

[*Duff's Feudal Conv.* 334; *Menzies' Conv.* 728; *M. Bell's Conv.* ii. 1012; *M'Laren on Wills*, i. § 993; *Rankine on Land-Ownership*, 569, 881.] See *Destination. Records. Institute. [Propulsion. Mansion-House. Minerals. Thellusson Act.]*

ENTIRETIES. In English law, if lands are given to husband and wife, and their heirs, they are not joint tenants, being in law one person, but they take by entireties; that is, neither can dispose of any part of the land without concurrence of the other, and if they do not agree in making a disposition, the survivor takes the whole; *Sweet's Law Dict.*]

ENTRY OF AN HEIR. In feudal law, this term is applied to the entry of the heir of the vassal with the superior. On the death of the vassal the property, or *dominium utile*, according to feudal principles, returns to the superior, by whom it must be again given out to the heir of the vassal, before he can complete a feudal title as heir to his predecessor. It is not, however, optional to the superior to refuse an entry; on the contrary, he is bound to grant a warrant for infefting the heir in the *dominium utile* to which he has succeeded. The person whom the superior is obliged so to enter is the heir pointed out by the original investiture, that is, by the charter, in virtue of which the *dominium utile* is held of the superior. The charter is usually conceived in favour of the vassal and his heirs whomsoever; and in that case, the legal destination is followed, and the heir-at-law is the person whom the superior is bound to enter. Where, again, a special destination is contained in the charter, it is the heir of that destination whom the superior is bound to receive as his vassal. In either case, the proper legal evidence of the heir's title to receive an entry is a service as heir to his predecessor in the particular character pointed out by the investiture; although the superior, if he chooses, may proceed on his private knowledge of the heir's propinquity, and give a precept for infefting him without requiring a service. The heir's entry is completed by infeftment [on a decree of service, or on a writ of *clare constat* granted by the superior.] The consideration or fee to which the superior is entitled for this transmission of the property is called the casualty of *relief*. Its amount is regulated by the *reddendo* clause in the original charter; and it is almost invariably fixed at a double of the feu-duty; that is, the heir, on receiving from the

superior the warrant of infeftment, pays him a sum equal to one year's feu-duty as relief-duty. See *Relief*. See also *Superior and Vassal. Charter. Clare Constat. Charge against Superiors. Heir. Service. Infeftment. Beneficium Inventarii.*

ENTRY OF A PURCHASER. The entry of a purchaser of an heritable subject, like the entry of an heir, is completed by infeftment, either proceeding on the warrant of the seller's superior, or recognised and confirmed by him. See *Disposition. Composition. Base Right. Confirmation. Resignation. Consolidation. Infeftment. [Conveyancing.]*

EPISCOPACY; that form of church government in which diocesan bishops are established, as distinct from, and superior to, priests and presbyters. *Encyc. Brit.*

EPISCOPALIAN. In Scotland, persons professing the religion of the Church of England are called episcopalians, in contradistinction to presbyterians, and the members of other religious persuasions, whose form of church government does not recognise the authority of bishops. The Toleration Act, 10 Anne, c. 10, authorises episcopalians to meet for divine worship according to the liturgy of the Church of England; and, by the same statute, clergymen of that persuasion are permitted to perform the ceremony of marriage in Scotland, and to administer the sacraments. But political considerations rendered it necessary to put the toleration thus granted under such regulations as might prevent danger to the State; and, accordingly, the statutes 10 Anne, c. 10, and 32 Geo. III. c. 63, contain sundry provisions for preserving the purity of this form of worship, and for securing the ministry of pastors well affected to the Government. The leading statutory provisions on this subject are, 1st, That the pastor must have received holy orders from a Protestant bishop of the Church of England or Ireland, and have subscribed, before officiating, the oaths of allegiance and abjuration, and the assurance, along with the thirty-nine articles of the Church of England. 2dly, The congregations or assemblies for worship must meet with doors unfastened—any meeting where five or more persons besides the household (if the meeting be in a private house) assemble to hear divine service performed by a pastor of this communion, being deemed an episcopal meeting-house within the meaning of the statutes. 3dly, The statutes require the clergyman to pray for

the king by name, and for the royal family, in the form prescribed by the liturgy of the Church of England. The statutory penalties are fine, imprisonment, or transportation; but the political necessity which dictated many of those enactments having ceased, the details of the several statutes are now of less importance. Episcopacy, as the national religion in Scotland, was finally abolished by the act 1689, c. 3. See *Hume*, i. 579; *Hutch. Justice of Peace*, B. iii. c. 15; [*Innes on Creeds*. See *Church Judicatories*.]

EQUIPOLLENT; is a term sometimes used in legal phraseology to signify equivalent, or similar in effect. Thus, for example, where statute or express paction has prescribed a particular form or ceremony to be observed, equipollents, as they are termed, are, in the ordinary case, inadmissible; that is, acts tantamount in effect will not be accounted legal compliance with the prescribed form.

EQUITY. Equity, in its more enlarged acceptation, has been correctly termed the soul and spirit of all law—positive law being construed by it, and rational law made by it. But, in a more limited sense, and (although somewhat incorrectly) as contrasted with law, equity is defined to be the correction of that wherein the law, by reason of its universality, is deficient. In the latter sense, it is said to be the province of equity to extend the words of the law to cases similar in principle, although not within the letter of the law, or to qualify the rigour of the law, where a literal construction of it might lead to unforeseen and inequitable consequences. But although, generally speaking, a distinction such as this has been, to a certain extent, recognised between pure law and equity, nothing can be more erroneous than the idea, sometimes entertained, that equity is administered at the discretion of the judge, according to the particular circumstances of each case, without regard to rules or precedents. On the contrary, wherever the dispensation of justice has made any progress, equity, whether it be administered in a court specially constituted for the purpose, or dispensed, along with law, in the supreme civil court, must, in order to attain the ends of justice, be governed in its application by an inflexible regard to legal principle, as well as to judicial precedents; otherwise, as has been justly observed, "it would be above all law, either common or statute, and be a most arbitrary legislator in every particular

case." The distinction between law and equity, as administered in separate courts, seems to be peculiar to England; and although there can be little doubt that the equitable jurisdiction of the Court of Chancery in that country was originally of the nature of a legislative correction of the rules of law, emanating from the Sovereign as the fountain of justice, yet it is obvious that such a tribunal is not suited to a period when the principles of legislation and the art of administering justice come to be better understood. Hence it may almost be said that the ancient distinction between law and equity as administered in England no longer exists; but that justice, whether under the name of law or equity, is dispensed, not according to arbitrary or fluctuating rules, depending upon the conscience or discretion of any individual, but under an artificial system of great perfection, in which the principles of rational and enlightened jurisprudence are brought into full and efficient operation; in a manner eminently calculated to give stability and permanence to the law of England. In Scotland, the Court of Session, as the supreme civil court of the country, combines in itself all the functions of the English courts, both of law and equity. The doctrine of the Scotch institutional writers is, that the Court of Session is a court of equity as well as of law, abating the rigour of the law, and giving aid where no remedy could be had in a court of pure law. This equitable power is, in Scotland, called the *nobile officium* of the court, a term derived from the Roman law. The *nobile officium* or *judicium nobile* of the Roman law was the power vested in the prætor, in virtue of which he exercised a species of legislative control over the law; and, in like manner, the *nobile officium* of the Court of Session seems originally to have encroached considerably on what may be considered as more properly the province of the legislature. But now the equitable jurisdiction of the Court of Session is governed by well-defined principles, and with all the regard usually had in Scotland to precedents. The examples of the exercise of this jurisdiction most frequently given, are those cases in which the court interposes to modify exorbitant conventional penalties, or to permit legal or conventional irritancies to be purged at the bar, or the like; or where, in the exercise of its paternal authority, the court interferes in extraordinary circumstances, by interdict or

otherwise, for the protection of the property or rights of individuals. Hence, Scotch authorities have defined equity to be the favourable modification of the law, whether it be that to which the parties limit themselves in their covenants, or the general law of the nation. At the same time, every one interested in preserving the purity of the law must deprecate any approach to an union of the legislative and judicial functions; and, as a protection against such a danger, it is of much importance to avoid the too hasty adoption of what have been termed "principles of equity," which, however well fitted they may be for the consideration of the Legislature, generally do more harm than good, when permitted to influence the determinations of a court of justice. See *Stair*, B. iv. tit. 3, § 1; *Bank*, B. iv. tit. 7, § 22; B. iv. tit. 45, § 149; *Ersk.* B. i. tit. 3, § 22; *Ross's Lect.* i. 360; *Blackstone*, i. 61, 91; iii. 426; where an exposure will be found of the errors into which Lord Kames has fallen in his "*Principles of Equity*." See *Law*. [*Nobile Officium*.]

ERASURES. Deeds or other formal writings erased in *substantialibus* are not deemed probative; and such defects are not suppliable by parole evidence. [Where the erasure occurs in a less material part of the deed, there being no fraudulent intention, and the essentials being left still intelligible, and capable of being carried into effect, the vitiated word or clause is merely held *pro non scripto*. See *Cattanach's Tr.* 25 June 1884, 11 R. 972. In either case, if it be mentioned in the deed itself that certain words were superinduced on an erasure before subscription, the defect is cured, and the words are allowed full effect. By 6 & 7 Will. IV. c. 33, erasures in instruments of sasine and of resignation *ad remanentiam*, if made before registration and without fraudulent intent, do not affect their validity. This provision is now made applicable to all instruments; 31 & 32 Vict. c. 101, § 144. Nor can a recorded deed now be challenged on the ground that any part of the record of such deed is written on erasure, unless fraud be proved; 37 & 38 Vict. c. 94, § 54. A testator's signature, written on an erasure, is good, unless otherwise proved to be invalid; *Brown*, 9 March 1888, 15 R. 511; see also *Grant*, 27 Feb. 1849, 11 D. 860. See *Stair*, B. iv. tit. 42, § 19; *Ersk.* B. iii. tit. 2, § 20;] *Bell's Com.* i. 717; *Bell's Princ.* §§ 344, 872, 875; *Ross's Lect.* i. 145; [*Dickson on Evidence*, i. § 876;

[*Menzies' Conv.* 127; *M. Bell's Conv.* i. 68, 671. See *Deed. Testing Clause. Error. Vitiatio. Deletion.*]

ERECTARE *essonia ab aliquo facto*; to reckon, esteem, or judge *essonzies*, or accusations made by any person. *Skene, h. t.*

ERECTION, LORDS OF. Those of the nobility, or others of the laity, to whom, after the Reformation, the king, *jure coronæ*, made grants of the lands or tithes which had formerly belonged to the Popish ecclesiastical establishment, were called Lords of Erection, and sometimes titulars of the tithes; because, under their grants, they had the same rights to the erected benefices, both lands and tithes, which were formerly vested in the monasteries or other religious houses. Those grants were made under the burden of providing competent stipends to the reformed clergy, an obligation which, prior to the dates of the decrees-arbitral by Charles I. in 1629, was much neglected by the grantees. See *Stair*, B. ii. tit. 8, § 35; *Ersk.* B. ii. tit. 10, § 18; *Connell on Tithes*, i. 98, 113 *et seq.*; *Bell's Princ.* § 1147. [See *Teinds*.]

ERECTION OF A BARONY. See *Barony*.

ERROR. An error in any essential point vitiates a contract; because those who err as to the substance of their agreement have not interposed that consent on which the validity of all contracts depends. This rule applies whether the error regard the person of one or other of the contracting parties, or the subject-matter of the contract; but if the error be in accidental qualities merely, the contract is valid. [See *Stewart v. Kennedy*, 29 June 1889.] *Error calculi* may always be rectified, because it must be presumed that the parties never intended to consent to an error of this description. [See *Brown*, 12 July 1849, 11 D. 1330; *M'Laren*, 22 Feb. 1862, 24 D. 577. As to clerical error, see *N.B. Insurance Co.* 1 Nov. 1864, 3 Macph. 1; *Johnston*, 16 June 1865, 3 Macph. 954; see also *Glasgow Feuing Co.* 11 March 1887, 14 R. 610. To entitle a party to an issue of essential error, he must specify the particular kind of error on which he founds; *Ritchie*, 13 Jan. 1866, 4 Macph. 292; *Munro*, 14 Feb. 1874, 1 R. 522; *Yeatman*, 17 Nov. 1877, 5 R. 179. The error may be proved *prout de jure* (*infra*, p. 415 *a*), even when the payment was by bill; *Balfour*, 9 Feb. 1877, 4 R. 454. See *Condictio Indebiti*. In a poor-law question, an admission of liability made in error as to fact, and acted on for a length of time, was

[not allowed to be opened up; *Beattie*, 15 Jan. 1875, 2 R. 330; *Young*, 9 Feb. 1877, 4 R. 448. The question, how far error in point of law invalidates a contract has occasioned much discussion. The doctrine of the institutional writers, which has been followed in several decisions, is that in certain circumstances redress may be given even for payments made in error in point of law; *Ersk. B. iii. tit. 3, § 54*; *Stirling*, 1773, M. 2930; *Carrick*, 1778, M. 2931. But in regard to the payment of money, the House of Lords, in *Wilson*, 7 Dec. 1830, 4 W. & S. 398, and *Dixon*, 7 Sept. 1831, 5 W. & S. 445, laid down the broad rule that a person paying under a mistake in point of law, cannot recover. This rule, however, does not extend to the homologation of a deed by a party in ignorance of his legal rights; *Douglas*, 30 June 1859, 21 D. 1066; nor to a discharge granted by a party in ignorance of his rights, and therefore *sine causa*; *Dickson*, 17 Feb. 1854, 16 D. 586; *Purdon*, 19 Dec 1856, 19 D. 206; nor to the election of *legitim* by a person who erroneously understood that she would be entitled to the whole of it; *Inglis' Trs.* 31 May 1887, 14 R. 740. In *Dickson*, doubts were expressed whether, even in a case of proper *condictio indebiti*, the question is conclusively settled by the *dicta* of the House of Lords in *Wilson* and *Dixon*, *supra*, the doctrine referred to not having been matter of express decision in either of these cases. See also *dicta* in *Mercer*, 6 March 1871, 9 Macph. 618 (affd. on special ground, 10 Macph. (H.L.) 39). It is not probable, however, that the court would, in ordinary circumstances, ordain restitution of money paid under a mistake in law. In the brocard *Ignorantia juris haud excusat*, "the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake;" *per* Lord Westbury, in *Cooper*, L.R. 2 H.L. 149. In case of any error or defect in any instrument, or in the recording of any deed or conveyance or instrument, or in any warrant of registration, or in the recording thereof, it is competent to make and record the same anew; 31 & 32 Vict. c. 101,

[§ 143.] See *Stair*, B. i. tit. 10, § 13, and B. iv. tit. 40, § 24; *More's Notes*, xiv.; *Bank. B. i. tit. 23, § 63*; *Ersk. B. iii. tit. 1, § 16*; *Bell's Com. i. 313*; *Bell's Princ. §§ 11, 534, 879*; *Brown on Sale*, 153; *Kames' Equity*, 92, 179, 296; [*Menzies' Conv. 66*; *M. Bell's Conv. i. 167*; *Mackay's Prac. ii. 141*; *Pollock on Contract*, 390; *Anson on Contract*, 125; *Law Quarterly Review*, i. 298. See *Ignorantia Juris. Executed and Executory. Interlocutor.*]

ERROR, SUMMONS OF. Where one was served heir to a deceased person while a nearer heir existed, the erroneous service was formerly in use to be set aside by a process, commencing with what was called a summons of error; in which the pursuer, on the ground that he was a nearer heir than the person wrongfully served, craved that the service, and all following on it, might be reduced, and the inquest who served found to have erred. The summons was drawn in Latin. Of old, the reduction of services was proceeded in by an assize of error, or grand inquest of landed gentlemen, on a precept out of Chancery; the object of the proceeding being, not only to set aside the service, but to have the former inquest punished under the act 1471, c. 47, as *temere jurantes super assisam*. Such was also the practice as to inquests in criminal causes; but assizes of error, having been included in the list of grievances presented to William III. by the states of the kingdom in 1689, have not been used since the Revolution. And now, instead of a summons of error, an erroneous service is set aside in an ordinary action of reduction in the Court of Session. *Mackenzie's Inst. B. iv. tit. 1, § 8*; *Stair*, B. iii. tit. 5, § 43; *Bank. B. iii. tit. 5, § 92*; *Acts of the Estates of Scotland*, c. 18. See *Service of Heirs*.

ERROR, WRIT OF. A writ of error is an English law term, signifying a commission to the judges of a supreme court, by which they are authorised to examine the record upon which a judgment was given in an inferior court; and, on such examination, to affirm or reverse the same according to law. *Tomlins' Dict. h. t.* [This mode of review is still in use in criminal cases; see *Stephen's Digest of Crim. Procedure*, art. 303. In civil cases, proceedings in error have, as a general rule, been abolished, and appeal substituted as the mode of review. *Sweet's Law Dict.*]

ESCAPE; is a secret or a violent evasion out of lawful custody or confinement. Those who aid or assist persons committed

for capital crimes in escaping or attempting to escape, though they succeed not, are guilty of felony, and punishable by transportation [now penal servitude] for seven years. If the prisoner be committed for a minor offence, or for debt, those aiding him in his escape, or in attempting to escape, besides being civilly liable for the debt, where the imprisonment is for debt, are guilty of a misdemeanour, and punishable by fine. The prosecution must be commenced within a year after the offence; 16 Geo. II. c. 31. The offence of assisting a prisoner of war to escape either out of prison or from the limits to which he is confined by his parole, is punishable arbitrarily at common law; and, by statute, the punishment is made transportation [now penal servitude] for life, or for fourteen or seven years. The crime is committed although the prisoner, after his escape, may have been prevented, by arrest or otherwise, from leaving the country; 52 Geo. III. c. 156; *Hume*, i. 527, note 3. A messenger-at-arms, who, through negligence or collusion, allows a debtor to escape after he has, or might have, taken him into custody, will be liable for the debt in the caption, provided the escape has not been effected by means of violence or resistance sufficient to overpower the messenger and his assistants. See *Bank*. B. i. tit. 10, § 196; *Ersk.* B. iv. tit. 3, § 14; *Stair*, B. iv. tit. 48, § 20; *More's Notes*, cxxi, cccxxii.; *Bell's Com.* ii. 438. See *Prison. Breaking of Prison.*

ESCHEAT; from the French word *échoir*, to fall, signifies any forfeiture or confiscation whereby a man's estate, heritable or moveable, or any part thereof, falls from him. Single escheat is the forfeiture to the Crown of one's moveable estate, incurred not only on conviction of certain crimes, but which, until 1748, followed upon denunciation for non-payment or non-performance of a civil debt or obligation. Liferent escheat is the forfeiture to the superior of the annual profits of the vassal's lands during his life, or while he remains unrelaxed, which, in like manner, formerly fell when a denounced debtor had remained year and day at the horn, unrelaxed. A total forfeiture to the Crown of all one's property, heritable and moveable, is a penalty which, in Scotland, is peculiar to the crime of high treason. By 20 Geo. II. c. 50, the casualties of single and liferent escheat, incurred by horning and denunciation for civil debts, were abolished. But both single and liferent

escheats are still incurred in the case of crimes. Thus single escheat is one article of the statutory pains of deforcement, bigamy, perjury, and some other offences. It also falls upon denunciation following on a sentence of fugitation or outlawry; and, if the rebel remain a year in this condition, the liferent escheat falls to his superior—not, however, as a punishment for the crime with which he is charged, but on account of his contumacy and rebellion, in failing to appear and underlie the law. Single escheat also follows every sentence for a capital crime; and in case, after sentence, the convict should make his escape, there seems to be ground for holding that, until he surrender himself to justice, his liferent escheat will accrue to his superior. [Although the liferent falls by the casualty of liferent escheat, the fee still remains in the vassal, and may be disposed of by him in any way which does not prejudice the party entitled to the liferent escheat; *Macrae*, 27 June 1839, M.L. & Rob. 645. Escheat does not now follow on a conviction of treason or felony in England; 33 & 34 Vict. c. 23.] See *Mackenzie's Inst.* B. ii. tit. 5, § 23; *Stair*, B. iii. tit. 2, § 15; *More's Notes*, cccxi.; *Bank*. B. iii. tit. 3, § 2; *Ersk.* B. ii. tit. 5, § 53; *Hume*, i. 546; ii. 271, 482, 492; *Bell's Princ.* § 730; *Ross's Lect.* i. 274; *Jurid. Styles*, ii. 696; iii. 194–6 (2d edit.); *Kames' Stat. Law Abridg. h. t.*; [*Menzies' Conv.* 511, 526; *M. Bell's Conv.* i. 539, 627.] See *Denunciation. Fugitation.*

[ESCROW; in English law, a writing under seal delivered to a third person, to be delivered by him to the person whom it purports to benefit, upon some condition. On performance of the condition it becomes an absolute deed; but if the condition be not performed, it never becomes a deed. *Wharton's Lex.*]

ESPOUSALS. Espousals, or *sponsalia*, are a contract or mutual and solemn engagement between a man and a woman to marry each other. By the law of Scotland all promises of marriage, whether private or contained in written contracts, may be resiled from, provided a *copula* has not followed on the promise; for in that case the marriage is complete. But the party resiling from such an engagement, without just cause, will be liable to the other in damages for breach of promise, to the extent not only of any pecuniary loss which may have been sustained, but in *solatium* of his or her injured feelings. *Stair*, B. i. tit. 4, § 6; *Bank*. B. i. tit. 5, § 2; *Ersk.* B. i. tit. 6,

6, § 3; [*Bell's Princ.* §§ 1508, 1515;] *Hogg*, 27 May 1812, F.C. See *Marriage*.

ESQUIRE; a title of dignity next in degree to that of knight. This addition is now conferred by courtesy, without regard to any particular qualification, or authority for using it.

[ESSENTIALIA. This term, applied to a contract, or right, or other subject of law, signifies those things which are essential to the very being of the contract or right, as such, and any alteration in which would make the contract or right resolve into one of another kind. The *naturalia* flow from the nature of the right or contract, independently of stipulation; but an express alteration of them does not resolve the right into one of another kind. *Accidentalialia* have their existence entirely by express stipulation, and are never presumed without it. See *Ersk.* B. ii. tit. 3, § 11.]

ESSONIUM or **ESSONZIE**; an old law term met with in the *Regiam Majestatem*, and the earlier statutes of the Scotch Parliaments, signifying an excuse, by reason of sickness, or other sufficient cause, for the non-appearance of a party in an action or court to which he is cited, or where he is bound to attend. The term has a similar import in the law of England. See *Tomlins' Dict. voce Essoign*; *Skene, h. t.*

ESTATE. The term estate, in its most ordinary acceptation, signifies a person's land estate; but it is also frequently applied to moveables. Thus, a man's personal estate comprehends both his moveable effects and the personal debts due to him. *Bank.* B. ii. tit. iii. p. 597. [By the Bankruptcy Act, 1856, the word is declared, when not expressly restricted, to include "every kind of property, heritable or moveable, wherever situated, and all rights, powers, and interests therein capable of legal alienation, or of being affected by diligence or attached for debt;" 19 & 20 Vict. c. 79, § 4. See *University of Glasgow*, 10 Feb. 1882, 9 R. 643.]

ESTATES OF THE KINGDOM. The ancient Parliament of Scotland consisted of the King and three Estates of the Kingdom, viz.,—1st, The archbishops and bishops, and before the Reformation, all abbots and mitred priors; 2^d, The barons, comprehending all the nobility as well as the commissioners for shires and stewartries; and 3^d, The commissioners from the royal burghs. All the three Estates assembled in one house, forming one aggregate meeting, by a majority of the votes of which, in ordinary cases, all matters, whether legisla-

tive or judicial, were determined. Through ignorance or inadvertence the three Estates of the realm are frequently spoken of as consisting of King, Lords, and Commons. This is a mistake. The three Estates are—the Lords temporal, the Lords spiritual, and the Commons. *Mackenzie's Inst.* B. i. tit. 3, § 3; *Bank.* B. iv. tit. 1, § 2; *Ersk.* B. i. tit. 3, § 2. See *Parliament. Convention of Estates. Election Law.*

ESTOPPEL; in English law, [an admission of so conclusive a nature that the party whom it affects is not permitted to aver against it or offer evidence to controvert it. *Sweet's Law Dict.* See *Personal Objection*.]

ESTOVER; sustentation, nourishment. A vassal in ward was entitled to an estoverium from his superior, proportioned to the quantity of the heritage. *Skene, h. t.* [In English law, every tenant for life or years of freehold land, unless restrained by agreement, may of common right take upon the land a reasonable quantity of wood for fuel, repairs, &c. This is called *estovers*, or *botes*. *Sweet's Law Dict.*]

ESTRAYS; valuable animals, not wild, found straying without a known owner. See *Strays*.

