PART V.

OF EVIDENCE; SENTENCES, AND THEIR EXECUTION; AND BANKRUPTCY.

V.

INTRODUCTORY NOTE.

The subject of Judicial proceedings has become of late years so complicated, and the decisions on points of practice so numerous, that it will require and be the proper subject of a separate work. I mean to confine myself here to the Law of Evidence; a general explanation of the form and nature of judicial decrees, with the modes of their execution; and the general principles of Bankrupt Law.

1. LAW OF EVIDENCE AS APPLIED TO JUDICIAL INQUIRIES.

2205. Those rights which have already been explained are, when brought into question, inquired into, and established by the judicial process of an action; in which the person who seeks to enforce his right states the extent and nature of his demand, and must be ready to establish it to the satisfaction of a judge or a jury, by the exhibition of such evidence as the law requires. The rules by which that evidence is regulated, and proofs of particular kinds admitted or rejected, are now to be stated.

Judicial Evidence, taken in its full extent, consists of, 1. Written evidence; 2. Parole evidence; 3. Presumptive evidence; and, 4. Evidence by confession, on application to the conscience of the party.

1. WRITTEN EVIDENCE.

2206. Written proofs are either, 1. such as are preconcerted by the parties, with a view to prevent future question; or, 2. such as happen casually to furnish evidence, on the occurrence of a dispute.

1. *Preconcerted or Conventional Evidence.*

2207. Proofs of this class are intended, not only to establish that a particular act or contract has passed or been agreed to; but to set forth the precise nature and import of the agreement or transaction itself, so as to remove all the doubts which might otherwise arise from the confusion or forgetfulness of witnesses as to the words made use of, and to leave no ambiguity but that which proceeds from the imperfection, or careless use, of language. This class of proofs consists of public and judicial records, or of private records, deeds, and contracts.

2208. 1. PARLIAMENTARY RECORDS. Acts of Parliament are records written on the rolls of Parliament; and which, from the numerous checks against falsehood interposed by the forms of Parliament, form the highest of all kinds of written evidence, and are not allowed to be questioned. Such are, 1. Public acts. These concern the public generally, and, strictly speaking, are held to be known, and require only to be suggested to the memory by referring to the Act. Any dispute as to the words, is determined by the production of a copy printed by the Queen's printers (*a*). 2. Local and personal acts relate to a particular class of men, or to individuals, or to some local interest or concern: But when declared by special clauses to be public acts, they are proved in the same way as public acts. 3. Private acts, when directed to be printed by the Queen's printer, and copies so printed to be evidence, are so made evidence. But private acts, although declared generally to be public, must be proved by a copy sworn to have been examined with the Parliament Roll (*b*).

NOTE.—These rules are settled in England. With us, the matter is more loosely dealt with. In daily practice in the Court of Session, printed copies of private acts are received without objection. But this must be referred to acquiescence: for if an objection were made, the onus probandi would be determined according to the rules above mentioned. And in a jury trial an objection to the copy of a private act would be disposed of according to those rules.

(*a*) 41 Geo. III. c. 90. § 9.
(*b*) Brett *v.* Beales, 1 Mo. and Malk. 421.

2209. 2. OFFICIAL RECORDS. These are of various kinds; and,

1. The London Gazette is evidence, 1. of public acts of Government, published by authority of the Queen; ex. gr. proclamations and orders in council, as passing the Great Seal before they can be entered in the Gazette (*a*). But, 2. The Gazette is not evidence of a commission in the army (*b*). 3. The Gazette is evidence of advertisements and notices authorized to be there published; as of sequestrations, discharges of bankrupts, and so forth (*c*). But, 4. When brought as evidence of other notices not so authorized (as of dissolutions of partnerships), the perusal, or at least the possession, of the paper by the party, must be proved (*d*). And a distinction is observed in matters of evidence, between the fact of notice made, and the truth of what is stated in the notice.

(*a*) Rex *v.* Holt, 5 T. R. 439. General Picton's case, 30 Howel's State Trials, 493. 1 Phillips on Evidence, 387, and cases cited. Attorney-General *v.* Theakstan, 8 Price, Rep. in Excheq. 89.
(*b*) Kirkwan *v.* Cockburn, 5 Esp. 233. The King *v.* Gardner, 2 Camp. 513.
(*c*) 2 and 3 Vict. c. 41.
(*d*) Jenkins *v.* Blizard, 1 Starkie, N. P. Cases, 420.

