy of a landlord or tenant;” “holding” means “any piece of land held by a tenant;” “sheriff” includes sheriff substitute. There is no appeal from the sheriff substitute to the sheriff principal; *Gillespie’s Hospital*, 1885, 1 Sher. Court Rep. 292.

The act also contains provisions in regard to removing for non-payment of rent (§ 27), notice of termination of tenancy (§ 28), bequest of lease (§ 29), and fixtures (§ 30). As to these, see *Removing. Lease. Fixtures*.

See *Johnstone’s and Philip’s* annotated

[editions of the statute; also *Rankine on Leases*, 237; *Hislop's Lect. on Agricult. Law*.]

AID, *Extent in.* See *Extent*.

ALBA FIRMA. In the language of the feudal law, *alba firma* is money-rent, in contradistinction to 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 albe firme*, 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. *Ersk. B. ii. tit. 4, § 7*.

ALDERMAN; an associate to the civil magistrates of an English city or town corporate. He ought to be resident in the place. The aldermen of London are exempt from serving in inferior offices, or on juries or assizes. *Alderman* was a degree of nobility amongst the Saxons: literally, it imports no more than a *senior* or *elder*. *Tomlins, h. t.*

ALE; anciently could not be imported and sold within a barony without the consent of the baron. *Ersk. B. ii. tit. 6, § 8*.

ALIAS. *Alias dictus*. Where a party, either in a civil or criminal process, is known by several names, he is, as it is technically expressed, described by an *alias dictus*; e.g., "John White, *alias* (otherwise called) Huffy White." *Tomlins, h. t.*

ALIBI; elsewhere. In criminal prosecutions, this term is used to express the panel's defence of having been in a different place at the time libelled, from that in which the crime was committed. Of course, when true, this defence is the best proof of innocence; but there are several reasons for regarding it with suspicion. 1. The *alibi* offers the readiest and most obvious opportunity for false evidence. 2. When the prosecutor's evidence is direct, there is a necessary discrepancy between it and that which is brought to establish the *alibi*. 3. Time is not very apparent, and is seldom regarded, except when the witness's attention has been called to it by some circumstance. Hence, the witness's having particularly noted it is in general not very probable. When, therefore, a witness speaks pointedly as to time, it is of importance to ascertain his reasons for having observed and remembered it so exactly. In cases where the prosecutor is allowed a certain degree of latitude in charging the place of the crime, if the panel offer a

proof of *alibi*, the prosecutor must bring evidence of the precise place where the act was committed, that the jury may know whether the proof of *alibi* meets the dispositions on the other side; consequently, a broad or alternative charge has no effect in excluding an *alibi*, where such a proof is naturally applicable. The charge of time is, by uniform practice, extended to three months; but this must, in like manner, be precisely fixed, when an *alibi* is pleaded for part of the time. In regard to those crimes, the place of committing which is immaterial, a proof of *alibi* will be of no avail; as, e.g., the act of fabricating the plates, or of throwing off the spurious notes in a case of forgery. [The plea of *alibi* is a special defence, and a written statement thereof, signed by the panel or his procurator, and specifying the place where the panel alleges that he actually was at the time libelled, must be tendered and recorded at the first diet of trial, unless cause be shewn for its not being lodged till a later day, which must not be less than two days before the second diet; 50 & 51 Vict. c. 35, § 36; *Macdellan*, 14 Jan. 1843, 1 Broun, 510; *Gairdner*, 18 July 1838, 2 Swin. 180.] See *Hume*, ii. 206–224, 410–413; *Ersk. B. iv. tit. 4, § 71*; *Alison's Prac.* ii. 369, 624; [*Macdonald*, 454; *Jurid. Styles*, iii. 894. See *Criminal Prosecution*.]

ALIEN; one born in a foreign country out of allegiance to the British Crown. By 4 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 are in the actual service of any foreign prince or state at war with Great Britain. [But the child, if born where legitimation *per subsequens matrimonium* is not the law of the land, must have been born legitimate; *Shedden*, 9 May 1854, 1 Macq. 535. By 13 Geo. III. c. 21, § 1, the same privilege is extended to all persons born out of allegiance, whose fathers, in virtue of the former act, are to be deemed natural subjects, although their mothers are aliens. See *Dundas*, 15 Nov. 1839, 2 D. 31. With regard to the national status of women and children, the following provisions have been made by the Naturalisation Act of 1870 (33 Vict. c. 14, § 10):—

[(1) A married woman shall be deemed to be a subject of the state of which her husband is for the time being a subject. (2) A widow, being a natural-born British subject, who has become an alien by marriage, shall be deemed to be a statutory alien, and may as such, at any time during widowhood, obtain a certificate of readmission to British nationality, in manner provided by the act. (3) Where the father, being a British subject, or the mother, being a British subject and a widow, becomes an alien according to the provisions of the act, every child of such father or mother, who during infancy has become resident in the country where the father or mother is naturalised, and has, according to the laws of such country, become naturalised therein, shall be deemed to be a subject of that country, and not a British subject. (4) Where the father, or the mother being a widow, has obtained a certificate of readmission to British nationality, the children, becoming resident during infancy in the British dominions with such father or mother, shall be deemed to have resumed the position of British subjects to all intents. (5) Where the father, or the mother being a widow, has obtained a certificate of naturalisation in the United Kingdom, in manner provided by the act, the children becoming resident during infancy with such father or mother in any part of the United Kingdom, shall be deemed to be naturalised British subjects.]

[By § 7 of the same act, an alien who has resided in the United Kingdom, or been in the service of the Crown, for five years, and intends, when naturalised, either to reside in the United Kingdom, or to serve under the Crown, may apply to one of Her Majesty's Principal Secretaries of State for a certificate of naturalisation; and on its being granted (which is at the discretion of the Secretary of State), he will be entitled to all political and other rights, powers, and privileges, and be subject to all the obligations, to which a natural-born British subject is entitled or subject, with this qualification, that he shall not, when within the limits of the foreign state of which he was previously a subject, be deemed to be a British subject, unless he has ceased to be a subject of that state. Such certificate, however, is not to take effect until the applicant has taken the oath of allegiance, the form of which is provided by § 9. Provision is also made, by §§ 3, 4, and 6, for British born and naturalised subjects divesting themselves of

[their status, and renouncing allegiance to Her Majesty, and by § 8, for their being afterwards readmitted to British nationality. See also 33 & 34 Vict. c. 102, and 35 & 36 Vict. c. 39.]

[Before the Naturalisation Act of 1870, no alien was entitled either to acquire or to succeed to heritage in Scotland. But by § 2 of that act, real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner as through, from, or in succession to a natural-born British subject. This enactment gives no qualification for any office, or for any municipal, parliamentary, or other franchise; nor does it confer any right or privilege as a British subject, other than those expressly given by the above section in respect of property; nor does it affect any estate or interest in real or personal property, to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before the passing of the act, or in pursuance of any devolution by law on the death of any person dying before the passing of the act. By § 14, nothing in the act qualifies an alien to be the owner of a British ship. The act does not affect the granting of letters of denization by Her Majesty. These confer on the alien, in whose favour they are granted, certain privileges of British subjects. A denizen, before the Naturalisation Act, could purchase or transmit lands, but he could not take by inheritance. No denizen can be a member of the Privy Council, or of Parliament, nor hold any office of trust, civil or military.]

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 were required to give an account to the custom-house officers of the number and names of the foreigners on board. [The act 6 Will. IV. c. 11, has superseded all the former enactments, and is termed the Peace Alien Act. The question whether an alien is liable or competent to serve on a jury in a criminal trial, was discussed, but not decided, in *Bartlett*, 16 Nov. 1876, 3 Coup.

[357. See *Ersk. B. iii. tit. 10, § 10; Hume, i. 535; ii. 41, 54; Bell's Princ. §§ 43, 1644, 2130; M. Bell's Conv. i. 143; Mackay's Prac. i. 301. See Enlisting. Foreign.*]

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 dispo*ne," 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 dispo*ne. *Ersk. B. ii. tit. 3, § 13. See Disposition.* For prohibitions against alienation, see *Entail*.

ALIMENT; maintenance, food, and clothing. By the law of Scotland, persons who, by reason of nonage, or from other causes, are unable to support themselves, are entitled, in certain circumstances, and in respect of certain relationships, judicially to enforce a claim for aliment.

1. *Claim of Children to Aliment.* (1) *Legitimate.* Parents are bound to aliment their lawful children, until they are of an age and in a condition to aliment themselves. The obligation ceases with forisfiliation; but it continues in all ranks until the child is physically able to earn a livelihood; and in the upper ranks still longer, if the child be destitute, especially in the case of daughters. If a child, after forisfiliation, fall into indigence, the obligation revives; and, as the obligation is of the nature of a debt, it transmits against the representatives of the father. [Hence, a posthumous child has a claim against his father's estate; *Spalding*, 18 Dec. 1874, 2 R. 237.] Failing the father, the mother is liable if she have the means; and failing father and mother, the grandfather is liable where the means of the father and mother are exhausted. [A step-mother is not liable; *Macdonald*, 20 June 1846, 8 D. 830. Nor does the obligation extend to collaterals, unless *ex jure representationis*; *Mackintosh*, 5 Nov. 1868, 7 Macph. 67. Hence, an heir of entail is not bound to support his brothers; *Jackson*, 24 Dec. 1836, 15 S. 313. When a father has suitably educated his son and put him into a profession, the son is not entitled to demand further assistance, unless from physical or mental infirmity he is disabled from earning a livelihood; *Smith*, 4 Nov. 1885, 13 R. 126; with which contrast *Maidment*, 27 May 1818, 6 Dow 257. In regard to the *quantum* of aliment to

[which a child is entitled, "support beyond want" is all that the law will enforce—"all beyond that is left to parental affection;" see *Maule*, 1 June 1825, 1 W. & S. 266; *Bain*, 16 March 1860, 22 D. 1021. But the term "want" is to be construed with reference to the rank and circumstances of the parties. "A person who has received the education of a gentleman, and who has been deprived of the means of subsistence, would not be placed above the reach of want by getting the relief of a parish pauper. The right to be relieved from want in a case of aliment is a right to be secured against that pressure of want which would place the pursuer in the position of a pauper relatively to his position in life;" *per* Lord Pres. Inglis, in *Smith, supra*.] The father will be discharged, if the child be otherwise provided with the means of aliment, or of raising money requisite for that purpose. The obligation includes the son's wife in the upper ranks, during her husband's life; [but not where her own father is able to support her; *Wallace*, 20 July 1848, 10 D. 1510. See *Fraser on Parent and Child*, 87, 104. The widow of a deceased son has, in general, no claim; *Hoseason*, 21 Oct. 1870, 9 Macph. 37. In the ordinary case, a father may implement his obligation by offering to keep the child in family with himself; but if, by his own misconduct, it would be injurious to the child's safety or morals to live with him, a separate aliment will be decreed; *Hepburn*, 1734, M. 410; *Ketchen*, 11 March 1871, 9 Macph. 690. A father refusing to aliment his child is punishable by fine or imprisonment; 8 & 9 Vict. c. 83, § 80. See *Stair, B. i. tit. 5, § 7; More's Notes, xxix.; Ersk. B. i. tit. 6, § 56; Bell's Princ. § 1629; Fraser on Parent and Child, 85; Kames' Princ. of Equity (1825), 71. See Parent and Child.* (2) *Claim of Illegitimate Children.* 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 in which the mother has a settlement. [See *Weepers*, 20 June 1844, 6 D. 1166. The obligation to aliment continues until the child is able to earn a subsistence for himself, the period varying according to the circumstances of each case. "The general rule is, that the father of an illegitimate child has to contribute

[one-half to its support till it is the age of seven, and in some cases till the further age of ten. The reason for that rule is, that during these years it is proper that the child should be left with its mother, and that it is not able to do anything for its own support. After that age a great deal depends upon the condition of parties, and if the mother chooses to go on keeping the child without asking for more money, or insisting upon the father taking the child, then if she thinks fit to bring an action for aliment of the child at the end of two or three years, she may be held to be debarred by her conduct from making any such demand. On the other hand, if the father of the child desires to have the custody and charge of the child, then is the time for him to offer to take it, and if the mother does not offer to keep it, the father will have to support it until it is fourteen, or until it is able to do for itself;"] *per* Lord Pres. Inglis, in *Dunnet*, 11 Dec. 1883, 11 R. 280. See also *Corrie*, 24 Feb. 1860, 22 D. 897; *A. v. B.*, Feb. 1875, Journ. of Jurisp. xix. 165; *Shearer*, 29 Nov. 1877, 5 R. 263; *Hardie*, 31 Oct. 1878, 6 R. 115; *Westlands*, 1 June 1887, 14 R. 763. As to the *quantum*, the principle established by *Maule*, *supra*, viz., that a child is entitled to no more than "support beyond want," applies to bastards as well as lawful children. The wealth or rank of the father affords no criterion, though it was recognised in *Lamb*, 6 Dec. 1842, 5 D. 248. In modern practice, the rate allowed against the father, in ordinary cases, has been 2s. 6d. per week, payable quarterly in advance. But the amount varies slightly in different districts; in *A. v. B. supra* (Renfrewshire) the rate allowed was 3s. per week; in Glasgow, the rate is £8 per annum; *Guthrie's Bell's Princ.* (1885), § 2062. Neglect by either parent is punishable by fine or imprisonment; 8 & 9 Vict. c. 83, § 80.] 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 father's bankrupt estate; [*Downs*, 7 July 1886, 13 R. 1101]; 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.* i. 681, 688. [See *Ersk. B. i. tit. 6,*

[§ 56; *Bell's Princ.* § 2062; *M'Glashan on Aliment*, 64; *Fraser on Parent and Child*, 123; *Barclay's Digest*.]

2. *Claim of Parents to Aliment.*—Parents, when in indigence, have a claim against their children for separate aliment, where the children are in circumstances to afford it; [*Thom*, 2 Dec. 1864, 3 Macph. 177; *Hamilton*, 20 March 1877, 4 R. 688. A bastard is bound to support his mother; *Samson*, 26 Nov. 1886, 14 R. 113. Whether he is bound to support his reputed father is extremely doubtful; see *dicta* quoted in *Samson*. At common law, a husband is bound to support the indigent parents of his wife during the subsistence of the marriage; *Reid*, 13 July 1866, 4 Macph. 1060; *Foulis*, 20 July 1887, 14 R. 1088. But a man who married after the passing of the Married Women's Property Act, 1877, and who was not *lucratus* by the marriage, was held not liable to aliment his wife's mother; *M'Allan*, 7 July 1888, 15 R. 863. See *Marriage*. See *Ersk. B. i. tit. 6, § 57*; *Bell's Princ.* § 1634; *Fraser on Parent and Child*, 114.]

3. *Wife's Claim to Aliment.*—A husband is bound to aliment his wife in family with himself. But if, from ill-usage on his part, or any other cause, the spouses live apart, this obligation to aliment will be enforced. So also, during the dependence of an action of divorce or of adherence, the husband, whether he be pursuer or defender, must not only aliment his wife, but must also provide the means of defraying her expenses in the action. [Aliment may be sued for by a wife, either in connection with an action of adherence or of separation, or separately; *Coutts*, 8 June 1866, 4 Macph. 802; *Crombie*, 19 May 1868, 6 Macph. 776. The procedure in actions for aliment in the Court of Session is the same as in other consistorial causes; 24 & 25 Vict. c. 86, § 15. By 1 Will. IV. c. 69, § 32, actions of aliment are competent in the sheriff court. But if any question of status is involved the sheriff can only award interim aliment, until the rights of parties are permanently settled by the supreme court; *Smith*, 11 June 1874, 1 R. 1010; *M'Donald*, 25 May 1875, 2 R. 705. Even where the spouses are separated, the interference of the sheriff is only justified on the ground of absolute necessity; see *Hay*, 24 Feb. 1882, 9 R. 667; *Hood*, 24 Jan. 1871, 9 Macph. 449. The amount awarded varies, but is usually about a fourth of the husband's income; see *Lang*, 27 Oct.

[1868, 7 Macph. 24; *Macmillan*, 20 July 1871, 9 Macph. 1067; *Hay*, *supra*; *Hoey*, 23 Oct. 1883, 11 R. 25; *Stewart*, 3 Dec. 1887, 15 R. 113. A wife is entitled to arrears of aliment; but the husband is liable to her creditors for alimentary debts; *Donald*, 26 May 1860, 22 D. 1118; *Macmillan*, *supra*. See *Bell's Princ.* §§ 1538, 1545, 1620; *Fraser on Husband and Wife*, i. 837; *Mackay's Prac.* i. 202, 363; ii. 290. See *Marriage. Separation.*]

4. It is laid down in our law books, that the liferenter of a landed estate is bound to aliment the fiar or heir when he has no other means of subsistence. This obligation seems to have originated in an extended construction of the statute 1491, c. 25, under which the superior in a ward estate was bound, while the estate was in ward, to aliment the heir. [But see *Bell's Illust.* and *Ersk.*, *infra cit.*] In whatever way this rule may have originated, it is probable, after the decision of the House of Lords in *Maidment's* case, and the *dicta* in that of *Maule*, that, in the abstract, this doctrine would not now be enforced; since, in every case of fee and liferent, it may be said, as was observed in *Maidment's* case, that the fiar has a marketable commodity, on which he may raise money by sale or otherwise for his maintenance. And although it may be inexpedient to countenance that species of improvidence, yet there appear to be no considerations, either of equity or of expediency, sufficient to warrant a court of law in imposing on a liferenter the burden of supporting, it may be, a strange fiar. See *Bell's Princ.* § 1065; [*Illust. ib.*; *Ersk.* B. ii. tit. 9, §§ 62, 63; *More's Notes to Stair*, ccxv., cccxx.; *Macenzie's Obs.*, 101. See *Liferent.*]

5. Under the Act of Grace (1696, c. 32), creditors who choose to detain their debtors in prison after a surrender of their property and effects in terms of that statute, and of 6 Geo. IV. c. 62, are bound to aliment them. See *Act of Grace*.

6. As to aliment of the poor, see *Poor*.

[7. When a person is maintained at bed and board by one not bound *super jure naturæ* to aliment him, and without any agreement as to remuneration, the general presumption of law is that the aliment was given *ex pietate*. It is otherwise, however, if the person entertained was minor, or incapable of contracting, and had no father or guardian, with whom a bargain might have been made; or if the host is one who earns his livelihood by entertaining strangers. See *M'Gaw*, 10

[Nov. 1882, 10 R. 157; also *Ersk.* B. iii. tit. 3, § 92; *Dickson on Evidence*, § 163. When aliment is furnished under an unwritten agreement, express or implied, the claim of the entertainer is subject to the triennial prescription; *Ligertwood*, 21 June 1872, 10 Macph. 832.

[As to imprisonment for alimentary debts, see *Imprisonment.*]

ALIMENTARY FUND; is a fund set apart by the destination of the giver, for an aliment to the receiver. A fund so vested, at least to the extent of a moderate aliment, is not arrestable, or otherwise attachable by the direct diligence of creditors. [See *Rogerson*, 6 Nov. 1885, 13 R. 154.] But although the bestower of the fund has, in this manner, a right to fix its destination, no one can exempt his own funds from the diligence of his creditors, by setting apart the whole or any portion of them as an alimentary fund 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 widows' funds, it is usual to declare the widow's annuity to be alimentary. [Arrears of an alimentary fund are arrestable; *Drew*, 17 Nov. 1870, 9 Macph. 163; *Muirhead*, 19 July 1877, 4 R. 1139. An alimentary annuity in excess of what is required for reasonable aliment may be restricted by the court; *Livingstone*, 5 Nov. 1886, 14 R. 43. See *Ersk.* B. iii. tit. 6, § 7; *Bank.* i. 159; *Bell's Com.* i. 124; *Bell's Princ.* § 2276; *M. Bell's Conv.* i. 330, 553. See *Arrestment. Annuities.*]

ALIMONY; seems to be used by Erskine as synonymous with *Aliment*; but in English legal phraseology the term is confined to the allowance which a married woman sues for, and is entitled to, on separation from her husband. *Tomlins, h. t.* See *Ersk.* B. i. tit. 6, § 56; B. iv. tit. 3, § 28. See *Aliment*.

[ALIOQUIN (or ALIOQUI) SUCCESSURUS; otherwise entitled to succeed. In the general case, an heir who succeeds to an estate, incurs by his succession liability for the debts and obligations of his ancestor. But if he can take the estate in a different character from that of heir of the last proprietor, such liability is not incurred. "Thus if a son, on the death of his father, succeeds to an entailed estate, in terms of the destination of the entail, he does not, by making up his title thereto, render himself liable for his father's private debts.

[He incurs no representation, because he succeeds not as his father's heir-at-law, but *alioqui successurus*, namely, as heir of entail, or, again, if a father disposes to his son heritage burdened with certain conditions, to which that son was entitled to succeed simply under the terms of a deed granted by a previous ancestor, or, it might be, of the antenuptial marriage contract of his parents, he may disregard the conveyance executed by his father, and elide the conditions imposed by it, by making up his title under the other deeds which gave him the right;" *Trayner's Latin Maxims*. See also *Bell's Princ.* § 1737.]

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 2 carats of alloy in the pound Troy; the standard for silver is 11 ounces 2 pennyweights, and 18 pennyweights 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. [From signifying the proportion of base metal in the coin, the term *alloy* was applied to the base metal itself. *Wharton's Lex.*]

ALLEGIANCE; is the fidelity due by every natural-born subject to the Crown. It is also due by every person who has been naturalised; and a temporary allegiance is due, during the period of his residence, by every foreigner who resides in the kingdom, and has the protection of our laws. Since the period of the Revolution, allegiance has been enforced by an oath, termed the Oath of Allegiance; 1693, c. 6. [A simple form is prescribed by the Promissory Oaths Act, 1868, 31 & 32 Vict. c. 72, § 2.] See *Ersk.* B. i. tit. 2, § 33; *Bell's Princ.* § 2133. See *Oaths. Affirmation. Alien.*

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 contradistinc-

tion to feudal; in which sense all moveable property is allodial. But in a more limited sense, the term is applied, 1. To the property belonging to the Crown; 2. To the superiorities reserved by the Sovereign; and, 3. To 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, provable 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 vassal's accepting of a charter from the Crown. There is also 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 copyhold 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 judicially recognised. [See *Kindly Tenants. Lochmaben.*] See *Stair*, B. ii. tit. 3, § 4; *More's Notes*, clvii.; *Ersk.* B. ii. tit. 3, §§ 8, 18; [*Menzies' Conv.* 517. See *Udal.*]

ALLONGE. An allonge is a slip of paper annexed to a bill of exchange, to receive additional indorsements, when the back of the bill has been already filled up. An indorsement written on an allonge is deemed to be written on the bill itself; Bills of Exchange Act, 1882, § 32 (1). See *Bill of Exchange.*

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 bills, stating the amount of the debt, the lands appraised, and the names of the appriser, 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 abbreviation. *Stair*, B. ii. tit. 3, § 22; B. iii. tit. 2, § 24; *Ersk.* B. ii. tit. 12, § 26. See *Abbreviate. Adjudication.*

ALLUVIO; is that addition which a river, running between the grounds of different heritors, may insensibly make to one of the properties, and which accretes 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 pro-

perty, but remains the property of that person to whom it originally belonged. See *Stair*, B. ii. tit. 1, § 35; *Ersk.* B. ii. tit. 1, § 14; *Bank.* i. 506; *Bell's Princ.* § 935; [*Rankine on Land-Ownership*, 100.] See *Accession. Avulsio.*

ALMS; relief bestowed on the poor. A parliamentary voter, whether in England or Scotland, who has received [proper] parochial relief during the preceding twelve months, is disqualified to vote; and by the English and Scotch Reform Acts such a person is not entitled to be registered as a voter in any city, burgh, or town. The disqualification in Scotland is the receipt of parochial relief within twelve calendar months next previous to the last of July; 2 & 3 Will. IV. c. 65, § 11. [See *Nicolson on Elections*, 86; *Election Law*.]