ESTREAT; is an English law term, signifying the true extract, copy, or note of some original writing or record, and especially of fines, amerciaments, &c., entered on the rolls of a court, to be levied by the officers of the law. *Tomlins' Dict. h. t.*

EVE ET TREVE; slaves or servants, whose father, gudesire, grandsire, and forbears, have been servants to any man and his predecessors. *Skene, h. t.*

EVICITION; is the dispossessing one of property, whether in land or in moveables, in virtue of a preferable legal title in the person of him by whom the eviction is made. The dispossessed party will be entitled to institute an action against his author, the extent of the pursuer's claim in which action will be regulated by the nature of the warrandice given. Where the warrandice has been absolute, which is the implied warrandice in all onerous contracts, he from whom the property has been evicted will have a claim against his author's representatives, to the full extent of the value of the evicted property as at the period of eviction, and for all loss or damage which he may have sustained through the defective title. *Stair*, B. ii. tit. 3, § 46; *More's Notes*, xci.; *Mackenzie*, B. ii. tit. 3, § 12; *Bank.* B. ii. tit. 3, § 120; *Ersk.* B. ii. tit. 3, § 25; *Bell's Com.* i. 690; ii. 259; *Bell's Princ.* §§ 121–126; *Bell on Purchaser's Title*,

56; *Kames' Equity*, 116, 183; *Hunter's Landlord and Tenant*, ii. 267; [*Rankine on Leases*, 393, 546.] See *Warrandice. [Lease. Removing. Crofters Holdings Act.]*

EVIDENCE; is the proof, either written or parole, which the parties in a civil or criminal cause may legally adduce in support of the facts and circumstances on which their respective pleas or defences depend. In this article the subject will be considered under the following arrangement:—

1. *Evidence by Writ.*
2. *Evidence by Oath.*
3. *The Order in which Evidence is to be received; with some general rules as to evidence.*

I. OF EVIDENCE BY WRIT.

The evidence afforded by writing is accounted the highest description of legal proof. It may be considered under the following heads:—1. Of a formal deed; 2. Of notarial instruments, and the executions of officers of the law; 3. Of acts of court, extracts from judicial records, &c.; 4. Of public instruments and documents not by officers of the law; 5. Of merchants' books; 6. Of writings *in re mercatoria*.

1. *Of a Formal Deed.*—A formal deed, signed and authenticated according to the rules prescribed by the law of Scotland, affords complete legal evidence of the contract, obligation, or other transaction which it sets forth. Such a deed is held in law to be a higher species of evidence than parole testimony; and, for that reason, it is the only evidence admitted to prove the constitution or transmission of a right to heritable property; nor will parole evidence be received to qualify the terms or conditions of the written deed. When the authenticity or validity of a formal deed is disputed on any ground not apparent *ex facie* of the instrument, the challenge must be made in the form of a regular action of reduction; and, until decree is obtained in that action setting aside the deed, the evidence it affords remains unimpeachable. The legal rules for the authentication of deeds, so as to render them fully probative—the effect given to holograph writings—to deeds subscribed by initials, or by notaries for the parties—to writings *in re mercatoria*—or to deeds defaced or vitiated, or otherwise defective in the statutory or consuetudinary formalities—and the consequence of *rei interventus* or homologation as validating informal writings—are explained under the following articles: *Deeds,*

Execution of. Holograph. Testing Clause. Privileged Deeds. Rei Interventus. Homologation. Erasures.

2. *Of Notarial Instruments, and the Executions of Officers of the Law.*—A notarial instrument is a written attestation, under the hand of a notary, of a fact or of facts falling within his observation. In some cases such an instrument is an indispensable solemnity. Thus, the fact of infeftment having been given in heritable property could not [formerly] be proved otherwise than by a notarial instrument of sasine. [See *Infeftment*.] In like manner, instruments of resignation, of requisition, of consignment, of intimation of assignations, of protests on bills of exchange, and the like, are deemed fully probative; and, although all such instruments may be set aside by reason of informality, or improven in an action of reduction on the ground of falsehood, yet parole evidence will not be admitted by way of exception to disprove the facts set forth in them, of which they are the proper and only legal evidence. Notarial instruments, however, cannot be effectually founded on as legal evidence of anything more than the mere act which the law requires to be so proved. Thus, an instrument of sasine will not be received as evidence of the charter on which it proceeds; nor will a notarial instrument, where it is not essential as a solemnity, relieve the party producing it from the necessity of legally proving the fact asserted in it, or prevent the opposite party from disproving it, either by written or by parole evidence. By consent of the opposite party, notarial copies of deeds or other writings are sometimes admitted as evidence; but such copies are not sufficient if objected to. [See *Notarial Instrument*.] Executions by messengers-at-arms, or other officers of the law, are attestations under their hands that they have given the citations, or executed the diligences conformable to their warrants; and wherever the execution is by law essential, it affords evidence which cannot be redargued except by improbation in an action of reduction. But even where such executions are essential solemnities, they will not, more than notarial instruments, be received as evidence of extrinsic facts which have no relation to the solemnities of the execution. See *Execution*.

3. *Of Acts of Court, Extracts from Judicial Records, &c.*—All acts and deeds under the hands of clerks of court, and keepers of public records, are, generally speaking, held to be probative. Extracts of judicial pro-

ceedings from the records of a court, the warrants of which are in the custody of the court, are admitted to prove what was done in court, or alleged by the parties, but not to prove the truth of those allegations; and the decrees and the judicial acts of the courts of a foreign country are, *ex comitate*, admitted to be proved by exemplifications or extracts, probative according to the law of that country. [See *Stiven*, 12 Feb. 1868, 6 Macph. 370.] On the same principle, judicial transumps, whether made under authority of the supreme or of an inferior court, are probative in all ordinary cases. See *Transumpt*. An extract of the deed, authenticated by the proper officer, whether it be in the record of the supreme or that of an inferior court, is as good evidence as the deed itself. Such, for example, is the case (except in improbations) with respect to private deeds having a clause of registration. But where there is no such clause, and where the deed is merely recorded as a probative writ, the principal deed being returned to the party at whose desire it was recorded, the general rule is, that the extract of such a deed is not admissible as evidence, the party being in possession of the principal deed, which he may produce. Even this rule, however, is subject to several exceptions. Thus, charters by subjects, dispositions, bonds, contracts, tacks, and, in general, all other probative writs, although not having a clause of registration, are, by special statute, allowed to be registered as probative writs, and an extract under the hand of the keeper of the record, declared to make faith in all cases except that of improbation; 1698, c. 4. Public instruments appointed to be registered for publication are also excepted; and although the principals are returned to the parties, extracts from the record of sasines, reversions, or regresses, and the like, are declared to be probative in all cases, except where the writ so recorded is sought to be improved; 1617, c. 16; 1669, c. 3. The same exception extends to the register of inhibitions and interdictions; 1581, c. 119, No. 1; to summonses to interrupt the prescription of real rights; 1696, c. 19; and to the register of hornings and relaxations; 1579, c. 75. Extracts under the hands of the proper officers in Chancery, of charters of lands held of the Crown, retours of services, &c., which are recorded in Chancery, are probative except in improbations; 49 Geo. III. c. 42, § 16. In reduction-improbation, although an extract

of a deed or instrument under the hand of the proper officer, or even a specification by the defender of the register in which it is recorded, will stop the certification, yet it is ultimately incumbent on either the defender or the pursuer to obtain a warrant for the production of the principal deed from the record, and that whether the deed has been recorded merely as a probative writ, or in virtue of a clause of registration. Where the registration has been made in the books of an inferior court, the Court of Session will grant a warrant to transmit the principal writing to the clerk of the process. See *Stair*, B. iv. tit. 42, § 10; *Bank*, B. iv. tit. 4, § 21; *Ersk.* B. ii. tit. 3, § 43; B. iv. tit. 1, §§ 22, 53; *Tait on Evidence*, 184-197, 200; [*Bell's Princ.* § 2215; *Dickson on Evidence*, §§ 1114, 1286.]

4. *Of Public Instruments and Documents not by Officers of the Law.*—Entries in public records, not judicial, where certified by the proper officers, are, in the ordinary case, admitted as evidence. Such are entries in the journals of the Houses of Lords and Commons—in bank books—in parish registers of deaths, baptisms, or marriages—in prison books—in corporation books—and the like. Public acts of Parliament are presumed to be known to all; and the statute book, printed by the Queen's printer, may be judicially referred to. Private acts of Parliament, neither printed in the statute book, nor declared public acts, nor specially directed to be printed by the Queen's printer, and to be admitted as evidence by all judges, required [formerly] to be proved by examined copies from the parliamentary rolls; [but, since 13 & 14 Vict. c. 21, § 7, every statute is a public statute, and is judicially taken notice of as such.] Royal proclamations, the articles of war, and the like, as printed by the Queen's printer, or in the Gazette, are held to be probative, without production of the proclamations themselves; and in the same way addresses from the people to the Crown may be proved. But gazettes are not evidence of private titles or interests, such as presentations to clergymen, or grants by the Sovereign to individuals. [See *Gazette*.] Histories are admitted to prove ancient facts, such as propinquity of blood, primogeniture, &c., if authentic and uncontradicted by other histories of equal authority. [A memorandum made in a church register by a deceased clergyman more than 100 years previously, was admitted as evidence *pro tanto*, in *Lauderdale Peerage*, 22 July 1885,

[10 App. Ca. 692, 698. See the Documentary Evidence Acts, 31 & 32 Vict. c. 37, and 45 Vict. c. 9; under which various proclamations, orders and regulations may be proved by copies printed by the Government printer, or under the superintendence of the Stationery Office, or by a copy of the Gazette containing them.] See *Stair*, B. iv. tit. 42, § 16; *Ersk.* B. iv. tit. 2, § 7; [*Bell's Princ.* § 2209; *Dickson*, §§ 1112, 1220, 1313; *Tait*, 50, 201; *Kirkpatrick*, § 117.]

5. *Of Merchants' Books.*—In general, a merchant's books will be held as good evidence against himself; and where they appear to have been regularly and accurately kept, they will afford what is called a *semplena probatio* in his favour, or that degree of evidence by which, in matters admitting a parole proof, a fact may be legally proved by one witness, and the oath of the party himself in supplement, [or rather, in modern practice, by one witness and supplemental evidence *prout de jure*; see *Brit. Linen Co.* 25 Jan. 1853, 15 D. 314; *Hatton*, 19 March 1853, 15 D. 574. Entries in bankers' books may be proved by a copy authenticated in terms of 42 Vict. c. 11. See *Bank.* As to entries or jottings in cash books or pass books, see *Storey*, 7 Dec. 1878, 6 R. 293; *Drummond*, 10 Jan. 1880, 7 R. 452.] See *Ersk.* B. iv. tit. 2, § 4; *Bank.* B. iv. tit. 27, § 6; *Bell's Com.* i. 348; *Tait*, 122; [*Bell's Princ.* § 2233; *Dickson*, § 1225.] See *Book Debts.* [*Semiplena Probatio.*]

6. *Of Writings in remercatoria.*—Under this description are included orders for goods, mandates, procurations, guarantees, offers, and acceptances to sell or buy, or transport merchandise; fitted accounts between merchants, and, in general, all letters, engagements, receipts, acknowledgments, and the like, which the various exigencies of trade may require, as to all of which the law, from favour to trade, has relaxed the rigour of the ordinary rules of authentication. Hence, such writings are probative, although not holograph, and although they want the name and designation of the writer, and are not subscribed before witnesses; a privilege which is not extended to missives or to settlements of accounts unconnected with mercantile transactions. In like manner, mercantile writs, such as bills of exchange or promissory notes, cheques upon bankers, and the like, whether arising out of mercantile transactions or not, are valid, although neither holograph nor tested. Receipts and dis-

charges granted to tenants for rent, however large the sum, are probative, although neither holograph nor tested; and, in practice, although perhaps incorrectly, it is usual to grant similar receipts for termly payments of interest, annuities, and the like. The privilege is said to be extended to tenants on account of their ignorance of business. See *Ersk.* B. iii. tit. 2, § 24; *Bell's Com.* i. 342; *Tait*, 112; [*Bell's Princ.* § 2232; *Dickson*, §§ 785, 793; *Kirkpatrick*, § 105.] See *Privileged Deeds.*

II. OF EVIDENCE BY OATH.

Evidence by oath consists,—1st, Of the oaths [of competent witnesses;] and 2nd, Of the oath of party.

I. *Of the Oaths of Witnesses.*—The testimony of witnesses is called parole proof; and on this branch of the subject it is proper to inquire,—1st, Who can be received as witnesses? 2d, In what manner their testimony is taken? 3d, In what cases, and to what points this species of evidence is admitted? and, lastly, to say something of the nature and effect of circumstantial and presumptive proof.

1. *Who can be received as Witnesses.*—The general rule is, that all persons of legal age and of sane mind, who believe in God and a future state of rewards and punishments, whether Christians or not, may bear testimony. With regard to the disqualifications of witnesses, it is of consequence to attend to the distinction between those objections which concern the admissibility, and those which go to the credibility only of the witness. Under the latter class of objections are included all circumstances likely more or less to bias or influence the witness, which, although they may not amount to absolute disqualifications, yet may relevantly be brought into view to the effect of admitting the full application of the maxim *Testimonia ponderanda non numeranda sunt*; and it may be observed generally, that the inclination of modern practice is, [as the tendency of modern legislation has been,] to allow all objections to go rather to the credibility than to the admissibility of witnesses. The following enumeration comprehends the objections which may be stated to the admissibility of a witness, [as well as the objections which formerly excluded, but which have been removed by recent statutes]:—

(1.) *From Age or Sex.*—Persons under fourteen years of age [were formerly

[excluded in ordinary civil causes,] as being incapable of understanding the moral obligation of an oath. [But in modern practice, both civil and criminal, their testimony is generally admitted *quantum valeat*, subject to a certain discretion in the judge; see *Robertson*, 19 July 1888, 15 R. 1001.] By our more ancient practice, women were inadmissible as witnesses; but the practice in that respect has changed, and, both in civil and criminal cases, female witnesses are admissible.

(2.) *From Mental Incapacity*.—All persons deprived of reason, whether idiots or furious persons, are inadmissible. But the testimony of a person subject to occasional fits of derangement will be admitted, *cum nota*, as to occurrences during a lucid interval, provided no fit of derangement have intervened between the fact sworn to and his deposition; [*Tosh*, 9 Dec. 1873, 1 R. 254; *Hume*, ii. 340; *Dickson*, §§ 1405, 1550.]

(3.) *From Infamy*.—The testimony of infamous persons, *infamia juris*,—i.e., by being convicted of crimes inferring infamy, was formerly inadmissible, and unless a pardon had been granted, infamy was a perpetual disqualification; *Black*, 22 Dec. 1815, F.C. But by 1 Will. IV. c. 37, § 9, where the party convicted had endured the punishment (unless the crime was perjury or subornation of perjury), he was not inadmissible by reason of his conviction. [And now, by 15 Vict. c. 27, no person is excluded from giving evidence by reason of having been convicted of or having suffered punishment for crime; but the right to examine witnesses on any point affecting their credibility is reserved.] Moral infamy, or bad moral character is no disqualification. The evidence of such witnesses, however, will be received *cum nota*. [See *Infamous*. As to atheists, see *Atheist*.]

(4.) *From Relationship, Connection, Legal Confidence, or Dependence*.—[Formerly] all who stood within those degrees of relationship to the party, which, in the case of a judge, would authorise a declinature, were incompetent witnesses for their kinsman, although they might be received against him. See *Declinature*. Husband and wife, however, were in no case allowed to bear testimony, even against each other, except in criminal prosecutions [for personal injury; *Muirhead*, 27 May 1886, 13 R. (J.C.) 52.] And it would rather seem that the evidence of children against their parents, and of parents against their children, was inadmissible, unless in the case of domestic crimes or occult facts; the principle being,

that unless the ends of justice absolutely required it, a witness was never to be placed in a situation where he might be tempted to commit perjury. Natural children were not, in law, recognised as the children of their reputed father; but an objection to their testimony, on the ground of actual relationship to the party adducer, [was in some instances sustained.] Tutors and curators were [at one time] inadmissible as witnesses in favour of their wards; [but latterly this disqualification existed only] where they had an interest to prove acts and deeds done by themselves, or where they had taken an active part in the process in which they were proposed to be adduced. Attorneys or trustees who had not given partial counsel, and who had no personal interest in the action, were admissible for their constituents. The testimony of domestic servants and of tenants at will, in favour of their master or landlord, was formerly rejected on account of their supposed dependence; but such persons are now admissible witnesses. [By 3 & 4 Vict. c. 59, § 1, it was declared to be no objection to the admissibility of any witness that he or she is the father or mother, or son or daughter, or brother or sister by consanguinity or affinity, or uncle or aunt, or nephew or niece, by consanguinity, of any party adducing such witness; nor is it competent to any witness to decline to give evidence on the ground of any such relationship. And by 16 Vict. c. 20, § 3, it was made "competent to adduce and examine as a witness in any action or proceeding in Scotland any party to such action or proceeding, or the husband or wife of any party, whether he or she shall be individually named in the record or proceeding or not; but nothing herein contained shall render any person, or the husband or wife of any person, who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, his wife or her husband, excepting in so far as the same may be at present competent by the law and practice of Scotland, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any proceeding render any husband competent or compellable to give against his wife evidence of any matter communicated by her to him during the marriage, or any wife competent or compellable to give against her husband

[evidence of any matter communicated by him to her during the marriage." But this enactment does not extend to revenue cases; 19 & 20 Vict. c. 56, § 43; see also *Dodsworth*, 15 Dec. 1886, 14 R. 238. A wife's evidence was held inadmissible, in a prosecution under the Public Houses Acts, in *Morrison*, 3 June 1887, 14 R. (J.C.) 28. Breach of interdict not being a criminal proceeding, the respondent in a complaint therefor is a competent witness; *Miller*, 9 July 1879, 6 R. 1215. By 16 Vict. c. 20, § 4, it was declared that the act should not "apply to any action, suit, or proceeding instituted in Scotland in consequence of adultery, or for dissolving any marriage, or for breach of promise of marriage, or in any action of declarator of marriage, nullity of marriage, putting to silence, legitimacy, or bastardy, or in any action of adherence or separation." This last section, however, was repealed by § 1 of the act 37 & 38 Vict. c. 64; which further enacted (§ 2) that "the parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding; provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery." (See *infra*, p. 414 a.) But by § 3, "nothing in this act contained shall be construed to alter or affect the law of Scotland in force at and prior to the passing of this act relating to the proof of a promise of marriage in any action of declarator of marriage founded upon promise of marriage, *cum copula subsequente*." By § 5 of 16 Vict. c. 20, the adducing of a party as a witness by the adverse party has not the effect of a reference to oath; but a party who has examined the opposite party as a witness cannot thereafter refer the cause, or any part of it, to his oath. By 19 & 20 Vict. c. 79, §§ 90, 91, the wife of a bankrupt may be examined, and is bound to answer all lawful questions relating to the affairs of the bankrupt. See *Sawers*, 17 Dec. 1858, 21 D. 153. In prosecutions under the Criminal Law Amendment Act, 1885, the accused persons, and their husbands or wives, are competent but not compellable witnesses; see *supra*, p. 258.]

(5.) *From Agency and Partial Counsel, or being Ultraneous.*—Witnesses who had

given partial counsel, *i.e.*, who had instigated the plea, or advised with the party or his agents as to the method of conducting it, or been present at consultations, were [formerly] objectionable. The [later] practice in this respect was not, however, so rigid as the older practice was, the course being rather to admit the witness *cum nota*. [Formerly,] advocates and agents, generally speaking, could not be witnesses for their clients in the causes in which they were employed; but they might be witnesses for the same party in other causes. They are still incompetent witnesses against their clients to prove confidential communications; and, on the same principle, as well as on account of the object of the communication, a clergyman to whom a prisoner has confessed a crime, in order to obtain spiritual consolation, cannot be called as a witness to disclose what has been so communicated to him; but similar confessions to other confidential persons, such as surgeons or physicians, or intimate friends, may be proved by the testimony of such persons. Ultraneous witnesses—*i.e.*, witnesses who offer their testimony without being regularly cited—were [at one time] inadmissible; but this objection [latterly] only affected their credibility; and, at any rate, it was competent to remove the objection, by giving the witness a citation at any time before he was sworn, even after he had come into court to be examined; *Tait*, 369. And in criminal trials it was declared by 9 Geo. IV. c. 29, to be no longer competent to state any objection to a witness on the ground of his having been irregularly cited, or having appeared without citation, provided his designation is correct in the list of witnesses served on the panel. [By 15 Vict. c. 27, § 1, no witness shall be excluded by reason of agency or of partial counsel, or by reason of having appeared without citation; the right to examine on any point affecting credibility being reserved. A proviso, however, declares that "it shall not be competent to adduce as a witness in any action or proceeding any person who shall at the time when he is so adduced as a witness be acting as agent in the action or proceeding in which he is so adduced, excepting in so far as the same may be competent by the existing law and practice of Scotland." But this proviso was repealed by 16 Vict. c. 20, § 2. By § 4, the latter act was declared to have no application to consistorial actions; but this section was repealed by 37 & 38 Vict. c. 64, § 1, except in so far as it relates to the proof of a

[promise of marriage in a declarator founded on promise *subsequente copula* (§ 3). It is only in such a declarator, therefore, that the evidence of the agent conducting the cause is now inadmissible. By 15 Vict. c. 27, § 1, "where any person who is or has been an agent shall be adduced and examined as a witness for his client, touching any matter or thing, to prove which he could not competently have been adduced and examined according to the existing law and practice of Scotland, it shall not be competent to the party adducing such witness to object, on the ground of confidentiality, to any question proposed to be put to such witness on matter pertinent to the issue." See *Confidentiality. Partial Counsel*.]

(6.) *From Interest*.—A person having any present interest in the issue of the cause, or whose character might be affected by his testimony, was [formerly] inadmissible as a witness. [But no witness is now excluded on the ground of interest; 15 Vict. c. 27, § 1.] In criminal cases, a *socius criminis* is admissible as a witness against those concerned along with him in the commission of the offence; commonly, however, with a reservation as to his credibility; and the mere act of calling such a person as a witness liberates him from all future prosecution on account of his accession to that offence. [See *Accomplice*.]

(7.) *From Enmity*.—Enmity to the party against whom the witness is adduced, if substantial, arising from injury done or attempted, and not merely inferred from expressions of ill-will, [was also a ground of disqualification. In criminal trials, inveterate enmity against the panel would probably still be held a sufficient reason for rejecting a witness for the crown; see *Enmity to Panel*. But in other cases, this objection would now be regarded as merely affecting the credibility of a witness.]

(8.) *From Bribery and Instructing how to Depone*.—A witness, otherwise unobjectionable, will be disqualified if the party adducing him has given, or promised or offered him, a reward or bribe for his testimony; or if he has tutored or instructed him as to what he is to swear; and this disqualification will operate, *in odium corruptentis*, even where the bribe has been refused and the instructions disregarded. Although, therefore, a party is fully entitled, before citing a witness, to question him as to his knowledge of the facts in dispute, yet care should be taken to avoid anything which may bias or embarrass the witness in giving his testimony.

Where a witness, as sometimes happens, has emitted a deposition which has been committed to writing, or where he has subscribed any written account whatever of the transaction concerning which he is again to be examined as a witness; before deponing of new he may require that his former deposition or declaration shall be cancelled, although, even if it were not cancelled, it never could be used against him, or appealed to as discrediting his subsequent testimony. It may disqualify the witness altogether if, before his re-examination, his previous written statement or deposition be shown to him. [The precognosing of witnesses in the presence of each other may lead to their exclusion, if done from a corrupt motive, or even if done without improper intention, where the matter in issue is of a delicate nature; and in any case it will affect their credibility. It is now no ground of exclusion, that a witness has been precognosed after citation; 15 Vict. c. 27, § 1. See *Precognition*. Presence in court during the examination of another witness was formerly an absolute disqualification, except in the case of scientific witnesses; but by 3 & 4 Vict. c. 59, § 3, "it shall not be imperative on the court to reject any witness against whom it is objected that he or she has, without the permission of the court, and without the consent of the party objecting, been present in court during all or any part of the proceedings; but it shall be competent for the court, in its discretion, to admit the witness, where it shall appear to the court that the presence of the witness was not the consequence of culpable negligence or criminal intent, and that the witness has not been unduly instructed or influenced by what took place during his or her presence, or that injustice will not be done by his or her examination."]

(9.) *From Indigence*.—Witnesses who were not worth the *king's un-law*, as it was termed,—that is, £10 Scots (16s. 8d.),—were, by our former practice, inadmissible; but such an objection would not now be listened to.

Several of the disqualifications here enumerated, particularly those founded on relationship, agency, dependence, and the like, were sometimes disregarded in cases of occult or private facts, where there was a *penuria testium*, especially in the case of occult or domestic crimes, the witnesses thus admitted being received *cum nota*—i.e., with a certain degree of suspicion of

their credibility. Objections to the admissibility of a witness ought to be stated before he deposes. They were [formerly] usually proved by the examination of the witness himself in *initialibus* (see *infra*); but they may also be proved by other unexceptionable witnesses, either instantly adduced, or (if reprobators have been protested for) examined afterwards in a process of reprobator, of which process, however, there is no recent example. See *Reprobator*. See, as to admissibility of witnesses, *Stair*, B. iv. tit. 43, § 7; *Bank*, B. iv. tit. 30, § 5; *Ersk.* B. iv. tit. 2, § 22; *Tait*, 342; *Hume*, ii. 339; [*Bell's Princ.* § 2237; *Dickson*, § 1542; *Kirkpatrick*, § 161; *Alison's Prac.* 432; *Macdonald*, 714.]