2210. 2. The journals of the House of Lords and also of the House of Commons are evidence of their proceedings, though not properly records; but not of the facts stated in the resolutions. An unstamped copy of the minutes of a judgment of the House of Lords, without more of the proceedings, is evidence.

Jones *v.* Rendal, Cowp. 17.

2211. 3. The records of public offices, the War Office, Navy Office, Excise and Customs, Bank of England, &c. are proof of the facts which are regularly recorded there; but the books themselves must, if required, be produced when removeable; or at least a copy sworn to by the clerk who made it, or by a witness as having examined it.

Dunbar, July 5. 1815; reversed, July 21. 1820; 2 Bligh, 351. Paris, March 5. 1823; 3 Murray, 336. Kay, June 25. 1832; 10 S. D. 831.

2212. 4. Parish Registers were formerly kept with such irregularity in Scotland, that they were not much to be relied on (*a*). In many parishes they are now kept with exemplary correctness; and it is not improbable that there may be soon a legis-

lative regulation for the due keeping of parish registers, as furnishing an important class of facts in marriage, legitimacy, succession, minority, &c. A record of burials is no evidence of the age of the person, though mentioned in the record (*b*).

(*a*) Wilson, March 3. 1626; M. 12700. Thomson, July 4. 1667; M. 12701.
(*b*) Watson, May 10. 1836; 14 S. 734. Ib. March 7. 1837; 15 S. 753.

2213. 5. This distinction is to be observed, that when the record is kept by a person authorized so to do, it will be received, and a copy sworn to as examined will be admitted: Where it is a private register, it must be produced, and can be received only with the credit and inferences attending it, which the jury in the circumstances may think it entitled to.

2214. 6. A distinction may be observed between the log-book of a man-of-war acting as convoy, and such log-book (or that of a merchant ship) relating to the ship's proceedings (*a*). A certificate of registry is evidence to negative ownership (*b*); but it is not necessarily proof of ownership (*c*).

(*a*) D'Israeli *v.* Jowett, 1 Esp. 427. See above, § 496.
(*b*) Camden *v.* Anderson, 5 T. R. 709. Marsh *v.* Robinson, 4 Esp. 98.
(*c*) Tinkler *v.* Walpole, 14 East. 226. Fraser *v.* Hopkins, 2 Taunt. 15. Pirie *v.* Anderson, 4 Taunt. 652. Scott *v.* Gifford, Nov. 16. 1832; 11 S. 21.

2215. 7. JUDICIAL RECORDS. These consist either of the written proceedings before the Court, or of deeds, warrants, &c. registered by the proper officers.

1. Judgments. In evidence of the fact of a judgment having been pronounced, or of the right or other consequence established by that judgment (*a*), an extract by the clerk, according to the settled rules, is evidence (*b*). But it is not the sole evidence; the original record read by the clerk is also evidence (*c*). But it is not evidence of any fact involved in the judgment. So conviction for assault is evidence of the conviction, to the effect of punishing, or of saving from a second prosecution or punishment. But it will not prove the assault to support an action of damages.

(*a*) Machargs, Feb. 24. 1767; M. 12541; 1 Hailes, 192.
(*b*) 50 Geo. III. c. 112. § 1. 10. 1 and 2 Vict. c. 114.
(*c*) Baillie, March 12. 1818; 1 Murray, 327.

2216. 2. Verdicts are proved by the record, so far as to shew the existence of the verdict; but as to the fact found by the verdict, although it is, on grounds of public policy, con-

clusive between the same parties and their representatives (*a*), it is not so against others who were not parties; nor even against one who was truly a party, but where the present adversary was not a party; or where he who objects to it was restrained in his opposition by the limited purpose for which the verdict was meant; though a verdict may be referred to in explanation (*b*). So a verdict in a criminal case will not be conclusive evidence in a civil; nor a verdict in a civil, evidence in a criminal case; nor a cognition of insanity conclusive in reduction. But in such cases they may serve as prima facie proofs.

(*a*) Van Wart, 1 Ryan and Mood. 4.
(*b*) Dalziel, Dec. 27. 1825; 4 Murr. 13.

2217. 3. Deeds and Warrants recorded. Of these an extract, certified by the signature of the proper officer of Court, is probative in all the Courts of Scotland (*a*). But when it is indispensable to produce the original, either in a reduction improbation in a Scottish Court, or in an English Court, warrant will, on due precautions, be granted for having the original transmitted (*b*). In bankruptcy, extracts are effectual abroad, if fortified by the seal of the Court of Session (*c*).