ALTARAGES. [See *Chapels and Altarages*.]

[ALTERNATIVE HOLDING. See *Conveyancing*.]

ALTERNATIVES. If there be an alternative in the manner of performing an obligation, the debtor has the choice, on the maxim, *In alternativis electio est debitoris*; but Bankton says, that after commencing a suit for the performance, the creditor has the right to choose. A conventional penalty for non-performance is not an alternative. The party entitled to the option retains his right, until he has declared under which alternative he has been acting. Thus, it was decided, that a tenant who was granted a lease for nineteen years, or for two lives, and who had held the farm for fourteen years without declaring his election, might insist on choosing to have the lease for two lives; [*Gray*, 1765, M. 460.] But acting upon one of the alternatives for a time fixes the choice, and bars a recurrence to the other. In an obligation to do one of two things for a certain period annually, it is doubtful whether the first choice fixes the alternative, or the debtor continues to have an annual option. It is thought, however, that a tenant or other party, bound to pay either a money or a grain rent, may avail himself of the choice each year. In alternative legacies the right of election seems to depend on the intention of the testator, as implied in the form of expression which he makes use of: thus, when he bequeathes one of two things to the legatee, the legatee would appear to have the option; when he enjoins his executors to pay one of two things, the choice seems to be left to them. See *Stair*, B. i. tit. 17, § 20; *More's Notes*,

cxxi., ccxlv.; *Bank.* i. 474, §§ 80, 83; iii. 89; *Brown's Synop. h. t.* and p. 1430; *Hume*, i. 501; ii. 169, 194, 198, 203–23.

ALTIVS NON TOLLENDI; was a Roman law servitude, whereby the servient proprietor was restricted from raising a building within his own ground to a height prejudicial to the dominant tenement. There was also, it is said, in the Roman law a servitude *Altius tollendi*, which, according to some commentators, imported a right in the dominant proprietor to raise his house higher than was permitted by the regulations for the height of buildings in Rome. But this is a very doubtful interpretation; and in Scotland, at least, would receive no countenance, as applicable to those towns (such as Edinburgh) where there is a statutory limitation in the height of the houses. It would rather appear, indeed, that, properly speaking, there was no servitude *altius tollendi*, and that the term merely signifies an immunity from the servitude *altius non tollendi*. [See *Banks & Co.*, 5 June 1874, 1 R. 981.] See *Ersk.* B. ii. tit. 9, § 10; *Bell's Princ.* § 1007; *Stair*, B. ii. tit. 7, § 9; [*Rankine on Land-Ownership*, 380, 399.] See *Edinburgh. Light. [Servitude]*.

[AMALGAMATION. See *Joint Stock Company. Insurance (Life)*.]

AMAND; is synonymous with a fine or penalty. In our older practice, a defender who proposed impropbation was required to consign a certain sum to be forfeited as an amand, in case it should turn out that he had proposed the plea *animo differendi litem*. Prior to the peremptory statutory regulations introduced by the Judicature Act, 6 Geo. IV. c. 120, it was usual for the court, or for the Lords Ordinary, to pronounce orders for the lodging of pleadings or other papers in the course of a process, "*under an amand*" (as it was expressed) "*of 40s.*," or some such sum; although, as these amands were seldom enforced, the compulsitor was practically ineffective, and is now in desuetude. *Stair*, B. iv. tit. 40, §§ 12, 39; tit. 1, § 63.

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 sovereign'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 cannot be arrested, nor 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 *Stair*, B. i. tit. 1, § 11; tit. 12, § 13; *Hume*, i. 536; [*Phillimore's International Law*, ii. 156; *Abdy's Kent's International Law*, 119.]

AMBIDEXTER; one who plays on both sides. In English legal phraseology, it signifies a juror who takes money [from both parties] for his verdict. *Tomlins, h. t.*

AMENDMENT OF THE LIBEL. [Increased powers of amendment of the libel in a criminal prosecution were conferred by the Criminal Procedure Act, 1887 (50 & 51 Vict. c. 35), § 70. See *Criminal Prosecution. Indictment*. In regard to amendment of complaints under the Summary Procedure Act, see *Henderson*, 6 Nov. 1878, 6 R. (J.C.) 1; *Stevenson*, 21 Feb. 1879, 6 R. (J.C.) 33; *James*, 28 Jan. 1880, 7 R. (J.C.) 9; *Matheson*, 19 March 1885, 12 R. (J.C.) 40. See, as to former law,] *Hume*, ii. 168, 184, 280; [*Bell's Notes*, 180, 232; *Alison's Prac.* 365; *Macdonald*, 464.]

[AMENDMENT OF THE RECORD. By the former practice, under the Judicature Act of 1825, after the record in an action had been closed, no amendment was allowed, except in the case of *res noviter veniens ad notitiam*; and in undefended actions there could be no amendment, other than a restriction of the conclusions of the summons. This has been altered by the Court of Session Act, 1868, which provides (§ 20) that "in undefended actions, any error or defect in any summons or other pleading, whereby the action is commenced in the Court of Session, may be amended upon application to the Lord Ordinary or the court before whom it depends, if the Lord Ordinary or the court think such amendment should be allowed; and such amendment shall be made in writing either upon the summons or pleading, or in a separate paper, and shall be authenticated by the signature of counsel; and the Lord Ordinary or court may, if he or they think fit, order the amended

[summons or other pleading to be served upon the absent defender or defenders, with liberty to him or them to enter appearance within such time as shall seem proper; provided that the expenses occasioned by such amendment shall not be chargeable against the defender or defenders." See *Absence*. With regard to defended actions, the act of 1868 provides (§ 29) that "the court or the Lord Ordinary may at any time amend any error or defect in the record or issues in any action or proceeding in the Court of Session, upon such terms as to expenses and otherwise as to the court or Lord Ordinary shall seem proper; and all such amendments as may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be so made." See *Shotts Iron Co.* 11 Jan. 1870, 8 Macph. 383; *Gelot*, 4 March 1870, 8 Macph. 649; *Arnot*, 14 Nov. 1872, 11 Macph. 62; *Rose*, 2 Feb. 1878, 5 R. 600; *Taylor*, 15 July 1885, 12 R. 1304. This enactment, however, contains the following proviso:—"That it shall not be competent, by amendment of the record or issues under this act, to subject to the adjudication of the court any larger sum, or any other fund or property, than such as are specified in the summons or other original pleading, unless all the parties interested shall consent to such amendment." Hence, a conclusion for interest cannot be added to a summons by way of amendment; *Shotts Iron Co., supra*; see also *Forbes*, 9 Nov. 1870, 9 Macph. 96. A farther proviso is applicable to both defended and undefended actions, viz., "That no such amendment shall have the effect of validating diligence used on the dependence of the action so as to prejudice the rights of creditors of the defender interested in defeating such diligence, but shall be operative to the effect of obviating any objections to such diligence when stated by the defender himself, or by any person representing him by a title, or in right of a debt contracted by him subsequent to the execution of such diligence;" §§ 20, 29. The act does not authorise the addition of new parties to a record, on a motion for amendment; *Anderson*, 12 Dec. 1871, 10 Macph. 217; *Merison*, 1 Nov. 1873, 1 R. 116. And such amendments only are contemplated, as parties are in a position to make, the moment they are suggested; hence, a party proposing to amend was not allowed a diligence to recover documents, in order to make his statement specific;

[*Thomson*, 18 Mar. 1869, 7 Macph. 687. A motion for amendment is competent at any time before final judgment has been pronounced, but not after that; *Gelot*, *supra*; *Forbes*, *supra*; *Mackenzie*, 17 March 1869, 7 Macph. 676. With regard to amendment of pleadings in the sheriff court, similar provisions to those above quoted are enacted by 39 & 40 Vict. c. 70, §§ 13, 24. See on this subject, *Ersk. B. iv. tit. 1, § 68*; *Shand's Prac. i. 493*; *Mackay's Prac. i. 376, 482*; *ii. 31*; *Dove Wilson's Sher. Court Prac. 245*. See *Abandonment. Supplementary Summons. Res noviter*.]

AMENDMENT. In parliamentary proceedings, an amendment is an alteration proposed in the draught of any bill, or in the terms of any motion. No member, except when the House is in Committee, is allowed to speak more than once on the same question; but he may speak again on an amendment, which is considered to be a new question. When a motion for the adjournment of the House is made, it is in the words, "That the House do now adjourn;" and if it be carried, the House will adjourn to the next sitting day; unless, at a previous part of the evening, a resolution has been come to, that, at its rising, the House shall adjourn to some particular day. It is not competent, therefore, on a motion for adjournment, to move an amendment, specifying any particular day to which the House shall adjourn. An amendment may be proposed on an amendment. The parliamentary rule as to putting motions and amendments to the vote differs from that usually observed at public meetings. In Parliament, the motion which has been first made and seconded is always put first from the chair; and hence, when an amendment has been proposed, instead of the question that it shall be adopted being directly put, a vote is taken on the question, "That the words proposed to be left out stand part of the question," and if this motion is carried, the main question, which is really the same thing, is next put, and of course agreed to. But if the question, "That the words stand part of the question," be negatived, the main question is put with the omission of these words; so that the amendment separately is never put at all. [See *May's Parl. Prac. 316*.]

AMERCIAMENT or **AMERCEMENT**; 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 [at the discretion

[of a jury, as distinguished from a fine, or certain penalty, imposed under a statute by a court of record.] *Tomlins, h. t.*; [*Mozley & Whiteley's Dict. h. t.*]

AMERCIAMENTUM, or *Forisfactum Curie*; used in the *Regiam Majestatem* to signify the *unlaw*, or fine for absence. *Skene, h. t.*

AMICUS CURIE; a bystander who, not being interested in the cause, of his own knowledge, and *tanquam amicus*, makes a suggestion in point of fact or in point of law, for the information of the court, or to correct a mistake. See *Tomlins, h. t.*

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 passed to the present proprietor by purchase, or what is called a singular title; such a person being termed the *author*. *Stair, B. iv. tit. 35, § 16*; *More's Notes, cccxxvi., ccclviii.*; *Ersk. B. iii. tit. 8, § 101*; *Bell's Com. i. 764*; *Bell's Princ. § 1931*.

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

[ANCIENT LIGHTS.] In England, this name is applied to the right of the owner of a building, who has enjoyed the access of light to it for twenty years as of right without interruption, to prevent any one obstructing the access of light to his windows. *Sweet's Law Dict., voce Light.*

ANIMALS. 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. See *Ersk. B. ii. tit. 1, § 10*; *Stair, B. ii. tit. 1, §§ 5, 33*; *Bank. i. 505*; [*Bell's Princ. §§ 1288–90*. See also *Occupancy*.] As to injury done by animals, see *Damages*.

ANN, or **ANNAT**; is the half year's stipend payable for the vacant half year after the death of a clergyman, to which his family or nearest of kin have right under 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 half of the next 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. [It has been decided that one-half goes to the widow, and the other to the children *per capita*; *Macdermit*, 1747, M. 464; and this decision is supported by most of the authorities;] but 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. By 50 Geo. III. c. 84, whereby provision is made for augmenting small stipends to £150, it is enacted (§ 16) that the executors or personal representatives of the minister whose stipend shall be augmented under this act, shall be entitled to one half-yearly moiety of the augmentation to be so granted, in name of ann, over and above the stipend due to the deceased minister in the same manner as in ordinary stipends, and the Barons of Exchequer are empowered to grant precepts for payment of this ann to those having right thereto, on their receipt, without confirmation or making up any other titles. See also 5 Geo. IV. c. 90, § 24. [Payment of ann under the act 1672 is not affected by the Apportionment Act, 1870; *Latta*, 30 Nov. 1877, 5 R. 266.] See *Ersk. B. ii. tit. 10, § 65*; *Stair, B. ii. tit. 8, § 34*; *More's Notes*, ccxlv.; *Bank. ii. 77*; *Connell on Tithes*, ii. 91; [*Buchanan on Teinds*, 429; *Duncan's Par. Eccl. Law*, 320; *Black's Par. Eccl. Law*, 133.]

ANNEXATION; as used in the *Regiam Majestatem* signifies "a fast-knitting and binding." *Skene, h. t.*

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 parish church to which they belong, to the church of a parish to which they are more contiguous.

1. *Annexed Property of the Crown*.—The liberality of our sovereigns during the fifteenth 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 not long acted on; the ancient system having been resumed, under the specious pretence of improving the country, by giving out the property of the Crown in feu for payment of a rent. By 1455, c. 41, the annexed property of the Crown is described, and declared unalienable, unless the gift receive the approbation of Parliament. But that enactment seems not to have checked the evil; and it was followed by other statutes, and particularly by the acts 1457, c. 71; 1540, c. 15 and 16; 1584, c. 6; 1597, c. 233 and 234; some of which, by sanctioning subinfeudation in Crown lands, had the effect of dissipating, or greatly depreciating, the value of the annexed property, in so much that now, with the exception of the castles of Edinburgh, Stirling, and Dumbarton, the palace of Holyroodhouse, and the feu-duties of the ancient domains feued out under the above statutes, little remains of the once extensive territories of the Crown. *Ersk. B. ii. tit. 3, § 14*; [*Bell's Princ. § 672*. See *Crown Lands. King.*]

2. *Annexation of Temporality of Benefices*.—This annexation was made by 1587, c. 29, 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, what had formerly been given by the Crown to religious houses is resumed, the cause of the disposition (that is, the support of the Popish religion) now ceasing, as the act expresses it. 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 subfeuing. *Ersk. B. ii. tit. 10, § 19*; *Stat. 1587, c. 29*; *Mackenzie's Observations*, 226. See *Teinds*.

3. *Annexation quoad sacra tantum*; is the annexation of lands lying at a distance from the church to which they belong, to

another church to which they are more contiguous, in so far as relates to the pastoral charge. Such lands still continue part of the parish from which, *quoad sacra*, they are separated, and remain subject to parochial burdens in it, such as the expense of building or repairing the manse, supporting the poor, paying stipend, and the like, although it has been decided (contrary to the *dictum* of Erskine), that lands annexed *quoad sacra tantum*, are liable in the expense of upholding the church of the parish to which they are so annexed; [*Drummond*, 1773, M. 7920.] See *Ersk. B. ii. tit. 10, § 64*; *Stair, B. ii. tit. 3, § 35*; *Bank. i. 538, 559*; *ii. 13, 16*. See *Disjunction*.

ANNO DOMINI; the computation of time from the incarnation of our Saviour. *Tomlins, h. t.*

ANNUALRENT; interest of money. Before the Reformation, it was not lawful to lend money at interest, and, to evade this law, persons lending money received a yearly rent out of land. The profit of the money so lent was denominated annualrent, and thus the term annualrent came to be synonymous with interest. *Stair, B. i. tit. 15, § 7*; *Bank. i. 436*; *Kames' Stat. Law Abridg. h. t.*; *Brown's Synop. h. t.*; *Watson's Statute Law, h. t.* 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 security for the whole debt, principal and interest. Hence, when these two securities came into competition, the annualrent right, though preferable to the heritable bond, extended merely to the annualrent, while the surplus was carried by the heritable bond. This form of security is now in desuetude. See *Stair, B. ii. tit. 5*; *More's Notes, ccix.*; *Ersk. B. ii. tit. 8, § 31*; *tit. 2, § 5*; *Bank. i. 487, 648*; *Bell's Com. i. 713*; *Bell's Princ. § 909*; [*Ross's L. C. iii. 108*; *Menzies' Conv. 845*. See *Burdens. Redeemable Rights. Heritable Securities. Ground-Annual.*]

ANNUEL; a word used in the older law of Scotland, to signify a yearly revenue or duty payable at certain terms, either legal or conventional. *Skene, h. t.*

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 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. *Stair, B. ii. tit. 8, § 13*; *B. iv. tit. 24, § 3*; *Ersk. B. ii. tit. 10, § 39*; *Bank. ii. 58*; *Kames' Stat. Law Abridg. h. t.*; [*Connell on Tithes, i. 265.*] See *Teinds*.

ANNUITY TAX; a local tax [formerly levied within the city of Edinburgh and the burgh of Montrose, for the support of the endowed clergymen in these towns. It was abolished by 23 & 24 Vict. c. 50, as amended by 33 & 34 Vict. c. 87.]

ANNUITIES. An annuity is the right to a yearly payment in money. When secured on land it becomes a conventional liferent, and a *debitum fundi*, differing from annualrent rights chiefly in this, that it has no relation to a capital sum or stock. Annuities are either settled as a permanent aliment on the annuitant for family purposes, or from favour; or they are constituted by bond of annuity, whereby the obligor engages to make to the obligee a certain yearly payment, in consideration of a price deemed adequate at the time. Such as are for a fixed term of years are called *Annuities Certain*; such as depend on the duration of human life are called *Annuities on Lives*. The creditor in an annuity may adjudge heritable property sufficient to answer his claim, and it has also been held that he may arrest a fund of lying money sufficient to cover his annuity. An annuitant, in bringing his action for recovery of his annuity, claims a capital sum sufficient to produce an annual interest equal to the annuity. If he succeed, the requisite sum is recovered and invested or secured, and the interest of it is paid to him until the expiration of the annuity, when the capital is restored to the debtor in the annuity; or the same object may be attained under an arrangement for the purchase of an annuity from an insurance company. [By § 54 of the Bankruptcy Act (19 & 20 Vict. c. 79), no creditor, in respect of an annuity granted by a bankrupt, is entitled to vote and draw a dividend, until such annuity is valued. The trustee, if then elected, or otherwise the sheriff, is directed, on application being made by such creditor, to put a value on the annuity, regard being had to the original price given therefor, deducting the diminution in value

[caused by the lapse of time since the grant thereof to the date of the sequestration; and the creditor is then entitled to vote and draw dividends in respect of such value, and no more. The judgment of the trustee or sheriff is subject to review, on appeal by any creditor who has claimed on the estate.] Annuities, as having *tractum futuri temporis*, are heritable, and an obligation to pay them falls, like other similar burdens, upon the heir of the deceased, [and not upon the executor, in the case of intestate succession; and also in the case of testate succession, unless a contrary intention appear. See *Crawford's Trs.* 11 Jan. 1867, 5 Macph. 275; *Mackintosh's Trs.* 19 May 1873, 11 Macph. (H. L.) 28; *Gordon*, 22 Jan. 1873, 11 Macph. 334. By the common law,] annuities do not vest *de die in diem*, but at the specified terms of payment, which are usually Whitsunday and Martinmas. [By the Apportionment Acts, however, annuities and other periodical payments in the nature of income, (except sums payable under policies of assurance,) accrue from day to day, and are apportionable in respect of time accordingly, unless it be otherwise stipulated; 4 & 5 Will. IV. c. 22; 33 & 34 Vict. c. 35. An annuitant under a will is entitled to payment of the annuity out of the capital of the estate, in so far as the revenue may be insufficient to meet it; *Knox's Trs.* 11 June 1869, 7 Macph. 873. Annuities to which a married woman becomes entitled during the marriage do not fall under a general conveyance of *acquirenda* to trustees under an antenuptial contract of marriage; *Boyd's Trs.*, 13 July 1877, 4 R. 1082. With regard to the purchase of government annuities, see 16 & 17 Vict. c. 45; 27 & 28 Vict. c. 43, 46; 45 & 46 Vict. c. 51. See *Ersk.* B. ii. tit. 9, §§ 43, 66; B. iii. tit. 6, § 9; *Bell's Com.* i. 353, 359; ii. 71; *Bell's Princ.* §§ 1484, 1498; *More's Stair*, cxli.; *Menzies' Conv.* 211, 319, 870; *M. Bell's Conv.* i. 272, 554; ii. 940, 953; *Goudy on Bankruptcy*, 188, 309.]

ANNUS DELIBERANDI; is the year [now only six months] allowed by law to the heir to deliberate whether he will enter and represent his ancestor. The entry of an heir infers serious responsibilities, and therefore the year is allowed for consideration. 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. A pointing of the ground, however, at the instance of the predecessor's widow for her jointure may proceed against the lands within the *annus deliberandi*, to which process the heir may be competently made a party; *Pitcairn*, 1702, M. 6876. The heir might formerly be charged to enter; but no procedure could follow on the charge within the year. And he might be cited in an action, provided the diet of compearance fell beyond the year; for within the year he was not bound to answer in any action in which he would require to appear as heir. If the apparent heir die within the year, the next heir has his own entire year, from the death of the apparent heir. The privilege of deliberating is terminated not only by the lapse of the year, but by the apparent heir's intermediate service to his predecessor, or by his incurring a passive representation; and the *annus deliberandi* will not interrupt the progress of an action of ranking and sale which has been raised against the predecessor. [The period of deliberation is now restricted to six months, by 31 & 32 Vict. c. 101, § 61 (re-enacting 21 & 22 Vict. c. 76, § 27, and 23 & 24 Vict. c. 143, § 16); which enacts that "actions of constitution and actions of constitution and adjudication against an apparent heir on account of his ancestor's debt or obligation, for the purpose of attaching the ancestor's heritable estate; and actions of adjudication against such heir on account of his own debt or obligation, for the purpose of attaching such estate, may be insisted in at any time after the lapse of six months from the date of his becoming apparent heir, any law or practice to the contrary notwithstanding."] See *Ersk.* B. iii. tit. 8, § 54; *Stair*, B. iii. tit. 5, § 32; tit. 5, § 1; B. iv. tit. 8, § 6; *Bank.* ii. 310; *Bell's Com.* i. 748; *Bell's Princ.* § 1685. See *Apparent Heir.* [Adjudication for Debt.]

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.

ANTENUPTIAL CONTRACT OF MARRIAGE. See *Contract of Marriage.*

ANTICHRESIS. In the Roman law, *pactum antichreseos* was an agreement, by which the creditor in a voluntary pledge had the use and profits of the thing pledged, in lieu of the interest of the debt. It might

also be agreed that the surplus should go to the extinction of the debt. This *pactum* bore some analogy to our wadset. *Stair*, B. i. tit. 13, § 11; *Bank*. i. 384. See *Wadset*. *Pledge*.

[ANTICIPATION. In English conveyancing, anticipation is the act of assigning, or otherwise dealing with income before it becomes due. A clause restraining anticipation is generally introduced in a settlement of property on a woman, in order to protect her from the influence of her husband by preventing her from depriving herself of the future income. Such a restraint cannot be imposed except in the case of a woman, and the restraint only exists so long as she is married. *Sweet's Law Dict.* The Conveyancing Act, 1881 (44 & 45 Vict. c. 41), § 39, empowers the Chancery Division of the High Court to bind the interest of a married woman in any property, with her own consent, notwithstanding a clause restraining anticipation.]

ANTICIPATION OF RENT. See *Lease*. *Grassum*. *Entail*.