2. In what manner Evidence is taken.—Parole evidence in the Court of Session [may be taken in three different ways:—(1) Before a judge and jury; (2) Before a judge alone; (3) Before a commissioner appointed by the court. The ordinary mode of proof is before a judge alone. Proof before a jury, and proof by commission, are used only in cases where these modes are specially appointed or permitted by statute. See *Proof. Jury Trial. Commission*.] Witnesses are compelled to appear to give their testimony, by letters of diligence issuing under warrant of the court; in virtue of which, in case of contumacy, the witness may be imprisoned. See *Diligence*. On his appearance before the judge or commissioner, and the counsel and agents for the parties, the witness is sworn in these terms to tell the truth: "I swear by Almighty God, and as I shall answer to God at the great day of judgment, that I will tell the truth, the whole truth, and nothing but the truth, in so far as I know and shall be asked in this cause." [But see *Affirmation. Oath*. Children under twelve years are never sworn, but are admonished to tell the truth. Children between twelve and fourteen may take the oath, but only if the judge is satisfied that they understand its nature; *Dickson*, § 1549. Before a witness was examined in relation to the cause, it was formerly the practice] to interrogate him in regard to his disposition towards the parties; whether he bore malice or ill-will to either of them; whether he had been instructed what to say, and had undertaken to give his evidence accordingly; whether he had received any bribe or reward for what he was to say, or had been promised any reward. [This was called examination in *initialibus*; it is now unnecessary, and rarely resorted to, though

[still competent; 3 & 4 Vict. c. 59, § 2.] The witness is then examined in the cause by the counsel or agent of the party by whom he is adduced, subject to the cross questions of the other party, after his examination in chief is concluded. [And the party against whom he is produced may examine him, not in cross only, but *in causa*; 3 & 4 Vict. c. 59, § 4. "The counsel who begins the examination of a witness shall continue that examination throughout, without interruption from any quarter (unless when an objection is taken to the legality of the question), until he exhaust the examination. After this, a counsel on the opposite side may cross-examine without interruption, until he exhaust his cross-examination. Then the counsel who first examined in chief may re-examine, confining his re-examination strictly to such new matter as may have arisen in cross-examination, unless with permission of the court;" A.S. 16 Feb. 1841, § 28. These rules were enacted in reference to jury trials in civil causes, but they are generally observed also in criminal trials and in proofs before a judge or commissioner.] It is a general rule that leading questions, or such as have a tendency to suggest to the witness the answer expected from him, or to instruct him as to the answer he should give, are not allowed. Thus, it is not permitted, with the view of proving a conversation, to mention to the witness a particular expression, and ask whether it was used. [But this rule is strictly applied only in that part of the examination which is material, and not, in modern practice, to cross-examination; *Mure*, 22 Nov. 1858, 3 Irv. 280; *Dickson*, §§ 1771-4. A witness may be examined as to whether he has, on any specified occasion, made a statement on any matter pertinent to the issue different from the evidence given by him in the cause; and evidence may be led in proof of such different statement; 15 Vict. c. 27, § 3. But a foundation must be laid for such proof by specifically interrogating the witness as to the alleged statement. See *Gall*, 23 Nov. 1870, 9 Macph. 177; *Robertson*, 27 Feb. 1874, 1 R. 532. A witness may be recalled after examination; 15 Vict. c. 27, § 4.] The witness under examination is bound to answer all pertinent interrogatories, the answers to which do not tend to criminate himself, or to involve him in any criminal charge inferring infamy; and he is not entitled to decline answering a question merely because the

answer may infer against him fraud or damage. [By 37 & 38 Vict. c. 64, § 2, no witness is liable to be asked, or bound to answer, any question tending to show that he has been guilty of adultery, unless he has already given evidence in the same proceeding in disproof of his alleged adultery. This provision is solely for the protection of the witness; and if he is willing to answer, no objection can be made; *Kirkwood*, 9 Dec. 1875, 3 R. 235. But it is the duty of the judge to prevent criminating questions being put, so as to save the witness from the necessity of declining to answer, unless he volunteers; *Cook*, 4 Nov. 1876, 4 R. 78; but see *Bannatyne*, 25 Feb. 1886, 13 R. 619. As to the duty of a commissioner, when such questions are proposed to be put, see *Muir*, 14 March 1873, 11 Macph. 529. For the general rules as to examination of witnesses, see *Dickson*, §§ 1760 *et seq.*; also *Jury Trial. Proof*. As to the examination of aged and infirm witnesses, see *Commission*. The leading of evidence in civil causes in the sheriff court is regulated, for the most part, in the same way as in the Court of Session; *Dove Wilson's Sher. Court Prac.* 175. In the Court of Justiciary evidence is always taken before a judge and jury; see *Criminal Prosecution*; also *Alison's Prac.* 392; *Macdonald*, 482.]

3. *On what points Parole Proof is admitted.*—Contracts in regard to land (except leases for one year), or the borrowing of money, or contracts where it is *pars contractus* that they shall be reduced to writing, cannot be established by parole evidence. [But see *Servitude. Rei Interventus*.] Contracts of sale, barter, and location of moveables, and, in general, all contracts with known prestations in regard to moveable subjects, however valuable, may be proved by witnesses, except contracts for the transference of ships, or of goods in a bonded warehouse, in the actual possession of the owner, and for the conveyance of a copyright, which, by special statutes, require writing. [The proof of an innominate contract is not restricted to writ or oath, unless the stipulations are of an unusual and extraordinary character; *Forbes*, 20 July 1877, 4 R. 1141; *Downie*, 5 Dec. 1885, 13 R. 273. In *Stewart*, 2 Feb. 1882, 9 R. 501, it was held that a contract to pay a share of the rent and expenses of a shooting held under lease could only be proved by writ. See *Reid*, 8 June 1887, 14 R. 789.] Verbal submissions and decrees-arbitral are not, in

the ordinary case, proveable by witnesses; but in matters of small importance they have been admitted to be proved by parole testimony. See *Arbitration*. [As to transactions or compromises, see *Transaction*.] Marriage, that is, the exchange of mutual consent *de presenti*, or cohabitation, or habit and repute, may be proved by witnesses. [And a promise of marriage may be proved *prout de jure*, or inferred from a course of conduct and correspondence; *Murray*, 4 July 1861, 23 D. 1243. But in order to establish a marriage by promise *subsequente copula*, the promise must be proved by writ or oath; *Fraser on Husb. and Wife*, i. 386.] Nuncupative legacies to the extent of £100 Scots (£8, 6s. 8d. sterling), or onerous verbal agreements to the same amount, may also be proved by witnesses; but this description of evidence is inadmissible to prove gratuitous promises, however small the sum. The fact that a conveyance of heritable property, or of rights of a personal nature, such as assignations of debts due by bond and the like, was made in trust, is, by express statute, proveable by writ or oath of party, and not otherwise; 1696, c. 25. But the statute has been held not to apply to trust in the *ipsa corpora* of moveables. [See *Trust*. By 19 & 20 Vict. c. 60, § 6, all guarantees, securities, or cautionary obligations must be in writing. See *Cautionry*.] See *Ersk.* B. iv. tit. 2, § 20, and B. i. tit. 6, § 5; *Stair*, B. iv. tit. 43, § 4; *Bank*, B. i. tit. 18, § 12; B. iv. tit. 29, § 10; tit. 30, § 1; *Tait*, 295; [*Bell's Princ.* § 2257; *Dickson*, § 543; *Kirkpatrick*, § 140.]

Parole evidence will not be admitted to extinguish or qualify an obligation constituted by writing. Thus, the payment of the whole, or of any part of the contents of a bond for borrowed money, is not proveable by witnesses. But implement of a written obligation to perform special facts,—*e.g.*, to deliver a quantity of grain, to build a bridge, a ship, or the like,—may be proved by witnesses. Payments of debts under £100 Scots, or, if the whole debt be more, a payment not exceeding that sum, may be proved in the same manner, [where the debt is not constituted by writ; A.S. 8 June 1597.] But in whatever way the debt may be constituted, its extinction beyond £100 Scots can be proved by writ or oath of party only, and not by witnesses. A payment exceeding £100 Scots, however, may be proved by parole evidence, where the payment is made

unico contextu with the bargain, as in the case of purchases in public market, paid for on the spot, or even after an interval, where the payment is made on delivery of the article. Erskine seems to consider parole evidence admissible to prove the creditor's renunciation of, or consent to pass from, an obligation not constituted by writing; but, except to the extent of £100 Scots, this doctrine seems questionable; see *Ersk. B. iii. tit. 4, § 8*; [*Dickson, § 629*. Where a deed is sought to be reduced on the ground of fraud or essential error, these may be proved *prout de jure*. See *Ferguson, 22 Jan. 1880, 7 R. 500*. In *Welsh's Trs. 18 March 1885, 12 R. 851*, parole was admitted to instruct an averment that an acknowledgment of receipt of money on loan meant receipt on behalf of another. As to how far a written lease may be modified by a verbal agreement followed by *rei interventus*, see *Kirkpatrick, 17 Dec. 1880, 8 R. 327*, and cases there commented on.] On the subject of parole evidence generally, see *Stair, B. iv. tit. 43, § 4*; *Bank. B. iv. tit. 27, § 10*; *Ersk. B. iv. tit. 2, § 21*; *Tait, 336*; *Bell's Com. i. 335*; *Hunter's Landlord and Tenant, i. 366, 381*; *Macfarlane's Jury Prac. 196*; [*Dickson, §§ 543, 1015*; *Kirkpatrick, § 135*.] See *Payment. Discharge*.

4. *Of the Nature and Effect of Circumstantial and Presumptive Evidence.*—Circumstantial evidence, or indirect proof, may be resorted to in certain cases where direct proof cannot be obtained; but where other facts are proved or admitted, having relation to the fact sought to be established, and from which the existence of that fact may be inferred, the conviction produced by this description of evidence is sometimes even stronger than that arising from the most direct testimony; for the facts and circumstances sworn to may be so connected, and, at the same time, may contribute so effectually to establish the fact inferred from them, as to remove all suspicion of collusion amongst the witnesses, which is not always the case where direct testimony is adduced. So great, indeed, is the force of circumstantial evidence, that payment, performance, or discharge, of formal written obligations, has been frequently held to be proved by facts and circumstances, without any direct proof of the extinction of the obligation; and, upon the same principle, although circumstantial evidence will not be received to qualify an express clause or stipulation in a deed, yet such evidence has in some

instances been admitted to overcome the legal inference arising *ex facie* of a formal deed. Thus, in a question between two co-obligants in a bond, facts and circumstances have been admitted to prove that, notwithstanding the terms of the bond, one of the co-obligants was only a cautioner for the other; *Smollet, 1793, M. 12354*. For further illustration of the weight attached to this species of evidence, see *Stair, B. iv. tit. 45*; *Ersk. B. iv. tit. 2, § 34*; *Hume, ii. 384*; *Tait, 434*; [*Dickson, § 65*.] See also *Circumstantial Evidence*.

In connection with circumstantial evidence, it may be observed, that the law of Scotland recognises certain presumptions founded on general conclusions, established by practice or statute, or deducible from the ordinary inferences of common sense; [as to which see *Presumptions*.]

II. *Of the Oath of Party.*—The oath of party may be taken either upon a reference by the opposite party, or by order of the judge.

1. *Oath on Reference of Opposite Party.*—[Prior to the statute 16 Vict. c. 20, this was the only way in which a party could obtain the testimony of the opposite party in the cause. That act, while it removed the party's disability to give evidence as a witness, declares, by § 5, that the right of reference to oath shall remain as formerly, except that a party who has examined the opposite party as a witness cannot thereafter refer the cause, or any part of it, to his oath. Reference is also incompetent, when a party has been adduced as a witness for himself, and cross-examined by his opponent; *Macleay, 8 July 1876, 3 R. 999*. But see *Dewar, 27 Feb. 1866, 4 Macph. 493*; *Swanson, 3 Dec. 1870, 9 Macph. 208*.] Where the opposite party refers the fact at issue to his adversary's oath, and the oath so given is explicit, it is decisive of the cause. This arises, not from the superior weight attached to this species of evidence, but is founded on the judicial contract between the parties, whereby the referrer is held to have bound himself to allow the cause to be decided on the evidence of his antagonist. So binding, indeed, is this contract held to be, that no evidence whatever is admissible to impugn the testimony of the party to whom the reference is made. Even direct proof that he has forsworn himself, although it might serve to convict him in a criminal prosecution for perjury, will not affect the decision of the civil action, which must be determined by the import of his

oath. But in such a case, the private party who made the reference might, with the requisite concurrence of the public prosecutor, insist in a criminal prosecution for the pains of law, with the damages and expenses he has suffered by the perjury; *Hume*, i. 373; *Stair*, B. iv. tit. 44; *Bank*. B. iv. tit. 32; *Ersk.* B. iv. tit. 2, § 8; *Tait*, 217.

Where the oath of the party is not precise or decisive, or where it contains matters foreign to the point at issue, questions of great nicety arise as to what are called *intrinsic* and *extrinsic* qualities in the oath. In general, where the qualification cannot be separated from the fact sworn to, it will be held as an intrinsic quality. Thus, if the fact that a party promised to pay a certain sum of money be referred to his oath, and he swear that he made the promise conditionally, and that the condition has not been purified, the condition cannot be separated from the promise, and will therefore be accounted an intrinsic quality in the oath. Where, on the other hand, the fact of the existence of a debt is referred to the oath of a party, and he swears that the debt is due, but that he has a counter claim which extinguishes it by compensation, the counter claim so stated will be held an extrinsic quality; because compensation, although a valid defence, must be established otherwise than by the oath of the party who pleads it; hence, it cannot be admitted to qualify an oath which distinctly admits the existence of the debt. The decision of questions of this kind, however, necessarily depends upon the true meaning and extent of the reference, which must be ascertained by an accurate discrimination of the facts which the party referring intends, or is bound by this mode of procedure, to peril on the good faith of his adversary. [Where a debt not constituted by writing is referred to the oath of the defender, and he admits the constitution of the debt, but alleges payment, "the quality of payment adjoined to the oath is intrinsic, and so ought to be deemed part of the oath;" *Ersk.* B. iv. tit. 2, § 13; *Newlands*, 16 Dec. 1885, 13 R. 353. In an action for payment of a prescribed account, the constitution and subsistence of the debt having been referred to the oath of the defender, he admitted the constitution of the debt, but deponed that it had been settled by the creditor subsequently agreeing to accept in payment certain outstanding accounts due to the defender by his customers. The quality was held intrinsic, and the oath negative; *Cowbrough & Co.*

[18 July 1879, 6 R. 1301. Lord Deas (p. 1312), after reviewing previous decisions, laid down the following propositions in regard to oaths of reference under the act 1579, c. 83 (triennial prescription):—"1st, That if the oath bear that some other mode of satisfaction or extinction than payment in money was stipulated or bargained for at the contraction of the debt, that other mode, if the debtor swears it was acted on, will be a competent and intrinsic quality of the oath, although not made the subject of subsequent agreement. 2d, That if the debtor depones to an express subsequent agreement to hold the debt satisfied or extinguished by some other specific mode than payment in money, that other mode will be a competent and intrinsic quality of the oath, although not stipulated for when the debt was contracted. 3d, That an express subsequent agreement to forgive the debt, in whole or in part, deponed to by the debtor, will in like manner be intrinsic, and receive effect accordingly, because, so far as thus deponed to, the debt cannot be said to be resting owing." But "compensation, if not sworn to have been sanctioned and agreed to by the creditor, will be extrinsic, because compensation usually involves matter of law, and although the deponent may establish any relevant matter of fact by his own oath, he cannot thereby establish matter of law." See also, as to intrinsic and extrinsic qualities, *Thomson*, 10 July 1855, 17 D. 1081; *Gordon*, 24 Feb. 1860, 22 D. 903; *Cooper*, 28 Nov. 1877, 5 R. 258;] and *Ersk.* B. iv. tit. 2, §§ 11-14; *Stair*, B. iv. tit. 44, § 14; *Bank.* B. iv. tit. 32, § 16; *Tait*, 240; [*Kames' Eluc.* art. 25; *Dirleton's Doubts* voce Qualified Oath; *Bell's Com.* i. 350; *Bell's Princ.* § 2268; *More's Notes to Stair*, ccccxviii.; *Dickson*, § 1505. See *Admissions*.]

Reference to oath of party is not admissible to supply the want of public instruments required as solemnities, such as instruments of sasine, of requisition, and the like. In like manner, where matters are entire, the want of writing in transactions concerning the titles to heritable subjects, including leases exceeding one year's endurance, cannot be supplied by oath of party. Writing is also indispensable, and not to be supplied by oath of party, in the nomination of an executor; but verbal legacies to any amount are good, if admitted by the party liable to pay them, and may be proved by reference to his oath, although not by witnesses, if they

exceed £100 Scots; *Ersk.* B. iii. tit. 9, § 7. Where there are manifest errors or inaccuracies in a deed, its contents may be overruled or controlled by oath of party; [*Sinclair*, 1 July 1869, 7 Macph. 934.] But it seems more doubtful whether a cause or obligation can, on such evidence, be added to a finished written agreement; *Tait*, 225. In almost all cases, however, in which writing is essential to bind the parties, they will be bound without it, if there have been a *rei interventus*, or performance, total or partial, by either party, on the faith of the contract; and after such a *rei interventus*, the contract, if denied, may be proved by oath of party, and in some cases even by witnesses. Thus, a *rei interventus* has been held sufficient to supply the want of writing, both in leases exceeding a year, and in sales of heritage—in the constitution of servitudes—in submissions concerning heritage—in agreements where writing was *pars contractus*—and the like; not, however, in sales of ships, even although the price had been paid, and possession given—writing being in that case a statutory requisite; *Tait*, 227; *Stair*, B. iv. tit. 44, § 5; *Ersk.* B. iv. tit. 2, § 9. [Reference to oath is incompetent on matters of law; but see *Anstruther*, 31 Jan. 1856, 18 D. 405; *Kirkpatrick*, 20 July 1864, 3 Macph. 1396.]

In criminal prosecutions, a party cannot be required to swear upon a reference to his oath in any matter in which his confession of guilt would infer infamy or personal punishment; [*Conacher*, 1 March 1859, 21 D. 597.] But in all criminal prosecutions concluding for fine only, or restricted to that by the prosecutor, the defender may be required to swear on a reference to his oath. In criminal cases it seems to be incompetent for the accused to refer the truth of the charge generally to the oath of the prosecutor, public or private, this being a species of contract on the panel's side hardly reconcileable with the principles of criminal jurisprudence; *Hume*, ii. 336, 403; [*Cameron*, 5 Dec. 1853, 1 Irv. 316.] In civil actions, reference to oath is excluded in all cases of an infamous nature, such as theft, swindling, and the like, and even in cases which, although not infamous, may, if prosecuted criminally, involve the party in personal punishment. [It is competent in actions of filiation; *Cameron*, 28 June 1851, 13 D. 1256.] See *Stair*, B. iv. tit. 44, § 5; *Bank.* B. iv. tit. 32, § 4; *Ersk.*

B. iv. tit. 2, § 9; tit. 4, § 94; *Tait*, 233; [*Dickson*, § 1427.]

The reference to oath is a bar to any new process upon the same interest and cause of action, but will not affect third parties who have not sanctioned it. [See *Longworth*, 30 July 1867, 5 Macph. (H.L.) 144.] To this rule there is an exception in the case of arrestments; for the arrestee may refer his defence against the arrester, to the oath of the common debtor; and by that oath the arrester will be bound; *Ersk.* B. iii. tit. 6, § 16. [Reference to the oath of a sequestrated bankrupt is incompetent, as he is absolutely divested by sequestration; *Adam*, 29 Jan. 1847, 9 D. 560; *Thomson*, 10 July 1855, 17 D. 1081. These cases overrule the opinion of Professor Bell in *Com.* i. 351; ii. 329. In the case of a creditor proposing to refer to the oath of a debtor who has granted a trust-deed for behoof of his creditors, "the proper course seems to be to refuse the oath, unless there is reason to expect a surplus after paying the debts;" *Dickson*, § 1481. Reference can only be to the oath of a person having interest in the matter; *M'Nab*, *infra*; *Farquhar*, 23 Feb. 1886, 13 R. 596.] The admission of one co-obligant or co-creditor, on a reference to his oath, does not bind the others; nor will the other co-obligants or co-creditors be bound by the deposition, in a reference made to oath by one of their number. But the rule appears to be different as between principal and cautioner; for the cautionary obligation, being merely accessory, must stand or fall with the principal obligation, and, consequently, may be affected either by the oath on reference, or by the reference to oath, made by the principal debtor; *Tait*, 258. The oaths on reference of trustees and managers for others, or the references to oath made by them in matters within their administration, bind their constituents; *e.g.*, the oaths or references of [tutors bind their pupil wards, though minors *pubes* do not appear to be bound by the oaths of their curators;] the oaths of wives *prepositæ rebus domesticis* bind the husbands; [*Mitchell*, 16 Dec. 1882, 10 R. 378;] the oaths of magistrates, although *functi officio*, to prove contracts made by them while in office, bind the corporation; and the like. [In general, a partnership debt cannot be referred to the oath of one of several partners; *M'Nab*, 10 March 1843, 5 D. 1014; *Broom*, 31 May 1843, 5 D. 1087. But if the whole business transactions have been entrusted to one of

[the partners as general manager, his oath will bind the other partners; *Gow*, 27 Feb. 1827, 5 S. 472; *Cleland*, 22 Jan. 1851, 13 D. 504.] The assignee, until intimation of the assignation, will be bound by the cedent's oath; but, after intimation, the cedent's oath is inadmissible to prove compensation, payment, or any other direct defence against the debt; [*Campbell*, 13 Dec. 1860, 23 D. 159;] except—1st, Where the assignation has been gratuitous, or in trust for the cedent; 2d, Even where the assignation is onerous, if it have been made after the subject of it has become litigious by an action (not a mere citation), at the instance of the debtor against the cedent, on the same grounds on which the debtor afterwards disputes the assignee's claim; 3d, If the assignee have followed out diligence commenced in name of the cedent; 4th, If compensation against the cedent have been proved *scripto*, and the assignee pleads recompensation in the person of the cedent, the cedent's oath is admissible against the assignee to elide the plea of recompensation—upon the principle that the ground of recompensation is still in the person of the cedent unassigned. [Where, as in the case of the sexennial and triennial limitations, proof is limited by statute to writ or oath of the debtor or party, reference to an agent or manager is incompetent; *Bertram*, 19 Dec. 1874, 2 R. 255.] See *Ersk.* B. iii. tit. 5, §§ 9, 10; B. iv. tit. 2, § 10; *Stair*, B. iii. tit. 1, § 18; B. iv. tit. 44, § 8; *Bank.* B. iii. tit. 1, § 25; B. iv. tit. 32, § 3; *Tait*, 258; [*Dickson*, § 1448.]

Where a reference to oath is proposed, the usual course is, for the party referring to put into process a minute of reference, which is seen, and, if necessary, answered, or objected to, by the opposite party; and the terms of the reference being finally adjusted and approved of by the judge, the deposition is taken in the ordinary manner, and the cause decided according to its import. [The deposition is taken by the Lord Ordinary in the cause, or by a judge of the Division, if the reference has been sustained by the Division; 29 & 30 Vict. c. 112, § 3. See *Proof*. In the sheriff court, the oath is taken by the sheriff; but if he cannot attend, or in any case of special emergency, he may appoint a commissioner; A.S. 10 July 1839, § 79. A party has no absolute right to refer to his opponent's oath: the court has a discretionary power to refuse the reference, if it would not aid the justice of the case; or to grant it on

[caution or consignment; *Pattinson*, 4 Dec. 1846, 9 D. 226; *Conacher*, 1 March 1859, 21 D. 597; *Aikman*, 24 Jan. 1868, 6 Macph. 277.] Reference to oath, where otherwise competent, may be made at any time before extract, and, according to some authorities, even after extract, if offered in a suspension. Such a reference is also admissible after a verdict in the Jury Court against the party referring, on account of his failure to prove his case; *Clark*, 20 Nov. 1819, F.C.; [*Conacher*, *supra*.] But after judgment, the reference must be either of the whole cause, or of a separate and distinct part thereof; *Sinclair*, *supra*, 7 Macph. 934. Reference is competent, though the parties have renounced probation; *Anstruther*, 31 Jan. 1856, 18 D. 405. In *M'Larens*, 3 July 1883, 10 R. 1067, opinions were expressed that it is incompetent to refer to oath of party a cause which has already been referred to the determination of a judicial referee or arbiter. When the case has been finally decided and is out of court, reference may be sustained on an incidental petition or note to the court; *Scott*, 22 Dec. 1831, 10 S. 174; *Winton & Co.* 10 June 1862, 24 D. 1094. In general, a reference may be retracted, at any time before the oath is sworn, on payment of expenses; but the court may refuse to allow it to be withdrawn, if the opposite party would be put to disadvantage; *Dick*, 17 Feb. 1876, 3 R. 449. See, on reference to oath generally, *Ersk.* B. iv. tit. 2, § 8; *Bell's Princ.* § 2263; *Dickson on Evidence*, § 1414; *Kirkpatrick*, § 197; *Fraser on Husb. and Wife*, i. 600, 628; ii. 1242; *Fraser on Parent and Child*, 139, 243, 339; *Murdoch on Bankruptcy*, 53; *Goudy on Bankruptcy*, 165; *Shand's Prac.* i. 387; *MacKay's Prac.* ii. 28, 199, 250; *M'Glashan's Sher. Court Prac.* § 1333; *Dove Wilson's Sher. Court Prac.* 280.]

2. *Oaths required by the Judge.*—The oaths of this description are the oath in supplement and the oath in *litem*. The oath in supplement is admitted to supply deficiencies in legal evidence, where the party whose oath is allowed has brought what is called a *semplena probatio*. The ordinary cases in which such an oath is admissible are those in which the oath of a merchant, in supplement to regularly kept books, is admitted to prove furnishings made by him; or where, in questions of filiation, the oath of the mother of an illegitimate child is admitted to establish the paternity, provided she has been enabled,

by other evidence, to prove such intimacy or familiarity between herself and the putative father, as raises not a suspicion merely, but a reasonable belief that illicit intercourse must have taken place within the requisite time. As, however, oaths in supplement do not rest on any implied contract between the litigants, they may be redargued by contrary proof afterwards discovered, or the cause may be brought under review of a superior court, on the ground that the oath ought not to have been allowed; *Ersk. B. iv. tit. 2, § 14; Tait, 273; [Dickson (2d ed.), § 1515; Shand's Prac. i. 401; Mackay's Prac. ii. 28.* The effect of the admission of parties as witnesses, by 16 Vict. c. 20, has been practically to abolish the oath in supplement; see *M'Bayne*, 10 Feb. 1860, 22 D. 738. But it is still competent; *Scott*, 2 Dec. 1856, 19 D. 119; *M'Kellar*, 8 Feb. 1862, 24 D. 499.] See *Semiplena Probatio*.