APOCHA TRIUM ANNORUM. In the Roman law, three annual receipts, and, in the law of Scotland, three consecutive receipts for termly payments, raise a presumption that all prior arrears are discharged. *Stair*, B. iv. tit. 40, § 35; *More's Notes*, cxxiii.; *Ersk.* B. iii. tit. 4, § 10; [*Dickson on Evidence*, i. § 177.] See *Discharge*. *Payment*.

[APOTHECARIES. See 55 Geo. III. c. 194; 37 & 38 Vict. c. 34.]

APPARENT HEIR. In common language this term is applied to the eldest son, [or other person to whom the succession must certainly open, if only he survive. See *Heir-Apparent*.] But in Scotch legal phraseology, an apparent heir is the person to whom the succession has actually opened, but who has not completed his title to his predecessor's estate, or taken up the succession by service, or by infeftment on a precept of *clare constat*. An apparent heir is entitled to the *annus deliberandi* [now six months], within which time he may consider the consequences of his entry, and resolve to take up or to renounce the succession. With that view, the apparent heir is entitled to pursue an action of exhibition *ad deliberandum*; that is, he may compel those who are possessed of his ancestor's title-deeds to produce them for his inspection and information. [See *Exhibition*; but see *Smith*, 8 Dec. 1871, 10 Macph. 211.] He may also defend the

titles of his ancestor when challenged. He may draw and discharge the rents, or even pursue for them. [A remark to the contrary, in Lord J. C. Inglis' opinion in *Malcolm*, 8 Nov. 1866, 5 Macph. 20, is said by Mr Guthrie (note to *Bell's Princ.* § 1682) to have been misreported.] His executor seems to be entitled to draw what may have fallen due during the heir's apparenacy, and remained undrawn at the time of his death. An apparent heir, however, cannot remove his predecessor's tenants. To enable him to do so, he must have completed his title. But in the case where the tenant has taken his lease from the apparent heir himself, during his apparenacy, the tenant cannot defend himself against a removing, by disputing the title of the person with whom he has thus contracted. 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 expense of the action is paid from the estate, when there is no surplus after paying the creditors; but, when there is a surplus, the expense must be taken from it. [See *Ranking and Sale by an Apparent Heir*.] An apparent heir [has been said to be,] in certain circumstances, entitled to an aliment from a life-renter in possession of the estate; see *Aliment*. He could also, [under the former law,] in virtue of his apparenacy, reduce deathbed deeds. The creditors of an apparent heir are postponed to those of his immediate ancestor, as to the defunct's heritable estate, provided the ancestor's creditors do diligence against the apparent heir, and the real estate belonging to the deceased, within three years after his death; 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 infeftment, 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. By 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. Titles of honour, leases held by his predecessor, and rights not feudal having a tract of future time, vest in the apparent heir *ipso jure*, and without service. [By § 9 of the Conveyancing Act, 1874, a personal right to every estate in land descendible to heirs vests in the heir, without service or other procedure, by his mere survivorship of the person to whom he is entitled to succeed, to the same effect as if he had acquired a personal right under an unfeudalised conveyance. The estate thus becomes immediately available to the heir, and attachable by his creditors. The act 1695, c. 24, "is superseded by the stronger statute of 1874, which says, not that the heir apparent shall have his deeds given effect to, but that he shall no longer be heir apparent, but absolute proprietor on a personal right." "This last enactment has the effect of making it impossible for any heir to possess an estate on apparenry. There is now no such thing known in the law of real property in this country;" *per* Lord Pres. Inglis, in *M'Adam*, 15 July 1879, 6 R. 1256. See *Ersk.* B. ii. tit. 12, § 61; B. iii. tit. 8, §§ 54, 58, 77; *Stair*, B. iii. tit. 5, §§ 1, 50; B. iv. tit. 26, § 8; *More's Notes*, cccxxx., cccxxxvi., ccclviii.; *Bank.* ii. 310, 322; *Bell's Com.* i. 94, 708; *Bell's Princ.* §§ 1677, 1929; *Mackay's Prac.* i. 285 (with *addenda*, i. 623, ii. 605).] See *Annus deliberandi. Beneficium Inventarii. [Heir. Personal Right.]*

[**APPEAL.** The subject of appeals from a lower to a higher tribunal, in Scotland, is treated of in the following articles:—

1. *Appeals from the Court of Session to the House of Lords.*
2. *Appeals from the Sheriff Court to the Court of Session.*
3. *Appeals from the Sheriff Substitute to the Sheriff Principal.*
4. *Appeals to the Circuit Court of Justiciary.*

For other kinds of appeals, see *Election Law. Valuation. Summary Prosecution. Quarter Sessions. Burgh. Sequestration.*

APPEAL TO THE HOUSE OF LORDS.

[Before the institution of the Session by James I., appeals to the King and Parliament were competent in civil causes; and though by the statute by which the Session was instituted (1425, c. 65), as well as by a subsequent act (1457, c. 62), its decrees were declared to be final, these provisions do not seem to have been strictly observed.

[In the time of James IV., an act was passed regulating appeals or "falsing of dooms;" 1503, c. 95. Lord Stair, however, says (B. iv. tit. 1, § 55) that, on the institution of the College of Justice by James V., final sentences of the Lords of Session "were ultimate, without appeal to King or Parliament, appeals then being in vigour and observance, but did absolutely become in desuetude and cease." (He excepts "protestation for remeid of law," which he describes as an extraordinary remedy, appropriate only to cases of excess of jurisdiction.) This subject, however, was matter of contemporary controversy, and had given rise to the memorable dispute between the bench and the bar in 1674, when the advocates were banished for asserting the right of appeal. At the Revolution (1689), the Convention of Estates declared the banishment of the advocates to have been illegal, and in the Claim of Right presented to William and Mary, one of the articles bears "that it is the right and privilege of the subjects to protest for remeid of law to the King and Parliament against sentences pronounced by the Lords of Session, providing the same do not stop the execution of these sentences." By the Treaty of Union (1707), no express provision was made as to the right of appeal from the courts in Scotland to the British Parliament; but it has never been disputed that the appellate jurisdiction formerly exercised by the Scottish Parliament was transferred by implication to the House of Lords. It was carefully provided, however, by the 19th article, "that no causes in Scotland be cognoscible by the Courts of Chancery, Queen's Bench, Common Pleas, or any other Court in Westminster Hall, and that the said courts, or any other of a like nature, after the Union, shall have no power to cognosce, review, or alter the acts or sentences of the judicatures within Scotland, or stop the execution of the same;" and no power was given to Parliament to alter this clause. In 1709, a standing order of the House of Lords, contrary to the Scottish Claim of Rights, directed that after an appeal had been lodged and duly intimated, the sentence appealed from should not be carried into execution. This regulation, after causing much mischief and injustice, was altered by 48 Geo. III. c. 151, § 17, which gives discretionary power to the Court of Session to regulate interim execution and possession, pending an appeal. See *Interim Execution.* The constitution of the House

[of Lords, as an appellate tribunal, remained unchanged from the Union till the passing of the Appellate Jurisdiction Act, 1876. By this act certain defects were remedied, which could not have been so long acquiesced in, but for the general confidence commanded by the decisions of the House. The reforms most needed were, (1) to secure an adequate attendance of law lords, and (2) to provide for the hearing of causes during the prorogation or dissolution of Parliament. Several proposals dealing with the question of appellate jurisdiction had previously been submitted to Parliament, some of them involving the abrogation of the judicial functions of the House of Lords. In 1873, an act was actually passed (36 & 37 Vict. c. 66), constituting a new Supreme Court of Judicature for England, unconnected with the House of Lords. The new court was intended to be imperial in its jurisdiction, and in 1874, a bill passed the House of Lords, transferring to it the appellate jurisdiction in Scotch and Irish cases. But during the passage of this bill through the Commons, public opinion was roused, and the national feeling manifested itself strongly in favour of preserving the historic and venerable tribunal of the Lords. From Scotland it was pointed out that the right of appeal to Parliament could not be abolished without violating the claim of the Scottish Convention, acceded to in the Revolution Settlement, and tacitly acknowledged by the Treaty of Union; and that the proposed transfer of the appellate jurisdiction to a new court in England would be an infringement of the clause already quoted from the 19th article of the Treaty of Union. (See letter by Lord Fraser, printed in *Journ. of Jurisp.* xix. 195.) The whole question was therefore reconsidered by Parliament; and the result was the passing of the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), which retained the House of Lords as a court of last resort, but made the requisite improvements in its administration. By § 5, at least three Lords of Appeal must be present at the hearing and determination of all appeals. The Lords of Appeal are the Lord Chancellor, two Lords of Appeal in Ordinary appointed under the act, and such Peers of Parliament as are holding or have held high judicial office (*i.e.*, as interpreted by § 25, the office of Lord Chancellor of Great Britain or Ireland, or of paid judge of the Judicial Committee of the Privy Council, or of judge of one of the superior

[courts of Great Britain or Ireland). The Lords of Appeal in Ordinary must, at their appointment, have held high judicial office for two years, or have been for 15 years practising barristers in England or Ireland, or practising advocates in Scotland; § 6. They hold office during good behaviour, and receive salaries of £6000 per annum. They rank as barons, and are entitled, during life, to sit and vote in the House of Lords. But their dignity as Lords of Parliament does not descend to their heirs; § 6, as amended by 50 & 51 Vict. c. 70, § 2. By §§ 8, 9 of the act of 1876, as amended by 50 & 51 Vict. c. 70, § 1, provision is made for the hearing and determination of appeals during the prorogation or dissolution of Parliament. The lay members of the House of Lords have a technical right to vote on judicial as well as other questions to be determined by the House. In some exceptional cases they have exercised that right; but in recent times they have invariably abstained from voting on judicial questions. See *May's Parl. Prac.* 404.

[The question of the competency of an appeal is considered and reported on by the Appeal Committee of the House of Lords, as to which see *Macqueen's Appellate Jurisdiction*, 33; *Denison & Scott's Appeal Prac.* 28.] Appeals are competent from final judgments of the Court of Session and the Court of Teinds, but not from the Court of Justiciary, nor from the verdict of a jury. [See *Justiciary Court. Teind Court.*] Appeals are also competent from interlocutory judgments of the Court of Session, if with the leave of the Division pronouncing such interlocutory judgment, or in cases where there is a difference of opinion among the judges; such leave, or difference of opinion, being certified by two of the counsel in the cause; 48 Geo. III. c. 151, § 15; [Standing Order No. 9 (1876). But see *Orr Ewing's Trs.* 24 July 1885, 13 R. (H.L.) 1, in which appeal was allowed, without leave, against a unanimous interlocutory judgment. Leave is in general given only when the judges have had difficulty, or have come to the same conclusion on different grounds; *Western Bank*, 20 March 1860, 22 D. 447. See also *Gardner*, 17 July 1877, 4 R. 1091; *City of Glasgow Bank*, 3 Feb. 1882, 9 R. 535, 555; *Rights of Way Society*, 16 Nov. 1886, 14 R. 74; *Stewart*, 26 Feb. 1889, 16 R. 521. As to whether leave can be obtained on a mere motion, or whether a petition is necessary, see *Smith*

[*Fleming & Co.*, 5 May 1864, 2 Macph. 1032. See also *Mackay's Prac.* ii. 426.] As to jury causes, if a bill of exceptions have been tendered, on the ground of misdirection by the judge at the trial in matter of law, or of the undue rejection or admission of evidence, the party against whom judgment is given may appeal; 55 Geo. III. c. 42, § 7. An interlocutor granting or refusing a new trial, when applied for on other grounds, is not appealable; 55 Geo. III. c. 42, § 6. See *Exceptions, Bill of. New Trial*. The findings in fact of a judgment of the Court of Session, on evidence taken in an inferior court, are not appealable; 6 Geo. IV. c. 120, § 40. See *Shepherd*, 1 Dec. 1881, 9 R. (H.L.) 1; *Fleming*, 1 March 1886, 13 R. (H.L.) 43; *Caird*, 13 June 1887, 14 R. (H.L.) 37. If the Court of Session has not exhausted the issue before it, or left any material question of fact undetermined, remit is made to it to pronounce a finding on such question, provided it has been plainly set forth on record; see *Mackay*, 7 March 1881, 8 R. (H.L.) 37. A question as to the law of Ireland is a question of fact before the Court of Session, but a question of law before the House of Lords; *Cooper*, 24 Feb. 1888, 15 R. (H.L.) 21.]

A party intending to appeal must, by his agent in the Court of Session, give to [each respondent, or his agent, written notice of the intention to appeal, and at the same time serve him with a copy of the petition of appeal; and this must be done at least two clear days before the petition is lodged. The petition of appeal prays that the matter of the order or judgment, as set forth in a schedule, may be reviewed before Her Majesty the Queen in her Court of Parliament, and, so far as adverse to the interests of the appellant, may be reversed, varied, or altered; 39 & 40 Vict. c. 59, § 4. All petitions of appeal must be signed, and the reasonableness thereof certified, by two counsel who shall have attended as counsel in the court below, or shall purpose attending as counsel at the hearing in the House of Lords; Standing Order No. 2. (The standing orders and forms of procedure applicable to appeals lodged after 1 Nov. 1876, are printed in the Appx. to *Denison & Scott's Appeal Prac.*, and in *Burness' Parliament-House Book*.)

[With regard to the time within which appeals may be brought, it is enacted by 6 Geo. IV. c. 120, § 25, that "the decrees or orders of the Court of Session shall be final, and not subject to be complained of

[by appeal to the House of Lords, unless the petition of appeal shall be lodged with the clerk of Parliament or clerk-assistant within two years from the day of signing the last interlocutor appealed from, or before the end of fourteen days to be accounted from and after the first day of the session or meeting of Parliament for the dispatch of public business next ensuing the said two years; provided always that when the person or persons entitled to appeal shall be out of the kingdom of Great Britain and Ireland, it shall be competent for him or them to enter an appeal at any time within five years from the date of the last interlocutor, if he or they shall remain abroad so long, or within two years from the time of coming into Great Britain or Ireland; the time allowed to such person or persons for lodging his or their appeal in no case on account of mere absence exceeding the foresaid space of five years, together with the space that may elapse before the end of the fourteenth day from and after the session or meeting of Parliament next after the expiration of the said five years; and in case the person or persons so entitled to appeal shall be under the age of twenty-one years, or *non compos mentis*, it shall be competent for them, or their heirs or representatives, where no appeal had been previously entered on this behalf, to enter an appeal at any time within two years after full age or coming of sound mind, or after the death of the persons so disqualified and the opening of the succession to the heir, or before the end of fourteen days after the first day of the session or meeting of Parliament next ensuing the said two years." By Standing Order No. 1 (1876), it is directed "that, except where otherwise provided by statute, no petition of appeal be received by this House, unless the same be lodged in the Parliament Office for presentation to the House within one year from the date of the last decree, order, judgment, or interlocutor appealed from;" and provision is made, in terms corresponding to those of the proviso in the statute quoted, for the case of parties being under age, covert, *non compos mentis*, imprisoned, or out of Great Britain and Ireland. Appeals from the Court of Session, being regulated by the statute, are not affected by this Standing Order; but it is thought that appeals from the Court of Teinds must be brought within one year, as the statutory rule is limited to decrees of the Court of Session. A judgment granting or refusing *cessio*

[*bonorum* is appealable only within ten days, or, if Parliament be not sitting, within six days after the commencement of next session; 6 & 7 Will. IV. c. 56, § 19. An interlocutor allowing or refusing a bill of exceptions must be appealed within fourteen days, or, if Parliament be not sitting, within eight days after the commencement of the next session; see *Melrose*, 28 Feb. 1854, 1 Macq. 698.]

When a petition of appeal is presented, an order of service is granted as a matter of course, and the respondent is ordered to [lodge his case in answer to the appeal.] The order is served on the [respondent or his agent,] by delivering him a copy, and showing him at the same time the original; and the service is proved by an affidavit, which may be written on the back of the order, sworn by the person who has served the warrant in presence of a judge or justice of peace. [The affidavit, with the order of service, must be returned to the Parliament Office within eight weeks, unless all the respondents have lodged their printed cases within that period; in default, the appeal to stand dismissed; Standing Order No. 3. By Standing Order No. 4, it is "ordered, in all appeals, that the appellant or appellants do give security to the clerk of the Parliaments by recognisance to be entered into, in person or by substitute, to the Queen of the penalty of £500, conditioned to pay to the respondent or respondents all such costs as may be ordered to be paid by the House in the matter of the appeal; and further, that the appellant or appellants do procure two sufficient sureties, to the satisfaction of the clerk of the Parliaments, to enter into a joint and several bond to the amount of £200, or do pay in to the account of the fee fund of the House of Lords the sum of £200; such bond, or such sum of £200, to be subject to the order of the House with regard to the costs of the appeal: Ordered, that within one week after the presentation of the appeal the appellant or appellants do pay in to the account of the fee fund of the House of Lords the said sum of £200, or submit to the clerk of the Parliaments the names of the sureties proposed to enter into the said bond; and, in the event of a substitute being proposed to enter into the said recognisance, the name of such substitute; two clear days' previous notice of the names so proposed for bond and recognisance to be given to the solicitor or agent of the respondent: Ordered, that, in the event of such sureties or such substitute

[not being deemed satisfactory by the clerk of Parliaments, the appellant or appellants shall, within three weeks after the presentation of the appeal, present a petition to the House in the matter of the said bond or recognisance: Ordered, that the said bond and the recognisance (whether entered into by the appellants or by a substitute) be returned to the Parliament Office duly executed within one week from the date of the issue thereof to the solicitor or agent of the appellant or appellants. On default by the appellant or appellants in complying with the above conditions, the appeal to stand dismissed." By Standing Order No. 5, it is directed, (1) That in Scotch appeals the printed cases and the appendix thereto be lodged within eight weeks from the presentation of the appeal; and that the appeal be set down for hearing on the first sitting day thereafter; on default by the appellant, the appeal to stand dismissed: (2) "That in all appeals from Scotland the appellant alone, in his printed case or in the appendix thereto, shall lay before this House a printed copy of the record as authenticated by the Lord Ordinary; together with a supplement containing an account, without argument or statement of other facts, of the further steps which have been taken in the cause since the record was completed, and containing also copies of the interlocutors or parts of interlocutors complained of; and each party shall, in their cases, lay before the House a copy of the case presented by them respectively to the Court of Session, if any such case was presented there, with a short summary of any additional reasons upon which he means to insist; and if there shall have been no case presented to the Court of Session, then each party shall set forth in his case the reasons upon which he founds his argument, as shortly and succinctly as possible": and (3) "That all printed cases be signed by one or more counsel, who shall have attended as counsel in the court below, or shall purpose attending as counsel at the hearing in this House." The time for lodging cases may be extended, on petition showing reasonable ground. There is no penalty for failure by the respondent to lodge his case; but he cannot appear at the bar without a printed case. By Standing Order No. 6, cross appeals must be presented within the time allowed for lodging cases in the original appeal. Standing Order No. 7 directs that, when a prescribed period, dating from presentation of the appeal, expires during recess, it be

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[extended to the third sitting day of the next ensuing meeting of the House. By Standing Order No. 8, supplemental cases are to be lodged where appeals are revived against the representatives of deceased parties, or where new parties are added.]

The cases are exchanged by the agent in London, and counsel are heard at the bar when the cause is on the list of the day for hearing. Judgment is usually pronounced soon afterwards, affirming or reversing those appealed from, or remitting the cause to the Court of Session for reconsideration. The execution of the judgment is obtained by presenting an authentic copy of it, with a petition, to the Court of Session, praying that it may be applied; [see *Anstruther's Trs.*, 19 July 1873, 11 Macph. 955. But a petition is not necessary when the appeal is simply dismissed; *Ricketts*, 12 June 1861, 23 D. 1014. See *Mackay's Prac.* ii. 431. As to interim execution and possession, pending appeal, see *Interim Execution*; and as to costs of appeal, see *Expenses*. See on this subject, *Ersk.* B. iv. tit. 3, § 2; *Macqueen's Appellate Jurisdiction*; *Denison & Scott's Appeal Prac.*; *Spink's Handbook of Procedure*, 198; *Jurid. Styles*, iii. 733. See further, as to history of right to appeal, *Stair*, B. iv. tit. 1, § 52; *Mackay's Prac.* i. 37; *May's Parl. Prac.* 55; *Preface to Robertson's Appeals*; *Preface to Paton's Appeals*, vol. vi.; *Hales' Lords' Jurisdiction*. See also *Report of Debate in House of Lords on Appellate Jurisdiction* in 1856, *Report of Lords' Committee, &c.*, in 2 Macq. 577. See *Lords, House of.*]

[APPEAL TO COURT OF SESSION.

The judgments of inferior courts were formerly brought under review of the Court of Session by advocacy; but that process was abolished, and the process of appeal substituted, by the Court of Session Act, 1868, §§ 64, 65, 76. Where advocacy was formerly competent, appeal is now competent; but an appellant need not find caution for expenses, which an advocator required to do; and appeals go direct to the Inner House, whereas advocations went through the Outer House. An appeal is taken either (1) for review of the judgment of an inferior court, or (2) for jury trial.

[1. *Appeals for Review of Judgment.* No cause can be appealed which does not exceed £25 in value; 16 & 17 Vict. c. 80, § 22. And no interlocutor can be taken to review, which is not an interlocutor "sisting process, or giving interim decree for payment of money, or disposing of the whole

[merits in the cause;" but when any interlocutor is once brought under review, the court may review all previous interlocutors in the cause; *ib.* § 24. In *Watson*, 24 Feb. 1872, 10 Macph. 494, an interlocutor, recalling *in hoc statu* a final interlocutor of the sheriff substitute, was held equivalent to an interlocutor sisting process; and in *Baird*, 16 Oct. 1874, 2 R. 25, an interlocutor granting warrant to a judicial manager to make payment, in a petition for sequestration of rent, was held equivalent to an interlocutor giving interim decree for payment. See also *Sinclair*, 11 Jan. 1884, 11 R. 413. An interlocutor limiting proof to writ or oath, is not appealable; *Wilson*, 15 March 1888, 15 R. 587. An interlocutor is held to dispose of the whole merits of the cause, though the expenses, if found due, have not been taxed, modified, or decerned for; 31 & 32 Vict. c. 100, § 53; *Malcolm*, 19 Oct. 1877, 5 R. 22. See also *Final Judgment*. It is competent to appeal against an interlocutor only dealing with expenses; *Fleming*, 20 Oct. 1881, 9 R. 11; but not against one merely giving decree for expenses which had been found due by a former interlocutor, no longer subject to review; *Tennents*, 22 June 1881, 8 R. 824; *Thompson*, 19 Jan. 1883, 10 R. 469.

[The value of a cause is determined by the conclusions of the summons. If the sum concluded for, along with interest (if also concluded for) down to the date of the decree appealed from, exceeds £25, appeal is competent; *Mitchell*, 10 March 1855, 17 D. 682; *Martin*, 10 July 1872, 10 Macph. 949. Expenses are not included in estimating the value; *Hopkirk*, 21 Dec. 1855, 18 D. 299. Where the value is indefinite, as where interdict is sought, or decree *ad factum præstandum*, review is competent; *Robertson*, 3 March 1857, 19 D. 594; *Aberdeen*, 16 July 1872, 10 Macph. 971; contrast *Singer Co.* 14 May 1881, 8 R. 695. Though the sum mentioned in the summons be under £25, yet if the conclusions involve other elements, such as the extinction of counter claims, which make the pursuer's interest to exceed £25, the Court of Session has jurisdiction; *Inglis*, 17 May 1859, 21 D. 822; *Brydon*, 2 Nov. 1864, 3 Macph. 7; contrast *Stevens*, 17 Oct. 1877, 5 R. 19. So also, if a question of continuous liability is involved, the real value is not limited to the sum concluded for; *Drummond*, 12 Jan. 1869, 7 Macph. 347; *Cunningham*, 9 Jan. 1883, 10 R. 441. Restriction of the conclusions

[to less than £25, after defences have been lodged, but before the record is closed, renders appeal incompetent; *Cairns*, 21 Nov. 1884, 12 R. 167; but see *Buie*, 5 Dec. 1863, 2 Macph. 208. By 40 & 41 Vict. c. 50, § 9 (3), the smallness of the value does not exclude appeal in causes first brought under the jurisdiction of the sheriff court by § 8 of that act (see *Sheriff*.) See *Mackay's Prac.* i. 263.

[The form of appeal is prescribed by 31 & 32 Vict. c. 100, § 66. By § 68, "a party may take an appeal within the space of twenty days after the date of the judgment of which he complains, during which period of twenty days extract shall not be competent; but on the expiration of the foresaid period, if no appeal shall have been taken, the clerk of court may give out the extract; it being competent, however, to take such appeal at any time within the period of six months from the date of final judgment in the cause, unless the judgment has previously been extracted or implemented." See *Macfarlane*, 6 Dec. 1884, 12 R. 232. By 39 & 40 Vict. c. 70, § 32, extract is allowed after fourteen days, unless appeal has been taken; and after extract appeal is incompetent; see *Tennents, supra*. Appeal cannot be taken after expiry of six months from the date of final judgment, even though it has not been extracted; 31 & 32 Vict. c. 100, § 67. The effect of an appeal is "to submit to the review of the Court of Session the whole interlocutors and judgments pronounced in the cause, not only at the instance of the appellant, but also at the instance of every other party appearing in the appeal, to the effect of enabling the court to do complete justice without hindrance from the terms of any interlocutor in the cause, and without the necessity of any counter appeal; and an appellant shall not be at liberty to withdraw or abandon an appeal without leave of the court; and an appeal may be insisted in by any party in the cause other than the appellant, in the same manner and to the like effect as if it had been taken by himself;" *ib.* § 69. See *Cross*, 22 May 1879, 6 R. 934. Within two days after appeal is taken, the clerk of the inferior court must give written notice to the respondent or his agent; but failure to do so does not invalidate the appeal, the Court of Session being directed to give suitable remedy for any disadvantage occasioned thereby; *ib.* § 70. See *Chisholm*, 17 Jan. 1874, 1 R. 388. The clerk of the inferior court must also trans-

[mit the process, within two days, to the clerk of the division of the Court of Session to which appeal is taken; *ib.* § 71. The printing and enrolment of appeals are regulated by A. S. 10 March 1870, § 3. The appellant must print and lodge the note of appeal, record, interlocutors, and proof (if any), within fourteen days after the process has been received by the clerk of court, unless, within eight days after such receipt, printing has been dispensed with by special interlocutor. If he fail so to print and lodge, he is held to have abandoned the appeal; but he may be reponed, on cause shown, within eight days after expiry of the fourteen. See *Macquian*, 17 May 1871, 9 Macph. 743; *Young*, 19 Feb. 1875, 2 R. 456; *Walker*, 12 May 1877, 4 R. 714; *Robertson*, 27 Nov. 1877, 5 R. 257; *Lattimer*, 20 Dec. 1881, 9 R. 370; *Boyd, Gilmour & Co.* 16 Nov. 1888, 16 R. 104. As to procedure where printing is dispensed with, see *Allan*, 4 March 1881, 8 R. 563; *Dolan*, 2 July 1885, 12 R. 1190. Where a motion to dispense with printing is refused, the court name a day for lodging; see *Ross*, 2 June 1887, 14 R. 768. Where an interlocutor has become final by default, in terms of the above rules, it cannot be brought under review by suspension or otherwise; *Watt*, 1 Nov. 1879, 7 R. 126. If there is no appearance for the respondent in an appeal, the court call on the appellant to show cause why the judgment of the sheriff should not stand; *Dunbar*, 5 March 1884, 11 R. 652. By § 72 of the act of 1868, "the court may, if necessary, order proof or additional proof to be taken in any appeal under this act, such proof to be taken in the same manner as proof may be competently taken in any cause depending before the Inner House, and shall thereafter, or without any such order (if no such proof or additional proof is necessary), give judgment on the merits of the cause according to the law truly applicable in the circumstances, although such law is not pleaded on the record; and the record may, with leave of the court, be amended at any time, on such conditions as to the court shall seem proper." Interim possession, pending appeal, is regulated by the inferior court, "having due regard to the manner in which the interests of the parties may be affected by the final decision of the cause;" and at the hearing of the appeal, the Court of Session has full power to give such orders as justice may require; *ib.* § 79. By 6 Geo. IV. c. 120, § 40, where proof has been taken in the inferior

[court, "the Court of Session shall, on reviewing the judgment proceeding on such proof, distinctly specify in their interlocutor the several facts material to the case which they find to be established by the proof, and express how far their judgment proceeds on the matters of fact so found, or on matters of law, and the several points of law which they mean to decide;" and, in so far as relates to the facts, the judgment of the Court of Session is final (see *supra*, p. 51a). See *Caird*, 13 June 1887, 14 R. (H.L.) 37. As to appeal under the Debts Recovery Act, see *Debts Recovery Act*. Appeal in petitions for service is regulated by 31 & 32 Vict. c. 101, § 42; see *Service of Heirs*. Appeal under the Ecclesiastical Buildings and Glebes Act (31 & 32 Vict. c. 96), is subject to special regulations (§§ 16–20), and is brought before the Lord Ordinary, whose judgment is final. See *Manse*.

[2. *Appeal for Jury Trial*. By 6 Geo. IV. c. 120, § 40, "in all cases originating in the inferior courts, in which the claim is in amount above £40, as soon as an order or interlocutor allowing a proof has been pronounced in the inferior courts (unless it be an interlocutor allowing a proof to lie *in retentis*, or granting diligence for the recovery and production of papers), it shall be competent to either of the parties, who may conceive that the cause ought to be tried by jury, to remove the process into the Court of Session." This is now done by note of appeal presented to the Inner House; and the cause may be remitted to the Outer House; 31 & 32 Vict. c. 100, § 73. Appeals for jury trial are not subject to the provisions of 16 & 17 Vict. c. 80, § 24, limiting the competency of appeals for review on the merits (see *supra*); *Harrington*, 20 Jan. 1854, 16 D. 368. If the claim is not simply pecuniary, so that it cannot appear on the face of the note that it is above £40 in amount, the appellant must apply to the judge in the inferior court for leave to appeal, and, if required, give his solemn declaration that the claim is of the true value of £40 and upwards; after which leave is granted, and certified by the clerk of court; A. S. 11 July 1828, § 5. See *Rain*, 19 May 1887, 4 R. 732. The same section enacts that the appeal must be presented within fifteen days after the order for proof (or thirty days, in Orkney or Shetland). See *Kinnes*, 15 Jan. 1881, 8 R. 386; *Duff*, 20 Oct. 1881, 9 R. 17. This appeal is only competent when an order for proof has been pronounced. The order may have been for

[proof before answer, or for proof of only part of the cause; *Stewart*, 19 July 1862, 24 D. 1442; *Robertson*, 13 July 1875, 2 R. 935; but not for proof by writ or oath only; *Primrose*, 18 Nov. 1859, 22 D. 1; *Shirra*, 7 June 1873, 11 Macph. 660. Nor is appeal competent while the interlocutor allowing proof is under appeal to the sheriff principal; *M'Arthur*, 6 Dec. 1887, 15 R. 117. When a case is appealed, if the Court of Session deem it unsuitable for jury trial, they may either remit it to the sheriff, or appoint proof to be taken in the Court of Session; *Cochrane*, 20 July 1883, 10 R. 1279; *Bethune*, 6 Jan. 1886, 13 R. 882. The smallness of the sum concluded for (if above £40) is no reason for refusing jury trial; *Mitchell*, 9 Feb. 1884, 11 R. 553. This right is not affected by the similar right of removal to the Court of Session under § 6 of the Employers Liability Act (see *Master and Servant*); *Patons*, 14 Jan. 1885, 12 R. 538. In cases of competing petitions for service as heir, or when a petition for service is opposed, any of the parties may appeal for jury trial, at any time before proof has been begun before the sheriff; 31 & 32 Vict. c. 101, § 41; *Mackintosh*, 7 Dec. 1875, 3 R. 232.

[See on this subject, *Stair*, B. iv. tit. 1, § 31; tit. 37, § 5; *Ersk.* B. iv. tit. 2, § 40; *Shand's Prac.* i. 440; *Mackay's Prac.* ii. 443; *Coldstream's Procedure*, 159; *M'Glashan's Sher. Court Prac.* 444; *Dove Wilson's Sher. Court Prac.* 562.]

[APPEAL TO SHERIFF PRINCIPAL FROM SHERIFF SUBSTITUTE.

This is regulated by the Sheriff Courts Act, 1876 (39 & 40 Vict. c. 70). By § 27, the following, and no other, appeals are competent, viz., "an appeal against a final judgment" (see *Final Judgment*); "or an appeal against an interlocutor (1) granting or refusing interdict, interim or final; or (2) granting interim decree for money, or making an order *ad factum præstandum*, or sisting an action; or (3) allowing, or refusing, or limiting the mode of proof; or (4) against which the sheriff substitute, either *ex proprio motu*, or on the motion of a party, grants leave to appeal." Appeal is taken by note of appeal, written on the interlocutor sheet, in prescribed terms, within seven days from the date of the judgment appealed from; § 28. But a final judgment may be appealed from within one month, if not sooner extracted or implemented; § 33. On appeal being taken, the process is forthwith transmitted to the sheriff, who then deter-

[mines the mode of procedure; with regard to which it is provided as follows:—

(1) "The sheriff may fix a diet for hearing the parties orally on the appeal, and may hear them accordingly, or may order a reclaiming petition and answers to be lodged, and prescribe the times for lodging the same; but it shall not be competent for him in any case both to order a reclaiming petition and answers and an oral hearing: (2) If both parties concur in asking the sheriff to dispose of the appeal without either ordering a reclaiming petition and answers or an oral hearing, the sheriff may, if he think fit, dispose of the same accordingly: (3) It shall be competent for the sheriff, where the action is before him on appeal on any point, to open the record *ex proprio motu*, if the record shall appear to him not to have been properly made up, or to allow farther proof;" § 28. The effect of an appeal in submitting the whole cause to review is described by § 29, in the same terms as those of § 69 of the Court of Session Act, 1868, quoted in the preceding article. A sheriff or sheriff substitute has power to regulate interim possession, pending appeal; § 31. See *Dove Wilson's Sher. Court Prac.* 316.]

APPEAL TO CIRCUIT COURT. 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 court, inferring neither death nor demembration; [see *Rhodes*, 23 Sept. 1870, 1 Couper, 469;] and, *2d*, In civil causes, where the sum in dispute does not exceed £12 sterling (extended to £25 sterling by 54 Geo. III. c. 67, § 5). [The courts from which appeal may be taken under this act are the sheriff's or stewart's courts; the courts of royal burghs, and burghs of regality and barony; and the courts of any baron or heritor, in so far as any jurisdiction was left to these courts by the act.] The act has been held not to warrant appeals from the sentences of justices of the peace to the circuit court; [*Maxwell*, 5 June 1820, F. C. App. 1;] nor from the sentence of the water-bailie of Glasgow; *Donaldson*, 21 Nov. 1828, 7 S. 41. [In the latter case the question of the competency of appeal from the Dean of Guild Court was alluded to, but not decided. By 1 Vict. c. 41, § 31, decrees of the Small Debt Court may be appealed to the next circuit court of Justiciary, or, where there are no circuit courts, to the High Court of Justiciary,

[under the same conditions and regulations as apply to appeals brought under 20 Geo. II. c. 43. But such appeal is allowed only on certain specified grounds, which are mentioned *infra*. When the sitting of a circuit court in any town is dispensed with under § 48 of the Criminal Procedure Act, 1887, any appeal which may have been taken to such court shall be heard by the High Court of Justiciary in Edinburgh, or may, when both parties consent, be heard at any sitting of the High Court at any place. By 16 & 17 Vict. c. 80, § 22, causes not exceeding £25 in value cannot be brought, by appeal or in any other way, under review of the Court of Justiciary; but this applies only to causes in the sheriff's ordinary roll, and not to small debt causes, in which appeal is still competent, under 1 Vict. c. 41. See *Aitken*, 27 April 1855, 2 Irv. 156. And when the sheriff exceeds, or refuses to exercise his jurisdiction, or where the proceedings are otherwise outwith the statute, appeal is competent against any judgment in the sheriff court, in causes under £25. See *Dick*, 8 Oct. 1860, 3 Irv. 616. See also 30 & 31 Vict. c. 96, § 17 (Debts Recovery Act); *Stewart*, 23 Sept. 1868, 1 Couper, 92. As to the criterion of the value of a cause, see *Appeal to the Court of Session*. By A. S. 10 July 1839, § 131, appeals to the circuit court, under 20 Geo. II. c. 43, "are competent only after a final judgment has been pronounced, and the matter of expenses has been disposed of, and when the subject-matter of the suit does not exceed in value £25 sterling." Appeal is competent when expenses have been found due, though they have not been decerned for; *Dundee Whale Fishing Co.* 13 Oct. 1848, J. Shaw, 15. See also *Launders*, 24 April 1850, J. Shaw, 347; *Whitson*, 27 April 1853, 1 Irv. 221.] 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. The appeal may be taken and minuted in open court, at the time of pronouncing the judgment; or it may be taken by lodging a written appeal in the hands of the clerk of court, and serving a duplicate of it upon the opposite party or his procurator, within ten days after the date of the sentence, and fifteen days at

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least before the sitting of the circuit court; [20 Geo. II. c. 43, § 35; A. S. 10 July 1839, § 132. Verbal notice is in no case sufficient; there must be some written attestation of the fact that an appeal has been taken; see *McMillan*, 21 Jan. 1832, 10 S. 220; *Anderson*, 28 Oct. 1872, 2 Coup. 359. When there are not fifteen days between service and the meeting of the circuit court, the service is valid for the following circuit; *Newlands*, 3 May 1866, 5 Irv. 245. By 38 & 39 Vict. c. 62, § 11, the time for lodging appeals against sentences of imprisonment was extended. These are now competent, if lodged at any time during imprisonment, or within ten days after liberation; provided the imprisonment commenced within ten days after sentence was pronounced. As to the requisite evidence of the decree appealed against having been pronounced, see *Baxter*, 11 Sept. 1861, 4 Irv. 84; *Sinclair*, 25 April 1863, 4 Irv. 390.] Along with his appeal the appellant must lodge a bond of caution for answering and abiding by the judgment of the circuit court, and for costs, should they be awarded; the circuit judges being empowered to award the opposite party's expenses against the appellant; [20 Geo. II. c. 43, § 36. See *Christie*, 14 Sept. 1854, 1 Irv. 560; *Keane*, 3 May 1866, 5 Irv. 248.] In point of form these appeals are variously framed; but in general they are short and articulate, containing a series of reasons of appeal, and a prayer for recall or alteration of the judgment. The circuit judges must proceed with such cases summarily; and their decision is final, and not subject to review of any kind. But in cases of difficulty, the case, where a criminal one, may be certified to the High Court of Justiciary; and where civil, to the Division of the Court of Session to which the judge who hears the appeal belongs; the judgment of the court on the point so certified being also final; [20 Geo. II. c. 43, § 37.] Where the sentence of the inferior court is recalled, and the case does not appear to the circuit judge to be matured, he may recall the judgment appealed from, and remit to the inferior court with instructions; and under such a remit, if the question of expenses be reserved, the inferior judge has power to decern for the expenses incurred in the circuit court; but in that case, as the sentence appealed from is recalled, the cautioner in the appeal will not be liable for the expenses.

[The grounds on which appeal is competent under the Small Debt Act (1 Vict. c. 41, § 31), are the following:—(1) "Corruption or malice and oppression on the part of the sheriff." These terms are construed in a legal, rather than a moral, sense. "What was done might be so grossly unjustifiable that the law would hold it equivalent to personal malice;" *per* Lord Deas in *Philip*, 16 Sept. 1868, 1 Couper 87. See *Arbitration*. (2) "Such deviations in point of form from the statutory enactments as the court shall think took place wilfully, or have prevented substantial justice from having been done." See *Glasg. & S. W. Railway*, 5 May 1855, 2 Irv. 162; *Mahon*, 6 Feb. 1856, 2 Irv. 383; *Scot. N. E. Railway v. Matthews*, 20 April 1866, 5 Irv. 237; in which appeals were sustained on this ground; and *Aitken*, 27 April 1855, 2 Irv. 156; *Sturrock*, 20 April 1866, 5 Irv. 234; *Scot. N. E. Railway v. Cargill*, 13 Sept. 1866, 5 Irv. 298; in which appeals were dismissed. (3) "Incompetency, including defect of jurisdiction of the sheriff." In *Murray*, 21 April 1869, 1 Coup. 247, an appeal was sustained on the ground of incompetency, the sheriff having disregarded the triennial prescription, the applicability of which was manifest *ex facie* of the account sued on. But contrast with this case, *Beattie*, 4 Feb. 1862, 24 D. 431; *Hair*, 4 May 1871, 2 Coup. 40; *Wilson*, 22 June 1878, 5 R. 981; *Allison*, 25 Oct. 1882, 10 R. (J.C.) 12; *Findlay*, 27 May 1886, 13 R. (J.C.) 53. Appeals under this enactment are heard and determined in open court; and the court may correct deviations in point of form, or remit the cause to the sheriff with instructions or for rehearing generally; see *Bryce*, 10 July 1885, 12 R. (J.C.) 43; *Bell*, 27 Aug. 1886, 1 White 229. It is not competent "to found upon any document as evidence on the merits of the original cause, which was not produced to the sheriff when the case is heard, and to which his signature or initials have not been then affixed, which he is only to do if required, nor to found upon or refer to the testimony of any witnesses not examined before the sheriff, and whose name is not written by him, when the case is heard, upon the record copy of the summons, which he is to do when specially required to that effect."

[Various other statutes give right of appeal to the circuit court. See 25 & 26 Vict. c. 35, § 33 (Public Houses Amendment Act); 38 & 39 Vict. c. 86, § 20.]

[See *Ersk.* B. i. tit. 3, § 28; *Hume*, ii. 516; *Bell's Notes*, 308; *Alison's Prac.* 32; *M'Glashan's Sher. Court Prac.* 440; *Moncreiff on Review in Criminal Causes*, 218; *Jurid. Styles*, iii. 901; *Journ. of Jurisp.* xiii. 425. See *Justiciary Court. Circuit Court. Small Debts.*]

APPEAL; in the old criminal law of England, was a vindictive action at the suit of the party injured by some heinous offence, in which the appellant, instead of merely seeking pecuniary compensation, as in civil actions, demanded the punishment of the criminal. *Tomlins, h. t.*

[**APPEAL, COURT OF**, in *England*. This court was created by the Judicature Act, 1873. It consists of four *ex officio* judges, viz., the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, and the President of the Probate Division of the High Court of Justice, and of five ordinary judges, called Lords Justices of Appeal; 38 & 39 Vict. c. 77, § 4; 39 & 40 Vict. c. 59, § 15; 44 & 45 Vict. c. 68, §§ 3, 4. The Court of Appeal has jurisdiction to hear and determine appeals from any judgment or order of the High Court of Justice, with certain limitations; see 36 & 37 Vict. c. 66, § 19. See *Indermaur's Manual of Practice*, 18.]

[**APPEARANCE, ENTERING**, by a *defender*. Appearance is entered for a defender in an action by adding to the *partibus* on the summons the names of his counsel and agent. The agent at the same time usually borrows the summons and productions, in order to prepare defences. Appearance may be entered on the day of calling the summons, or on either of the two days following; A. S. 14 Oct. 1868, § 11. If no appearance is entered within that time, the cause may be immediately enrolled either in the roll of undefended causes, or in the Lord Ordinary's motion roll, as an undefended cause, for decree in absence; 31 & 32 Vict. c. 100, § 22. See *Shand's Prac.* i. 284; *Mackay's Prac.* i. 415.]

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.

APPENAGE; a child's part or portion, and properly the portion of the King's younger children in France. *Tomlins, h. t.*

APPENDANT; in English law, signifies a pertinent or accessory to another inheritance of greater value, as a seat in a church to a house, &c. *Tomlins' Dict.* See *Part and Pertinent*.

[**APPOINTMENT**. In a marriage contract or will, a power of appointment given to a person enables him to appoint the uses to which the property to which it refers shall be applied, or the proportions in which the beneficiaries shall participate therein. By 37 & 38 Vict. c. 37, § 1, such power may be exercised to the effect of wholly excluding an object of the power. See *Mackie*, 4 July 1885, 12 R. 1230; also *Anstruther's Trs.* 25 April 1872, 10 Macph. (H.L.) 39; *Best's Trs.* 3 Nov. 1885, 13 R. 121. See *Bell's Princ.* §§ 1971, 1988; *M'Laren on Wills*, ii. § 1912; *Sweet's Law Dict.*]

[**APPORTIONMENT**. See *Heir and Executor. Annuities. Rents.*]

APPRAISEMENT; see *Appretiation*.

APPRAISERS; are the persons appointed to value pointed goods. They must be licensed and sworn *de fidei administratione*; 54 Geo. III. c. 184.

APPREHENDING OF A DEBTOR; is the act of arresting a debtor 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 [formerly] the ordinary warrant for apprehending a debtor was a caption issued in the sovereign's name, and under the signet, charging messengers-at-arms to apprehend and imprison the debtor, and to call upon magistrates for assistance in doing so. [The usual warrant for apprehension is now the "*fiat*" written by the clerk of the Bill Chamber, on an extract decree of the court, or decree of registration, as authorised by the Personal Diligence Act. See *Diligence*. The method of apprehension, "pointed out by the law and practice of the country," is described in *Bell's Com.* ii. 436, as consisting of three steps, viz.:—(1) The officer must have his blazon displayed, otherwise he may be resisted; (2) he must show his warrant of incarceration; and (3) he must touch the debtor with his wand of peace." The last solemnity, however, has been held unnecessary for the purpose of legal or constructive imprisonment, though it may be essential in a question of enforcement; *Scott*, 18 Jan. 1855, 17 D. 292. See *Ersk.* B. iv. tit. 1, § 42; *Bell's Com.* ii. 159, 435, 460; *Campbell on Citation and Diligence*, 252; *Menzies' Conv.* 300; *M. Bell's Conv.* i. 541. See *Imprisonment. Bankrupt. Meditatio Fugæ.*]

[**APPREHENSION OF A CRIMINAL**. See *Criminal Prosecution.*]

APPRENTICE. An apprentice is one who engages by indenture to serve a master

for a certain number of years, in order to be instructed in some profession, art, or manufacture, which the master becomes bound to teach him. [The contract must be in writing; but if defective in legal solemnities, it may be validated by *rei interventus*; *Rymer*, 1781, M. 5726; *Neil*, 1807, Hume's Dec. 20.] The terms of such an engagement, as to its endurance, apprentice-fee, the recompense 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. But indentures may be set aside on the head of minority and lesion. [The master will be liable in damages, if he fails to teach the apprentice his trade, either personally or by an experienced deputy; *Lyle*, 17 Nov. 1863, 2 Macph. 115. He cannot, without the apprentice's consent, assign the indenture to another; *Edinr. Glasshouse Co.* 1789, M. 597. As to the right of a master of a ship to chastise his apprentice, see *Wight*, 30 Nov. 1883, 11 R. 217.] Where the apprentice deserts his service, the master is entitled to the apprentice-fee, without deduction. [See also *Enlisting*.] See *Ersk.* B. i. tit. 7, § 62; B. iii. tit. 3, § 16; *Bank.* i. 58; *Bell's Princ.* § 2186; [*Menzies' Conv.* 388; *M. Bell's Conv.* i. 362; *Fraser on Master and Servant*, 335. For form of indenture, see *Jurid. Styles*, ii. 215.]