The oath *in litem* is the oath of the pursuer of an action as to the amount of the loss or damage which he has sustained through the defender; and it is admitted only in two classes of cases: 1st, Where there is full proof that the defender has been engaged in some illegal act, as *spuilzie*, or the like; and, 2dly, In the case of losses which a party is entitled to recover under the edict *Nauta, caupones, stabularii*. In either case the oath *in litem* is conclusive as to the quantities lost; but, in so far as regards the price or value put on the articles, it is subject to modification by the court. [See *Craucour*, 30 July 1842, 5 D. 10; *Gowans*, 6 Feb. 1844, 6 D. 606. Since the admission of parties as witnesses, this oath also is of rare occurrence.] See *Ersk. B. iv. tit. 2, § 18; B. iii. tit. 1, § 29; Stair, B. iv. tit. 44, § 4; Bank. B. i. tit. 10, § 133; tit. 16, § 1; B. iv. tit. 32, § 11; Tait, 279; [Bell's Com. i. 501; Bell's Princ. §§ 212, 242; Dickson (2d ed.), § 1506; Shand's Prac. i. 402; Mackay's Prac. ii. 28; M'Glashan's Sher. Court Prac. § 1386.]*

Where a party has been required to give his oath, either on reference or by the judge, the requisition is made under the certification that, in default of his appearing to make oath, or on his declining to swear, he shall be held as confessed; that is, his failure to appear, or his silence, will be deemed equivalent to an acknowledgment, on oath, that the fact, as stated by the other party, is correct. For this purpose, however, it is necessary that the party who is to swear shall have been regularly

cited either *apud acta* (i.e., by the judge notifying the day to him in court), or by a messenger-at-arms. See *Citation*. If the party appear and swear *non memini* to a fact so recent that he cannot be supposed to have forgotten it, that will be held equivalent to a refusal to swear, and he will be held as confessed. *Ersk. B. iv. tit. 2, § 14; Tait, 287, 240; [Dickson, § 1499.]*

Besides the oaths already mentioned, the law sanctions or requires several judicial or voluntary oaths, affidavits, and declarations of parties:—

1st, The oath of calumny, as known in our older practice, was a declaration upon oath by a party, on the requisition of his adversary, of his belief in the truth of the averments on which his plea rested. See *Calumny, Oath of*.

2d, The bankrupt statute requires from the bankrupt and those connected with his affairs, and from the creditors, sundry affidavits, oaths of verity and credulity, and other declarations upon oath, as to which, and all similar statutory oaths or affidavits, it may be observed that, except against the deponents themselves, they are not legal evidence. The examinations upon oath of the bankrupt and others as to the state of his affairs, are in law regarded as mere inquisitorial investigations of the nature of a precognition; and it is only in the event of the death of the parties by whom they are made, that such depositions will be admitted even as adminicles of evidence. The affidavits and oaths of verity and credulity by creditors, again, can be viewed as nothing better than the solemn attestation of a party in his own favour, not as legal evidence where the claim is disputed. [See 19 & 20 Vict. c. 79, §§ 21–25, 90–95; *Savers*, 17 Dec. 1858, 21 D. 153; *M'Kay*, 24 Feb. 1863, 1 Macph. 440; *Bell's Com. ii. 291, 304, 329; Murdoch on Bankruptcy*, 49, 234, 257, 267; *Goudy on Bankruptcy*, 132, 166, 243, 450; *Dickson*, §§ 1575, 1718. See *Sequestration. Affidavit*.]

3d, Neither party can insist for a judicial examination of his adversary as matter of right, it being entirely in the discretion of the judge to admit it or not; and the declaration of a party on such an examination, although good evidence against himself, can, as against his opponent, be received as no more than the deliberate statement of a party. Such examinations are altogether incompetent,—(1) Where a reference to oath is intended, or is the only mode of proof competent in the circumstances of the

case; (2) Where writing is indispensable; and, (3) Where the facts, in regard to which the party is proposed to be judicially examined, are such as would infer personal punishment or infamy against him, if prosecuted criminally; *Gordon*, 22 Dec. 1809, F.C.; *Tait*, 291; [*Dickson* (2d ed.), § 1394. See *Declaration, Judicial*.]

4th, In criminal prosecutions, the voluntary declarations emitted by the accused in the course of a precognition, or before the libel has been served upon him, may be founded upon at his trial, and, taken along with the other evidence adduced, may contribute to his conviction. See *Declaration*.

Lastly, The admissions or confessions made by a party, either on a judicial examination or voluntarily in court, or even extrajudicially, if seriously made, may supersede the necessity of resorting to other evidence, all such admissions or confessions being good evidence against the party making them. From this rule are excepted admissions or confessions made in the course of extrajudicial communings for a settlement of the case; for it is presumed that a party is willing to make large concessions in order to avoid a law-suit; besides, were such communications to be taken advantage of, it might prove a serious obstacle to compromises. *Ersk.* B. iv. tit. 2, § 33; *Stair*, B. iv. tit. 45, §§ 5-8; *Bank.* B. iv. tit. 33, §§ 18, 19; *Tait*, 293; [*Dickson*, § 276. See *Admission. Confession. Transaction*.]

III. OF THE ORDER IN WHICH EVIDENCE IS TO BE RECEIVED; WITH SOME GENERAL RULES AS TO EVIDENCE.

The best evidence, and that to which a party ought first to resort in support of his plea, is a written deed. Where that does not exist, parole proof, where otherwise admissible, may be resorted to; and failing both of these, the party may, where such a mode of proof is competent, refer the point at issue to the oath of his opponent.

The following rules, applicable to the subject of evidence generally, may be of service:—

1. Neither judges nor juries can legally proceed upon their own private knowledge concerning matters of fact at issue before them; but are bound to decide solely according to the legal evidence judicially adduced. *Hume*, ii. 319.

2. The best evidence to be had in the circumstances must be adduced. Thus, it is incompetent to prove the contents of a

written document otherwise than by the document itself, if it be in existence; except in the case of extracts from public or judicial records, as already explained. [See *Thom*, 23 Nov. 1850, 13 D. 134; *Clark*, 30 Nov. 1860, 23 D. 74. Letters written by persons who may be examined as witnesses, are not evidence of the facts stated in them; *Livingstone*, 28 June 1860, 22 D. 1333.] And, on the same principle, *hearsay* evidence, generally speaking, is inadmissible; that is, where a fact or facts pertinent to the issue, and in the knowledge of a competent witness, are proposed to be proved, not by that witness himself, but by the evidence of one who heard him state them. To this rule there are exceptions,—(1) In a criminal prosecution, the dying declaration of the injured party as to the mortal injury, uttered in the prospect of death, is allowed to be proved by hearsay on a trial for his murder. (2) Even in civil cases, hearsay evidence is admitted where the statements of a competent witness, in relation to the matter at issue, are offered to be proved after his death, or after he has become insane. [See *Lauderdale Peerage*, 10 App. Ca. 692; *Lovat Peerage*, 10 App. Ca. 763.] (3) Hearsay is admitted in evidence where it forms part of the transaction which is the subject of inquiry. But where the transaction in question concerns words spoken (as in the case of defamation), and those words are attempted to be proved by a witness who was present and heard them, that plainly is not hearsay, as technically understood. See *Hearsay*. [*Res gestæ*.]

3. By the law of Scotland, no fact can be legally proved, and, in criminal cases, no conviction can follow, on the unsupported testimony of a single witness, however unimpeachable his credit may be. But where one witness swears distinctly to a fact, the want of a second witness to the same specific fact may be supplied by a witness to corroborative circumstances; and in cases of circumstantial evidence, two witnesses are not required to prove each circumstance of the same transaction. Nor, where a specific offence is charged, is it necessary to prove each reiterated act by two witnesses, unless where the acts have no connection with, or relation to each other. Thus if, in a prosecution for defamation, one witness swear that he heard the defender utter the slander, and another swear that he heard him use expressions of a similar import on a different occasion, that will amount to legal

proof; *Landles*, 18 July 1816, 1 Mur. 79. But if successive acts of uttering forged notes to different persons and in different places be charged, two witnesses to each act are requisite. *Hume*, ii. 382; *Tait*, 437; [*Bell's Princ.* § 2257; *Dickson*, § 1807.]

4. It is a trite rule in evidence, that a party cannot be required to prove a negative; but when evidence is adduced in support of the affirmative, such evidence may be rebutted by opposite proof, which is not properly proving a negative, but merely proving a proposition inconsistent with that which is affirmed.

5. Every member of the community, if legally capable, is bound to give evidence when required by competent authority; and peers as well as commoners, when examined as witnesses, must be sworn to tell the truth. [But any person conscientiously objecting to be sworn may make a solemn affirmation instead of an oath; and such affirmation has the same force and effect as an oath, and if false infers perjury. See *Affirmation. Oath.*]

6. Witnesses must be examined apart from each other; and examined must have no communication with unexamined witnesses, lest the latter should be biassed by hearing what the others have deposed. Neither, generally speaking, are unexamined witnesses permitted to be present in court, while the case is going on, or while objections to their admissibility, or to the competency of the questions proposed to be put to them, are under discussion; *Stair*, B. iv. tit. 43, § 18; *Tait*, 420; [*Dickson*, § 1760.

[As to the rate of allowance to witnesses for their attendance, see *Witness*.

[See *Dickson on Evidence* (3d edit. by Sheriff Hamilton Grierson); *Kirkpatrick's Digest*; *Tait on Evidence*; English treatises by *Taylor*, *Best*, *Starkie*, *Phillips*; *Stephen's Digest*; *Greenleaf on Evidence* (American); also *Stair*, B. iv. tits. 42 to 45; *More's Notes*, cccxcvi., cccxcix.; *Ersk.* B. iv. tit. 2; *Bell's Princ.* §§ 2205–2269; *Hume on Crimes*, vol. ii. chaps. 12–15; *Alison's Prac.* chaps. 13–16; *Macdonald*, 471.]

EVIDENTS; a word used by conveyancers as synonymous with writs or title-deeds, by which property is proved. See *Balfour's Practicks*, 187.

EWEST; nearest. The word is used in this sense in our older statutes. Thus the act 1572, c. 48, in regard to manse and glebes, provides that the manse "maist ewest to the kirk" shall pertain to the

minister or reader, "together with four acres of land of the glebe at least lyand contigue, or maist ewest to said manse, gif there be sa meikle." See *Glebe*.

EX OFFICIO; is a term applied to acts done by a functionary in virtue of his office, and not at the suit, or on the employment, of any other party. An *ex officio* information, in the law of England, is an information (analogous to a Scotch indictment) filed by the Attorney-General *ex proprio motu*, and without the intervention of any judicial authority. See *Tomlins' Dict. h. t.*

EX PARTE. In judicial proceedings a step is said to be taken *ex parte*, when the adverse party, either by neglect or refusal to appear, has not been heard, or has not stated his reasons why what is asked should not be granted. See *Absence. Default*.

EX POST FACTO; is a term used in law to signify something done in order to affect some right or demand, which had been brought into question before the *ex post facto* act or deed was done. An *ex post facto* law, is a law which operates retrospectively; as, for example, which imposes a penalty on an act or deed done before the law was enacted, and which act or deed, when done, was not penal or prohibited. This is an extraordinary remedy resorted to in extreme cases, and which seems to be justifiable only where the law so made is directed against some unquestionable moral wrong, which, from the infrequency of its occurrence, or from its enormity, may not have been hitherto made the object of legislation. *Tomlins, h. t.*

EX DELIBERATIONE DOMINORUM CONCILII. These words are annexed to all signet letters which pass the Royal Signet for Scotland, on bills presented at the Bill Chamber of the Court of Session; such as privileged summonses, letters of suspension, supplement, and the like, letters of horning on decrees of inferior judges, letters of caption and other diligences requiring bills. The words are subjoined to the signet letter immediately above the subscription of the writer to the signet. See *Bill. Bill Chamber*. See also *Stair*, B. iv. tit. 3, §§ 4 and 32; *Bank*. B. iv. tit. 27, § 9.

EXACTION; as understood in the law of England, is a wrong done by an officer or one in pretended authority, by taking a fee or reward which the law does not allow him. As contradistinguished from extortion, it is said to be an exaction when the officer wrests a fee or reward where none is due; whereas it is extortion, when, something

being due, the officer extorts more than he is entitled to. *Tomlins' Dict. h. t.*

EXAMINATION OF A PRISONER.

See *Declaration. Criminal Prosecution.*

EXAMINATION, JUDICIAL. See *Declaration, Judicial.*

EXAMINATION OF A WITNESS.

See *Evidence. [Jury Trial.]*

EXAMINATION OF A BANKRUPT.

[See *Sequestration.*]

EXAMINED COPIES. In the phraseology of the English law, an examined copy of a deed, writing, or record, is a copy or extract of the deed or entry in the record, examined and certified by the proper officer. The term is nearly synonymous with the Scotch law term *Extract*. As to the effect of such examined copies or extracts, and of notarial copies when produced as evidence, see *Evidence*, p. 407, *b*.

EXCAMBION; is the legal name of the contract whereby one piece of land is exchanged for another. The deeds, by which the contract is completed, ought to bear that the lands are excambed and disposed in excambion. The implied warrandice of this contract is real warrandice, in virtue of which either party, in case of eviction of the land which he has received in excambion, may recover possession of the land which he gave in exchange. This right to recur to the original property in case of eviction, is competent to the original excamber and his heirs and singular successors, against the party with whom he contracted and his heirs and singular successors, even although the singular successor may have acquired his right prior to the eviction. The original title of the party claiming under this warrandice is proved by the recital in the contract of excambion, it being presumed that, when the exchange was made, he delivered the title-deeds of the portion excambed to the other party, unless the contrary appear. In order to constitute this sort of warrandice, the deeds must expressly bear that the lands are mutually given in excambion. [A clause giving power to excamb is competent in a deed of entail, but must be exercised within such limits as are consistent with the subsistence of the entail over the great body of the estate; see *Baird*, 25 Feb. 1847, 6 Bell's App. 7. Independently of such special clause,] heirs possessing under deeds of entail have a statutory privilege of exchanging or making excambions of certain portions of the entailed lands. This privilege was conferred by the Montgomery Act (10 Geo. III. c. 51, §§ 32-34), not only

to benefit the heirs of entail, but also to promote the general improvement of the country. [Under that act, the privilege was limited to] thirty acres of arable land, or one hundred acres of ground unfit for the plough; [but by 31 & 32 Vict. c. 84, § 14, the extent was increased to three hundred acres lying together in one place or plot, and an equivalent in land must be received in place of the land given in exchange.] Upon report by two or more skilful persons, that the exchange will be just and equal, the sheriff authorises the exchange to be made by a contract of excambion; which is effectual on being executed, and afterwards recorded in the sheriff court books of the county in which the estate is situated, within three months after the execution of the deed. The land given in exchange to the entailed estate is thenceforth held as part thereof, and that given from it held as free of the fetters of the entail; [*M'Kechnie*, 11 July 1821, 1 S. 116.] By the Rosebery Act (6 & 7 Will. IV. c. 42), this power was greatly extended. It is thereby enacted that, notwithstanding the prohibitory, irritant, and resolute clauses in any entail, it shall be lawful for the respective heirs of entail in possession, without consent of any other heir, to make excambion of any portion of the entailed estate for an equivalent in lands, estates, or heritages lying contiguous to the same, or to some other part of the entailed estate, or being convenient to be holden with the same, whether belonging to himself in fee-simple or to any other person, and that although the heritages to be given and taken in exchange consist of different descriptions of heritable property; § 3. Such excambions cannot be made of the principal mansion-house or offices, or the garden, park, home farm, or policy, of any entailed estate, nor of more than one-fourth in value of the entailed heritages; and if a fourth part has, under authority of the act, been excambed, no further excambion is competent to any heir of entail; § 4. The land given in exchange to the entailed estate is thenceforth held as part thereof, subject to all the prohibitory, irritant, and resolute clauses, and that given from it held as free of the fetters of the entail. No debt contracted by any heir of entail during the execution and registration of the contract of excambion, affects the lands contained in the contract, and thereby added to the estate. Any excess of value on either side, not exceeding £200, is paid to the proprietor to whom the lands of similar

value are awarded. But if any party to an excambion gives or receives any consideration other than the lands to be exchanged, or aforesaid excess not exceeding £200, the excambion is null and void; § 5. Where any part of an entailed estate is under more than one deed of entail, descendible to the same series of heirs, such deeds of entail are, in reference to the application for excambion under this act, to be construed as one deed of entail; § 6. [Certain procedure, in applications under this act, was prescribed by § 3; but it has been superseded by the simpler procedure provided by the Rutherford Act (11 & 12 Vict. c. 36, §§ 33-35), which is, by § 37, made applicable to excambions under the Rosebery Act. It is not necessary to call as parties to such application any other heirs of entail than those whose consent would be required to any instrument of disentail; § 36; *Davys*, 29 Oct. 1870, 9 Macph. 44. See the procedure prescribed for all entail petitions by 38 & 39 Vict. c. 61, § 12. A remit is made to men of skill to report upon the value of the lands, and the excambion is authorised, on the court being satisfied of its expediency; *D. Hamilton*, 12 June 1858, 20 D. 1134. In contracts of excambion executed under the Rutherford Act, the destination and conditions of entail may be omitted, if referred to as set forth in the original tailzie; 16 & 17 Vict. c. 94, § 11. With the same consents as are required to disentail, and under authority of the court, an heir in possession, being of full age, may excamb the whole or any part of the estate; Rutherford Act, § 5 (as amended by 38 & 39 Vict. c. 61, § 6). This provision applies to all entails, and to all trusts under which land is held for the purpose of being entailed; 31 & 32 Vict. c. 84, § 18. See *Burton*, 27 Feb. 1851, 13 D. 955; *Hamilton*, 26 Jan. 1867, 5 Macph. 324. All the consents may now be dispensed with; see *Entail*, p. 395. By § 150 of the Consolidation Act, 1868 (31 & 32 Vict. c. 101), where lands disposed in excambion are burdened with debts, they are, from and after the date of registration of the contract or deed of excambion, freed and disburdened of such debts, so far as previously affecting them, and are burdened with the debts, if any, which previously affected the lands acquired in exchange for them; under certain conditions as to intimation to creditors, and statement in the contract or deed, as recorded, of particulars regarding the debts; and providing that the

[debts are expressly declared in such contract or deed to be a burden on the lands to which they are transferred.] See *Ersk.* B. ii. tit. 3, § 28; *Stair*, B. i. tit. 14, § 1; *Bank.* B. i. tit. 19, § 4; *Bell's Com.* i. 733; *Bell's Princ.* § 1770; *Bell on Purchaser's Title*, 130; *Bell on Leases*, i. 296; *Hunter's Landlord and Tenant*, i. 385; ii. 123; [*Duff on Entails*, 73; *Duncan's Entail Procedure*, 67, 270; *Menzies' Conv.* 160, 747; *M. Bell's Conv.* i. 214; ii. 1063, 1103; *Rankine on Land-Ownership*, 583, and notes on statutes in Appx. See *Entail. Warrandice*.]

EXCEPTION; is a term borrowed from the Roman law, and used in the law of Scotland as synonymous with *Defences*. According to *Stair*, "Exceptions are so termed by the Roman law from the *formulæ* of actions in that law and the edicts of the prætors, which, if they did bear conditions not to hold in such cases, these conditions were thence called exceptions;" *Stair*, B. iv. tit. 50, § 14. In *Spottiswood's Annotations on Hope's Minor Practicks*, tit. 1 (of the Form of Process), p. 29, there is the following note on the word *Exception*:—"This word is from the law of the Romans; and in their language, *excipere* signifies to defend, and so an exception is called a defence; or it may be said to be taken from the style or *formula* of the summons, which was in use to be given with a *nisi*, unless, *si non*, if the other party do not, *extra quamvis*, without the defender do this or that, &c. And the Emperor Justinian, in the title of his Institutes which treats of exceptions, at the beginning says, 'That exceptions are devised to defend, and are introduced for the sake of those against whom the action is raised; because it often happens that, though the pursuit be according to law, yet it is unjust against him who is called to it.' A defender, who comes prepared for his defence, either denies that the pursuer has right and title in law to pursue, or, though he finds the action competent, yet propounds something that either removes it wholly, or diminishes the claim; and this, in a proper sense, and not the inficiation or total denial, is an exception. But, generally speaking, everything which one alleges for defending himself, and for eliding the action, is called an exception." In the more correct acceptation of the term "exception," therefore, it is not applicable to a defence, which denies the relevancy of the libel as laid; or which resolves into an objection to the citation of the party, and

the like ; since, strictly speaking, an exception must assume that the libel is relevant, but allege that the defender is not liable in the conclusion, in respect of the exception which he pleads. This distinction, however, has not hitherto been much attended to in our practice. See *Defences*. It is a question of some practical importance whether the defence against an action is pleadable by way of exception, or whether it must not be made good by a separate action. This difficulty arises in cases where the demand rests on a deed *ex facie* valid and regular, but which is reducible on the head of deathbed, or of fraud, force, or fear, or the like ground. It seems to be settled, that *ex facie* nullities, whether at common law or founded on statute, are pleadable by way of exception. But the exceptions of fraud, force, or fear, if the deed alleged to have been thus legally obtained relate to heritage, cannot be pleaded by way of exception. The defender in such a case must reduce the deed to which he objects. The same was the rule as to deathbed deeds—deathbed being pleadable, not by way of exception, but by reduction ; although by our older practice the rule seems to have been different, in petitory and declaratory actions at least. See *Calderwood*, 1668, M. 12,607, 2737 ; *Stair*, B. iii. tit. iv. § 31. According to one authority the distinction between allegations proponable by way of exception, and those which must be established by way of action, is founded in “the circumstances of the process ; as when, in defending the right quarrelled *incidenter*, other persons not called to the principal action are concerned, or the process will, if that allegiance be instantly received, expatiate into another form or kind of action, of higher and more weighty consequence than the principal process, or that this will be retarded, the question being only a *præjudicium*, or preparatory, and which, though sustained, will not determine the principal cause ;” *Spottiswood's Notes on Hope's Minor Practicks*, 29, 30. See also *Stair*, B. iv. tit. 40, § 16 ; *Kames' Equity*, 297 ; *Thomson on Bills*, 188.