APPRETIATION; the valuing of pointed goods. See *Poiniding*.

APPRIISING. See *Adjudication*.

APPROBATE AND REPROBATE. A person is said to approve and reprobate, where he takes the advantage of one part of a deed, but rejects the rest. This the law does not admit of. A deed must be taken altogether, or rejected altogether, [according to the maxim, "*Quod approbo non reprobo*."] The principle is thus stated by Lord Eldon:—"It is equally settled in the law of Scotland as of England, that no person can accept and reject the same instrument. If a testator give his estate to A, and give A's estate to B, courts of equity hold it to be against conscience that A should take the

[estate bequeathed to him, and at the same time refuse to effectuate the implied condition contained in the will of the testator. The court will not permit him to take that which cannot be his but by virtue of the disposition of the will, and at the same time to keep what by the same will is given, or intended to be given, to another person. It is contrary to the established principles of equity, that he should enjoy the benefit, while he rejects the conditions of the gift;" *Kerr*, 3 May 1879, 1 Bligh, 1. In England, this is called the doctrine of Election; and this term is frequently used in Scots Law, though the application of the doctrine is not in all respects identical. The election must be a spontaneous and deliberate act, by a party in the knowledge of his rights; *L. Panmure*, 22 Nov. 1854, 17 D. 85. A minor's election is reducible, and a *curator bonis* of a lunatic is not bound to elect on behalf of his ward; *Cowan*, 17 March 1848, 6 Bell's App. 222; *Morison*, 3 Dec. 1880, 8 R. 205. A husband cannot elect for his wife; *Stevenson*, 7 Dec. 1838, 1 D. 181; *Lowson*, 15 July 1854, 16 D. 1098; nor a father for his children; *Fisher*, 1 July 1833, 6 W. & S. 431. When a deed, reducible *ex capite lecti*, contained a revocation of a prior settlement, the heir was allowed to reduce the deathbed deed, so far as prejudicial to him, and at the same time to found on it to the effect of revoking the prior settlement; the title of an heir-at-law being always complete until his right is cut off by a valid deed; *Crawford*, 14 March 1806, 5 Pat. App. 73, 2 Bligh, 655; *Mudie*, 1 March 1824, 2 Sh. App. 9; *Anderson*, 17 May 1833, 11 S. 612. Where there was no express revocation in the deathbed deed, it was held that the latter could not be founded on as virtually revoking a former deed; *Rowan*, 1775, 5 Br. Sup. 423; and this decision, though disapproved of, was treated as a binding precedent by the House of Lords, in *Crawford*, *supra*, and was followed accordingly in *D. Roxburghe*, 25 May 1820, 6 Pat. App. 548, 2 Bligh, 619. See *Ross's L. C.* i. 617, *et seq.* When two deeds are executed by the same party, relating to different subjects, and containing different purposes, capable of being separately carried into effect, a person taking under the one deed is not barred by the plea of approve and reprobate from repudiating the other; *Dow's Trs.* 11 March 1856, 18 D. 820. But when a testator's

[will is gathered from several writings, read as one settlement, a beneficiary cannot repudiate one of them, without forfeiting the provisions in his favour in the other; *Harvey's Trs.* 30 Jan. 1863, 1 Macph. 345. An impossible or illegal condition attached to a bequest is held *pro non scripto*; *Arbuthnot*, 1792, M. 620, Bell's 8vo cases, 165; *Douglas*, 27 June 1862, 24 D. 1191. In the latter case it was observed by Lord J. C. Inglis that, "to make a proper case of election, the facts of the case must be such as to satisfy three conditions. In the first place, I think the party who is put to his election must have a free choice, and that whichever alternative he chooses, he shall have a right absolutely to that which he has chosen, without the possibility of his right being interfered with or frustrated by the intervention of any third party. In the second place, the necessity of making the election must arise from the will, express or implied, of some one who has the power to bind the person put to his election. And, in the third place, the result of the election of one or other of the alternatives must be to give legal effect and operation to the will so expressed or implied." Writings founded on as putting a beneficiary to his election are to be construed according to the law of the testator's domicile; *Trotter*, 10 June 1829, 3 W. & S. 407; *Dundas*, 22 Dec. 1830, 4 W. & S. 460.

[When an heir repudiates his ancestor's settlement, and betakes himself to his legal rights, thereby forfeiting a fund destined to him under the settlement, a question arises as to the disposal of the fund thus set free; and there has been engrafted on the doctrine of election what is called in England the equity of compensation, whereby the party prejudiced by the election is entitled to be compensated out of the rejected provision. The same equitable principle is recognised in Scotland, being founded on the presumed intention of the testator; and the forfeited interest is transferred to the party prejudiced by the challenge, as a *surrogatum* in place of what had been destined to him under the settlement. See *Kerr, supra*; *Peat*, 14 Feb. 1839, 1 D. 508; *Breadalbane's Trs.* 15 Jan. 1841, 3 D. 357; *Nisbet's Trs.* 6 Dec. 1851, 14 D. 145; *Davidson's Trs.* 15 July 1871, 9 Macph. 995; *Johnston*, 20 July 1875, 2 R. 986; *Macfarlane's Trs.* 20 July 1882, 9 R. 1138. See *Ersk. B. iii. tit. 3, § 49*; *tit. 8, § 98*; *tit. 9, § 10*; *Bell's*

[*Com. i. 141*; *Bell's Princ. § 1938*; *M'Laren on Wills, § 923*.]

APPROBATORY ARTICLES. See *Articles Improbatory*.

APPROPRIATION; signifies the annexing of an ecclesiastical benefice to the proper and perpetual use of some religious house, bishopric, college, or spiritual person, to enjoy for ever. *Tomlins' Dict.* ["*Appropriation* is when a benefice was in the hands of a religious house,—of monks, for instance, or of a bishop and chapter, or of a college or university. *Impropriation* is where a benefice ecclesiastical is in the hands of a layman, who is incapable of holding a cure of souls;" *Innes' Legal Antiquities*, 185.]

[**APPROPRIATION**, of indefinite payments. See *Indefinite Payment*.]

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

APPROVER. In English law language, an *approver*, or *prover*, is one who confesses participation in a felony, and bears evidence against his accomplice or accomplices. A person who has once pleaded guilty of the crime cannot be an approver. *Tomlins, h. t.* See *Accomplice*. [*King's Evidence*.]

APUD ACTA. This expression is applied to judicial notices or intimations given in open court, the parties, or their counsel or agents, being present. Thus, if an adjournment of a proof or other judicial proceeding is made by the court, or by a commissioner, and the parties and witnesses, being present, are convened to attend at a future day, this is called a citation *apud acta*. So, in a criminal process, the court may adjourn a trial to a future day specified in the deliverance, which being intimated *apud acta* to parties, witnesses, and assizers, is sufficient notice without further citation. *Hume*, ii. 275.

APPURTENANCES; are things either corporeal or incorporeal, appertaining to another thing as principal, as hamlets to a chief manor, &c. *Tomlins' Dict.* See *Part and Pertinent*.

AQUÆDUCTUS; a known rural servitude, signifying the right to conduct water by conduits, canals, pipes, &c., in the servient tenement. This servitude may be acquired by immemorial possession; and as the owner of the dominant tenement has

the benefit of the servitude, so he is bound to maintain the aqueducts, pipes, &c., in such a condition as to prevent their injuring the servient lands. The servient proprietor, on the other hand, is bound to allow reasonable access for repairs, cleansing, and the like. The dominant proprietor is not bound to repair the injury occasioned by restagnation from floods. *Ersk.* B. ii. tit. 9, § 13; *Bell's Princ.* § 1012; *Stair*, B. ii. tit. 7, § 12; *Bank.* i. 681; [*Rankine on Land-Ownership*, 475. See *Servitude*.]

AQUÆHAUSTUS; or watering, is another known rural servitude, under which the dominant proprietor has right to water his cattle at a stream, well, or pond, in the servient lands, [or to take water thence for domestic or other uses.] It does not prevent the servient proprietor from making a similar use of the water for his own cattle, or from covering it over, provided he leave open a portion sufficiently extensive to admit of a reasonable exercise of the servitude, with free access. [See *Home*, 18 Dec. 1846, 9 D. 286; *Smith*, 8 March 1880, 7 R. (H.L.) 28.] See *Ersk.* B. ii. tit. 9, § 13; *Bell's Princ.* § 1011; *Bank.* i. 681; [*Stair*, B. ii. tit. 7, § 11; *Rankine on Land-Ownership*, 295, 474.]

ARAGE; (from *averia*) an old law term still employed by conveyancers, signifying services due by a tenant to his landlord or superior, and performed by horses, or carriage by horses. [See *Arriage*.]

ARATRUM TERRÆ; a ploughgate of land. It consists of eight oxgates of land, because, anciently, the plough was drawn by eight oxen. *Balfour's Practicks*, p. 441.

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

ARBITRATION; this term is applied to the voluntary reference of a dispute to the determination of one or more persons appointed for that purpose by the parties; and to the decision or award 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. 2^d, A clause defining the arbiter's 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. 3^d, A clause specifying the time within which the award or decree-arbitral is to be pronounced. 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, that the reference shall be binding on creditors or representatives, notwithstanding the death or bankruptcy of either party before its determination; and also a declaration, that in case the submission shall terminate without a final decree-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 acceptance of the submission by the arbiter, and the appointment of a clerk, by a minute indorsed on the deed of submission. The pleadings, when written, commence by a claim lodged by one of the parties, which is followed by answers, replies, &c., or by the making up of a record, when the arbiter deems that necessary; after which, the arbiter either determines the case *de plano*, or allows a proof, or orders further pleadings or procedure. When there are two arbiters, the deed of submission usually provides that they shall have power to name an umpire or oversman, in case they shall differ in opinion; or sometimes such an oversman is named in the deed; and when the arbiters differ, the reference, or devolution, as it is sometimes called, is made to the oversman, who, if he chooses, may order further debate before deciding. The decree-arbitral 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 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. By Act of Regulations, 2 Nov. 1695, c. 25, decrees-arbitral are declared not to be reducible, except on the grounds of bribery, corruption, or falsehood. It is necessarily implied, however, in their nature, that such decrees are also reducible when the arbiters exceed the powers with which the submission invests them, for by it their jurisdiction is defined; or where the proceedings of the arbiter are palpably irreconcilable with the principles of impartial justice; as, where he has not fully heard the parties, or where he has taken a proof, or any other important step in the submission, in absence of one of the parties. [The word "corruption," in the above Act of Regulations, has received a very broad construction, "including any plain failure in duty, distinct from an error in judgment;" and the arbiter's duty is to be viewed not merely "in reference to his moral dispositions, but he is bound to show that he has dealt fairly, that is equally, with both parties." See *Sharpe*, 24 Feb. 1815, 3 Dow, 102; *Mitchell*, 17 June 1848, 10 D. 1297; *Miller*, 10 March 1855, 17 D. 689; *Alexander*, 5 Feb. 1869, 7 Macph. 492. With these authorities the decision in *Cameron*, 25 June 1868, 6 Macph. 279, seems hardly in accordance. See also *Morison*, 26 Nov. 1880, 8 R. 147.]

The preceding observations apply to formal submissions followed by regular decrees-arbitral; but effect will also be given to less formal agreements to refer, more particularly where matters are not entire, *ubi res non sunt integrae*, as it is expressed; that is, where something has been done on the faith of the agreement. This is especially the case *in re rustica* and *inter rusticos*; or amongst merchants in the adjustment of mercantile disputes. But such references, and the awards following on them, found a right of action merely for implement against the party refusing implement, and cannot be, like a formal submission and decree-arbitral, the warrant of summary diligence. It would now seem, however (although there are *dicta* to the contrary), that such submissions and decrees-arbitral, unless in matters of the most trivial importance, must be proved *scripto*; *Ferrie*, 5 June 1824, 3 S. 113.

[See *Dykes*, 13 Jan. 1869, 7 Macph. 357; *Otto*, 7 March 1871, 9 Macph. 660.]

In articles of roup, missives or minutes of sale, contracts of copartnership, and other mutual deeds, it frequently happens, that in contemplation of future differences, provision is made for a submission or reference; and in all such cases, 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, the reference will not be effectual; *Buchanan*, 1799, M. 14,593; [*Bell's Com.* ii. 538; *Bell's Princ.* § 391. See also *Hendry's Trs.* 28 May 1851, 13 D. 1001; *Campbell*, 2 June 1864, 2 Macph. 1130; *Steel Co.* 22 Dec. 1887, 15 R. 215. But an important exception to this rule is recognised in cases where parties to a contract agree to leave to arbiters to be named the extrication or liquidation of specific points which may arise in connection with the contract; "as, for instance, where parties bind themselves to pay and receive a sum to be fixed by men mutually chosen, or to accept their opinion as the criterion of the existence or non-existence of some contingency on which the obligation of the parties is by the contract dependent;" *per* Lord Fullerton in *Hendry's Trs. supra*; see also *Mumro*, 18 Dec. 1823, 2 S. 593; *Smith*, 28 Feb. 1843, 5 D. 749; *Howden*, 16 March 1882, 9 R. 758; *Ramsay*, 6 Feb. 1884, 11 R. 527. There is a farther exception in the case of certain statutory submissions, in which it is made competent to refer disputes to arbiters not named; see 5 Geo. IV. c. 96 (Masters and Workmen); 38 & 39 Vict. c. 60, § 22 (Friendly Societies). In *Bremner*, 24 June 1875, 2 R. (H.L.) 136, a dispute between two parishes as to the settlement of a pauper was referred by the parties to the decision of a society of inspectors of poor. The society had been in the practice of deciding such questions by vote at their general meetings, at which it was uncertain what members would be present. It was held that the reference and the award following thereon were valid. A clause of reference in a contract may either include only disputes arising in the execution of the contract, or it may refer to arbitration every claim and obligation that at any time arises out of the contract; contrast *Kirkwood*, 6 Nov. 1877, 5 R. 79; and *Beattie*, 5 July 1883, 10 R. 1094; with *Mackay*, 22 June 1883, 10 R. 1046. An arbiter has power to award expenses to either party, though not specially authorised; *Ferrier*, 18 April 1845, 4 Bell's App.

[161. A proper arbiter has no claim for remuneration, unless he has stipulated for it; *Henderson*, 15 March 1867, 5 Macph. 628. When the time within which the arbiter is to decide is left blank in the submission, his power has been by practice limited to a year and day; see *E. Dunmore*, 13 May 1829, 7 S. 595. After the submission has expired, the arbiter cannot issue a decree-arbitral, even though he have come to his decision and intimated it by issuing notes of his proposed award; *Lang*, 8 May 1855, 2 Macq. 93. [The arbiter cannot prorogate the submission, without express or clearly implied power to do so; *Gowans*, 3 Feb. 1859, 21 D. 403. The parties may prorogate it either expressly, or by acting and pleading under it after expiry of the term; *Paul*, 15 March 1867, 5 Macph. 613. An arbiter who has accepted a submission, is bound to execute a decree-arbitral, unless he can show cause for declining to act; *Marshall*, 26 March 1853, 15 D. 603. But the Court of Session alone has jurisdiction to compel an arbiter to proceed; *Forbes*, 22 Jan. 1886, 13 R. 465. In general, a reference falls by the death of either of the parties thereto. But this rule does not apply, where one of the parties is a trust, though one or more of the original trustees may have died; nor where the reference is merely executorial of a contract, in regard, for instance, to the fixing of the price in a sale; see *Alexander's Trs.* 13 July 1883, 10 R. 1189.] See *Stair*, B. iv. tit. 2, § 18; tit. 3, § 1; *More's Notes*, xliii., lv.; *Ersk.* B. i. tit. 2, § 2; B. iv. tit. 3, § 29; [*Bell on Arbitration*; *Bell's Princ.* § 391; *Menzies' Conv.* 393; *M. Bell's Conv.* i. 366; *Mackay's Prac.* ii. 155, 219, 552; *Jurid. Styles*, ii. 222. See *Oversman. Judicial Reference.*]

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. *Ersk.* B. iv. tit. 4, § 15. In cases punishable capitally, the public prosecutor may, at any time before moving for sentence, restrict his libel to an arbitrary punishment; but, if there be no such restriction, the judge is bound to pronounce the capital sentence. *Alison's Prac.* 88, 90, 97, 108; *Hume*, ii. 134.

ARBITRIUM BONI VIRI. A dispute left *ad arbitrium boni viri*, means one to be decided as a person in whose probity confidence may be placed would decide. The price of a thing is often fixed in this

way. When parties in their contract have agreed to refer to persons, who afterwards die or leave the country, the amount of any sum to be paid, the Court of Session sometimes modifies the amount as a thing *in arbitrio boni viri*. *Brown's Synop. h. t.*; *Brown on Sale*, 149, note; *Kames' Princ. of Equity* (1825), 134, 154.

ARCHBISHOPS; Primates of the church. [See *Bishops*.]

ARCHES COURT. The Court of Arches in London is the chief and most ancient consistory court belonging to the Archbishop of Canterbury, for the disposal of spiritual causes. The judge of this court is called the Dean of the Arches. [The court is "so called of Bow Church in London, by reason of the steeple thereof raised at the top with stone pillars in fashion like a bow bent archwise; in which church this court was ever wont to be held;" *Phillimore's Eccl. Law*, 259. The jurisdiction of the court in testamentary matters was transferred to the Court of Probate by 20 & 21 Vict. c. 77. There is an appeal to the Judicial Committee of the Privy Council. See *Wharton's Lex.*]

ARLES. See *Earnest*.

ARMIGER, ESQUIRE; the term of dignity below a knight, and above that of a gentleman. *Tomlins, h. t.*

ARMORIAL BEARINGS, or ARMS. Mackenzie defines arms to be "marks of hereditary honour, given or authorised by some supreme power, to gratify the bearer, or distinguish families,"—and historically, armorial bearings seem to have been originally the distinctive marks, badges or devices, whereby warriors clad in armour were recognised in battle. The bearings so assumed or conferred as cognisances became permanent in families, and in process of time heraldic emblazonry was reduced to a system, by which the different branches of a family, and their relationships and intermarriages, were discoverable from their coats-armorial. This department has been long under the jurisdiction of the Lyon King of Arms, and besides having been the subject of several statutes, it has been illustrated by considerable antiquarian learning and research. Strictly speaking, the privilege of conferring armorial bearings belongs to the Crown; but practically, a coat-armorial may now be purchased at the Lyon Office; see *M'Donnell*, 20 Jan. 1826, 4 S. 371; [*Cunninghame*, 13 June 1849, 11 D. 1139.] In deeds of entail, stranger heirs called to the succession are frequently enjoined by the entailor to bear his name and arms;

and in one case, where the maker of the entail had inserted such a clause without having had any coat-armorial matriculated, it was held incumbent on the heir of entail succeeding, and on the other heirs of entail, to follow out the entailor's appointment by obtaining from the Lyon Office arms of the proper description, descendible to the heirs of entail; *Moir*, 5 Feb. 1794, M. 15, 537. [The validity of a coat-armorial granted by the Lyon King cannot be brought up as a side issue in a declarator of irritancy on the ground of contravention: it must be challenged in the regular way; *Hunter*, 31 Jan. 1882, 9 R. 492.] See 1587, c. 46, 1592, c. 127, 1672, c. 21. By various revenue statutes a tax is imposed on armorial bearings, whether borne on plate or on carriages. See *Ersk. B. i. tit. 4, § 32*; *Mackenzie's Heraldry Works*, ii. 575, folio edit.; *Encyc. Brit. voce Heraldry*. See *Entail. Lyon King of Arms*.

[**ARMY.** By the Bill of 'Rights (1 William & Mary, st. ii. c. 2), a standing army in time of peace, without consent of Parliament, is illegal. Since 1689, therefore, the army has been maintained from year to year by a special statute. Till 1879, an annual Mutiny Act was passed, which, with the annual Articles of War, contained the code of regulations for the army. In that year, however, the provisions of the Mutiny Act and of the Articles of War were consolidated in the Army Discipline Act (42 & 43 Vict. c. 33). The Army Act, 1881 (44 & 45 Vict. c. 58), which repealed the act of 1879, re-enacting most of its provisions, constitutes, along with Rules of Procedure made in the same year under authority of the statute, the existing military code. The Army Act, in accordance with the constitutional law mentioned above, is renewed annually by an act which specifies the number of forces to be maintained for the current year. The Army Act deals in the first part with crimes, punishments, and courts-martial; in the second part with enlistment; in the third part with billeting and impressment of carriages; parts 4 to 6 containing general and supplemental provisions. See *Manual of Military Law* (War Office, 1887); *Tovey's Military Law*; *Clode's Military Forces*; *Stephen's Com. ii. 618*; *Dicey on the Constitution*, 603. See *Court Martial. Enlisting. Desertion. Soldiers. Commission. Militia. Furlough. Mutiny. Judge Advocate General.*]

ARRAIGN; (*ad rationem ponere*) 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 *Tomlins' Law Dict.*

ARREARS; money unpaid at the due time, such as rent, interest, the balance of an account, and the like. The most important practical rule of the law of Scotland with respect to arrears is, that all arrears of annual returns, and of funds themselves heritable, such as arrears of rent, the arrears of interest due on an heritable bond and covered by the real security, arrears of feu-duties, the balance or reversion of the price of subjects sold judicially, and the like, are held to be moveable, and, in questions of succession, belong to the executor, and not to the heir in heritage. See *Ersk. B. ii. tit. 2, § 7*; tit. 9, § 64; *Bell's Com. ii. 7*; *Bell's Princ. § 1479*; *More's Notes to Stair*, cxxxix. See *Hypothec. Heritable and Moveable. Executor. Aliment.*

ARRENDARE; according to Skene, is a Spanish word used in old Scotch deeds, to signify a rent or yearly duty. *Skene, h. t.*

ARRERAGIUM; a word used in the *Regiam Majestatem*, to signify arrears of rents, profits, and duties. *Skene, h. t.*

ARREST. As applied to personal diligence, this is properly an English law term; and means the apprehending or restraining a person in execution of the command of a court or by officers of justice. In Scotland, the word *apprehension* is usually applied to this species of arrest; and the civil and criminal warrants for such apprehension are various. The following articles may be consulted:—*Caption. Act of Warding. Border Warrant. Meditatio Fugæ. Apprehending a Debtor. Criminal Prosecution. Bail. Commitment. [Diligence. Privilege, Personal.]*

ARREST OF JUDGMENT; an English law term. To move an arrest of judgment is to show cause why judgment should be stayed, notwithstanding a verdict. Judgment may be arrested for good cause in criminal as well as in civil cases. *Tomlins, h. t.*

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. [Forthcoming.]*

ARRESTMENT; is the diligence, whereby the debtor in a moveable debt or

obligation, is interpellated from making payment or delivery to his creditor until the debt due to the arrester by the arrestee's creditor is paid or secured. The party in whose hands the arrestment is laid is called the *arrestee*; the user of the arrestment is called the *arrester*, and the arrester's debtor is called the *common debtor*, because, where (as usually happens) there are two or more competitors for the arrested fund or subject, he is debtor to all of them. The *nexus* thus imposed does not operate as a transfer of the debt or subject to the arrester; [except in the case of arrestments upon an extract decree of the Court of Exchequer, which, by 19 & 20 Vict. c. 56, § 30, operate "to transfer to the Crown, preferably to all other creditors of the Crown debtor, all right to and interest in the arrested fund, competent to the Crown debtor." In the ordinary case,] an action of forthcoming is necessary, at the instance of the arrester, in which he calls the arrestee and the common debtor; and if there be no competition, and no objection on the part of the common debtor, decree of forthcoming in the arrester's favour will be pronounced. If, on the other hand, several arrestments have been used by other creditors of the common debtor, then, instead of an action of forthcoming, the arrestee, or any of the creditors in his name, may bring all parties into the field by an action of multiplepoinding, in which the arrestee states the amount of the debt due by him to the common debtor, and his readiness to pay it but for the arrestments. He then concludes, that he shall be held liable in once and single payment only, and found entitled to the expenses of bringing the action into court; and decree to that effect having been pronounced, the arrestee, if he pleases, or if any party interested insist on it, consigns the money, or places the subject *in manibus curiæ*; or the arrestee is allowed to retain the sum or the subject until the issue of the competition amongst the arresting creditors. He is thus discharged, either by consignment, or, where that has not been insisted for, by making payment or delivery to the party preferred by the decree of the court. [When the subject arrested is a ship, the process used is not a forthcoming, but an action of arrestment and sale, as to which see *Boyd's Admiralty Prac.* 29; *Shand's Prac.* 417; *Mackay's Prac.* ii. 105.]

Arrestment may be used either after the arrester has constituted his debt against the common debtor, or during the dependence of an action for that purpose. [Warrant

[to arrest and poind is now generally inserted in extracts of decrees of the supreme and sheriff courts, and in extracts of registered obligations and documents on which execution may competently proceed; 1 & 2 Vict. c. 114, §§ 1, 2, 9. Arrestment, however, may still proceed, as it formerly did, upon special letters of arrestment, or on a warrant contained in letters of horning, or on a precept of arrestment granted by an inferior judge.]

When the arrester's debt is not yet constituted, arrestment may be used on the dependence of an action for constituting the debt, as to which the rules are—1st, [It is competent to insert in Court of Session summonses, which conclude for payment of money, a warrant to arrest the moveables, debts, and money belonging or owing to the defender, until caution be found that the same shall be made forthcoming; and by virtue of such warrant (or by virtue of letters of arrestment raised on any libelled summons according to the previous practice), arrestment may be executed before execution of the warrant of citation; but such arrestment is effectual only if the warrant of citation is executed within twenty days after execution of the arrestment, and if the summons is called in court within twenty days after the diet of comparance (or, if in vacation, on the first calling day thereafter); 1 & 2 Vict. c. 114, §§ 16, 17. As to arrestment on Exchequer decrees, see 19 & 20 Vict. c. 56, §§ 28, 30, 36.] 2d, Such arrestment may be used at any time during the dependence of the action, the action being held as in dependence pending an appeal to the House of Lords; and as a corollary to this rule, an arrestment on the dependence does not fall *eo ipso* by a judgment of the Court of Session, assoilzieing the defender from the conclusions of the action on the dependence of which the arrestment has been used, but will remain effectual in case the pursuer should take an appeal, and obtain a reversal in the House of Lords; [see *Johnston*, 23 Jan. 1813, F.C.; *Hadinton*, 8 March 1822, 1 S. 387.] 3d, The will of an inferior court petition may also contain a warrant to arrest on the dependence; [but separate precepts of arrestment may still be issued; A.S. 10 July 1839, §§ 12, 153; 39 & 40 Vict. c. 70, § 10. Such arrestment, however, is ineffectual, when the schedule of arrestment has not been personally served on the arrestee, unless a copy of such schedule is sent by post to the arrestee at his last known place of abode; *ib.* § 12 (5). See also A.S. 10 July 1839, §§ 154, 155.

[A warrant of arrestment granted by one sheriff may be executed in the territory of another sheriff, being first indorsed by the sheriff-clerk of the latter sheriffdom; 1 & 2 Vict. c. 114, § 19. Arrestment on the dependence is competent only when the summons or petition has pecuniary conclusions other than the conclusion for expenses; *Kitchen*, 5 July 1871, 9 Macph. 966; *Stafford*, 20 Nov. 1875, 3 R. 148. It is competent on the dependence of an action of separation and aliment; *Burns*, 9 Dec. 1879, 7 R. 355. Arrestment in security of a debt not yet due is not competent, unless the debtor be *vergens ad inopiam*, or there be other circumstances of a parallel kind; and in that case the proper procedure is by bill; see *Symington*, 3 Dec. 1875, 3 R. 205. See *Inhibition*. Arrestment on the dependence has been held competent, when the action was brought, not for the real purpose of being insisted in before the Court of Session, but avowedly in order to secure the benefit of the diligence during the dependence of a similar suit in Chancery; *Hawkins*, 9 March 1842, 4 D. 924; *Fordyce*, 2 June 1842, 4 D. 1334. Arrestment on the dependence covers both principal and interest of the debt sued for, as well as the expense of the action; *Macdonald*, 2 Feb. 1825, 3 S. 494. But the expense of the arrestment itself is not included in the expenses of process; *Taylor*, 25 Jan. 1820, F.C.; *Symington*, 11 June 1874, 1 R. 1006. In *Lucovich*, 12 June 1885, 12 R. 1090, the court granted warrant to arrest a ship in circumstances where arrestment on the dependence was impossible.]

The subjects which may be arrested are moveable and personal debts, not made real by sasine, including the arrears of interest on heritable or real debts. The debt or subject arrested must not be in the possession of the common debtor himself, or of his servant, or of any one who is a mere custodian for him. On the contrary, the arrestee must be properly the debtor of the common debtor: [so arrestment in the hands of a factor for the party who is indebted to the common debtor, is ineffectual; see *Campbell*, 1752, M. 742; *Trowsdale*, 4 Nov. 1870, 9 Macph. 88. A statutory exception to this rule was enacted by 19 & 20 Vict. c. 60, § 3, which provides that "any seller of goods may attach the same while in his own hands or possession, by arrestment or poiding, at any time prior to the date when the sale of such goods to a subsequent purchaser shall have been intimated to such seller, and such

[arrestment or poiding shall have the same operation and effect in a competition or otherwise, as an arrestment or poiding by a third party." See *Wyper*, 27 Feb. 1861, 23 D. 606.] Some moveable subjects are by statute, charter, or special destination, not arrestable; e.g., the original stock of the Royal Bank of Scotland; annuities to widows of ministers of the Church of Scotland, of writers to the signet, &c. [And in general, alimentary funds, such as servants' wages, are, by common law, not arrestable, except for alimentary debts. A statutory exemption is enacted by 33 & 34 Vict. c. 63, with regard to the wages of "all labourers, farm-servants, manufacturers, artificers, and work people," except so far as exceeding the rate of twenty shillings a week. See *M'Murphy*, 4 Feb. 1888, 15 R. 375. This does not apply, however, to alimentary debts, nor to rates and taxes imposed by law.] With these, and some other exceptions of the same class, all personal claims, and all claims resolvable into personal claims, are arrestable, even although payable from the proceeds of heritable property. Such are claims against trustees who are empowered to sell heritage, and to apply the price,—obligations by trustees to account for the price of heritage,—and so forth. A creditor, by producing the grounds of a personal or moveable debt in a process of ranking and sale, does not thereby render the debt heritable, or bar arrestment. Neither will a personal creditor's accession to a trust-deed, conveying heritage in payment of debts, have that effect. But, on the other hand, the shares of the price of heritage, payable under a ranking and sale to heritable creditors, are not arrestable; neither is the reversion of an heritable estate which has been sold judicially by creditors. So also a debt, secured by an assignation to a lease of an heritable subject, is not arrestable, although a debt due by heritable bond before infestment is; 1661, c. 51. Debts by bill of exchange, and the *ipsa corpora* of bills, are not arrestable; and where a mercantile agent has sold goods, and taken bills for the price as agent, an arrestment in his hands, before he has received payment of the bills, will not attach either the bills or their proceeds, as a debt due by him to his constituent; *Johnston*, 12 May 1837, 15 S. 904. And, in general, nothing will be covered by arrestment, except an actual debt, or a sum or subject, for which, as debtor, the arrestee is accountable to the common debtor; although, on this subject,

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the judgments of the court have varied, and the distinctions drawn have been occasionally so subtle, that it is difficult either to classify the cases, or to deduce any abstract rule from them. Future debts, *i.e.*, debts not due until after the arrestment is used, are not attached; but this does not include debts, the obligation for which is already incurred, but the term of payment only not arrived. Arrears of rent and interest, and the current term's rent or interest, may be arrested; but an arrestment used on the term-day to attach the ensuing term's rent is premature; [*Wright*, 1802, M. 15,919.] Arrestments, however, of current rents are always to a certain extent contingent, since the efficacy of the arrestment depends on the common debtor being *in titulo* to exact them at the term of payment; his right being defeasible by adjudgers, or other singular successors acquiring right to the lands, and consequently to the rents, in the intermediate period. In like manner, where the subject, the rents of which have been arrested *currente termino*, has been a donation *inter virum et uxorem*, the arrestment may be defeated by a revocation of the gift by the husband or wife. Arrestment used in the hands of the consignee of goods before they have come into his possession, will not attach the goods; [*Stalker*, 1759, M. 745. The contents of a policy of insurance are arrestable during the life of the party insured; *Strachan*, 19 June 1835, 13 S. 954; *Bankhardt's Trs.* 21 Jan. 1871, 9 Macph. 443. As to arrestment of a conditional debt, see *Marshall*, 18 Dec. 1847, 10 D. 328. The arrestment of a ship is made by fixing a copy on the mainmast (or on the stern, if it is not masted), and chalking above it the royal initials. See *Clark*, 17 June 1853, 15 D. 750; *Bell*, 19 Dec. 1862, 1 Macph. 183. A ship that has already started on a foreign voyage cannot legally be seized and brought back to port; *Borjesson*, 9 July 1878, 5 R. (H.L.) 215. See *Ship*. A debtor's interest in any subject can only be attached by arrestment *tantum et tale* as it stood in the debtor himself; *Chambers' Trs.* 15 April 1878, 5 R. (H.L.) 151.]

As to the parties in whose hands the arrestment must be used, the leading rule is that it must be used in the hands of the debtor to the common debtor. Where the debtor is an incorporation or joint stock company, it will be validly used either in the hands of the treasurer or manager, or by being executed against the managers and directors by serving each with a copy,

or by delivering a copy to them when met on the business of the incorporation. If the debtors are trustees, the arrestment must be used in the hands of the trustees who, under the trust-deed, are empowered to act. Where the debtor is abroad, and has no domicile at which the arrestment can be used, it may be executed against him edictally, [by delivery of a schedule of arrestment at the office of Edictal Citations; 1 & 2 Vict. c. 114, § 18. But such arrestment does not effectually interpell the arrestee from paying to his original creditor, unless it is proved that he, or those having authority to act for him, were previously aware of it; 19 & 20 Vict. c. 91, § 1. Even when the arrestee resides in Scotland, he will not be liable in second payment, if he has paid his creditor in circumstances in which it was impossible for him to know of the arrestment; *Laidlaw*, 26 Oct. 1841, 2 Rob. 490.] Arrestment in the hands of the tutor of a pupil is effectual to attach a debt due by the pupil; but arrestment in the hands of a minor *pubes* is good, although not executed against his curators. [As to the competency of arrestment to attach stolen money in the hands of a public criminal official, see *Stuart*, 8 Feb. 1883, 10 R. 581.] Every arrestment must be regularly executed before [one witness,] who must subscribe the execution, and be designed therein, under the sanction of nullity; 1681, c. 5; [1 & 2 Vict. c. 114, § 32; 9 & 10 Vict. c. 67. A clerical error was fatal to the validity of an arrestment, in *Graham*, 15 July 1875, 2 R. 972.] The execution must be either personal, or by leaving a service copy at the arrestee's dwelling-house. If left at his shop or counting-house, it will be inept; [*Sharp*, 21 Feb. 1822, 1 S. 339.]

If the arrestee pay or deliver in the face of the arrestment, he will be liable for the value to the arrester, at least to the extent of his debt; [see *Breach of Arrestment*.] But the arrestment creates no real right entitling the arrester to vindicate the subject from third parties acquiring *in bona fide*. [An arrestment for execution can be loosed only on payment of the debt, unless where the decree or obligation is brought under suspension. Where arrestment in security is used oppressively or nimiously, the Lord Ordinary in the cause, or the Lord Ordinary on the Bills in vacation, or the sheriff, may recall or restrict it, or grant warrant for loosing on caution, or without caution; 1 & 2 Vict. c. 114, §§ 20, 21. See *Latham*, 18 July 1866, 4 Macph.

[1084; *Potter*, 17 Nov. 1847, 10 D. 97; *Macdougall's Tr.* 18 Nov. 1864, 3 Macph. 68; *Buchanan*, 10 June 1882, 9 R. 926; *James*, 10 July 1886, 13 R. 1153; *Dick*, 24 Dec. 1887, 15 R. 261. The old procedure by bill for letters of loosing is also still competent; *Hart*, 24 Dec. 1864, 3 Macph. 336. See *Loosing of Arrestments*.] Arrestment, used on the dependence of an action, falls by the death of the arrestee, whose heir may pay the common debtor, unless interpellated; but it subsists, to the effect of supporting an action of forthcoming, while the heir holds the subject; and may be renewed against the arrestee's heir, so as to give a preference to the arrester over an arrester in the hands of the heir. It also subsists after the death of the common debtor; and, on the death of the arrester, remains effectual to his heir. [Arrestments not pursued or insisted within five years prescribe; 1669, c. 9; and the period was reduced to three years by 1 & 2 Vict. c. 114, § 22. See *Jameson*, 18 March 1887, 14 R. 643. In the case of arrestments used upon a future or contingent debt, that period is counted from the time when the debt becomes due, or the contingency is purified; 1 & 2 Vict. c. 114, § 22.] In competition, arrestments are preferable according to their dates: hence, in the execution, the hour at which the arrestment was used should be mentioned. But all arrestments used within sixty days before, and four months after, [the constitution of notour bankruptcy,] are to be ranked *pari passu*; while arrestments used posterior to the four months cannot compete with prior arrestments, [but may rank with each other on any reversion of the fund attached; 19 & 20 Vict. c. 79, § 12. Sequestration is equivalent to an arrestment in execution and decree of forthcoming; and no arrestment executed within sixty days before sequestration is effectual; *ib.* § 108. See *Bank of Scotland*, 12 Jan. 1870, 8 Macph. 391; *Mitchell*, 29 June 1881, 8 R. 875; *Benhar Coal Co.* 6 Feb. 1883, 10 R. 558. And, by 49 Vict. c. 23, § 3, the winding up of a company, by or under supervision of the court, has the same effect as sequestration. See *Joint Stock Company*. In competition with assignation, the date of the intimation of the assignations is the criterion of preference, not the date of the deed of assignation. See *Ersk.* B. iii. tit. 6, § 1; *Stair*, B. iii. tit. 1, § 24; *More's Notes*, cclxxxiii.; *Bank.* ii. 196; *Bell's Com.* i. 6; ii. 62; *Bell's Princ.* § 2272; [*Menzies' Conv.* 311; *M. Bell's Conv.* i. 548; *Campbell*

[*on Citation and Diligence*, 148; *Mackay's Prac.* i. 66, 378; ii. 423; *M'Glashan's Sher. Court Prac.* § 1924; *Dove Wilson's Sher. Court Prac.* 216, 351; *Goudy on Bankruptcy*, 69, 110, 523; *Jurid. Styles*, iii. 296.] See *Forthcoming. Assignation. Multiplepoinding.*

ARRESTMENT *jurisdictionis fundandæ causa*; arrestment for the purpose of founding a jurisdiction. This arrestment is used for the purpose of bringing a foreigner under the jurisdiction of the courts of Scotland. A person domiciled abroad, whether native or foreigner, is not amenable to the Scotch courts, or liable to legal diligence, real or personal, unless he either has property in Scotland, or comes personally into the country. Where his property is heritable, he is held to have a *forum*, and may be cited as furth of the kingdom. But where his property is merely moveable, an arrestment to found a jurisdiction is necessary. This arrestment is laid on, either in virtue of the warrant of an inferior court, or of letters of arrestment *jurisdictionis fundandæ causa*, passing the signet on a warrant obtained at the Bill Chamber; and even when laid on by the warrant of an inferior court, such an arrestment will found a jurisdiction in the supreme court. [Where letters of arrestment are used, it is not necessary to execute them before the summons is signeted: it is probably enough that they be executed before defences are lodged; *Walls' Trs.* 1 Feb. 1888, 15 R. 359. If the subjects arrested are so trivial in value "as to make the seizure illusory," it is a doubtful question to what extent the jurisdiction founded thereon might be held to reach; *Lindsay*, 23 Feb. 1858, 3 Macq. 99; 27 Jan. 1860, 22 D. 571. But unless the thing arrested is of no appreciable value, the smallness of the value is no relevant objection to the foundation of jurisdiction; *Shaw*, 2 Feb. 1869, 7 Macph. 449; *Wyper*, 2 Feb. 1877, 4 R. 444; *Ross*, 29 June 1878, 5 R. 1013. An obligation to account for a possible balance was held an arrestable interest; *Baines & Tait*, 15 March 1879, 6 R. 846. The arrestment of books or documents of no mercantile value would probably not found jurisdiction; *Trowsdale's Tr.* 4 Nov. 1870, 9 Macph. 88. This arrestment has the effect of founding jurisdiction in all patrimonial claims of a pecuniary nature, even in a claim of damages for slander; *Longworth*, 1 July 1865, 3 Macph. 1049. But it is no foundation in questions of

[*status* ;] and it will have no effect as a *nexus*, in competition with ordinary arrestments. For that purpose, after the jurisdiction has been thus founded, the creditor must raise an action against his debtor, on the dependence of which he may then use an arrestment in common form. An arrestment *ad fundandam jurisdictionem* is also required to warrant the raising of a horning against a party domiciled abroad, who has moveable property in Scotland. But this kind of arrestment is not necessary, where the sum or goods belonging to the absent party are already the subject of an action of multiplepoinding, or after they have been already arrested, or where jurisdiction is founded on the principal of reconvention. [As to whether this arrestment imposes such a *nexus* on the goods arrested, that the holder cannot part with them until caution is found *judicio sisti*, see *Malone*, 28 May 1884, 11 R. 853. Arrestment used in the hands of an individual member of a firm does not attach a debt due by the company; *Hay*, 19 June 1880, 7 R. 972; see also *Parnell*, 5 Feb. 1889, 16 R. Arrestment is personal, and falls by the death of the party against whom it has been used to found jurisdiction; *Cameron*, 9 March 1838, 16 S. 907.] See *Ersk. B. i. tit. 2, § 19*; *Bell's Com. ii. 65*; *Kames' Equity*, 286; [*Shand's Prac. 163*; *MacKay's Prac. i. 67, 173*; *Dove Wilson's Sher. Court Prac. 81*; *Campbell on Citation, &c. 147*; *Menzies' Conv. 313*; *M. Bell's Conv. i. 549*; *Moir's Note in Ersk. Princ. (17th ed.) 16*; *Jurid. Styles, iii. 305*. See *Jurisdiction.*] *Reconvention. Foreigner. Edictal Citation.*

ARRHÆ. See *Earnest*.

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 writing apart. Mill-services continue on the former footing. ["A rage, uthewise average, from *averia*, quhilk signifies ane beast, . . . signifies service, quhilk the tennent aucht to his maister, be horse, or carriage of horse;" *Skene*.] See *Ersk. B. ii. tit. 6, § 42*; *Stair, B. ii. tit. 4, § 7*; *Hunter's Landlord and Tenant, i. 478*; [*Ross's Lect. ii. 495*. See *Personal Services*.]

ARROGATION; in the Roman law, was the adoption of one who was *sui juris*, as contradistinguished from proper adoption, which took place where the adopted person was formally manumitted by his natural

father, and taken under the *patria potestas* of his adopter. Arrogation was originally effected by a species of legislative act, assented to in the *Comitia Curiata*, and, during the empire, by an imperial rescript. See *Adoption*.

ARSON; an English law term, synonymous with wilful fire-raising. Arson is defined to be [the malicious firing of a house or other building. It was a capital felony at common law, but is now punishable by penal servitude or imprisonment; 24 & 25 Vict. c. 97, §§ 1-8. *Stephen's Digest*, art. 377.] See *Fire-raising*.

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 assisting in the execution of it. By statute 1592, c. 153, all criminal libels [except for concealment of pregnancy, in which accession is impossible; see *Punton*, 5 Nov. 1841, 2 Swin. 572] must contain a charge of art and part, even although the crime consisted in a simple and indivisible act, committed, and charged to have been committed, by one person; so that the panel may be convicted, although it should turn out that the act was not committed by him, but by another at his command. [But by the Criminal Procedure Act, 1887 (50 & 51 Vict. c. 35, § 7) the charge of art and part is implied in all indictments, and need not be specially stated.] It follows from the nature of this charge that a verdict of guilty art and part is substantially the same as a simple verdict of guilty, and does not infer an inferior degree of guilt. See 9 Geo. IV. c. 29, § 9; *Hume*, ii. 225-9, 236-9, 441, 456; [*Bell's Notes*, 81; *Alison's Prac. 250*; *Ersk. B. iv. tit. 4, § 10*; *Macdonald*, 3, 297. See *Accessory. Accomplice*.]