EXCEPTIONS, BILL OF. In England [until recently,] if the counsel for either party, at the hearing or determining of a cause, apprehended that the judge, either in his directions or decisions, had misstated the law, they might require him to seal a bill of exceptions, stating the point wherein he was supposed to err ; which bill was of the nature of an appeal to the

next superior court ; [*Stephen's Com.* iii. 585. Bills of exceptions were abolished in England by the Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77), sched. 1, order lviii.] When jury trial in civil causes was extended to Scotland by 55 Geo. III. c. 42 ; it having been deemed proper to adopt sundry English law terms and forms in preference to those which our own law supplied, amongst others, *bills of exceptions* were introduced, as to which the following provisions were made in § 7 : “It shall be competent to the counsel for any party, at the trial of any issue or issues, to except to the opinion and direction of the judge or judges before whom the same shall be tried, either as to the competency of witnesses, the admissibility of evidence, or other matter of law arising at the trial ; and on such exception being taken, the same shall be put in writing by the counsel for the party objecting, and signed by the judge or judges ; but notwithstanding such exception the trial shall proceed, and the jury shall give a verdict therein for the pursuer or defender, and assess damages when necessary ; and after the trial of every such issue or issues, the judge who presided shall forthwith present the said exception, with the order or interlocutor directing such issue or issues, and a copy of the verdict of the jury indorsed thereon, to the Division by which the said issue or issues were directed ; which Division shall thereupon order the said exception to be heard in presence on or before the fourth sederunt day thereafter ; and in case the said Division shall allow the said exception, they shall direct another jury to be summoned for the trial of the said issue or issues, or if the exception shall be disallowed, the verdict shall be final and conclusive.” [By the Court of Session Act, 1868, § 34, it is provided that “when an exception is taken in the course of a jury trial, a note thereof shall be taken by the judge, or, if he shall so direct, or the party excepting shall think proper, a note thereof shall be written out and signed by such party or his counsel, and also by the judge at the time ; and such exception may be made the ground of an application to set aside the verdict, either by motion for a new trial, or by bill of exceptions.” And by § 35 it is provided that “the bill of exceptions (which may be subsequently prepared, and of which notice shall be given as in the case of a motion for a new trial), shall consist of a distinct statement of the exception or exceptions so noted, with such a statement of the circum-

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[stances in which the exception or exceptions were taken (including, if necessary, a statement of the purport of the evidence, or extracts therefrom, so far as bearing upon such exception or exceptions, but without any argument), as, along with the record in the cause, may enable the court to judge of such exception or exceptions; and, unless the party excepting shall choose, or the judge at the trial, or the court at the discussion of the bill, shall so direct, it shall be unnecessary to print or submit to the court the notes of evidence or the documentary evidence adduced at the trial; and when such notes and documents are submitted to the court, they shall form no part of the bill of exceptions; and in discussing a bill of exceptions it shall be competent for either party to refer to the record, and to every document produced and put in evidence at the trial, and the notes of evidence at the trial may be produced and founded on at any time." Though the bill of exceptions may be subsequently prepared, the exception must be taken at the trial; otherwise motion for a new trial is incompetent; *M'Clelland*, 6 Feb. 1842, 4 D. 646; but see *Woods*, 9 July 1886, 13 R. 1118. See *New Trial*. The bill must be lodged, and notice thereof must be given, "within six days after the commencement of the next session, or of the meeting of the court after the Christmas recess, if the cause has been tried after the end of the session, at the sittings in March or July, or during the Christmas recess, or upon circuit; or within ten days, if the case has been tried during the session, or immediately before the sitting down of the session, . . . except leave has been obtained from the court to prolong the period for presenting the bill;" A.S. 16 Feb. 1849, §§ 36, 38. See *Morrison*, 21 Dec. 1860, 23 D. 232.] The exception must be to the law laid down by the judge, including his judgment on the admission or rejection of evidence, his refusal to adopt a direction in point of law suggested from the bar, or the like. Where, in the course of his charge, the judge makes any mistake in point of fact, the practice is for the counsel who thinks he has erred to interrupt him and set him right. [The admission or refusal of evidence in replication, being in the discretion of the judge, cannot be excepted to; *Rankine*, 26 Nov. 1873, 1 R. 225. A bill of exceptions will not be allowed on the ground of undue admission of evidence, if, in the opinion of the court, its exclusion could not have led to a different verdict; nor is it imperative

[on the court to sustain a bill on the ground of undue rejection of documentary evidence, if it appears from the documents themselves that they ought not to have affected the result; 13 & 14 Vict. c. 36, § 45. But see *Cameron*, 21 Dec. 1850, 13 D. 412. A judge is always assumed to have laid down the correct and necessary law, so far as not excepted to; *Addie*, 6 June 1865, 3 Macph. 899; *Hogg*, 23 June 1865, 3 Macph. 1018; but see *Wilson*, 25 May 1866, 4 Macph. 736. The bill must state both the direction actually given by the judge, and the proposition which the party excepting would have substituted; and must show on its face that the direction was either erroneous in itself, or wrongly applied. In Lord Mansfield's phrase, the bill must "hit the bird in the eye." See *Baird*, 6 March 1856, 18 D. 734; *Kyle*, 27 June 1859, 3 Macq. 610.] See forms of bills of exceptions in *Macfarlane's Jury Prac.* 352; and see Lord Chief-Justice Tindall's answer to questions put by the Dean of Faculty on this subject, 15 S. 1312. A judge who presided at a trial may sign a bill of exceptions after he has resigned the judicial office; *Smith*, 27 Jan. 1835, 13 S. 323; [or if he has died, the Division may appoint another judge to sign it; *Shepherd*, 16 Oct. 1869, 8 Macph. 31. If the judge who tried the cause is not one of the judges of the Division, he is called in to hear the bill, and gives judgment with the other judges; 31 & 32 Vict. c. 100, § 58. An interlocutor allowing or refusing a bill of exceptions may be appealed to the House of Lords within fourteen days, if Parliament be sitting, or if not, within eight days after the commencement of the next session. And such appeal is appointed to be heard on or before the fourth cause day after the time limited for laying the printed cases upon the table of the House; 55 Geo. III. c. 42, § 7. But see *Appeal to House of Lords*, p. 52 b. By 7 Will. IV. c. 14, in all cases in which any bill of exceptions is brought before the Court of Session, or carried by appeal to the House of Lords, it is not competent to the Court of Session or to the House of Lords, in pronouncing judgment on such bill of exceptions, to make any order, or to pronounce any judgment, ordering a new trial, unless the said court or House of Lords are of opinion that the exception is to be allowed. And when the court or House of Lords are of opinion that the law directed at the trial, or the determination to receive or reject evidence excepted to, is correct, they are to

make an order that the bill of exceptions shall be disallowed, and that the verdict found by the jury shall be carried into effect, by judgment pronounced thereon, for the party in whose favour the said verdict was found. See *Jurid. Styles*, iii. 840; *Macfarlane's Jury Prac.* 236, 271; [*Mackay's Prac.* ii. 70.] See *Jury Trial. New Trial.*

EXCEPTIO NON NUMERATÆ PECUNIE. This was one of the Roman law exceptions, founded on the *obligatio literarum* of the Romans. The *obligatio literarum* was constituted by a writing, the grantor of which acknowledged receipt from the creditor of a certain sum of money. But as the obligation was sometimes granted before the money was advanced, *spe numerandæ pecuniæ*, by the Roman law, the obligation, until the lapse of two years after its date and delivery, did not prove the receipt of the money; and the debtor against whom, within that time, a demand for repayment was made, might plead the *exceptio non numeratæ pecuniæ*; that is, that the money of which repayment was demanded, was truly never advanced. The exception was sufficient to elide the demand, unless the creditor proved that he had advanced the money. In the older form of the Scotch bond for borrowed money, the debtor was made to renounce "the exception of not numerated money," from a groundless apprehension that the Roman law exception might be pleadable. It does not appear, however, to have been at any time recognised in the law of Scotland. This renunciation, therefore, is only one among many proofs of that over-anxiety in conveyancers, whereby points, otherwise free from all doubt, have been sometimes brought into question. See *Ersk.* B. iii. tit. 2, § 5; *Stair*, B. i. tit. 10, § 11; [*Ross's Lect.* i. 53.]

EXCHANGE and RE-EXCHANGE.

Exchange has been defined to be the difference in the value of money at a place where a bill is drawn, and the place where it is payable; or rather, as the premium or discount (as it may happen) paid or received as the price or value of a draft, drawn in one country and payable in another. The term seems to have originated in the circumstance of such bills or drafts on foreign countries being drawn in a country where one species or denomination of coin is the current money, and payable or exchangeable in another country for money of the denomination current in that country. Exchange, however, may

now be said to be a term almost exclusively applicable to the premium or discount paid in one country for a draft payable in another—that premium or discount varying, of course, with the supply of, or the demand for, such drafts. Re-exchange is due where a draft or bill, procured as above, is not accepted or not paid by the drawee; in which case the holder of the dishonoured draft or bill is entitled to re-draw upon the original drawer, and to add to his re-draft the premium, discount, or cost attending the transaction, and arising from the dishonour of the original bill or draft. The holder of the dishonoured draft is entitled to raise money to its full amount, at the drawer's expense, in whatever currency, or at whatever rate of exchange it was made payable; and if the re-draft cannot be sold but at a discount, the holder of the dishonoured draft may add to his re-draft a sum sufficient to cover that discount. The sum thus added to the amount of the original draft is termed *re-exchange*. [By the Bills of Exchange Act, 1882, § 57 (2), when a bill has been dishonoured abroad, "the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment." See *Strickland*, 20 Jan. 1869, 7 Macph. 400; *Gen. S. American Co.* 1877, 7 Ch. D. 637; *Robarts*, 1886, 18 Q.B.D. 286; also *Thomson on Bills*, 439;] *Glen on Bills*, 9-16; *Stair*, B. i. tit. 11, § 7; [*Bell's Com.* i. 429 *et seq.*;] *Bell's Princ.* § 342; [*Byles on Bills*, 448; *Thorburn's Bills of Exchange Act*, 135.] See *Bill of Exchange*.

EXCHEQUER, COURT OF. The Scotch Court of Exchequer, prior to the Union, was the King's revenue court, and consisted of the treasurer, the treasurer-depute, and as many lords of Exchequer as the King chose to appoint. The ministerial part of the treasurer's office was to receive casualties due to the King, either as sovereign or as feudal superior; with which office, about a century before the Union, was united the office of comptroller, whose duty it was to levy the rents of Crown lands, burgh rents and customs, and to examine the treasurer's accounts. By article 19 of the treaty of Union, it was provided that the Scotch Court of Exchequer was to continue until a new Revenue Court should be established in Scotland by Parliament; and, by 6 Anne, c. 26, the Court of Exchequer was

established on the footing on which it continued till the recent changes. The judges of the then new court were, by that statute, declared to be the High Treasurer of Great Britain, with a chief Baron and four Barons, who must have been either serjeants-at-law, or English barristers, or Scotch advocates of five years' standing. All barristers might plead before this court who were entitled to practise in the courts of Westminster or in the Court of Session; and the privileges belonging to members of the College of Justice were communicated to the barons and other members of the court, "excepting only that they might be pursued in justice before the Lords of Session for causes not competent to the Court of Exchequer." This court had, under the statute by which it was established, a privative jurisdiction as to the duties of customs, excise, or other revenues appertaining to the King or Prince of Scotland; and as to all honours and estates which might accrue to the Crown, in which matters they were to judge according to the forms of proceeding used in the English Court of Exchequer; but under the limitation, *1st*, That no debt due to the Crown should affect the Crown debtor's real estate in Scotland, in any other manner than as such estate might be affected by the law of Scotland; and, *2dly*, That the validity of the Crown's title to any honours, lands, or casualties in Scotland, should be tried as formerly by the Court of Session. The barons were also vested with the powers which belonged to the ancient Scotch Court of Exchequer, whereby it was their province to pass the accounts of sheriffs, and other officers who have the execution of writs issuing from, or returnable to, the Court of Exchequer, and to receive resignations of lands, and to pass signatures of charters, tutories, or other gifts of casualties &c., as the Scotch Exchequer formerly did. But this power in the Scotch Exchequer was always limited; for when a signature imported a conveyance of more than was conferred by the Crown vassal's former charter, besides being passed by the barons, it must have been subscribed by the King himself. If such a signature had passed, of course, in Exchequer, it would not have been effectual to the grantee *quoad* the new right. Gifts of escheat, and some other gifts of minor importance, might pass in Exchequer without a special warrant; but remissions of crimes and gifts of forfeiture on conviction of high treason, required the King's sign-manual as their warrant. And,

in general, although all such signatures, gifts, &c., must have passed in Exchequer, it was the Court of Session only that could competently judge of their preference after they were completed. By 6 Anne, c. 26, § 12, it was declared competent for parties affected by the judgments of the Court of Exchequer in Scotland, and who, by law, were entitled to "maintain a writ or writs of error thereupon, to sue and prosecute, out of the Court of Chancery in England, a writ or writs of error to be made in usual manner upon any such judgment returnable in the Parliament of Great Britain;" and, in the prosecution of such writs of error, the same course was to be followed which is adopted in similar appeals from English courts. But appeals of any kind from the Court of Exchequer in Scotland to the House of Lords were of very rare occurrence; and the judgment appealed from must have been pronounced in a cause in which the judges acted as such *ex officio*, and not ministerially as commissioners under an act of Parliament. There is no example of an appeal from the proceedings of the Barons in the exercise of their powers in receiving resignations, passing signatures, making gifts, and the like. See *Form of Procedure in the House of Lords upon Appeals from Scotland* (8vo, 1821), 97-100.

Execution was awarded on the decrees or judgments of the Scotch Court of Exchequer relating to the customs or excise, or other revenue matters falling under its cognisance, according to the forms used in the English Court of Exchequer. But the diligences of horning and caption, agreeably to the former law and practice of Scotland, [continued to be competent] under authority of the Court of Exchequer, for enforcing payment of the land-tax, for feu-duties specified in the *reddendo* of Crown charters, or the like. Such diligences were subscribed by a writer to the signet, and passed the signet in the usual form. The horning was obtained upon a bill presented in Exchequer, which was the warrant for signeting the letters. These letters bore in the end, "*Ex Deliberatione Baronum Scaccarii*." By 43 Geo. III. c. 150, § 44, diligence by horning may issue from Exchequer against collectors of revenue in certain circumstances; and, generally, it may be observed, that the writ of extent contains a *capias* on which horning may be issued, and caption may follow;" *Bell's Com.* ii. 492.

The Court of Exchequer was made the subject of various legislative enactments, [which ended, in 1856, in its abolition as a separate court.] By 2 Will. IV. c. 54, it was provided that successors should not be appointed to such of the barons as should retire or die, and that after the retirement or death of the last remaining baron, the duties of the court should be discharged by a judge of the Court of Session, with an addition to his salary of not more than £600. By 3 Will. IV. c. 13, all the powers and duties of the Court of Exchequer bearing in any way upon the direction of the revenue, were transferred to the Commissioners of the Treasury; but the legal jurisdiction of the Court of Exchequer was excepted from the operation of the act, and it was declared that all debts, duties, revenues, fines, penalties, and forfeitures, should continue to be sued for as formerly. [See also 4 Will. IV. c. 16; 5 & 6 Will. IV. c. 46; 1 Vict. c. 65; 2 & 3 Vict. c. 36; 18 & 19 Vict. c. 90. By the Court of Exchequer Act, 1856 (19 & 20 Vict. c. 56), the whole power, authority, and jurisdiction belonging to the Court of Exchequer, as then constituted, were transferred to and vested in the Court of Session; and the Court of Session was declared to be the Court of Exchequer in Scotland; § 1. One of the Lords Ordinary, appointed by the Crown, acts as Lord Ordinary in Exchequer causes; and, in general, proceedings in such causes are brought before him in the first instance; § 2. The Lord Ordinary in Exchequer causes may act in vacation as well as during session; and in his absence, any other Lord Ordinary may act in his room; § 3. Exchequer causes may be commenced either by summons, or by subpoena, in form prescribed, which is served, and called in court, in the same way as an ordinary summons; §§ 5-10. In causes commenced by subpoena, an information must be lodged and served, as to which see §§ 6-8. See also *Subpoena. Information*. When parties are agreed upon the facts, they may present a special case for judgment of the Lord Ordinary; § 8. By § 11, procedure was provided in cases of seizure; and by §§ 12-17, a procedure adapted to the forms of the Court of Session was substituted in lieu of the English forms of writs of *capias*, writs of the pipe, injunction, *mandamus*, affidavit of danger, writs of *habeas* and *certiorari*. By § 19, the duties of the Court of Exchequer in appointing tutors *datave* are performed by the Inner House,

[on application by summary petition to either Division. In Exchequer causes, the Lord Advocate has the privilege of being heard last; § 23. Such causes are treated as summary causes, and have precedence of all others; § 25. Exchequer decrees are put in execution by the sheriffs; to whom power is given to arrest, charge, pound, sell, and imprison; §§ 29-36. All bonds to Her Majesty are held to contain a clause of registration; § 38. Duties accruing in other parts of the United Kingdom may be recovered in Scotland, under § 40. The existing jurisdiction of sheriffs and justices of the peace in Exchequer causes is saved by § 41. Nothing in the act is to affect the preference of the Crown over other creditors; § 42. See *Crown Debts. Extent, Crown's*. See also 20 & 21 Vict. c. 44; 22 Vict. c. 32; 22 & 23 Vict. c. 21, § 24.

[In *Sharpe*, 12 June 1861, 23 D. 1015, it was held that, whenever the question is duly raised, whether goods have been properly seized for a Crown debt, the case becomes at once a matter of revenue, and any litigation on such a point before any other judicature ought immediately to be stopped by the Court of Exchequer (when called upon to interfere), in order that the case may be determined in that court; that the Court of Exchequer may be called on to interfere, at any time before extract; that a collector of revenue may apply for the same remedy as the Crown itself could resort to; and that he is not bound to bring up any proceedings originating in the sheriff court by any process of review, so as to make them depend or be discussed in the Court of Exchequer. See also *Beattie*, 29 Jan. 1856, 18 D. 378.]

See on this subject, *Ersk. B. i. tit. 3, § 30; Bank. B. iv. tit. 11; Bell's Com. ii. 40; Stair, B. iv. tit. 1, § 29; More's Notes, cccclxx.; Historical View of the Court of Exchequer in Scotland, by Baron Sir John Clerk, Bart., and Baron Scrope (1820); [Shand's Prac. i. 25; Mackay's Prac. i. 43, 192; M'Laren's Procedure Acts, 1. See Charters from the Crown. Signatures. Remembrancer, Queen's. Presenter of Signatures.]*

EXCHEQUER, COURT OF, *in England*. The English Court of Exchequer was a supreme court of record, but the lowest in rank [of the three superior courts of common law,] viz., the Court of Queen's Bench, the Court of Common Pleas, and the Court of Exchequer. [Under the Judicature Act, 1873, these three courts became separate Divisions of the High

[Court of Justice; and by Order in Council, dated 16 Dec. 1880, they were consolidated and merged in one, called the Queen's Bench Division. *Broom's Common Law*, 25, 33.] The name is said to be derived from the chequered cloth, resembling a chess-board, which covers the table of the court, and on which cloth, when certain of the accounts are made up, the sums are marked and scored with counters. [*Sweet's Law Dict.* See *High Court of Justice*.]

EXCHEQUER CHAMBER, COURT OF, in England. A Court of Error, now abolished, where the judgments of each of the superior courts of common law (viz., Queen's Bench, Common Pleas, and Exchequer), were subject to revision by the judges of the other two courts sitting collectively. The jurisdiction in appeals was transferred to the Court of Appeal by the Judicature Act, 1875, § 18 (4). *Sweet's Law Dict.* See *Appeal, Court of*.]

EXCHEQUER BILLS; form the principal part of the unfunded public debt of Great Britain. Those bills, which were first issued in the reign of William III., are issued, under authority of Parliament, for sums varying from £1000 to £100. They bear interest, and may be transferred from hand to hand without any formal transfer; and the holders may also receive their amount periodically from Government, at par, with the interest due on them, with an option to exchange them for new bills, to which the same advantages are extended. The interest borne by Exchequer bills has fluctuated since they were first issued. Originally the interest seems to have been 5d. *per* £100 *per diem*, or £7, 12s. 1d. *per annum*: latterly it has varied from 2½d. to 2d., and even to 1½d. *per* £100 *per diem*, being about, or a fraction under, £3 *per annum*. [The act 29 Vict. c. 25, consolidates the law as to the preparation, issue, and payment of Exchequer bills and bonds. See *Wharton's Lex.*; *McCulloch's Comm. Dict.*; *Stephen's Com.* ii. 603; *Bell's Princ.* §§ 1343, 1408.]

EXCISE; is an inland duty levied under authority of Parliament, and paid sometimes on consumption of the commodity, and frequently upon the retail sale. Excise was first imposed by the rebellious Parliament of 1643. [Since then, the articles liable to excise duty have varied from time to time. Many of the old duties have been abolished; and on the other hand, the excise duties now include licences, which must be taken out by manufacturers of, or dealers in, certain

[articles, persons following certain employments, and others. The administration of the excise was greatly simplified by the merging, under 42 Vict. c. 1, of the three revenue branches of excise, stamps, and taxes, into one general department of Inland Revenue, under the management of the Board of Commissioners of Inland Revenue. A collection of the excise statutes, with notes, was published by the Commissioners in 1873. See *Barclay's Digest*; *Stephen's Com.* ii. 593; *Encyc. Brit.* See *Revenue. Customs. Smuggling. Defrauding the Revenue. Justice of Peace*.]

EXCLUSIVE PRIVILEGE. This term is used in a limited acceptation, to signify the rights and franchises of the nature of monopolies, [formerly] enjoyed by the incorporated trades of a royal burgh; in virtue of which the craftsmen or members of those incorporations were entitled to prevent *unfreemen*, or tradesmen not members of the incorporation, from exercising the same trade within the limits of the burgh. [See *Glasgow Tailors*, 13 June 1828, 6 S. 972; *Murison*, 2 Dec. 1836, 15 S. 179. See *Incorporation*. By 9 & 10 Vict. c. 17, the exclusive privileges of trades in burghs were abolished. See *Ersk. B. i. tit. 7, § 64*; *Kames' Elucidations*, art. 7. As to the exclusive privilege granted to authors, see *Copyright*.]

EXCOMMUNICATION; ecclesiastical censure, whereby the person against whom it was directed was excluded from the communion of the church. By the ancient law of Scotland, excommunicated persons could not enjoy feudal rights, and were disqualified for holding, either directly or indirectly, the lands which they had formerly possessed, and were besides subjected to punishment in their persons. See sundry statutes imposing those and similar penalties, abridged in *Kames' Stat. Law, h. t.* But by 1690, c. 28, and 10 Anne, c. 7, all civil pains or penalties consequent on excommunication are removed; and the statute 10 Anne farther prohibits any civil judge to lend his aid for obliging any one to appear in a church court when summoned in a process for excommunication; or for compelling the excommunicated person to obey such sentence when pronounced. The lesser excommunication, or suspension from the privileges of the church, which is directed against persons under scandal, is the highest censure which kirk-sessions usually inflict. The greater excommunication requires the sanction of the presbytery. Neither has any civil

effects, and the presbytery on being satisfied of repentance, will relieve the persons of the sentence. *Ersk. B. ii. tit. 3, § 16; Hume, i. 574; Swinton's Abridg. h. t.; Ross's Lect. i. 90, 248; Hill's Church Prac. 23; [Cook's Styles, 25, 145.] See Cursing, Letters of.*

EXCULPATION, LETTERS OF; a warrant granted at the suit of the panel or defender in a criminal prosecution, for citing and compelling the attendance of witnesses in proof either of his defence against the libel, or of his objections against any of the jury or witnesses, or in support of whatever else may tend to his exculpation. These letters were issued as a matter of course, on application at the Justiciary Office; [11 & 12 Vict. c. 79, § 3; but they are now unknown in practice.] See *Stair, B. iv. tit. 14, § 17; Hume, ii. 398; Ersk. B. iv. tit. 4, § 90; [Dickson on Evidence, ii. § 1694; Macdonald, 450; Campbell on Citation and Diligence, 345. See Criminal Prosecution.]*

EXECUTION, by a Messenger-at-Arms or other Officer of the Law.—An execution is an attestation, under the hand of the messenger or other officer, that he has given the citation, or executed the diligence, in terms of his warrant for so doing. Executions must be subscribed by the executors and witnesses, otherwise they are null; [1681, c. 5; 1686, c. 4; 13 & 14 Vict. c. 36, sched. B. Only one witness is necessary, except in poindings, where there must be two; 1 & 2 Vict. c. 114, § 32; 9 & 10 Vict. c. 67.] Where the execution consists of more pages than one, each page, or at least each leaf, ought to be signed by the executor and witnesses, for they are witnesses to the fact attested, not to the subscription of the officer, whom, therefore, it is not necessary that they should see subscribe. And correctly, the execution ought to bear that the witnesses were witnesses to the premises, or, at least, the fact that they were witnesses must follow by direct implication from what is stated in the execution. [The witnesses must be designed in the execution; 1681, c. 5; 1 & 2 Vict. c. 114, sched. 2; 13 & 14 Vict. c. 36, sched. B.;] and no witness ought to be taken who might not competently be a witness to the subscription of a private deed. In the execution, the messenger or other officer must detail what he did, in order that it may appear that he proceeded lawfully; and if the execution should omit to state any essential step which was actually taken, that omission cannot be compet-

ently supplied by the parole evidence of the witnesses who were present and saw it performed. [An abridged statutory form of execution of summonses, &c., is provided by 13 & 14 Vict. c. 36, sched. B; but the narrative must still specify all essential steps in the procedure; *Stewart*, 20 July 1860, 22 D. 1514. The execution is written at the end of the summons itself, or of the usual certified copy of the note of suspension, or of suspension and interdict; or of suspension and liberation; if necessary, on continuous sheets, but not on a separate paper; 13 & 14 Vict. c. 36, § 20. Similar provisions are made by the Sheriff Court Act, 16 & 17 Vict. c. 80, § 9, sched. F. Executions of charge under the Diligence Act must state the names and designations of the debtor and creditor, and also the date and nature of the decree or other warrant on which the charge proceeds; 1 & 2 Vict. c. 114, sched. 2; A.S. 24 Jan. 1839. It has been observed that "the leaning of the court for a considerable time has been to discourage critical objections to the execution of summonses, although considerable strictness is still observed in executions of diligences, and in cases where there are competing creditors;" *Dickson on Evidence*, § 1272.] In addition to the requisites above mentioned, certain executions, with their warrants, must be registered, under the sanction of nullity. Thus hornings, with the executions of charge and of denunciation, must be registered within fifteen days after denunciation, otherwise a caption cannot be obtained; 1579, c. 75. (See *Denunciation*.) In like manner, inhibitions and interdictions, with the executions of their publication, must be registered within forty days after publication, under sanction of nullity; 1581, c. 119. (See *Inhibition. Interdiction*.) So also, executions of summonses to interrupt prescription of real rights must, with their executions, be registered within sixty days after the date of the execution and instrument of interruption, otherwise they are ineffectual against singular successors; 1696, c. 19. Blank executions,—i.e., executions which persons, relying on the faith of the executor, are prevailed on to sign, as witnesses along with him, blank or unfilled up,—are declared to be void and null to all intents and purposes; and the lieges are prohibited to fill up such blank executions. The penalty to the executor is deprivation and perpetual incapacity to hold the office of a messenger; and to the witnesses, infamy; A.S. 28 June 1704.