ARTICLES IMPROBATORY AND APPROBATORY. By the old form of process, where a deed or writing was objected to as false or forged, after the party founding on the document had abidden by it *sub periculo falsi*, pleadings, called *articles improbatory and approbatory*, were ordered to be put in. According to the [more recent] practice, when the writing had been abidden by, the record was made up, "by ordering a condescendence of articles improbatory, and answers containing articles approbatory, which shall be revised and accompanied with notes of pleas in law. The revised condescendence

and answers to be signed by the parties respectively, as well as by their counsel, except where, on cause shown, and in respect of the particular circumstances of the case, it may be deemed necessary, for the ends of justice, to dispense with the signature of the party, and without prejudice to the form of procedure heretofore observed in such cases; A. S. 11 July 1828, § 53. These articles improbatory and approbatory consisted of articulate averments and answers, in the usual form in which condescendences and answers were prepared, setting forth the facts and circumstances relied on by the one party, as instructing the alleged forgery or falsehood, and by the other, as showing the writing to be genuine and fairly come by. [This procedure is now in disuse. See *Shand's Prac.* ii. 645; *Mackay's Prac.* ii. 164.] See *Abiding by*. [*Reduction.*]

ARTICLES, LORDS OF; were a committee of the Scotch Parliament, thus described by Robertson; "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 Parliament. 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.; [*Burton's Hist.* iv. 96.] See also 1594, c. 218, and 1663, c. 1. At the Revolution of 1688, this system was thought inconsistent with the freedom of Parliament, and was declared a grievance by the Convention of Estates; 1689, c. 18. The Lords of the Articles were accordingly suppressed by the act 1690, c. 3. See *Ersk. B. i. tit. 3, § 5*. [See *Election Law.*]

[ARTICLES OF ASSOCIATION. See *Joint Stock Company.*]

ARTICLES OF ROUP; are the conditions under which property is exposed to sale by auction. [See *Auction.*]

[ARTICLES OF WAR. See *Army.*]

ARTICULATE ADJUDICATION. The proper occasion for an articulate adjudication is where several separate grounds of debt are vested in a trustee, to pursue one adjudication for the whole. In that case the practice is to accumulate each debt separately, so that, if a *pluris petitio* in any one of the debts should occur, it may not prejudice the adjudication as to the remainder. This is called an articulate adjudication; and correctly there ought to be conclusions in the libel for accumulating the debts separately, or the interlocutor must be so expressed as to have that effect. But there may be an articulate adjudication where there is only one ground of debt; e.g., a bond, with principal, interest, and penalties separately stated, instead of being accumulated into one sum. [See *Shand's Prac.* ii. 673; *Mackay's Prac.* ii. 333; *Parker on Adjudication*, 160;] *Jurid. Styles*, iii. 122; *Bell's Com.* i. 773. See *Adjudication. Pluris Petitio.*

ARTISTS AND ARTIFICERS; are held to profess expertness in the art which they practice, *spondere peritiam artis*, and are therefore liable for any damage which may occur through their want of skill, on the maxim, *imperitia culpæ annumeratur*. Under this rule all professional men are comprehended. See *Bell's Com.* i. 489, for the rules with regard to this responsibility, the principle of which is, that the performer of the work is responsible for any deficiency in that degree of skill which the hirer or employer is naturally entitled to expect. The property of artists in their work is protected by various statutes. *Ersk. B. ii. tit. 1, § 16*; *Bell's Com.* i. 119, 489; *Bell's Princ.* §§ 154, 1361. See *Copyright*.

ARTIZAN. See *Master and Servant Workmen*. [*Trade Union. Houses.*]

ASCENDANTS; persons in the degrees of kindred reckoned upwards. [See *Succession*.]

ASSAY OF WEIGHTS AND MEASURES; is the examination of weights and measures by the proper officers. See *Weights and Measures*.

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*, i. 180, 288; *Ersk. B. iv. tit. 4, § 45*; *Swint. Abridg. voce Treason*, § 75.

ASSAULT; is an attempt or offer with force and violence to do a corporal hurt to another. It does not necessarily imply an injury actually done; it is sufficient if such was intended, and a menacing gesture may amount to an assault; but no words, if unaccompanied with violence, will amount to assault. And no words, however insolent and contumelious, will justify an assault, though such provocation will in general tend to mitigate the punishment. Any one, however, who is assailed with blows, is quite justified in defending himself in the same manner, and is not to blame if the assailant be injured in the struggle. But after the aggressor has been disabled, or has submitted, the party who has been originally assaulted may in his turn become the assailant by continuing his blows; in which case the first offender is entitled to demand punishment for the counter-assault committed on him. No provocation which did not take place recently before the assault will justify it; for when a considerable time has elapsed, the deed will be held to have resulted from a spirit of revenge, and not from momentary passion. The aggressor is liable both to a civil action for damages, and to a criminal prosecution. In cases of assault, even of the most atrocious kind, the practice is to make a charge simply of assault, and to state the serious parts of the offence as aggravations of the simple crime. The highest aggravation of assault is intent to murder. See *Attempt to Murder*. But assault is a very aggravated crime, though there may have been no intention to kill, if it has been to the effusion of blood, or the danger of life, or with loaded fire-arms or other lethal weapons. The intent to ravish is also a serious aggravation of assault, which will not be made out, however, by the mere

using of indecent liberties, unless there has been an evident preparation for carnal connection. Intent to rob, which is also an aggravation of a serious nature, is proved by acts of violence, indicating a design to take the property; but such proof is admitted with caution, as, in the confusion of an assault, acts of this kind may take place with no intention to carry off the property. Assault is aggravated when committed in pursuance of an intent to compel a rise of wages, &c., or when committed on a magistrate, or any other officer of the law, in the discharge of his duty, or in revenge for the exercise of it,—on a parent,—on a wife,—or on any one in his own house. See *Hamesucken*. Mutilation of the limbs may be charged either as the worst aggravation of assault, or as a separate offence. The punishment of assault is arbitrary, varying from imprisonment for a month, or even less, to [penal servitude] for life. In cases of great cruelty, scourging has frequently been added. See *Hume*, i. 327–336, 26; *Bell's Notes*, 89, 90; *Alison's Princ.* 175–179, 188; [*Macdonald*, 153;] *Ersk. B. iv. tit. 4, § 37*; *Bell's Princ.* § 2032; [*Guthrie Smith on Damages*, 121; *Pollock on Torts*, 182.]

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

ASSEMBLY, GENERAL. [See *Church Judicatories*.]

ASSENT, ROYAL. When a bill has passed through all its stages in both Houses of Parliament, it receives the royal assent, which is always given in the House of Lords; the Commons being summoned by the Black Rod. The Sovereign may either be present in person, or the assent may be signified by letters-patent under the great seal, signed by the Sovereign, and communicated by commissioners; who are usually three or four of the great Officers of State. The Sovereign's assent is announced by the Clerk of Parliament in French. In recent times there is no instance of the royal assent being refused; although that occurred once or twice in the reign of William III., and once in the reign of Queen Anne, the bill not assented to by her having been the Scotch militia bill. In former times the refusal of the royal assent was not an unusual occurrence. By a legal fiction, all the laws passed in a session of Parliament are considered as properly only one statute, the separate acts being so many different chapters; and this fiction having led to doubts as to the

proper commencement of the act, it was ordered, by 33 Geo. III. c. 13, that the Clerk of Parliament should indorse on every bill the day on which it received the royal assent, and that from that day, if not otherwise provided in the act, its operation should commence. *Hatsell's Precedents*, 338; [*May's Parl. Prac.* 592.]

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; [or skilled persons called in to assist a court in trying questions requiring technical or scientific knowledge.] See *Stair*, B. iii. tit. 5, § 25; *Bank.* ii. 507; *Hume*, ii. 15, 29, 31; [*Sweet's Law Dict.*]

ASSETS; is an English law term (now much used in Scotland), signifying, strictly speaking, 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; but applied more generally to the estate and effects of every description available for the payment of the debts of a bankrupt or insolvent. [See *Wharton's Lex.*]

ASSIGNATION. In legal phraseology, the term assignment is applied to a written deed of conveyance in favour of another, made by the creditor in any obligation, or the proprietor of any subject not properly feudal. The maker of the assignment is called the *cedent*; the receiver is called the *assignee*, or *cessionary*; and where the right or subject assigned is a debt or obligation, the obligant or debtor therein is called the *common debtor*. According to the [former] style of the deed, the assignee and his heirs and donators are made the lawful cessioners of the cedent "in and to" the sum or subject 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 of the nature of a mandate or procuratory *in rem suam*. In more modern practice, however, it became common to use the words "assign, convey, and make over," which correspond more with the actual character and effect of the deed. When the assignee conveys to a third party, the deed is called a *translation*; and when he reconveys to the cedent, it is called a *retrocession* (*q.v.*). [A short form of assignment of a personal bond or of a conveyance of moveable estate is provided by 25 & 26 Vict. c. 85. The assignment may be written upon the bond or convey-

[ance, and may be registered in terms of the clause of registration in the deed; § 1.]

In order to complete the transference to the assignee, the assignment must be intimated to the common debtor; and so essential is this, that in competition, an assignment first intimated will be preferred to one prior in date, but posterior in intimation. [The regular mode of intimation was formerly notarial, and that mode is still competent. But simpler methods are provided by 25 & 26 Vict. c. 85, § 2, viz.:—

(1) by a notary public delivering a certified copy of the assignment to the person to whom intimation is to be made; or (2) by the holder of the assignment, or any person authorised by him, transmitting a certified copy by post. In the first case, a certificate by the notary public, in form prescribed; and in the second case, a written acknowledgment of receipt by the person to whom the copy has been transmitted by post, is declared to be sufficient evidence of intimation. [If the deed containing the assignment contains also other conveyances or trust purposes, a copy of the part respecting the subject-matter of the assignment is enough. These are the regular modes of intimation;] but the law admits equipollents, when the notice to the common debtor is equally strong; *e.g.*, a charge on letters of horning at the assignee's instance against the common debtor, or a judicial demand by action or otherwise. The assignee's possession of the right, as, for example, by receiving payment of rents or interest from the common debtor, is another equivalent to intimation; or his being a party to the assignment; or his acknowledgment in writing on the back of the assignment, or by letter. So also a written promise by the common debtor to pay to the assignee as in right of the debt, or a draft accepted or presented and protested, in the case of a money debt, will be sufficient. But the common debtor's mere private knowledge of the assignment, unaccompanied by possession on the part of the assignee, in competition with more formal rights or intimations, is not held tantamount to intimation, although such knowledge may be a sufficient bar to the common debtor's paying to the cedent. [Citation of a tenant on a summons of poinding the ground is not equivalent to an intimation of assignment to the rents contained in the bond, so as to interpel the tenant from paying future rents to the landlord as they fall due; *Royal Bank*, 8 July 1868, 6 Macph. 995. Registration

[in the Books of Council and Session is not equivalent to intimation; *Tod's Trs.* 20 July 1869, 7 Macph. 1100.] When the common debtor is out of Scotland, the intimation must be made edictally; the warrant for which is obtained at the Bill-Chamber, on production of the ground of debt and assignation. See *Edictal Citation*. [Where there are several debtors, the assignation should be intimated to each of them; and in the case of ordinary trading companies, intimation should be made to each of the partners, unless there is a regularly appointed manager. Intimation to one who is *de facto* the managing partner is not sufficient; *Hill*, 7 Feb. 1846, 8 D. 472. In the case of trustees, where one holds the trust funds, and practically administers the trust, intimation to him is sufficient; *Jameson*, 18 March 1887, 14 R. 643. In the case of an incorporated joint-stock bank, intimation should be made to the manager at the head office, and also, if the money is lying at a sub-office, to the agent or manager there. In the case of companies incorporated under the Companies' Act, 1862, intimation is left, or sent by post in a prepaid letter addressed to the company, at their registered office; 25 & 26 Vict. c. 89, § 62. See also 8 & 9 Vict. c. 17, § 137; c. 33, § 130 (as to railway companies). As to assignations by antenuptial contract of marriage, see *Tod's Trs. supra*; *Campbell's Trs.* 11 July 1884, 11 R. 1078.]

Certain assignations require no intimation; such as indorsations to bills of exchange,—adjudication, which is a judicial assignation,—marriage (*quoad* the husband's rights), which [was, till 18 July 1881,] a legal assignation,—the assignation to all rights vested in the bankrupt in favour of the trustee under mercantile sequestration, [which operates as an intimated assignation of its date; 19 & 20 Vict. c. 79, § 102.] The class of subjects which are not assignable is very limited. Text writers enumerate merely liferent rights (*i.e.*, the rights themselves, not the profits of them), alimentary provisions and paraphernal goods; which last are said to be so peculiarly the wife's property, that if not specially assigned, they are not carried by a general assignation of the wife's moveable estate.

An assignation vests the assignee with the whole right which was in the cedent; and hence, where diligence has been raised by the cedent against the common debtor, the assignee, according to Erskine, may

use the cedent's name in following it out. But without judicial authority the assignee is not entitled to execute in his own name diligence which has been raised in the name of the cedent. The requisite warrant for the change will be obtained at the Bill Chamber, on production of the assignation; and in every case this would seem preferable to following out the diligence in the name of the cedent after he is denuded. [After the cedent's death, the assignee may proceed in his own name without confirmation; 1690, c. 26; 1693, c. 15. In assignations of personal obligations, an onerous assignee, though purchasing in good faith, is subject to all exceptions and pleas pleadable against the original creditor, according to the maxim, *Assignatus utitur jure auctoris*. See *Scot. Widows' Fund*, 14 July 1876, 3 R. 1078. This rule does not apply to heritable property, nor to corporeal moveables, nor to writings *in re mercatoria*. And when the question is not between the assignee and the original debtor, but between the assignee and a third party,] an onerous assignee will not be affected by a latent claim of trust, or the like, pleadable against the cedent, unless such claim has been duly notified; *Redfearn*, 1 June 1813, 1 Dow 50, [5 Paton, 707; see also *Burns*, 7 July 1840, 2 D. 1348. But in sequestration, the trustee for the cedent's creditors takes the subject *tantum et tale* as it stood in him, and subject to any latent trust pleadable against him; *Dingwall*, 6 June 1822, 1 S. 463; *Gordon*, 5 Feb. 1824, 2 S. 675; *Fleeming*, 16 July 1868, 6 Macph. (H.L.) 113; *Grame's Tr.* 1 June 1888, 15 R. 691.] Assignations of moveables *re-tenta possessione*, *i.e.*, while the cedent himself retains possession, cannot prejudice his onerous creditors. [See *Borthwick*, 17 Feb. 1829, 7 S. 420; *Fraser*, 26 June 1830, 8 S. 982. When a debt is assigned, there is implied warrandice *debitum subesse*, *i.e.*, that the debt is truly due; *Ferrier*, 16 May 1828, 6 S. 818; *Reid*, 6 June 1879, 6 R. 1007.]

In the case of leases, where assignation is otherwise lawful, difficulties connected with the nature of the subject have arisen. The question then is, whether the right of the assignee to a lease can be completed by intimation without possession, as to which the following points appear to be settled: 1. Actual possession of the subject of the lease by the assignee certainly completes the assignation. 2. Where the principal tenant has sublet, and has then assigned, intimation to the subtenant will complete the assignation, to the effect of entitling

the assignee to draw the subrent, to which the cedent would have been entitled. 3. When the object of the principal tenant is to convert his lease into a security for debt, the expedient resorted to has been to grant an assignation of the lease to the creditor, and to intimate that assignation to the landlord; and then for the assignee, as principal tenant, to grant a sublease to the cedent. In this way no change in the actual possession takes place, and there being no record of leases, the assignation remains, to a certain extent, latent, or at least a deed known, it may be, only to the landlord, the tenant, and the assignee. The question as to the validity of such a security has been much agitated both in the Court of Session and in the House of Lords; and although it is said to be still an open question, yet, so far as it has been decided, the general rule is, that possession, natural or civil, is indispensable to the validity of the assignation; and consequently, in a question with the creditors of the cedent, the security is not to be relied on. [See *Brock*, 23 Sept. 1831, 5 W. & S. 476; *Grant*, 1802, Hume's Dec. 810; *Clark*, 30 June 1882, 9 R. 1017.] Consult on the subject, *Bell's Com.* i. 63, *et seq.*; *Ersk. B.* ii. tit. 6, § 26; [B. iii. tit. 5, § 5; *Bell's Princ.* § 1212; *Hunter on Landlord and Tenant*, i. 493; *Rankine on Leases*, 167. The Registration of Leases Act, 1857 (20 & 21 Vict. c. 26), gave important facilities in making long leases available as securities. See *Lease*.]

In connection with the subject of assignations, it may be stated as a general rule, that in every case, where a creditor receives payment from a cautioner, or from one who is not the proper debtor, he is bound *ex equitate*, and for the relief of the cautioner, to grant an assignation to any separate security which the creditor may have held for his debt. To this rule, however, there is an exception, where such equitable assignation cannot be granted without prejudice to some separate right in the creditor; *e.g.*, a security over the same subject for a different debt. In that case, the cautioner paying the one debt, could not demand an assignation to the security, without also making payment of the other. [See *Cunningham's Trs.* 18 Dec. 1847, 10 D. 307; *Fleming*, 12 June 1867, 5 Macph. 856. See on the subject of this article, *Ersk. B.* iii. tit. 5; *Stair*, B. iii. tit. 1; *More's Notes*, cclxxxi.; *Bank.* ii. 198; *Bell's Com.* ii. 16; *Bell's Princ.* § 1459; *Kames' Equity*, 38, 74, 156, 262, 504; *Menzies' Conv.* 240;

[*M. Bell's Conv.* i. 295; *Jurid. Styles*, ii. 670.]

[ASSIGNATION OF RENTS. The clause of assignation of rents, in a charter or disposition, gives the grantee a title to uplift the rents, while he is still uninfert; subject, however, to the hazard of being excluded by completion of a real right in the person of a creditor or another disponee of the granter. By § 8 of the Consolidation Act of 1868, the short clause—"And I assign the rents,"—imports, unless specially qualified, "an assignation to the rents to become due for the possession following the term of entry, according to the legal and not the conventional terms;" except in the case of forehand rents, when it imports "an assignation to the rents payable at the conventional terms subsequent to the date of entry." See *Ersk. B.* ii. tit. 3, § 32; B. iii. tit. 5, §§ 5, 6; *Bell's Com.* i. 793; *Menzies' Conv.* 557, 644; *M. Bell's Conv.* i. 638; ii. 1161. See *Rents*.]

[ASSIGNATION OF WRITS. The purpose of this clause is to enable the grantee to vindicate his right against challenge, by showing that his predecessors and authors have possessed the subject, during the period of the long prescription, upon regular and complete titles. The statutory form of this clause, under § 8 of the Consolidation Act of 1868, is in these words,—"And I assign the writs, and have delivered the same according to inventory;" and unless specially qualified the clause imports "an absolute and unconditional assignation to such writs and evidents, and to all open procuratories, clauses, and precepts, if any, and as the case may be, therein contained, and to all unrecorded conveyances to which the disponent has right." But this assignation does not transmit collateral rights not essential to the right of property in the land, such as an obligation to relieve of stipend; *Graham*, 15 Dec. 1814, F.C.; *Horne*, 21 Feb. 1842, 1 Bell's App. 1, Ross's L. C. i. 55; *Stewart*, 27 March 1863, 1 Macph. (H.L.) 25; *Smith*, 26 Nov. 1869, 8 Macph. 204. See *Ersk. B.* ii. tit. 3, § 32; B. iii. tit. 5, § 7; *Menzies' Conv.* 556, 643; *M. Bell's Conv.* i. 637, 689; ii. 1001, 1161.]

ASSIGNATUS UTITUR JURE AUCTORIS; a law maxim, importing that the assignee comes into the right and place of the cedent. ["In a personal obligation, whether contained in a unilateral deed or in a mutual contract, if the creditor's right is sold to an assignee for value, and the assignee purchases in good faith, he is

[nevertheless subject to all the exceptions and pleas pleadable against the original creditor;" *per* Lord Pres. Inglis in *Scot. Widows' Fund*, 14 July 1876, 3 R. 1078. See *Bell's Princ.* § 1468; *Broom's Legal Maxims*, 465; *M. Bell's Conv.* i. 177;] *More's Notes on Stair*, lxxi. See *Assignment*.

ASSIGNEE; the person in whose favour an assignation is granted.

ASSIGNMENT; an English law term, similar in import to the term *assignation* in the law of Scotland. An assignment is defined to be a deed or instrument of transfer, the operative words of which are, "assign, transfer, and set over;" and which passes both real and personal property. *Tomlins, h. t.*

ASSISA; has various significations in the older law of Scotland; thus, it signifies properly a *sitting* in session—and is taken also in the *Regiam Majestatem* for a constitution, ordinance, or law. It is likewise used to signify a measure of quantity,—a rent due to the king,—and finally, it signifies a *jury*, in which last acceptation it is still in use. *Skene, h. t.*

ASSIZE; sometimes signifies the sittings of a court, sometimes its ordinances, and sometimes it signifies a jury. See *Jury*.

ASSOILZIE; is to free a party from the conclusions of an action, or to find a criminal not guilty.

ASSUMPSIT; was the commonest form of action in the English courts for the recovery of damages occasioned by the breach of a simple contract. The name is derived from the plaintiff asserting that the defender undertook to perform or pay something to him. [The term has been in disuse since the Judicature Acts of 1873 and 1875. See *Wharton's Lex.*]

ASSUMPTION OF THIRDS. This was a provision for the clergy by 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 plan of providing for the clergy was rendered unproductive by 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. *Ersk. B. ii. tit. 10, § 17.* [See *Teinds*.]

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 [was formerly] necessary in order to entitle trustees to execute such a deed; [but now every gratuitous trust is held to include power to the trustee, or quorum of trustees, to assume new trustees; 24 & 25 Vict. c. 84, § 1; 30 & 31 Vict. c. 97, § 11. The last mentioned act provides a short form of Deed of Assumption. See *Trust*.]

ASSURANCE. See *Insurance*. [In English law, an assurance means a conveyance, the legal evidence of the transfer of property.]

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 acknowledgment 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*, 1767, M. 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. [Action of assythment does not lie, unless the act on which it is founded is punishable as a crime; *Eisten*, 13 July 1870, 8 Macph. 980; *Horn*, 13 July 1878, 5 R. 1055. A brother of a person killed has no claim for assythment by way of *solatium*, no pecuniary loss being alleged; *Greenhorn*, 13 June 1855, 17 D. 860.] See *Hume*, i. 284; ii. 124; *Stair*, B. i. tit. 9, § 7; *More's Notes*, lvii.; *Ersk. B. iv. tit. 4, § 105*; *Bank. i. 246*; *Bell's Princ.* § 2029.

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. *Stair*, B. iv. tit. 15; *Ersk. B. ii. tit. 9, §§ 18, 32*; *Bell's Princ.* § 1017. See *Thirlage*.

ATHEISM; disbelief in the existence of God. Under the acts 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. [One who has no belief in a God or a future state is inadmissible as a witness, according to the authorities; see *Henry*, 25 April 1842, 1 Broun, 221. But this ground of exclusion may now be held obsolete; see *Affirmation. Oaths*.] See *Ersk. B. iv. tit. 2, § 23*; tit. 4, § 16; *Bank. ii. 645*; *Kames' Stat. Law Abridg. h. t.*; [*Hume*, i. 568; *Alison's Prac.* 437; *Mac-*

[*donald*, 474; *Dickson on Evidence*, ii. § 1557; *Kirkpatrick's Digest*, § 170.]

ATTACHIAMENTUM; from the French word *attacher*, used in the *Regiam Majestatem* to signify a charge or binding of a person, to the effect he may be compelled to appear to answer in judgment. It also signifies an attachment of goods and effects by arrestment or otherwise. *Skene, h. t.*

ATTACHMENT; in English law, is a judicial proceeding, answering to what in Scotland is termed arrestment, by means of which a creditor may obtain the security of the goods or other personal property of his debtor, in the hands of a third person, for the purpose, in the first instance, of enforcing the appearance of the debtor to answer to an action; and afterwards, upon his continued default, of obtaining the goods or property absolutely in satisfaction of the demand. *Attachment* is also used to signify a kind of criminal process, which courts of record are authorised summarily to issue upon a mere suggestion, or upon the personal knowledge of the judges without indictment or information. It is properly granted in cases of contempt. *Tomlins, h. t.*

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 propinquity between the two is through the attainted person. 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." [On the attainder of a person possessing an estate upon apparenay, the feudal right to the estate at once vests in the Crown, (not merely the interest of the apparent heir); *E. Perth*, 19 June 1871, 9 Macph. (H.L.) 83. See also *Forfeiture*. Attainder does not now follow on a conviction of treason or felony in England; 33 & 34 Vict. c. 23.] See *Ersk. B. ii. tit. 3, § 16*; *B. iv. tit. 4, § 24*; *Bank. ii. 261*; *Swint. Abridg. voce Treason*, 96; *Stair, B. iii. tit. 3, § 37*; *More's Notes*, cccxii.; *Bank. ii. 275*; *Bell's Princ.* § 1645. See *Treason*.

ATTAYNT; convicted. *Skene, h. t.*

[ATTEMPT TO COMMIT CRIME. By the Criminal Procedure Act, 1887 (50 & 51 Vict. c. 35, § 61), attempt to commit any indictable crime is itself an indictable crime; and under an indictment which charges a completed crime, the accused may be lawfully convicted of an attempt to commit such crime. Under an indictment charging an attempt, the accused may be convicted of such attempt, although the evidence be sufficient to prove the completion of the crime. Under an indictment charging a crime which imports personal injury inflicted by the accused, resulting in death or serious injury to the person, the accused may be lawfully convicted of the assault or other injurious act, and may also be lawfully convicted of the aggravation that such assault or other injurious act was committed with intent to commit such crime.]

ATTEMPT TO MURDER. At common law, an attempt at murder is held to have been committed when the panel has inflicted an injury of such a nature as shows him to have been quite reckless of the life of the sufferer; or when he has done all that he could to accomplish his purpose, although no injury may have ensued; as, *e.g.*, where the pistol misses fire, or the ball does not hit its object. An act of a more remote nature, by which the panel intended to destroy life, and which would have had that effect had it not been defeated, amounts to this crime. But mere preparations for murder, while the deed is still in the panel's option, are not legally cognisable. Any circumstances, which would have made the killing amount only to justifiable or culpable homicide, if the wounded man had died, will of course go to extenuate the attempt. Attempt at murder is punishable at common law with any pain short of death. By 10 Geo. IV. c. 38, attempt to murder, or to do severe bodily injury, is capital in the following cases:—1. Where loaded fire-arms are discharged, or attempted to be discharged, at any one. In this case, the intention to kill or injure does not need proof. 2. Stabbing or cutting with intent to murder or inflict injury. In this case the intent must be proved, and also that it has taken effect on the person aimed at. 3. Where poison is administered with intent to murder or inflict injury. Here also, the intent must be proved, and the poison must have been actually swallowed, and not merely put in the way of the intended victim. 4. An attempt to suffocate,

strangle, or drown, with intent to kill or inflict injury. Here the intent must be proved. 5. Where sulphuric acid or other corrosive substance is thrown at a person with intent to murder, disfigure, or injure, and where the person aimed at has been disfigured or seriously injured in consequence, the mere throwing of the acid, or its burning or destroying the dress, will not be sufficient. Here also the intent must be proved. Circumstances which would have lowered the crime from murder, had death followed, do not render the statute inapplicable, but merely modify the punishment. The prosecutor has the power of restricting the pains of law without departing from the statute. [The statute applies only to offences against "Her Majesty's subjects;" but it is not necessary that the indictment expressly bear that the person injured is a British subject, if his designation leads to the reasonable inference that he is such; *Davidson*, 27 April 1882, 4 Coup. 600.] See *Hume*, i. 26-30; *Alison's Princ.* 163; [*Macdonald*, 143, 401.] See *Murder*.

ATTESTOR, in the *Bill Chamber*; is one who attests the sufficiency of a cautioner offered in the Bill Chamber. Where a cautioner is offered and objected to, and where the objection cannot be otherwise obviated to the satisfaction of the clerk of the bills, the additional caution of an attestor is interposed. The attestor not only certifies the sufficiency of the cautioner offered, but binds himself *subsidiarie* along with the cautioner; whereas, when a justice of the peace or other respectable person certifies that the proposed cautioner is habit and repute in good circumstances, such a certificate imports no more than that at the time the fact so certified is true, without inferring any personal responsibility beyond the knowledge and belief of the magistrate, or other person certifying. Proper attestors are entitled to the benefit of discussion. See A. S. 27 Dec. 1709; *Stair*, B. iv. tit. 52, §§ 10, 25; *More's Notes*, cxiii.; *Ersk.* B. iii. tit. 3, § 71; *Bank.* i. 459; *Kames' Stat. Law*, voce *Cautioner in Suspension*; *Jurid. Styles*, ii. 422; *Beveridge on Bill Chamber*, 33, and *App.* 44; [*Shand's Prac.* i. 478; *Mackay's Prac.* ii. 180. See *Cautionry Bill Chamber. Suspension*.]

ATTORNEY; one appointed by another to act for him in his absence. The office of attorney is conferred by letters of attorney, which regulate the extent of power conferred. [See *Letter of Attorney. Power*

[*of Attorney. Warrant of Attorney*.] In the ceremony of giving sasine, the person who acted for, or represented the party who was to be infeft, and who, as his procurator, received symbolical delivery, was denominated the attorney, and was [at one time] appointed by special letters of attorney; but [latterly] possession of the warrant for infeftment was held to be sufficient evidence of his commission, though a fraudulent use of the warrant might annul the sasine. *Stair*, B. ii. tit. 3, §§ 16, 17; *More's Notes*, xi.; *Bell's Com.* i. 508; [*Menzies' Conv.* 571; *M. Bell's Conv.* i. 653.] See *Infeftment*. [In England, the law-agents practising in the superior courts of common law were, till recently, called attorneys-at-law. They are now called *Solicitors of the Supreme Court of Judicature* (see that article).]

[ATTORNMENT]; in English law, a tenant's acknowledgment of his new landlord, on the alienation of the lands by the former landlord. *Brown's Law Dict.*]

ATTORNEY-GENERAL. In England and Ireland the Attorney-General is the first ministerial law-officer of the Crown, appointed by letters-patent. He is, in principle, attorney for the Sovereign, to whom he stands in the same relationship that any other attorney does to his employer. His official duty is to exhibit informations, and conduct prosecutions for such crimes and offences as tend to endanger the state; to advise the heads of the various departments of Government on legal questions; to conduct all suits and prosecutions connected with the recovery of the revenue of the Crown, for the protection of charitable endowments; and, in general, to appear in all courts in England or Ireland, when the interests of the Crown are in question. Many questions of precedence have arisen between the Attorney-General and other functionaries; but it was settled by royal warrant in 1811, that the Attorney and Solicitor-General take rank at the head of the English bar; and by the Lord Chancellor in 1834, that at the bar of the House of Lords the Attorney-General has precedence of the Lord Advocate of Scotland. In some respects, the office of Attorney-General is analogous to that of Lord Advocate; but the powers of the Lord Advocate are more extensive and uncontrolled. *Tomlins, h. t.* See *Advocate, Lord*.

AUBAINE. See *Droit d'Aubaine*.

AUCTION or ROUP; a mode of selling various descriptions of property, by a competition of bidders or offerers, under certain

conditions previously stipulated. These conditions [are called Articles of Roup, and] set forth the terms of the contract between the exposor and the offerer or purchaser. They refer, generally, to the nature of the right to be conferred; specify the titles by which the property is to be conveyed; regulate the manner of bidding; prescribe the rules by which offerers are to be preferred; 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 exposor on stamped paper; and when the day of sale arrives, they are read over in presence of the meeting, at the place and time appointed for the sale. The subject 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. [If the highest offerer at a roup of heritable subjects fails to sign his offer, he is not entitled to demand implement; *Aberdein*, 29 March 1867, 5 Macph. 726. The articles sometimes provide that the subjects are to be exposed during the running of a sandglass, or for a specified space of time to be ascertained by a watch placed on the table; and the highest offerer at the expiry of such period is declared to be the purchaser by the judge of the roup. But if competition is still going on, it is not to be interrupted; and the judge's duty is to lay the glass on its side, or to stop the watch, until the competition is over; *Burns*, 1807, M. App. Sale, No. 4. It is a frequent stipulation that the highest offerer shall, within a certain time, either pay, or give security for the price, failing which he shall forfeit his right; in which case the exposor has the option either to treat the sale as null, and expose the subjects anew, or to hold the next highest offerer bound by his offer. See *Clause of Devolution*.] Minutes of the procedure are made, and regularly signed and attested at the time of sale. The 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 exposor 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. [The exposor cannot be purchaser; *Faulds*, 25 Feb. 1859, 21 D. 587. But when trust property is exposed, one of several beneficiaries interested in it may purchase; *Shiell*, 26 June 1874, 1 R. 1083. If a trustee becomes the purchaser the sale may be set aside by any one having a beneficiary interest under the trust; but a third party, even though a competing bidder, has no interest to challenge the sale; *Aberdein*, *supra*. The sale of each lot forms a separate transaction; *Chapman*, 19 July 1872, 10 Macph. (H.L.) 74. The posting up of the conditions of sale on the walls of the auction room, or publication of them in printed catalogues to be had in the room, is sufficient notice; *Macdonald & Fraser*, 3 Nov. 1882, 10 R. 95. A question as to *bona fides* of a bid, which does not emerge till the sale is over, does not fall to be decided by the judge of the roup; *Strachan*, 19 March 1884, 11 R. 756. See *Ersk. B. iii. tit. 3, § 2*; *Bell's Com. ii. 255*; *Hunter's Landlord and Tenant, i. 422*; [*Bell's Princ. § 130*; *Brown on Sale, 578*; *Menzies' Conv. 890*; *M. Bell's Conv. ii. 725*; *Addison on Contracts, 867*. See *Sale*.]

AUCTIONEER; is the person who officiates at an auction. He puts up the articles to sale at a certain price; he calls the offers; and declares the purchaser by knocking down the article to him. An auctioneer must take out a licence annually, for which a duty is paid to Government; [8 & 9 Vict. c. 15. See *Bell's Princ. § 132*; *Blackburn on Sale, 74*.]

[AUCTOR IN REM SUAM. See *Trustee. Tutor*.]

AUDITOR; an officer or agent of the Crown, or of a private party, or of a corporation, who examines periodically the accounts of under officers, tenants, stewards, or bailiffs, and reports the state of their accounts to his principal. *Tomlins, h. t.*

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 A.S. 6 Feb. 1806. By 1 & 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*. Two auditors may be appointed, if necessary; one for each Division. The auditor cannot practise before the court, either directly or indirectly, under pain of deprivation of office. [But this does not prevent his undertaking extrajudicial audits.] If unable to discharge his duties from temporary indisposition or absence, the court may appoint a fit person, though practising before the court, to officiate in the interim. The persons eligible to the office are writers to the signet, who have practised as such for not less than three years, and members of the incorporation of solicitors before the supreme courts in Scotland; 1 & 2 Geo. IV. c. 38, § 32. [The salary is £700 *per annum*, with office accommodation, under 1 & 2 Vict. c. 128, § 24. The fees exigible by the auditor are now payable by stamps, as fixed by the Treasury, under 31 & 32 Vict. c. 55.] In the inferior courts, an officer, with the like powers, is usually appointed by the particular court. [See *Shand's Prac.* i. 118; *Mackay's Prac.* i. 153; ii. 582.] See *Expenses*.

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. No stipend can be augmented until twenty years after the date of the last decree of modification; 48 Geo. III. c. 138, § 2. All augmentations are now 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 paid in money, according to the fair prices of that year for which it is payable; *ib.* §§ 8-13. In addition to the heritors, the minister pursuing a process of augmentation is required to cite the moderator and clerk of the presbytery of the bounds; *ib.* § 17. The summons of augmentation has two objects: *first*, The ascertainment or *modification*, as it is expressed, of a suitable stipend for the minister, regard being had to the state of the teinds of the parish, its extent, and other circumstances; and, *secondly*, The allocation or localling of the stipend, so modified, on the heritors. There is also a conclusion for a suitable

sum for communion elements; and in his summons the minister must state, as accurately as he can, the number of the inhabitants, the extent of the parish, and the other circumstances on which he founds. The summons is signed by the teind clerk, and passes the signet. The titular, or the tacksman of the teinds, heritors, or liferenters, or other intromitters with the teinds, and others having interest, are not cited personally, but by the precentor giving public notice from his desk, immediately before the congregation is dismissed from the forenoon service. This notice specifies the day in which the summons will be called in court, being not less than six weeks after the date of the first notice, and the notice must be repeated three several Sundays; a certificate to that effect being transmitted to the pursuer's agent. Notice in writing must also be put up on the principal door of the church by a messenger-at-arms or by a constable, who also transmits to the pursuer's agent a certificate to that effect; and, finally, the pursuer must insert similar notices, three several days, [beginning not less than six weeks before the calling of the summons, in three newspapers fixed from time to time by Act of Sederunt; *Mair's Church Laws*, 277.] When it is necessary to call the Officers of State for the interest of the Crown, they are called on *induciae* of six weeks; and the moderator and clerk of presbytery are sufficiently cited by a letter from the pursuer himself, engrossed in the presbytery record one month before the summons is called in court; A.S. 12 Nov. 1825.

As soon as the summons is signeted, the pursuer must lodge with the clerk of court a note of the amount of the present stipend, specifying how it is paid, and the amount of the communion elements. He must also give in a rental of the parish (usually called the *minister's rental*), distinguishing the rent of each heritor as exactly as he can; and when the summons is called, which is by calling list, as in the Court of Session, the case is enrolled in the ordinary action roll of the Teind Court (Inner House), when all concerned will be allowed to see the summons and writings produced in the clerk's hands, for fourteen days. On the lapse of that period the case may be again enrolled, when a proof will be allowed of the rental of minors' lands, and the heritors who are major will be held as confessed on the minister's rental, unless one or more of them take a day to depone. One act and

commission, at the expense of the heritors deponing, is in that case extracted for the whole, on which they or their factors may depone; and as to the rental of minors' lands, it may be proved by a certificate under the hand of any of the tutors or curators, without extracting an act and commission. When the day assigned for deponing and proving has elapsed, the cause may be again enrolled, to have the term for proving circumduced, and a remit made to the Lord Ordinary [on Teinds] to prepare a scheme of the rental, either according to the minister's rental, if there has been no proof, or according to the proof led, and the certificates of rental and decrees of valuation produced. And when the scheme of the *proven rental* (as it is technically called) is prepared, the cause may be again enrolled before the Teind Court, when the parties will be heard, *viva voce*, on the merits, and the augmentation granted or refused. [If the minister can make out a *prima facie* case as to the existence of free teind, the court will grant augmentation; leaving it for him to establish, in the course of the process of locality, that there are sufficient free teinds; *Paul*, 1 July 1863, 1 Macph. 1014; *Cook*, 9 Dec. 1863, 2 Macph. 224. But where the existence of free teind is denied by the heritors upon grounds which require investigation, the court will sist the process to enable the minister to challenge by declarator or otherwise the validity of the objection; see *Frood*, 9 Nov. 1874, 2 R. 76; *Simpson*, 22 Feb. 1886, 13 R. 594.] When a decree modifying a stipend has been pronounced, it is declared by A.S. 12 Nov. 1825, to be final and not subject to review in the Teind Court by petition or otherwise, unless it has been pronounced in absence; in which case a note may be given in by the defenders, praying to be heard; and on payment of previous expenses the case may be reheard. [See *Buchanan*, 29 Oct. 1883, 11 R. 59.] But doubts have been raised (founded on the enactment in the Judicature Act (1825), that the ministerial and discretionary jurisdiction of the Teind Court, expressly including the modification of stipends, "shall nowise be altered or affected by this act") as to the power of the court to alter the older practice of the Teind Court by an Act of Sederunt; see 6 Geo. IV. c. 120, § 54. When the decree of modification is pronounced, the Teind Court at the same time remits to the Lord Ordinary [on Teinds] to prepare a scheme of locality; *i.e.*, an allocation

of the modified stipend on the several heritors or others liable therefor; A.S. 12 Nov. 1825. See *Locality*. Whether the heritors oppose the augmentation or not, unless in very special circumstances, the minister's own expenses, at least, must be borne by himself; but the heritors are at the whole expense of the locality, the common agent being authorised to furnish the minister with an extract of the decree of locality, interim or final, at the common expense; A.S. 5 July 1809. [See also A.S. 20 June 1838, and 4 March 1840.] As to the mode of applying for the benefit of the statutes 50 Geo. III. c. 84, and 5 Geo. IV. c. 52, for improving small stipends, and making allowances in lieu of manse and glebes, see *Small Stipend*. See *More's Notes on Stair*, ccxxxvii.; *Ersk. B. i. tit. 5, § 21*; *B. ii. tit. 10, § 46*; *Ivory's Form of Process*, ii. 444; *Beveridge*, ii. 729; *Jurid. Styles*, iii. 241; *Connell on Tithes*, i. 391 *et seq.*; *Buchanan on Teinds*, 223; *Cook's Styles*, 218; *Mair's Church Laws*, 275.] See *Teinds. Teind Court. Stipend*.

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. *Ersk. B. ii. tit. 7, § 1*. See *Ancestor*.

AUTHORSHIP. See *Copyright*.

AUTO DE FE; or *Auto da Fe* (*Act of Faith*); was the public and solemn reading of extracts from the trials promoted by the Inquisition, and of the sentences, condemnatory or of acquittal, pronounced by the judge of that tribunal. The offenders, or their bones or effigies, were present at this ceremony. The civil and criminal authorities of the place were also present, into whose hands the offenders were delivered for punishment. See *Encyc. Brit.*

AVAIL OF MARRIAGE; was the sum formerly payable to the superior by the heir of a deceased ward vassal, on his becoming marriageable. Marriage was a casualty in wardholding, 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 casualty affected minor heirs only, who, after puberty, refused to marry upon the superior's requisition; 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 offered a wife to the heir, in every respect his equal, who publicly declared her readiness to marry him, but whom he refused 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; *More's Notes*, ccviii.; *Ersk.* B. ii. tit. 5, § 18; *Bank.* i. 637. [See *Marriage. Disparagement.*]

[**AVAL.** An aval is an indorsement of a bill of exchange by a stranger to the bill. "By the custom of merchants, as modified by English law, there may be an indorsement by a person, not a holder of the bill, who puts his name on the bill to facilitate the transfer by a holder. By the old foreign law, not in this respect entirely adopted by the English law, this might be done by what was called an *aval*, (said to be an antiquated word signifying 'under-writing,') either on the bill itself, or on a separate paper; and if such an aval was given by any one, his obligation to all subsequent holders of the bill was precisely the same as that of the person to facilitate whose transfer the aval was given. . . . An aval for the acceptor, even if on the bill, is not effectual in English law. . . . But the indorsement by a stranger to the bill on it to one who is about to take it is efficacious in English law, and has the same effect as an aval. . . . Such an indorsement creates no obligation to those who previously were parties to the bill,—it is solely for the benefit of those who take subsequently. It is not a collateral engagement, but one on the bill, and it is for that reason, and because the original bill by the custom of merchants has incident to it the capacity of an indorsement of the nature of an aval on it, that such an indorsement requires no new stamp. The law of Scotland also gives effect to such an indorsement. Indeed, no better example of an indorsement having

[the effect of an aval for the drawer of a bill can be given than is afforded by *Macdonald* (29 March 1864, 2 Macph. 963);" *per* Lord Blackburn in *Walker's Trs.* 14 June 1880, 7 R. (H.L.) 85. By § 56 of the Bills of Exchange Act, 1882, a person signing a bill otherwise than as drawer or acceptor, thereby incurs the liabilities of an indorser to a holder in due course. See *Pothier, Contrat de Change*, i. 4, 7; *Chitty on Bills*, 186 (note), 220; *Thorburn on Bills of Exchange Act*, 132. See *Bill of Exchange.*]

AVERAGE; a term used in commerce and navigation to signify a contribution made by the owners of the ship, freight and goods on board, or the insurers of these, 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. 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 provisions, 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. *Bell's Com.* i. 629. [The law on this subject is more fully explained under *Contribution.*]

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; but if incurred for any extraordinary purpose, or to avoid impending danger, they are regarded as a loss includible within gross average. *Bell's Com.* i. 614.

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*, ii. 832.

AVERIA. In the *Regiam Majestatem*,
F

this word signifies the best animal, which, in law, was given by a husbandman to his master as an *herezelde*.

AVERMENT; in judicial proceedings, is a statement in point of fact, which the party making it is understood to be prepared to prove.

AVERSIO. Sale *per aversionem*, means sale by the bulk; as, all the wine in one's cellar; *Stair*, B. i. tit. 14, § 7; *Bank*. i. 419.

AVIZANDUM. To make avizandum with a process, or part of it, is to take it from the public court to the private consideration of the judge. When a Lord Ordinary [or other judge], after hearing 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, the Lord Ordinary issues his decision in the usual form. [When a case is removed to the Inner House on report by a Lord Ordinary, *great avizandum* is said to be made. Thus, in provings of the tenor, which are appropriate to the Inner House, the summons is called and enrolled in the Outer House, but the Lord Ordinary at

[the next enrolment makes great avizandum to the Inner House.] See *Stair*, B. iv. tit. 2, § 9; tit. 20, § 20; tit. 43, § 12; *Bank*. i. 675; [*Shand's Prac.* i. 341; *Mackay's Prac.* i. 361, 576.]

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. *Ersk.* B. ii. tit. 1, § 14; *Bank*. i. 506; *Bell's Princ.* § 936; [*Rankine on Land-Ownership*, 100.] See *Alluvio*.

AVUNCULUS; the mother-brother, but sometimes taken for the father-brother. *Skene, h. t.*

AWARD; is properly an English law term, signifying the judgment or determination of an arbiter. See *Arbitration*.

B

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. [*Jurid. Styles*, ii. 440.] See *Absolute Disposition*.

[BACK-LETTER; a letter addressed by the creditor in a bond and disposition in security to the borrower, containing certain stipulations affecting the terms of the bond, and relating most commonly to the endurance of the loan, and the rate of interest; *Jurid. Styles*, i. 421; ii. 430. See *Heritable Securities. Absolute Disposition.*]

BACK-TACK; was a tack connected with wadsets, whereby the actual possession of the wadset lands was continued, or returned, to the proprietor or reverser, on payment of a rent corresponding to the interest of the loan. Where the wadset was accompanied by such a back-tack, it was termed an improper wadset. *Stair*, B. ii. tit. 10, § 11; *Ersk.* B. ii. tit. 8, § 28;

Bank. ii. 128; *Jurid. Styles*, 2d edit. i. 641. See *Wadset*.

BACKING A WARRANT. 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, or a justice of the peace, if otherwise competent, must concur in authorising his officers to aid the person possessed of the original warrant in carrying it into execution. This authority is given by indorsing or backing the warrant. [But a sheriff's warrant is good in any county, without indorsation, if executed either by a messenger-at-arms, or by an officer of the court where it was issued; 1 & 2 Vict. c. 119, § 25. See also 11 & 12 Vict. c. 42, § 15; 12 & 13 Vict. c. 69, § 15; 6 & 7 Vict. c. 34, § 2, as amended by 16 & 17 Vict. c. 118; 33 & 34 Vict. c. 52, § 13. See *Hume*, ii. 78; *Alison's Prac.* 125; *Macdonald*, 254; *Campbell on Citation and Diligence*, 332. See *Criminal Prosecution. Extradition.*]

BAGIMONT'S ROLL; was the rent roll