See *Stair*, B. iii. tit. 2, § 17; B. iv. tit. 38; *Ersk.* B. ii. tit. 5, § 55; B. iii. tit. 2, § 17; *Ross's Lect.* i. 300, 478; ii. 534; [*Campbell on Citation*, &c., 55; *Menzies' Conv.* 294; *Dickson on Evidence*, §§ 1246, 1262; *Shand's Prac.* i. 250; *Mackay's Prac.* i. 407. See *Citation. Summons. Charge. Diligence.*]

[**EXECUTION OF DEEDS.** See *Deeds, Execution of.*]

[**EXECUTION OF THE LIBEL.** [See *Criminal Prosecution.*]

EXECUTION OF SENTENCES AND DECREES. The executive power of the State is vested in the Sovereign; and, by the law of Scotland, all executions of decrees and sentences, whether civil or criminal, proceed either directly in the name of the Sovereign, in virtue of letters or writs of execution, under the Royal Signet, or on the authority of judges or magistrates, to whom a certain portion of executive power is delegated by the Sovereign. Inferior judges are vested not only with jurisdiction to a limited extent, but with power so far to execute their own sentences; subject, generally speaking, to appeal to the supreme courts. But the chief *executorials* (as they are termed by our institutional writers), or the means of obtaining civil execution against the person or estate of the debtor, are letters or writs in the Sovereign's name, passing under the signet for Scotland. Personal diligence, or execution in civil causes, was [formerly] warranted almost exclusively by letters of horning and caption; the act of warding of magistrates of royal burghs, and the statutory power of justices of the peace, under the small debt acts, to authorise imprisonment, being the only exceptions. [But these forms are now superseded by the improved system of diligence introduced by the Personal Diligence Act, 1 & 2 Vict. c. 114.] Civil execution against heritable or moveable property is warranted by the diligences of poinding, arrestment, and adjudication. The nature of those several diligences is explained under separate articles, and the present general reference to them is intended merely to point out the manner in which the sovereign authority is interposed to enforce judicial sentences. See *Decree. Diligence. Horning. Letters of. Act of Warding. Denunciation. Caption, &c. [Executor-Creditor.]*

In criminal cases, the sentence is carried into execution either by the magistrates of the burgh, or by the sheriff of the county, according as the sentence is to receive

execution within the territory comprehended in the jurisdiction of the one or of the other. The warrant for the execution is the sentence of the court or judge by whom the criminal was tried; that being sufficient without the special intervention of the Royal authority, which is never interposed between the sentence and the execution, except for the purpose of pardoning the convict, or delaying the day of his execution, or mitigating the rigour of his punishment; and, in executing the sentence, the terms of the judgment must be precisely and literally adhered to. By 11 Geo. IV. & 1 Will. IV. c. 37, § 2, the day of execution of a capital sentence, southward of the Firth of Forth, must not be less than fifteen nor more than twenty-one days after the date of the sentence; and northward of the firth, not less than twenty nor more than twenty-seven days. And by 3 Geo. II. c. 32, inferior corporal punishments may be carried into execution after the lapse of eight or twelve days from the passing of the sentence, according as it is pronounced on the south or the north of the Forth. The Court of Justiciary has a power to interfere in altering the day for the execution of sentences, when particular circumstances render such an interference necessary. [See *Hume*, ii. 472; *Alison's Prac.* 655; *Macdonald*, 528. See *Criminal Prosecution.*]

EXECUTOR. An executor is the legal administrator of the moveable estate of a deceased person, for behoof of all concerned therein; or, more correctly, perhaps, he may be said to be a judicial trustee for the collection and distribution of the defunct's moveable estate and effects amongst those interested, according to the rules of law. The office of executor is conferred either by the written nomination of the defunct, or, failing that, by decree of the commissary; the executor, in the former case, being called an *executor-nominate*, and, in the latter, an *executor-dative*. In either case, the executor must complete his title to administer, by a judicial proceeding, called a *confirmation*; without which he has no *jus exigendi*, nor are the debtors to the defunct in safety to pay to him; [*Buchanan*, 30 Nov. 1842, 5 D. 211.] See *Confirmation*. Persons applying to the commissary for confirmation as executors, are preferred to the office in a certain order; the executor-nominate, whether a relation to the defunct or not, being invariably preferred in the first place; failing such nominee, universal disponees are preferred;

[*McGown*, 4 Dec. 1835, 14 S. 105.] then the next of kin (all in the same degree being entitled, if they please, to be conjoined in the office); then the relict; then creditors in liquid grounds of debt; and, lastly, a special legatee. According to the above order, the commissary will proceed in conferring the office; the parties claiming it respectively proving their title to be confirmed in the particular character in which they claim. [Next of kin may be appointed, though they have no beneficial interest in the executry; *Bones*, 21 Dec. 1866, 5 Macph. 240. By 18 Vict. c. 23, § 1, surviving next of kin have the exclusive right to the office; but the children or descendants of a predeceasing next of kin are entitled to confirmation when no next of kin compete. See *Dowie*, 18 March 1871, 9 Macph. 726. A mother may, in the absence of next of kin, be confirmed executrix-dative *qua* mother, in virtue of the interest conferred on her by the statute 18 Vict. c. 23; *Muir*, 3 Nov. 1876, 4 R. 74. And representatives of the deceased father of an intestate may be conjoined with a brother as executors-dative; *Webster*, 25 Oct. 1878, 6 R. 102. Under the Married Women's Property Act, 1881, a husband seems to be entitled to the office, in like manner as a widow; see *Marriage*. When the deceased was domiciled abroad, it is the next of kin according to the *lex domicilii*, who are entitled to the office; *Mss. Hastings*, 10 Feb. 1852, 14 D. 489; *Whiffin*, 12 June 1872, 10 Macph. 797. The practice which formerly existed, of appointing the procurator-fiscal to be executor, when no one legally entitled applied for the office, is now obsolete. In such a case, a judicial factor is now usually appointed by the Court of Session, on the application of the heirs. When a foreigner dies in this country, and no one entitled to administer his estate is present, administration may be granted to the consul; 24 & 25 Vict. c. 121, § 4.] The office of executor being, in effect, a trust, the executor before being confirmed is required to find caution for the faithful discharge of his trust; except in the case of an executor-nominate, who, under 4 Geo. IV. c. 98, § 2, is exempted from the necessity of finding caution. But in all other cases, the same statute provides that the court, in granting confirmation, shall fix the amount of the sum for which caution is to be found by the person or persons confirmed; the caution not exceeding the amount confirmed. [A woman is not received as

[cautioner; *French*, 16 May 1871, 9 Macph. 741.] The executor confirming is also required, under certain penalties, to exhibit upon oath in the commissary court, a full inventory of the whole estate and effects to be recorded—the principal object of the statutes being to prevent evasion of the duties payable to Government. The statutes regulating this subject are 48 Geo. III. c. 149, §§ 35 *et seq.*, and 55 Geo. III. c. 184. See *Inventory*. By 4 Geo. IV. c. 98, certain other important alterations on the law with regard to executors were made. By § 1, “in all cases of intestate succession, where any person or persons who, at the period of the death of the intestate, being next of kin, shall die before confirmation be expedite, the right of such next of kin shall transmit to his or her representatives, so that confirmation may and shall be granted to such representatives, in the same manner as confirmations might have been granted to such next of kin immediately upon the death of such intestate.” [See *McLaren on Wills*, ii. § 1688.] By § 3, every person requiring confirmation is bound, upon oath, to confirm the whole moveable estate of the defunct known at the time; it being lawful to eik to such confirmation any part of the estate which may afterwards be discovered; the whole of such estate so discovered being in like manner added upon oath—saving the provision of the act 1690, c. 26, with regard to special assignations, which remain as fixed by that statute. By § 4, in the case of confirmation by executors-creditors, the confirmation may be limited to the amount of the debt and sum confirmed, to which the creditor shall make oath; provided that notice of every application for confirmation by an executor-creditor shall be inserted in the Edinburgh Gazette at least once immediately after such application; in evidence whereof a copy of the Gazette, containing the advertisement, must be produced in court before confirmation.

In the case where the executor is a residuary legatee, or one of the next of kin, who *de jure* are entitled to certain proportions of the executry, it may be observed that, although such executors, when confirmed, are trustees for all concerned, yet the creditors of such executors have an interest in their debtor's reversionary right to the executry, of which, at common law, those creditors might have been deprived by the executors refusing to confirm. To remedy this, by 1695, c. 41, “in the case of a moveable estate left by a defunct and

falling to his nearest of kin, who lies out and doth not confirm, the creditors of the nearest of kin may either require the procurator-fiscal to confirm and assign to them, under the peril and pain of his being liable for the debt if he refuse, or they may obtain themselves decerned executors-dative to the defunct as if they were creditors to him: with his provision always, that the creditors of the defunct doing diligence to affect the said moveable estate, within year and day of their debtor's decease, shall always be preferred to the diligence of the said nearest of kin." In reference to this provision, it may be observed,—1st, That if the executor have confirmed, and if the funds with which, in that character, he has intromitted, can be distinguished and separated from his own funds, the defunct's creditors have a preference over the funds of their debtor in the executor's hands, even after the expiration of the year; and, 2dly, If, on the other hand, the executor have not confirmed, his creditors may apply to the procurator-fiscal, in the manner, and to the effect pointed out in the statute, or may be themselves decerned executors-dative to the defunct, as if they had been his creditors; subject to the above preference in favour of the actual creditors of the deceased. This preference, however, is a preference which was fully recognised at common law, independently of the statute, the object of which, indeed, rather appears to have been, in certain circumstances, to limit the endurance of the preference to one year; *Bell's Com.* ii. 81; *Ersk.* B. iii. tit. 9, §§ 35, 46. [See *Greig*, 1 March 1837, 15 S. 697; *Smith's Trs.* 27 June 1862, 24 D. 1142; *Forrest*, 26 May 1863, 1 Macph. 806.] When two or more persons have been confirmed executors, they hold the office *pro indiviso*, and must concur in suing the defunct's debtors; and, if one of such executors refuse his concurrence, he may be excluded from the office at the suit of the co-executors. But, after the debt has been established in the executors by decree, each executor may, by himself, recover his own share, which the debtor is in safety to pay him. [A majority of co-executors have a right to manage and realise the estate as they think best, if they cause no prejudice to the estate; *Mackenzie*, 3 Feb. 1836, 13 R. 507. Executors *qua* next of kin may sue separately for their shares of the succession; *Torrance*, 24 Nov. 1841, 4 D. 71. As to whether executors can act by a quorum, see *M'Laren on Wills*, ii.

[§ 1740.] A debtor to the executry ought not to make payment of any part of his debt to an executor-creditor, without the concurrence of the other executors confirmed; because the right of an executor-creditor to receive payment depends on the justice of his alleged debt; and if, on investigation, it prove not to have been legally due, the debtor who pays him may be compelled to pay a second time to the other executors. Generally speaking, indeed, it is prudent in a debtor to the executry to decline paying to one executor, where there are more than one confirmed, unless the other executors are parties, or consenting to the payment. All the co-executors having thus an equal right to the debts due to the defunct, it follows that they are only liable *pro rata* for the debts due by him, unless it appear that the executor sued has by himself actually intromitted with as much of the executry as will cover the debt sued for; *Ersk.* B. iii. tit. 9, § 40. An executor being, as already explained, a trustee for all concerned, does not, by his confirmation, incur a universal responsibility for the debts of the defunct. On the contrary, he is only liable to the value of the inventory in the confirmation, *non ultra vires inventarii*. But he is liable in diligence for making the inventory effectual; [*Pearson*, 19 Nov. 1824, 4 S. 206; *Forman*, 2 Feb. 1853, 15 D. 362.] A year after confirmation is usually allowed for this purpose (1503, c. 76); and a decree and registered horning, [or registered charge,] are accounted sufficient diligence against debtors to the executry. In like manner, an executor-creditor, who confirms more than the precise amount of his debt, is liable in diligence for the recovery of what he confirms; A.S., 14 Nov. 1679. [It is said by Erskine that, even where the proceeds of the executry are lent out at interest,] the executor is not accountable for the interest he receives, since he lends the money at his own risk; *Ersk.* B. iii. tit. 9, § 41; *Bank.* B. iii. tit. 8, § 57. [But this view would not be sustained now; the liability of executors, with regard to investment, interest, &c., being generally the same as that of trustees, at common law. See *Trust*. "An executor," however, "is not a trustee in the sense of being a depositary. A trustee has to hold as a depositary; not so an executor, who has to administer, not to hold. An executor must pay legacies and debts within a certain time, and is liable in interest if he does not. An executor is nothing else

[than a debtor to the legatees or next of kin. He is a debtor with a limited liability; but he is nothing else than a debtor; and the creditors of the deceased, and the legatees who claim against him, do so as creditors;"] *per* Lord Pres. Inglis, in *Jamieson*, 24 Jan. 1872, 10 Macph. 399. See also *Malcolm's Exrs.* 10 Dec. 1869, 8 Macph. 272; *Smith*, 24 June 1880, 7 R. 1013. Executors are not subject to the jurisdiction of the sheriff court in which they obtained confirmation, if not resident within the same; *Halliday's Exr.* 17 Dec. 1886, 14 R. 251.]

It is a general rule, that an executor should pay no debt of the defunct's without the authority of a decree; and even where a decree is produced, that he should pay no debt within the six months immediately following the defunct's decease. But from this rule there is an exception in favour of what are called privileged debts; such are,—1. Deathbed and funeral charges. 2. Servants' wages for the current year or term. 3. Where the defunct has been an officer in a friendly society, a statutory preference over his effects, for payment of sums due by him to such societies, [is established by 38 & 39 Vict. c. 60, § 15.] 4. The expense of confirmation and management comes off the total of the executry, and like privileged debts, is preferable; *Ersk.* B. iii. tit. 9, § 46. [See *Privileged Debts.*] Those privileged debts may be paid by the executor without a decree, and without waiting the expiration of the six months. [And in practice it is only when the estate is small, the amount of claims uncertain, and the existence of the debt in question doubtful, that an executor is entitled to require formal constitution thereof by decree; *M'Gaan's Trs.* 7 Dec. 1883, 11 R. 249.] The executor might also at one time have retained the executry funds, without judicial authority, in payment of debts due to himself by the defunct; and, in like manner, he might, unless legally interpellated, have paid such debts as the defunct acknowledged to be due in his testament. But, since A.S. 28 Feb. 1662, this has not been held admissible to the prejudice of the *pari passu* ranking of creditors claiming within the six months. But if no claim be made within the six months, the executor, after the lapse of that period, may, unless interpellated, both retain in payment of debts due by the defunct to him, and pay the residue *primo venienti*; [*Elder*, 2 July 1859, 21 D. 1122.] Even when a decree is produced to the executor, he

cannot competently make payment to the party producing it, to the prejudice of creditors whose debts the defunct admits to be due in his testament; for the acknowledgment of the debts by the defunct in his last will, which it is the duty of the executor to execute, is accounted a sufficient interpellation to protect the interests of testamentary creditors without the necessity of any step on their part; *Ersk.* B. iii. tit. 9, § 43; *Stair*, B. iii. tit. 8, § 72. It follows from the nature of the executor's office, that he is accountable to the parties interested, for the due collection and distribution of the executry. If, therefore, he fail in the performance of his duty, he is liable, *qua* executor, and to the extent of the inventory, to a personal action at the instance of any of the parties beneficially interested; decree in which action will authorise personal diligence against him, and will also entitle the creditor to attach, by poinding or arrestment, the funds unrecovered in the hands of the defunct's debtors. Or, if the executor has taken bonds from such debtors in his own name, the executry creditors may attach the sums in those bonds, and they will be preferable over those sums to the executor's own creditors. And where the executry funds and the individual funds of the executor have been so mingled that they cannot be identified, diligence may proceed against the person and the individual estate of the executor; failing which, recourse may be had on the cautioner in the confirmation; *Bell's Com.* ii. 77. So, also, if there be omissions in the inventory made up by the executor in the confirmation, or if the articles in that inventory be undervalued, any creditor of the defunct may bring an action against the executor for the value of the subject omitted, if the executor's intromission with that subject can be proved. Or the creditor may apply to the commissary court to be himself confirmed executor *ad omnia vel male apprehiata*, to which application the executor already confirmed must be made a party; and the only effect of such a proceeding, generally speaking, is to obtain the omitted or undervalued effects added to the inventory at their true value; *Bell's Com. ubi cit.*; *Ersk.* B. iii. tit. 9, § 36. [See *Executor-Creditor.*] An executor is not entitled to make payment to beneficiaries, without first providing for payment of all debts of the estate; *Lamond's Trs.* 8 March 1871, 9 Macph. 662; *Stewart's Trs.* 9 June 1871, 9 Macph.

[810.] By 1617, c. 14, a stranger nominated executor was allowed to retain to himself one-third part of the dead's part, after deducting debts. [See *Lowndes*, 18 July 1862, 24 D. 1391. But this provision was repealed by 18 Vict. c. 23, § 8, and executors-nominate, as such, have now no right to any part of the estate.]

The office of executor, like other trusts, is personal, and not descendible to heirs. Hence, where two or more have been confirmed executors, on the death of one of them, the office accrues to the survivors or survivor, and falls entirely on the death of the whole. In the latter case, the commissary was formerly in use to appoint an executor-dative *quoad non executi*, who was accountable, not to the next of kin of the deceased executors, but to the next of kin of the defunct, the unexecuted part of the testament being held to be still *in bonis* of him. The part executed, and the responsibilities therewith connected, were, of course, transmitted to the next of kin of the deceased executors in the ordinary course of succession. But for upwards of a century and a half, the confirmation has, in every case, been held to have the effect of an assignation or procuratory *in rem suam*, whereby the full right to the subjects confirmed, and, consequently, the right to execute the testament, in so far as unexecuted, is transmitted to the representatives of the deceased executors; *Ersk. B. iii. tit. 9, § 38*. It was formerly the practice for executors who desired to have their accounts settled, and to be discharged of their trust, to raise actions before the commissary court, concluding for decree of exoneration. This form of action is gone into desuetude; and according to the present practice, no formal exoneration is considered necessary; but when an executor is sued by creditors or others interested, and entitled to call him to account, he may competently plead, by way of exception against such action, that the inventory in the confirmation is exhausted by lawful payments, not by mere decrees ordaining him to make payment. If there be any debts mentioned in the inventory as due to the defunct, which have not been received by the executor, he will be exonerated as to those, by producing decrees and registered hornings against the debtors, and by granting assignations thereof to the defunct's creditors who are insisting in the action against the executor, so as to enable them, if they please, to sue the defunct's debtors for payment; *Stair, B. iii. tit. 8,*

§ 75; More's Notes, cccliv.; *Ersk. B. iii. tit. 9, § 47*. [By 30 & 31 Vict. c. 97, § 18, the resignation of a trustee who is also executor infers resignation as executor. As to whether one who is appointed merely executor, and not trustee, may resign, see *Journ. of Jurisp.* xxiii. 113.] See generally, on the subject, *Stair, B. iii. tit. 8; Mackenzie, B. iii. tit. 9; Ersk. B. iii. tit. 9, §§ 1, 26; Kames' Stat. Law Abridg. voce Executor; Kames' Elucid. art. 16; Bell's Com. ii. 77; Bell's Princ. §§ 1870, 1888; Ross's Lect. i. 55-76; Kames' Equity, 273, 293, 497, 502; [Alexander's Commissary Prac. 40; Currie on Confirmation of Executors; Menzies' Conv. 200, 482; M. Bell's Conv. ii. 1119; M'Laren on Wills, ii. § 1657; Dove Wilson's Sher. Court Prac. 542; Jurid. Styles, ii. 648.]* As to the intromission of an executor without confirmation, see *Vituous Intromission*. As to questions of relief between heir and executor, see *Discussion. Heir and Executor*.

EXECUTOR-CREDITOR. Where the executor-nominate, and the other executors legally entitled to expedite confirmation, have declined confirming, any creditor of the deceased holding a liquid ground of debt may obtain himself confirmed *executor-creditor*, to the effect of administering as much of the estate as may be sufficient to pay his debt; A.S. 14 Nov. 1679. [By 4 Geo. IV. c. 98, § 4 (quoted in preceding article), the confirmation may be limited to the amount of the debt, and notice must previously be given in the Gazette. See *Lee*, 17 May 1816, F.C.; *Willison*, 17 Dec. 1840, 3 D. 273; *Smith's Trs.* 27 June 1862, 24 D. 1142. As to the procedure, see *Confirmation*.] The creditor's right, or, more correctly speaking, this *diligence*, is completed by the confirmation—the mere decree-dative of the commissary, which precedes the confirmation, not being sufficient to complete the right. And where other creditors are in circumstances to do so, they may apply to the commissary, and be confirmed along with the first; or another creditor may himself confirm executor-creditor also, and summon the first to communicate a share of the fund which he has confirmed. Where, again, the debt of the creditor of the defunct is not constituted, the act 1695, c. 41, provides that it shall be lawful for the creditor, who has a depending cause or claim against the defunct at the time of his death, “to charge the defunct's nearest of kin to confirm executor to him within twenty days after the charge given; which charge, so executed,

shall be a passive title against the person charged, as if he were a vitious intromitter, unless he renounce; and then the charger may proceed to have his debt constitute, and the *hereditas jacens* of moveables declared liable by a decree *cognitionis causa*; upon the obtaining whereof, he may be decerned executor-dative to the defunct, and so affect his moveables in common form;" *Ersk. B. iii. tit. 9, § 35*. In order to secure an equitable distribution of the funds of a defunct, it was provided by 1654, c. 16 and 18, enacted during the Usurpation, "that hereafter there be no executor-creditor decerned and confirmed to any defunct until half a year be passed after the defunct's decease; and that no decree for payment be extracted against any executor for six months after the defunct's death; and that all creditors who shall use diligence against the executor, within the said six months, shall come in *pari passu* with others who have decrees ready to extract." This enactment was repealed at the Restoration, but substantially re-enacted by the declaratory A.S. 28 Feb. 1662; whereby "all creditors of defunct persons using legal diligence at any time within half ane year of the defunct's death, by citation of the executors and intromitters with the defunct's goods, or by obtaining themselves decerned and confirmed executors-creditors, or by citing of any other executors-creditors confirmed, the said creditors using any such diligence before the expiry of half ane year, as said is, shall come in *pari passu* with any other creditors who have used more timely diligence;" the posterior creditors, before taking benefit by the inventory confirmed, being bound to pay a proportional part of the expense incurred by the executor-creditor first decerned and confirmed; and it being lawful for such posterior creditor or creditors to obtain themselves conjoined with the first in the office of executors-creditors. The distinction between the *pari passu* preference thus introduced, and that of adjudication within year and day of the first effectual one, is that, in the case of adjudications, the participation of creditors adjudging, after the expiration of the year and day, in the benefit of the first adjudication, is absolutely excluded; whereas claims upon the executry may be made notwithstanding the expiration of the six months, so as to give the claimant a share of the fund, if it be still undivided; *Bell's Com. ii. 81*. See also *Bank. B. iii. tit. 8, § 81*; *Ersk. B. iii. tit. 9, §§ 34, 45*; *Bell's*

Princ. § 1895; *Stair, B. iii. tit. 8, § 63*; *More's Notes, cclxxxix., ccclx.*; [*Alexander's Commissary Prac. 93*; *Currie on Confirmation, 68*; *Menzies' Conv. 489*; *M. Bell's Conv. ii. 1135*; *M'Laren on Wills, ii. § 1675*.]

EXECUTORS. This term is sometimes applied *designative* to the next of kin of a defunct who are entitled to his moveable succession *ab intestato*. [See *Succession*.] Where the defunct has not nominated an executor or administrator of his moveable estate, nor disposed it in favour of a general donee, the whole next of kin or executors are entitled to the administration *pro indiviso*, and may obtain confirmation accordingly. See *Executor. Confirmation of Executors*.

EXECUTORY and EXECUTED; in English law, are terms expressive of the different stages in a contract. [A contract is said to be *executed*, where nothing remains to be done by either party, and where the transaction is completed at the moment the agreement is made, as where an article is sold and delivered, and payment therefor is made on the spot. A contract is said to be *executory*, where some future act is to be done, as where an agreement is made to build a house in six months, or to do an act on or before some future day, or to lend money upon a certain interest, payable at a future time; *Wharton's Lex.*] In the question of *condictio indebiti*, this distinction is of importance. When the payment has been only executory,—i.e., when the granter has only bound himself to deliver a certain thing,—he may be freed from his obligation, by proving that he was under an error in law, with regard to the consideration of it; but when the payment has been executed, error in law is no ground for repetition. [But see *Condictio Indebiti. Error*.]

EXECUTRY; is the general name given to the whole moveable estate and effects of a defunct, and is the proper subject of the executor's administration. It includes not only what belongs to the executor by his office, or succession, but all that belongs to the defunct's relict, children, or nearest of kin, legatees, and creditors. *Stair, B. iii. tit. 8, § 1*; *Ersk. B. iii. tit. 9, § 1*; *Bell's Com. i. 137*. See *Goods in Communio. Jus Relictæ. Legitim. Dead's Part*.

EXERCITOR. An exercitor is the person to whom the profits of a ship or trading vessel belong, whether he be the actual owner or merely the freighter. According to Erskine, the word is derived from *exercere*, to employ—an exercitor being one

who employs the ship in the way of trade on his own account. An exercitor is liable for all repairs, provisions, or furnishings, of whatever kind, necessary for the ship or crew, and ordered by the master, or by the person in the actual charge of the ship. This obligation is founded on an implied mandate, which the exercitor is presumed to have granted in favour of the master, to the effect of procuring whatever may be needful for the successful prosecution of the voyage. Hence, the master may, in that character, competently bind the exercitor for such furnishings, even although the master may be himself incapable of contracting a binding obligation on his own account; for any one may be appointed master, "without distinction of age, sex, or condition; even pupils, and women clothed with husbands;" *Ersk. infra cit.* But although the contractions of a shipmaster, who is not *sui juris*, thus bind his constituents, yet, in the ordinary case, the master as well as the exercitor is personally bound to the furnisher; for a shipmaster is not accounted a mere administrator for the owners. Whoever is in the actual command of the vessel is deemed to be *præpositus, presumptione juris et de jure*, without any commission from the exercitor, and even although he should be acting as master without the exercitor's knowledge, and contrary to his orders. The exercitor is also liable for the necessary furnishings, whether the master has purchased them with his own money, or has borrowed money for the purpose. It is to be observed, however, that a shipmaster's obligations for borrowed money bind the exercitor, only where the advance has been made in a foreign port; while contractions for ordinary and necessary furnishings bind the exercitor, although made to the master in a home port; *Lindsay*, 18 June 1800, F.C., M.App. Mandate, No. 2. [See 19 & 20 Vict. c. 60, § 18.] And as the master can in no case bind the exercitor in the matters not falling within the trust committed to him as master, it is proper that bonds for money advanced for the use of the vessel should expressly mention the cause for which the money is borrowed. The furnisher or lender, in order to make good his claim against the exercitor, is not bound to prove that the furnishings or advances of money have been properly applied by the master; but he must be able to show that the furnishings or the repairs, for which the advances were made, were ordinary, necessary, and proper. If there be more than one exercitor, they are

all liable, *singuli in solidum*, for the master's contractions, without regard to their respective shares in the vessel—the exercitor who pays being entitled to relief, *pro rata*, from the others. Where the exercitors manage the ship themselves, without appointing a master, and without devolving the ostensible and exclusive management on any one of their own number, each is accounted master, *quoad* his own share; and his contract binds himself alone. The shipmaster's contracts concerning the cargo do not bind the exercitor, unless the master's commission contain an express authority to that effect—the management of the cargo, and of the contracts therewith connected, being usually entrusted to a supercargo. The exercitors, as well as the master, are included under the edict, *Nautæ, carpones, stabularii*—not, however, *in solidum*, but *pro rata*, according to their interests in the vessel; and that whether the exercitors be owners or mere freighters. [See *M'Kessack*, 15 Jan. 1886, 13 R. 445. But, by 25 & 26 Vict. c. 63, § 54, the liability of owners is limited, in respect of loss of life or personal injury, to £15 for each ton of the ship's tonnage, and, in respect of loss or damage to ship or merchandise, to £8 for each ton.] See *Ersk. B. iii. tit. 1, § 29*; *Bank. B. i. tit. 18, § 30*. Exercitory obligations, as they are termed, being properly maritime, were formerly cognisable, judicially, in the Admiralty Court, in the first instance. See *Stair*, B. i. tit. 12, § 10; *More's Notes*, lxxiii.; *Ersk. B. iii. tit. 3, § 43*; *Bank. B. i. tit. 18, § 24*; *Bell's Com. i. 506*; *Bell's Princ. § 450*; [and other authorities cited under *Shipmaster*.]

EXHIBITION. This term is applied to an action for compelling production or delivery of writings, and may be resorted to either for the recovery of writings which belong to the pursuer, or it may be raised at the instance of an apparent heir, to force production of writings and title-deeds relative to his predecessor's estate, in order to enable the heir to deliberate as to the propriety of entering heir, and thereby incurring a responsibility for his predecessor's debts and obligations.

1. *Exhibition and Delivery by a Proprietor of the Writs called for.*—This is an ordinary petitory and principal action, whereby the owner of a writing requires the defender to produce it, and deliver it to him. Being a real action, it may be insisted in against any holder of the document required—the pursuer being bound to specify

the manner in which the defender became possessed of the document; and also to prove (which he may do by witnesses) that the defender had the writ in his possession at the date of the citation, or since. After that has been established, it is incumbent on the defender either to produce the writing, or to prove that he warrantably parted with it, or fairly lost possession of it; and if the pursuer be not satisfied with the defender's statement, he may compel him to answer, upon oath, all pertinent interrogatories in relation to his having the writing, or putting it away, or as to his knowledge or suspicion concerning the person or persons who have got possession of it; A.S. 22 Feb. 1688. [See *Campbell*, 26 May 1826, 2 W. & S. 440; *Emslie*, 17 Jan. 1856, 18 D. 318. When a trustee in a sequestration desires to compel production of documents, an action of exhibition and transumpt is unnecessary: he has sufficient powers under the Bankruptcy Act, 1856, §§ 90, 91, 93; *Selkirk*, 22 Oct. 1880, 8 R. 29. When in an action of exhibition the court is satisfied that the titles called for should be produced, the proper course is to ordain them to be exhibited in the hands of the clerk of court; *Clark*, 16 Nov. 1880, 8 R. 81.] See *Stair*, B. iv. tit. 33, § 1; B. i. tit. 7, § 14; *More's Notes*, li.; *Bank*. B. i. tit. 8, § 41; *Ersk.* B. iv. tit. 1, § 52; *Jurid. Styles*, iii. 20; *Bell's Com.* ii. 68; [*Dickson on Evidence*, § 1378; *Shand's Prac.* i. 230.]

2. *Exhibition ad Deliberandum by an Apparent Heir*.—This action has more the character of an accessory action than the preceding has, and may be pursued against third parties as well as relations, by every heir who may competently be charged to enter heir to a deceased person. The right to insist in the action is one of the privileges of an apparent heir; and he may raise it either within the *tempus deliberandi*, or after its expiration, and at any time before his entry as heir. In the action, the apparent heir is entitled to call for exhibition of all deeds granted to or by his predecessor, whether the deeds have been perfected by sasine or not, to the effect that he may thereby be enabled to deliberate whether or not it will be prudent for him to take up the succession which has opened to him; [*Campbell*, 15 July 1869, 7 Macph. (H.L.), 101; *Fulton*, 9 March 1878, 5 R. 752.] Any deed of the predecessor, by which the heir is excluded from succession, will afford a good defence against the action. Hence an irredeemable dis-

position, or a deed of entail, by which the ancestor has been divested and the heir excluded, will be a sufficient defence to the disponent against exhibiting the writings relative to such disposition or deed of entail; and that whether sasine has followed on the deed or not. In like manner, if the apparent heir have been charged to enter heir by a creditor of the defunct, and have renounced, the heir cannot legally insist in an exhibition *ad deliberandum* against the creditor on whose charge he has renounced; but that renunciation will be no bar to an action of exhibition *ad deliberandum* against any other creditor of the defunct. Although the heir, before his entry, may require exhibition of writings *ad deliberandum*, he cannot, until his actual entry as heir, compel delivery of the title-deeds or other documents belonging to his ancestor, in the hands of third parties; neither can he enforce payment of the debts proved by such documents to be due to the ancestor. See *Ersk.* B. iii. tit. 8, § 56; *Stair*, B. iv. tit. 33; *Bank*. B. iii. tit. 4, § 66; tit. 5, § 7; *Bell's Princ.* § 1688; *Jurid. Styles*, iii. 21; [*Mackay's Prac.* i. 285, 365.] See *Apparent Heir*.

3. An exhibition *ad probandum*, was another accessory action formerly in use. This was an action competent to the party to a suit, when he wished to prove a fact pertinent to the cause, by the production of writings belonging to, or in the custody of, third parties—technically called *Havers*. In practice, this action has been long superseded by incident diligences, granted in the course of the principal action against the haver of the writing. [It seems, however, to be still competent; *Campbell*, 13 May 1869, 7 Macph. 759.] See *Ersk.* B. iv. tit. 1, § 52; *Stair*, B. iv. tit. 33, § 2; tit. 41, § 5; *More's Notes*, cccxv.; [*Dickson on Evidence*, § 1381; *Shand's Prac.* i. 368; *Mackay Prac.* i. 365.] See *Haver. Diligence*. [*Incident Diligence. Commission.*]

EXHIBITION; the benefactions settled for the maintenance of scholars in the English universities, not depending on the foundation, are called exhibitions. In this sense, the term is analogous with the Scotch term bursary. An exhibition was the name formerly given to an allowance of meat and drink, such as was customary among the religious appropriators of churches, who usually made it to the depending vicar. *Tomlins' Dict. h. t.* See *Bursary. Altarages*.

EXHUMATION. This term is some-

times applied to the offence of disinterring a dead body. See *Dead Body*.

EXILE. See *Transportation*.

EXITUS; the issue or profits of anything. *Exitus terre*, the rents, fruits, and profits of the land. *Exitus justitiarum*, the profit of the justice airt. *Exitus curie*, the issues and commodity of a court, as amercia-ments, and the like. *Skene, h. t. ; Stair, B. ii. tit. 3, § 64.*

EXONERATION; a discharge; or it signifies the act of being legally disburdened of, or liberated from, the performance of a duty or obligation. See *Discharge*.

EXPEDING LETTERS. This expression is said to be derived from the French verb *expédier*, which signifies to make out the principal copies of letters, judgments, and other juridical writs. In the phraseology of the Scotch law, to expedite letters means to write out the principal writ, and get it signeted, sealed, or otherwise completed. Thus, after a bill of suspension or of advocacy had been passed by the Lord Ordinary on the Bills, the act of writing out the letters of suspension or of advocacy, and of obtaining them signeted, was termed expediting the letters—the passed bill being the warrant for so doing. In like manner, the act of passing a royal charter through the seals was formerly termed expediting a charter, although now the technical expression is *passing* a charter. See *Ross's Lect. i. 236.* See *Suspension. Advocacy.*

EXPENSES, or COSTS OF SUIT. In judicial procedure, this term is applied to the charges exigible from a party to a process, as court dues, fees to counsel and agents, and other expenses incurred in the prosecution of the action. It is almost the invariable practice for the pursuer, or generally speaking, for the party making any claim judicially, not only to demand payment or performance of the obligation, or declarator or reduction of the right which is in question, but also to conclude for the expenses of the process which he has found it necessary to institute. In like manner, it is the practice for the defender or respondent to demand the expense attending his defence; and the court (except where special statute or rules of court regulate the matter otherwise) are in use to exercise a discretionary power on this point. [The question of expenses is always one of equity, and is pre-eminently a matter for the discretion of the court, to be dealt with on an equitable view of the circumstances of each case. The guiding rule,

however, is that the right to expenses follows success in litigation. In the earlier practice, this rule was less observed, liability for costs being regarded (as it was in the Roman law) as a penalty for rash litigation. But now, in the ordinary case, the losing litigant is held liable, though he be in perfect good faith, and though the questions raised be novel or delicate, or the previous authorities conflicting; the principle being that "if any person is put to expense in vindicating his rights, he is entitled to recover it from the party by whom it was created, unless there was in his own conduct something which gave him the character of an improper litigant." See *Kirkpatrick*, 18 Jan. 1848, 10 D. 367; *Torbet*, 23 Feb. 1849, 11 D. 694; *Crawford*, 25 Jan. 1862, 24 D. 357.] Regularly, the question of expenses ought to be determined in the decree which settles the point of law; for the expenses are not demandable in a new action. By 6 Geo. IV. c. 120, § 17, "in pronouncing judgment on the merits of a cause, the Lord Ordinary shall also determine the matter of expenses, so far as not already settled, either giving or refusing the same in whole or in part; and every interlocutor of the Lord Ordinary shall be final in the Outer House." It frequently happens, however, that decrees are allowed to be extracted, which contain a reservation of the question of expenses, the process to that extent remaining in dependence. Expenses may be awarded to the pursuer in a litigated cause, although not concluded for in the summons; *Bank. B. iv. tit. 36, § 5.* [They constitute an entirely separate claim, which is not in existence at the date of the summons, and only emerges in the course of the process; *Heggie*, 1 March 1826, 4 S. 510.] In the case of decrees in absence, the statute 1 & 2 Geo. IV. c. 38, § 33, provides that it shall not be lawful to extract any decree for the random sum of expenses concluded for in the summons; but that, in all cases of decrees in absence, an account of expenses shall be lodged in process, and taxed by the Auditor; and that a report thereon by the Auditor shall be a sufficient warrant to the extractor to fill up the amount of the expenses to be awarded against the defender, without the necessity of bringing the Auditor's report before the Lord Ordinary, unless by his own direction or that of the Auditor, or on the motion of any party interested. See *Decree*. Where, in a litigated cause, expenses have been found due to either party by the Court of Session or

by a Lord Ordinary, the practice is for the court or Lord Ordinary to make a remit to the Auditor of court to tax the account of expenses. The account, together, with a copy of the interlocutor finding expenses due, prefixed thereto, is lodged with the Auditor, who thereafter fixes a time for the taxation; and a copy of the account, together with the Auditor's warrant for taxing, is served on the agent for the party or parties found liable in expenses, that he may attend at the time so fixed. The agent for the party found entitled to expenses attends at the same time, and produces the process, or such part of it as may be necessary for the taxation of the account, together with the drafts or copies of papers, and other vouchers of his account, to the Auditor. After the account is taxed, the agent is entitled to get back the process, in order to return the same to the clerk, except in those cases where it may be necessary for the Auditor to retain it for further examination, in which case a receipt is given by the Auditor or his clerk for the process; A.S. 11 July 1828, § 69. The Auditor is empowered to hear the agents for the parties, but not in writing, on their objections. The Auditor returns a short report on the account, specifying the taxed amount; and, if no objection be made, the court or Lord Ordinary before whom the process depends, approves of the report and decerns for the amount. In case either party means to object to the Auditor's report, he must immediately lodge with the clerk of the process a short note of his objections without argument, a copy of which must be transmitted to the agent on the other side, and the court or Lord Ordinary may either direct the objections to be answered *viva voce*, or in writing; the expense of the discussion being laid on the objector if he fail in making good his objection, and the interlocutor thereon being final; A.S. 6 Feb. 1806. An intimation of an appeal to the House of Lords is not enough to stop decree being pronounced for expenses; but where the appeal has been actually presented, [and an order has been served on the respondent to answer the said appeal,] a motion for expenses is incompetent. [The court has power, however, by 48 Geo. III. c. 151, §§ 17, 18, to make interim regulations, according to its discretion, as to the payment of expenses already incurred; and it is the invariable practice to grant interim execution for expenses, the party finding caution to repeat, in case the judgment be reversed.

[See *Interim Execution*.] If the agent who has conducted the cause wish it, the decree for expenses will be allowed to issue and be extracted in his name; [Miller, 22 June 1848, 10 D. 1384.] And where an interlocutor has been pronounced finding expenses due, or which by necessary implication carries expenses, the right of the agent to claim those expenses, and to have decree in his own name for them, cannot be defeated by a compromise of the law suit; Hamilton, 17 June 1813, F.C.; Bell's Com. ii. 38. [See *Agent. Hypothec*.] The taxation of the expenses, where either party is found liable to pay them, is, of course, a taxation as between *party and party*, not as between *agent and client*; for, although a party who is found liable in his adversary's expenses, is, under such an award, bound to pay the regulated expenses of a judicial discussion, conducted in the ordinary manner, he lies under no obligation to pay all the expenses which an anxious or capricious litigant may have incurred in the conduct of his cause; A.S. 19 Dec. 1835. But although such expenses are not included under an award of the expenses of process, it is equally clear that the litigant is bound to pay his own agent for all the unnecessary, and, very often, useless expense *bona fide* occasioned by the litigant's own over-anxiety, and at his express desire. Hence arises the distinction which has been recognised between a taxation of costs as between party and party, and as between agent and client. Independently, however, of such capricious and extraordinary costs, it necessarily happens that, in almost every case, the agent for one or other of the parties (and, where no expenses are found due to either party, the agent for each party) has an account to claim from his own employer. The A.S. accordingly provides in like manner for the taxation of accounts as between agent and client, by authorising a summary application to be made by the party to the Lord Ordinary before whom the cause depends, or has formerly depended, to get the account claimed by his agent remitted to the Auditor to be taxed according to the existing regulations; the report, in that case also, being returned to the Lord Ordinary, and disposed of as above, and the sum so ascertained forming the proper charge by the agent against his client. So also, when an agent, or his representative, raises an action against his employer for payment of a professional account, the

Lord Ordinary may, and usually does in the first place, remit the account claimed to the Auditor to be taxed; and no decree, either in absence or after hearing parties, can be pronounced in such a case until a report has been made by the Auditor; A.S. 6 Feb. 1806. As to the agent's preference for his expenses over the fund recovered, or in the competition with the creditors of the party, see *Hypothec. Retention*. As to the liability of attorneys or mandatories for expenses, see *Defender*. The amount of fees paid to counsel is never interfered with, if *bona fide* paid and within reasonable bounds. In all cases where memorials are laid before counsel, the fee paid therewith, together with the date of payment, must be marked on the back in large legible characters (in words), and the paper must afterwards be got back from counsel, indorsed with his signature or initials, and produced to the Auditor. Where fees are paid to counsel without a memorial, a certificate under the hand of the counsel or his clerk, must, if required, be produced, that such fees were paid of the dates stated in the account. [Charges for consulting counsel, preparatory to raising an action, are not part of the expenses of process, and cannot be awarded; *Dougal*, 7 March 1834, 12 S. 532.] A party, after he has been found entitled to expenses, is not allowed to pay or state higher or additional fees to counsel, not actually paid at the time. But this rule does not apply either to cases on the poor's roll, or to such as have been conducted gratuitously by the agent and counsel, on account of the poverty of the party; A.S. 19 Dec. 1835; [*Sim*, 12 March 1889, 16 R. 583.] In general, the fees of two counsel only can be allowed against the losing party. [But this rule is relaxed in cases of more than ordinary magnitude, especially in heavy jury trials, where the labour of preparing may be divided among the counsel. See observations of Lord Pres. Inglis, in *Padwick*, 4 March 1874, 1 R. 697.] The personal charges of an unprofessional party are not allowed. Where it is necessary or proper to employ a country agent in conducting a cause in the Court of Session, reasonable charges may be allowed for his trouble, &c., provided that double charges are not thereby incurred for doing the same business; A.S. 19 Dec. 1835. [By A.S. 16 July 1876, "in judicial taxations between party and party, there shall be only one account, in which the whole

[business chargeable against the opposite party shall be stated continuously, by whatever agent performed, the agents employed making their own arrangements as to the portion payable to each."] In an action on a mutual contract, stamped during the dependence of the action at the pursuer's expense, if the pursuer prevail and is found entitled to expenses, the expense of stamping, including penalty and solicitor's fee, must be borne by the parties equally; *Stewart*, 12 Feb. 1817, F.C. A decree for expenses in favour of a party who has been admitted to the benefit of the poor's roll, in order to prosecute the action, includes the expense of getting upon the roll; *Cameron*, 25 June 1814, F.C.; *Rankine*, 31 May 1821, 1 S. 43 (note). Where a judicial remit has been made by the Court of Session, to an accountant or other professional person to report, [the agent who conducts the remit, if he has authority to bind the party, is not, without special agreement, personally responsible to the reporter for his fee; A.S. 19 Dec. 1835.]

After a case has been decided in the Inner House without mention of expenses, it is not competent to claim expenses from the Lord Ordinary; *Campbell & Co.* 1803, M. App. Expenses, No. 3; *Wyllie*, 5 Feb. 1820, F.C. Where an interlocutor of a Lord Ordinary not mentioning expenses has been reclaimed against by the defender, and the interlocutor has been adhered to, without mention of expenses, and the interlocutor allowed to become final, no expenses can be awarded to the pursuer; *Flethers of Canongate*, 7 July 1809, F.C. A Lord Ordinary can in no case give the expense of any part of a process finally decided in the Inner House, without an express remit for that purpose; *Falconer*, 4 March 1815, F.C. See also *Wilson*, 12 Nov. 1814, F.C. [Where an interlocutor of a Lord Ordinary, finding expenses due generally, has been adhered to in the Inner House, it is necessary to move specially for the Inner House expenses, otherwise they will be held as not awarded; *Grant*, 30 June 1835, 13 S. 1007. When a reclaiming note is withdrawn before counsel have been instructed, two guineas of expenses are allowed to the respondent; *Davidson*, 14 March 1878, 5 R. 763; *Johnston*, 24 June 1876, 3 R. 879.] The Lord Ordinary in the Outer House, or the court, in the event of bills of suspension of decrees of inferior courts being passed may find the suspender, [or respondent,] entitled to the expenses he has incurred

in the inferior court, as well as in the Court of Session; 6 Geo. IV. c. 120, § 46; A.S. 11 July 1828, § 8; [*Murdoch*, 8 March 1832, 10 S. 445.] A general finding of expenses in favour of the suspender does not carry his expenses in the inferior court. In a suspension, the court cannot remit to the inferior court to decide the question as to the expenses in the Court of Session. When the court remits a case to the sheriff, with instructions to repel the dilatory defences, it is competent to give power to the sheriff to decide all questions of expenses relative to said defences. [When expenses of any incidental procedure are reserved, they are covered by a general finding for expenses; *Caled. Railway*, 19 March 1889, 16 R. 622.]

In jury causes, it is competent to award the expenses of discussing questions of law and relevancy at the time they are disposed of; but this is not usual. When a party prevails on any incidental point, he ought always to get the expenses connected with it at once. [With regard to expenses incurred in bringing witnesses, taking precognitions, and printing documents, in connection with jury trials, see A.S. 16 Feb. 1841, § 45; 10 July 1844; 18 July 1850.] At the termination of the cause, the question of expenses can only be taken up in the Division of the court to which the case belongs, on a motion duly lodged and intimated, which is usually done when application is made to have the verdict applied. In general, the party obtaining the verdict is entitled to his expenses; but this rule is, in special circumstances, subject to exceptions. To get expenses, it is not necessary that a party should succeed to the full extent of his claims. It is enough that he has substantially succeeded in the point at issue. [But, by the Court of Session Act, 1868 (31 & 32 Vict. c. 100, § 40), “where the pursuer in any action of damages in the Court of Session recovers by the verdict of a jury less than five pounds, he shall not be entitled to recover or obtain from the defender any expenses in respect of such verdict, unless the judge, before whom such verdict is obtained, shall certify on the interlocutor sheet that the action was brought to try a right besides the mere right to recover damages; or that the injury, in respect of which the action was brought, was malicious; or, in the case of actions for defamation or for libel, that the action was brought for the vindication of character, and was in his opinion fit to be

[tried in the Court of Session.” The judge’s certificate is final, and entitles the pursuer to an award of expenses; *Macmillan*, 25 Oct. 1887, 15 R. 6; but see *Craig*, 7 July 1871, 9 Macph. 973; and *Bonmar*, 1 June 1887, 14 R. 761. As to certificate by a judge under the Merchant Shipping Acts that the case was fit to be tried in a superior court, see *Lawson*, 14 June 1888, 15 R. 753. Expenses may be modified in consideration of circumstances. Where a party is successful only on some of several issues, but upon the whole gets damages, he is entitled to his expenses, under deduction of the portion applicable to the issues which he has lost, and that portion he must sometimes pay to the other party; A.S. 19 Dec. 1835. [See *Dean*, 26 June 1873, 11 Macph. 759.] Where the loss has been definite, and where the defender has tendered a sum by way of reparation, along with the expenses of process, up to the date of the tender, he will be liable in expenses, if the jury award more than that sum, but he will be entitled to expenses if they give less; [*Fullerton*, 2 Nov. 1882, 10 R. 70; *Gunn*, 17 Feb. 1886, 13 R. 573. If the jury award the exact sum which the defenders had tendered, they will be entitled to expenses from the date when the tender should have been accepted; *Shaw*, 28 Nov. 1863, 2 Macph. 142.] This rule, however, does not apply to actions for defamation, and others of that description, where a public investigation is necessary. [In such cases, as a general rule, a tender of money without retraction is of no value; *Faulks*, 22 Dec. 1854, 17 D. 250. But see *Anderson*, 24 Nov. 1835, 14 S. 54.] in which the defender got expenses, in respect of a tender of £50, the jury finding for the pursuer only one shilling of damages. [The court will judge of every case according to its own circumstances. See *Tender*. When a new trial is granted, and results in a different verdict from that of the first, a difficult question arises as to the expenses of the first trial. If the first verdict was set aside on a bill of exceptions, in respect of an erroneous direction in law given to the jury by the presiding judge, the party who is ultimately successful is entitled to the expenses of both trials. If, on the other hand, the first verdict has been set aside on the ground of miscarriage by the jury, the former practice was to grant a second trial only on condition of payment of the expenses of the first, so far as not available for the second; and this course may still be followed in special circum-

[stances; *Neville*, 6 Feb. 1864, 2 Macph. 625. But the usual practice now, when a new trial is granted on this ground, is to reserve the question of expenses till the ultimate issue of the cause; *Frasers*, 2 Dec. 1882, 10 R. 264. As a general rule, the party losing the first trial does not recover the expenses thereof, though ultimately successful, the presumption being that he lost it through some fault, or negligence, or mispleading on his own part; *Lindsay*, 31 Jan. 1863, 1 Macph. 380; *Steel & Craig*, 5 Feb. 1878, 5 R. 622. But the court has an equitable discretion to award the expenses of both trials, if a special and exceptional case is made out. See *Lyll*, 30 Nov. 1867, 6 Macph. 42; *M'Bride*, 22 May 1869, 7 Macph. 790. In *Stewart*, 4 Feb. 1870, 8 Macph. 486, where a verdict was set aside, as being not only inconsistent with evidence, but irrational and self-contradictory, the party who practically lost the first trial, but was ultimately successful in the second, was not allowed the expenses of the former. It is not probable, therefore, that the expenses of both trials would be allowed, where the first verdict was set aside on grounds for which the jury were wholly responsible.

[With regard to the expenses of appeals to the House of Lords, the general rule was, until recently, that they could not be obtained by an appellant, even when successful. But since the Appellate Jurisdiction Act, 1876, that rule has been set aside, and successful appellants now generally obtain all their expenses, including the costs of appeal. The subject, however, is dealt with by the House in its discretion, according to the justice of each individual case. The general rule has always been that a successful respondent recovers the expense of supporting the judgment appealed against. Under a judgment of the House of Lords, with a remit to the Court of Session, "to proceed as may be consistent with this judgment," but with no special finding as to expenses, if the judgment of the House of Lords exhausts the whole merits of the cause, it is incompetent for the Court of Session to dispose of the expenses prior to appeal; but if the cause is remitted for further discussion on the merits, after applying the judgment, the court may dispose of the whole expenses incurred in the Court of Session, whether before or after the appeal; *Stewart*, 11 March 1836, 14 S. 692; *Western Bank*, 28 Nov. 1865, 4 Macph. 97. See *Ersk. B. iv. tit. 3, § 2*; *Macqueen's Appellate Jurisdic-*

tion, 266, 342; *Denison & Scott's Appeal Prac.* 141; *Mackay's Prac.* ii. 551.

[Trustees are entitled to be relieved of the expense of any litigation fairly arising out of the peculiarities of the trust, or of the situations of the claimants on it. Such expense will, in general, fall on the fund of division. But if trustees act unreasonably, or in a litigious spirit, they will be found personally liable; *Smith*, 29 June 1838, 16 S. 1223. Where a trustee on a bankrupt estate sisted himself in the bankrupt's room as a party in an action, in which he was ultimately unsuccessful, he was held liable in full for the expenses of the action, incurred before, as well as after, he had sisted himself as a party; *Torbet*, 23 Feb. 1849, 11 D. 694. See *Trustee. Sequestration*. Costs may now be given both for and against the Crown; 18 & 19 Vict. c. 90; 19 & 20 Vict. c. 56, § 24. A husband is generally liable for the expenses of all actions raised or defended by his wife. Even in a case of declarator of marriage, still pending, a woman may obtain an interim award of expenses to enable her to proceed with her action, if she has a strong *prima facie* case; *Forster*, 18 Feb. 1869, 7 Macph. 546. In actions of divorce or separation, the husband is bound to furnish the wife with the means of carrying on the action, whether as pursuer or defender. See *Divorce*. By the Conjugal Rights Act, 1861 (24 & 25 Vict. c. 86, § 7), in every action of divorce for adultery raised by a husband, the alleged paramour may be cited as co-defender, along with the wife, and may be decerned against for the whole or any part of the expenses of process. An arbiter has power to award expenses, though no mention of them be made in the submission; *Ferrier*, 28 Jan. 1843, 5 D. 456. In criminal prosecutions, the Lord Advocate cannot be found liable in expenses; but an inferior public prosecutor may be subjected in expenses, where his conduct is either grossly irregular or oppressive. Private prosecutors may be found liable, in the discretion of the court. See *Hume*, ii. 127; *Alison's Prac.* 92; *Macdonald*, 278.]

See *Stair*, B. iv. tit. 3, § 2; *More's Notes*, ccxc.; *Ersk. B. iv. tit. 3, § 18*; *Bell's Com.* i. 693; [*Shand's Prac.* 1026; *Mackay's Prac.* i. 380; ii. 526; *M'Glashan's Sher. Court Prac.* § 1687; *Dove Wilson's Sher. Court Prac.* 192; *Macdonald*, 549; *Moncreiff on Review*, 104, 182; and articles by Sheriff Scott Moncreiff in *Journ. of Jurisp.*, vols. xvii., xviii.]

EXPIRY OF THE LEGAL. See *Adjudication. Legal.*

[EXPLOSIVE SUBSTANCES. See 38 Vict. c. 17; 46 Vict. c. 3; also *Dykes*, 7 Feb. 1885, 12 R. (J.C.) 17; *Costelloe*, 22 May 1882, 4 Coup. 602.]

EXPOSING CHILDREN. The offence of exposing and deserting an infant child, if accompanied with circumstances proving an intention to destroy, and followed by death in consequence of the exposure, amounts to the crime of murder. Whether this be the case where there is no evidence of an intention to destroy, but the child dies by an accident connected with the exposure, may be more questionable; but on principle, the reckless exposure of an infant child to the risk of death, followed by death, seems to be nothing less. [See *Kerr*, 24 Dec. 1860, 3 Irv. 645.] Even although the child does not perish, its desertion and exposure to any considerable risk is a crime punishable arbitrarily, according to the circumstances of the case, and which has been punished with whipping, imprisonment, or banishment. [It is also criminal wilfully to place a child in a situation of danger to its life, though there be no actual desertion; *Gibson*, 8 Jan. 1845, 2 Broun, 396.] See *Hume*, i. 190, 299; *Alison's Princ.* 162; [*Macdonald*, 172.] See *Child-Murder*.

EXPROMISSOR. According to the distinction of the Roman law, an *expromissor* was one who undertook the debt of another, by substituting himself as principal debtor, in room of the former obligant; who, in so far as concerned the creditor, was liberated from his obligation. An *adpromissor* or *fidejussor*, on the other hand, was more properly a cautioner, inasmuch as he merely acceded to, or bound himself in terms of, the obligation of the principal debtor, who also remained bound to the creditor. *Stair*, B. i. tit. 17, § 3; *Bank*, B. i. tit. 23, § 25; *Ersk.* B. iii. tit. 4, § 22. See *Cautionry. Delegation*.

EXTENT; is the name given to the ancient *census* or general valuation put upon all the lands in Scotland, for the purpose of regulating the proportion of public subsidies or taxes exigible from them, as well as for ascertaining the amount of the casualties due to the superior. The precise period at which a valuation of this kind was first made, has not been clearly ascertained, although it has long been the subject of inquiry and controversy amongst lawyers and antiquaries. It appears, however, that, so early as the year 1474, the

old extent or valuation had been deemed inadequate; and, accordingly, the statute 1474, c. 56, ordains that, in the retours made to Chancery, the inquest shall state "what the land was of avail of the auld, and the very avail it was worth, and gives the day of the serving of the said breve." Under that statute, according to the generally received theory, the practice for some time prevailed of adducing evidence before inquest, of the real rent or value of the lands at the time, which, as well as the old extent, or more ancient valuation, was accordingly stated in the retour. But after lands had been once so valued, it is said that, on the occasion of future retours, a new valuation was not made, but that the amount of the new, as well as of the old extent, was taken from the former retour; and that, even where no evidence of the present value had been adduced, a practice was introduced of stating in the retour the present value at a quadruple, quintuple, or sextuple of the old extent, according to the custom of retouring lands in the particular shire; *Hope's Minor Practicks* (1734), p. 194. In this manner, the new and the old extent are supposed to have been ascertained—the new extent being the valuation thus fixed, and the old extent consisting, as has been generally understood, of a valuation made in the reign of Alexander III., or, at any rate, at some time prior to 1474; *Ersk.* B. ii. tit. 5, § 33. Neither of these valuations extended to church lands, the share of the subsidies applicable to them being levied from the beneficiaries, according to the value of their benefices, as settled by Bagimont's Roll; *ib.* § 34. See *Bagimont's Roll*. During the Usurpation a more equitable rule of assessment was introduced, and the rates laid upon each county precisely fixed. After the Restoration, very nearly the same system was continued—statutory commissioners being appointed to apportion the general sum laid upon each county, upon the different lands in the county, according to their respective real rents. See *Act of Convention*, 23 Jan. 1667. The rent fixed by those valuations is commonly called the *valued rent*; according to which the land-tax, and most of the other public and parochial assessments, have been since imposed. It was likewise the rule, under the old election law, for regulating freehold qualifications where the old extent did not appear; 1681, c. 21. See *Election Law*. Erskine's account of old and new extent is abridged from *Kames'*

Law Tracts, XIV.; and the same authority has been followed by more recent writers, Lord Kames having been indebted for the materials of his theory to Mr John Davidson, a very learned member of the society of Writers to the Signet. But see Lord Kames' views modified and corrected, in *Cranston v. Gibson*, 18 May 1818, F.C.,—one of the papers in which case, written by Mr Thomson, deputy-clerk register, was stated from the Bench to contain a very learned treatise on the old extent. [In the modern petition of service, it is not necessary in any case to set forth the value of the lands either according to new or old extent; 31 & 32 Vict. c. 101, § 29.] See also *Skene, voce Extent*; *Balfour's Practicks*, 430; *Craig, de Feudis*, lib. ii. dieg. 17, § 36; *Stair*, B. iii. tit. 5, § 38; *Mackenzie's Inst.* B. ii. tit. 5, § 18; *Bank. B.* iii. tit. 5, § 32; *Kames' Stat. Law Abridg. h. t.*; *Ersk. B.* ii. tit. 5, § 31; *Hailes' Annals*, i. 202; *Wight on Elections*, 160; *Bell's Election Law*, 154; *Bell's Princ.* § 1831; [*Innes's Legal Antiquities*, 270; *Rankine on Land-Ownership*, 190.]

EXTENT, CROWN'S. An extent, in the acceptance of the English law, is a writ of execution or commission to the sheriff for the valuing of lands and tenements; and sometimes the act of the sheriff or other commissioner upon this writ; *Tomlins' Dict. h. t.* By the treaty of Union between Scotland and England, the revenue laws of the two countries were assimilated; and the Crown's preference and the English execution by extent (so far at least as concerns moveable property), were introduced in revenue matters, under the exception, and in the manner explained under *Crown Debts*. The process of extent, thus introduced, was a speedy remedy given to the Crown for recovering money due to the public. Originally, in England, this execution was confined to land; but by 33 Henry VIII. c. 39, it is authorised to be given to the Crown for attaching the body, lands, goods, and debts of the Crown debtor, for the recovery of all sorts of debts due to the Crown. In the case of a partnership debt, the extent may issue against the several copartners; but for the debt of an individual partner, the Crown can take no more than his interest in the company goods, after payment of the company debts. The application in Exchequer, for a writ of extent, is accompanied by an affidavit stating the amount of the debt, and that there is danger of its being lost to the Crown unless the

extent be issued. The *fiat* or warrant for a writ of extent may be obtained at any time, either during term or vacation, on application to the judge in Exchequer, by whom the *fiat* is signed—the date of the *fiat* being the date of the testing of the writ. The writ is tested by the judge, and sealed with the Exchequer seal. The writ of extent directs the sheriff to take the person of the Crown debtor, and to take and appraise his effects and debts. [See *Wharton's Lex.*

[In Scotland, a writ of extent issuing from the Exchequer, was formerly the mode of execution for recovery of Crown debts. But by the Exchequer Act of 1856 (19 & 20 Vict. c. 56), writs of extent were superseded by new forms of procedure against Crown debtors. See *Exchequer, Court of.*] Under a writ of extent, the moveable estate only of the debtor could be taken; and the general rules were,—1st, That all goods and effects, the absolute property of the Crown debtor at the *teste* of the writ, might be taken, into whose hands soever they might have come since that time; and, 2d, That money might be seized, and all debts due to the Crown debtor, or assigned by him since the *teste* of the writ. But *bona fide* cash payments made since the *teste* were not affected. The sheriff, in execution of the writ, was not authorised to sell or convert the effects into money, until the *venditioni exponas* had issued; and after the goods had been sold, under that authority, to the amount of the Crown debt, the proceeds were returned to Exchequer for the use of the Crown, under deduction of poundage and extra allowance, which the sheriff was entitled to claim on a motion in Exchequer. An extent in the *second degree*, as it was termed, was the process by which, on the insolvency of a Crown debtor, the debts due to him by his debtors were made effectual to the Crown. This process was issued from Exchequer on an affidavit of the Crown debtor's insolvency, on which affidavit a *fiat* was granted for a writ of extent against the debtor of the Crown debtor; and the same process might be repeated in the third, and even in the fourth degree. Such an extent was called an *extent in chief* in the second, third, or fourth, degree; and it differed from an *extent in aid*, inasmuch as it was sued out by the Crown as the real plaintiff, for the direct recovery of the Crown debt, whereas an extent in aid was sued out only nominally by the Crown, but really by a Crown debtor, for the recovery of a debt

due to himself, and for his own benefit. An extent in aid proceeded on the fact, or fiction, that the Crown debtor was less able to pay under the Crown's extent against himself, than he would have been if he could have recovered the debts due by another to him. Hence, this extent was said to be obtained *in aid* of a previous extent, at the Crown's instance, against the applicant for an extent in aid; and the writ accordingly issued, not against the Crown debtor, but against the debtor to the Crown debtor. For a history of the abuses of extents in aid, see *Bell's Com.* ii. 45. These abuses were at last attempted to be remedied by the statute 57 Geo. III. c. 117, proceeding on the preamble,—“That extents in aid have, in many cases, been issued for the levying and recovery of larger sums of money than were due to his Majesty by the debtors, on whose behalf such extents were issued.” And also, “That extents in aid have been issued at the instance and for the benefit of persons indebted to his Majesty by simple contract only.” To remedy which evils, it was enacted,—1st, That the amount of the debt due, or claimed to be due, by the principal debtor to the Crown, should be stated in the *fiat*. 2^d, That, where the sum found due to the Crown debtor should be equal to, or exceed the Crown debt, as stated in the *fiat*, the amount of the debt in the *fiat* should be indorsed on the writ of extent in aid, and should be deemed the authority as to the amount to be levied. 3^d, That where the debt due to the Crown debtor should be less than the debt due to the Crown, as stated in the *fiat*, the amount of the debt due to the Crown should be indorsed on the writ, as the authority for the amount to be levied, the money so levied being paid over to the Crown, in satisfaction *pro tanto* of the Crown debt. 4th, That where, in consequence of the necessity otherwise of splitting the debt, more than the sum indorsed was necessarily levied, the overplus should be paid into the Court of Exchequer, together with the amount of the sum indorsed; and that the court, on summary application, might make an order for the return, or for the proper disposal of such surplus. 5th, That the Crown debtor should not, by the extent in aid, be prejudiced of other means of recovering his debt. As to the second evil, the statute declared that no extents in aid should be given to debtors by simple contract, for debts arising to the Crown in the course of

trade, saving, however, the rights of debtors who had become so by simple contract in the collection or receipt of money arising from his Majesty's revenue for his use. Any Crown debtor, against whom an extent in chief might issue, was entitled to have an extent in aid. So also cautioners or sureties to the Crown for debts due by accountants or receivers for the Crown—collectors of taxes who had actually received money belonging to the Crown—bankers, or other depositaries of money arising from duties or taxes, or deposited officially by the receiver-general—persons bound as distributors of stamps, who had forfeited their bonds—traders dealing in exciseable commodities, and liable to account at stated periods for the accruing duties—farmers of duties, and the like Crown debtors—were entitled to the benefit of this writ. But it was not enough that one should be indebted to the Crown for duties as an individual; otherwise any one might obtain an extent in aid. The principle on which an extent in aid was issued was that, without it, the Crown debtor would be insolvent towards the Crown—*i.e.*, unable to discharge the debt he owed the Crown. But the fact, whether or not the Crown debtor were actually insolvent, was not very scrupulously inquired into, both on account of the difficulties attending such an investigation, and also on grounds of expediency—the public interest requiring that facilities should be given for the recovery of Crown debts. The affidavit for an extent in aid stated,—1st, the debt due to the Crown by the Crown debtor. 2^d, The debt due to the Crown debtor by the person against whom the writ was to issue; and that it was *bona fide* due, and not in trust. 3^d, That the debt due to the Crown debtor was in danger of being lost by the defendant's insolvency; and, 4th, That the Crown debtor was thereby less able to pay the Crown the debt due by him. On this affidavit, an extent *pro forma* was issued against the Crown debtor; which, with the affidavit and relative grounds of debt, were the warrant for a *fiat*, authorising an extent in aid to issue against the debtor to the Crown debtor; on which extent execution followed in the manner above explained. The foregoing account of extents in chief and in aid is abridged from *Bell's Com.* ii. 40 *et seq.* See also *Kames' Stat. Law Abridg. h. t.*; *Bell's Princ.* § 2291; *Swint. Abridg. voce Exchequer.*

EXTORTION. Extortion, in its most

general acceptance, is any oppression under colour of right. Hence, in the law of England, the term is usually applied to the abuse of public justice which consists in the unlawful taking; by a public officer, under colour of his office, of any money or valuable thing from a person where none is legally due; or where less than the sum demanded is due; or where the sum demanded has not yet become due. *Tomlins' Dict. h. t.* See *Exaction*. But, in the phraseology of the law of Scotland, the term extortion is also applied to the offence or delict of compelling one by force or fear to execute a deed, or to perform an act, or to contract an obligation, which, of his own inclination, he would not have done. Such force or fear excludes that liberty of action which is requisite to constitute legal consent; for, according to the expression of the Roman law, *Quamvis si liber esset, noluisse, tamen coactus voluit*. Acts and deeds thus extorted may, by the law of Scotland, be set aside by an action of reduction before the Court of Session; in which action, if the party alleging extortion prove his allegation, he will be relieved from the consequences of the act or deed; and the offender, besides, may be subjected in damages. Extortion, as well as fraud, when stated as the ground for reducing a deed, may be proved by evidence *prout de jure*. See *Force and Fear*.

EXTRACT. The term extract, in the law of Scotland, signifies either the proper written evidence or warrant on which diligence or execution on a judicial decree may issue; or it signifies a copy, authenticated by the proper officer, of a deed, writing, or other entry, of which either the principal is in a public record, or a transcript, taken from the principal, has been preserved in a public record.

I. The extract of a decree is a written instrument, signed by the proper officer, containing a recital of the claim and procedure in an action, and concluding with the judicial sentence or award, [and, under the modern system of personal diligence, a warrant to charge, arrest, and poind; 1 & 2 Vict. c. 114; A.S. 8 Jan. 1881. See *Diligence*.] The extract must be signed on every page by the extractor or other officer whose duty it is to give extracts; nor can it be validly attested by any other person, not even by the judge who pronounced it. The officer who makes the extract being a public functionary, the extract will be sufficiently authenticated by his subscription (without witnesses) to every page,

the number of pages of which it consists being mentioned on the last page. But it is not necessary that the extract should be written by the extractor, nor indeed that the writer be named or designed. If the extractor gives out an erroneous extract, he may rectify the mistake by a second extract; *Tait on Evidence*, 182. The long extracts of decrees of the Court of Session, and of some of the inferior courts, formerly in use, in which the whole record of the case was transcribed *verbatim*, were abolished, and abridged forms of extracts directed to be substituted; 50 Geo. III. c. 112; 1 & 2 Geo. IV. c. 38; [A.S. 24 Dec. 1838. See *Thomson*, 6 July 1841, 3 D. 1167; *Cleland*, 27 July 1850, 7 Bell's App. 153. By immemorial practice, decrees of the Court of Session may be extracted in twenty-four hours after the reading in the Minute-book, which takes place on the eighth day free of the date of the decree. See *Minute-Book*. But the reading is sometimes dispensed with, in order that decree may be instantly extracted. The court has also a discretionary power to supersede extract, or to require some preliminary condition to be fulfilled before extract; but this power is only exercised on special cause being shown; *Lawson*, 22 Nov. 1844, 7 D. 153; *Thomson*, 10 July 1855, 17 D. 1081. Decrees in absence may be extracted after ten days; 31 & 32 Vict. c. 100, § 23. See *Absence*. After a process has been borrowed for the purpose of reclaiming against an Outer House interlocutor, extract will not be issued; *Mackay's Prac.* i. 612; but see *Ayr Road Trs.* 20 July 1883, 10 R. 1295. Interim decrees may be extracted without special leave (which was formerly requisite); 13 & 14 Vict. c. 36, § 28. See *Beveridge*, 2 March 1852, 14 D. 772; *Taylor*, 20 March 1860, 22 D. 1031. In the sheriff court, extract may not be issued until fourteen days after the date of the interlocutor, unless with the sheriff's permission; 39 & 40 Vict. c. 70, § 32; *Simpson*, 23 Nov. 1888, 16 R. 131. See the regulations of the extractor's office, and suggestions to agents, in *Burness's Parliament House Book*. See also *Mackay's Prac.* i. 602; *Dove Wilson's Sher. Court Prac.* 328.]

II. Extracts of deeds or writings, or entries, registered in judicial or public records, are certified copies of the deeds or entries, whether they be deeds by public officers, as notarial instruments, or executions by messengers, or the deeds, obligations, or contracts of private parties, or

the entries in registers of births, deaths, or the like. Such extracts are in like manner authenticated by the subscription of the keeper of the record, or other officer duly authorised. Where the deed has been recorded in virtue of a clause of registration, consenting to execution, an extract or decree of registration, which is a mere transcript of the deed, with a decree of the court interposed *fictione juris*, in terms of the consent, is issued, on the demand of the party ordaining implement of the obligation, which extract is, like the extract of a judicial decree, signed by the extractor, and may be the warrant for diligence to enforce payment or performance in terms of the obligation contained in the deed. See *Decree of Registration*. As to the evidence afforded by extracts, whether from judicial or other records, see *Evidence*. See *Stair*, B. ii. tit. 3, § 24; B. iv. tit. 1, § 45; *More's Notes*, v., cccclxxxi.; *Bank*. B. iv. tit. 36, § 1; B. ii. tit. 3, § 44; *Ersk.* B. iv. tit. 1, § 22; tit. 2, § 6; *Ross's Lect.* ii. 208; [*Bell's Princ.* §§ 2217, 2271; *Dickson on Evidence*, ii. §§ 1249 *et seq.*; *Kirkpatrick's Digest*, §§ 68, 77 *et seq.*, 117 *et seq.*]

EXTRACTOR; is the official person by whom the extract of a decree or other judicial proceeding [of the Court of Session] is prepared and authenticated. [This duty is entrusted to one principal extractor, appointed by the Crown, who may not practise in the Court of Session, nor hold any other official situation; and one assistant extractor, nominated by the principal, who, during the necessary absence of the latter, is empowered to subscribe and authenticate the extracts. The preparation of extracts is under the superintendence of the junior principal clerk of Session, with whose instructions the extractor is bound to comply, and who is directed to report to the court at least once during each winter and summer session, as to the due discharge of the duties of the office. This superintendence, however, is not now in use to be exercised; *Mackay's Prac.* i. 158 (b). The principal and assistant extractors are paid entirely by salaries, that of the former being £500 *per annum*, and that of the latter £300; 1 & 2 Vict. c. 118, §§ 18-20. The acts and decrees of the Bill Chamber and Teind Court are extracted by the clerks of these courts. See *Shand's Prac.* 112; *Mackay's Prac.* i. 157.]

[**EXTRADITION**; the surrender to a foreign state of a person accused or convicted of the commission of a crime within the jurisdiction of such state. Extradition

[has been the subject of various conventions between this country and foreign states, which have been legalised and given effect to by various acts of Parliament. All existing conventions are now carried out under the regulations of the act 33 & 34 Vict. c. 52, as amended by 36 & 37 Vict. c. 60. The following are "extradition crimes:"—Murder, and attempt and conspiracy to murder; manslaughter; counterfeiting and altering money, and uttering counterfeit or altered money; forgery, counterfeiting and altering, and uttering what is forged, counterfeited, or altered; embezzlement and larceny; obtaining money or goods by false pretences; crimes by bankrupts against bankruptcy law; fraud by a bailee, banker, agent, factor, trustee, or director, or member, or public officer of any company made criminal by any act for the time being in force; rape; abduction; child-stealing; burglary and housebreaking; arson; robbery with violence; threats by letter or otherwise with intent to extort; piracy by law of nations; sinking or destroying a vessel at sea, or attempting or conspiring to do so; assault on board a ship on the high seas with intent to destroy life or to do grievous bodily harm; revolt or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the master. The amending act added to these the crimes of kidnapping and false imprisonment, perjury and subornation of perjury, and several statutory indictable offences; and made accessories liable to be surrendered as well as principal offenders. No criminal is surrendered for a political offence, or if it be shown that the requisition for his surrender has in fact been made with a view to try or punish him for a political offence. Nor is surrender made without provision, by law or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to her Majesty's dominions, be detained or tried for any offence committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded. An interval of fifteen days must elapse between committal to prison and actual surrender. See *Clarke on Extradition*; *Kirchner's L'Extradition*; *Phillimore's International Law*, i. 515.]

EXTRAJUDICIAL; not judicial, or not transacted under judicial cognisance or superintendence. The term is usually applied, in contradistinction to *judicial*, to

something said or done in the course of a process, or before an action has been brought into court, but which is not intended to form any part of the record, or of the judicial pleadings or admissions of the parties, such as communings or correspondence, having in view a private settlement of the matter in dispute, or the like. Extrajudicial concessions or admissions made by a party in the course of communications for a compromise, or in order to avoid a lawsuit cannot be competently founded upon, or proved against him judicially, where the object of the negotiation has failed; *Smythe*, 20 May 1809, F.C. [Neither was it, until recently, competent to prove an extrajudicial statement by a witness, different from his judicial statement, in order to discredit him. But this rule was altered by 15 Vict. c. 27, § 3; see *Evidence*, p. 413 b.]

EXTRAORDINARY LORDS OF SES-

SION. After the original institution of the College of Justice in 1537, it continued to be the practice of the Scottish Kings, in addition to the fifteen ordinary Lords of Session, or Senators of the College of Justice, to nominate other Lords of the King's Council, as extraordinary Lords of Session. The number of those extraordinary Lords was limited, by the 1537, c. 40, to "three or four," but the Kings, greatly to the prejudice of the administration of justice, frequently nominated seven or eight. This abuse, together with the power of appointing extraordinary Lords of Session, was put an end to by 10 Geo. I. c. 18. See *Kames' Stat. Law Abridg. h. t.*; *More's Notes on Stair*, ccclxvi.; *Ersk. B. i. tit. 3, § 16*; [*Mackay's Prac. i. 27.*] See *College of Justice*.

[**EXTRAVAGANTES.** See *Canon Law*.]

EXTRINSIC. See *Evidence*, p. 416.

F

FACILITY. A person is said to be of a facile disposition, when, although not a fit subject for cognition as an idiot, he is easily imposed upon, and liable to be induced to do deeds to his own prejudice. And the Court of Session, either *ex officio*, when in the course of an action they discover a party to be of that disposition, or on the application of his heir or next of kin, will interdict him; thereby preventing him from granting deeds, unless with the consent of the interdictors whom they appoint. A person, who is conscious of such an infirmity, may also voluntarily place himself under interdiction. See *Interdiction*. A facile disposition, though it may authorise the interference of the court, is not of itself a ground of reduction of any transaction into which a facile person may have entered; nor has interdiction any retrospect. In order, therefore, to support a reduction of the deed of a facile person, there must be evidence of circumvention and of imposition in the transaction, as well as of facility in the party. But, "where lesion in the deed, and facility in the granter concur, the most slender circumstances of fraud or circumvention are sufficient to set it aside." [In order to reduce a deed on the ground of facility and circumvention, there must be correspondence between the facility and the kind of arts

[practised against the granter; *Morrison*, 27 Feb. 1862, 24 D. 625. It is not necessary to establish general facility on the part of the granter, but only facility in relation to the fraud and circumvention used; *Munro*, 18 June 1874, 1 R. 1039. See also *Clunie*, 11 March 1854, 17 D. 15; *M'Culloch*, 3 Dec. 1857, 20 D. 206; *Baird*, 6 July 1858, 20 D. 1220; *Love*, 16 Dec. 1870, 9 Macph. 291.] See *Ersk. B. i. tit. 1, § 27*; *B. i. tit. 7, § 53*; *Stair, B. i. tit. 9, § 8*; *More's Notes*, liv.; *Bank. i. 191*; *Bell's Com. i. 136*; *Kames' Equity*, 67; *Bell's Princ. §§ 13, 14, 2113, 2123*; [*Mackay's Prac. ii. 138*. See *Fraud. Circumvention. Insanity*.]

FACTOR; a person employed to do business for another for hire. Factory, which, in modern times, has almost entirely superseded the *Mandate* of the Roman law, differs from that contract in not being gratuitous. ["A factor is distinguished from a merchant in this, that a merchant buys and sells for his own direct mercantile profit; a factor only buys or sells on commission. Again, a factor is distinguished from a broker by being entrusted with the possession and apparent ownership, as well as with the management and disposal, of the property of the principal. He is distinguished from an agent, in his authority being extended to the management of all