(*a*) Morton, Dec. 17. 1831; 10 S. D. 162. See Clark, Nov. 8. 1816; 1 Murr. 163. 178.
(*b*) Bloxham, Jan. 13. 1825; 3 S. D. 428. Annandale, Feb. 29. 1828; 6 S. D. 657.
(*c*) 2 and 3 Vict. c. 41. § 49.

2218. 4. There is still much doubt as to the effect of pleadings, condescendences, answers, &c. regarded as evidence. In the Court of Session, the practice is extremely loose; and the case often argued and decided on the statements in papers of an argumentative nature. But the rules of evidence seem to be these, 1. That direct admissions specifically made are evidence against the party making them. 2. That specific statements made on the record are evidence against him who makes them. 3. That mere inferences from statements not contradicted, are not to be relied on as evidence; and, 4. generally, that admissions and statements require to have been known to, and authorized by, the party.

Earl of Fife, March 2. 1817; 1 Murr. 137. White, March 20. 1817; 1 Murr. 422. Grub, Sept. 10. 1818; 2 Murr. 3. Allen, July 10. 1819; Ib. 159. Miller, May 11. 1820; Ib. 322. Smith, Oct. 2. 1820; Ib. 342. Ballantyne, Sept. 10. 1821; Ib. 533. Anderson, July 17. 1826; 4 Murr. 100.

2219. 8. PUBLIC INSTRUMENTS. These comprehend executions of messengers and notarial instruments.

2220. 1. Messenger's Executions. Citations, charges, &c. can be proved only by the written execution, or return of the messenger (*a*): executions, when signed by the messenger and one witness, are prima facie evidence of the citation, charge, &c. but may be redargued.

(*a*) M'Alla, Dec. 4. 1679; M. 12632. Hay, Nov. 19. 1680; M. 12268. Haswall, June 25. 1714; M. 12270. Hog, June 3. 1797; M. 8346.

2221. 2. Notarial Instruments or Copies. 1. Notarial Instruments, when actus legitimi, are good evidence of the act which it is the province of a notary to perform; but not of extraneous facts recited in the instrument (*a*). But, 2. When produced only as proofs of notice or intimation, their effect is limited to the fact of the *notice;* and can be evidence of the *statement* only by inference from acquiescence (*b*). 3. Notarial copies are evidence only by admission (*c*).

(*a*) Clark, March 22. 1827; 4 Murr. 205. Thomson, Feb. 24. 1823; 3 Murr. 297. Hosie, Jan. 11. 1828; 4 Murr. 417, 431. Brown, March 28. 1828; 4 Murr. 475.
(*b*) Duke of Roxburghe, May 24. 1822; House of Lords, 1 Shaw's App. Cases, 157, and cases there cited.
(*c*) Williamson, Feb. 18. 1834; 12 S. 466.

2222. 3. Minutes of Public Meeting. These are received as evidence of what took place there.

Hamilton, May 21. 1827; 4 Murr. 239. Wilson, Sept. 21. 1827; Ib. 366. Lea, Jan. 16. 1828; 6 S. D. 350. Oswald, Nov. 1828; 5 Murr. 8. See Inglis, June 14. 1826; 4 Murr. 77.

2223. 4. The Sederunt book of a Sequestration is not evidence of the date of sequestration, or of the bankrupt's discharge.

Smith, Jan. 27. 1835; 13 S. 323. Mansfield, March 15. 1835; Ib. 731.

2224. 5. Reports and other proofs in writing must be lodged for jury trial in due time before the trial.

Donaldson, March 15. 1833; 11 S. 570.

2225. 5. PRIVATE DEEDS. The requisites of solemn attested deeds, holograph deeds, and privileged deeds, are settled partly by statute, partly by consuetudinary law, partly by mercantile usage. Where these requisites are duly complied

with, the writing is said to be probative; there is a presumption of truth and authenticity; and it is not necessary, as in England, to prove the signature, &c. of the writing. But it has been a great object in the laws relative to those requisites, to supply to those interested the means of invalidating or checking the authenticity of the deed, and so of challenging and reducing it if false; and this by requiring in solemn attested deeds, 1. the names and description of the witnesses; 2. the name and description of the writer; to which at common law is added, 3. the place and date,—which, however, are not essential in point of authenticity.

2226. 1. *Attested Deeds.* In authenticating these deeds, the general rules are, 1. That the party must himself subscribe without the aid or tracing of the letters by another, (*a*). 2. That subscription by a mark is improbative, but by initials good, if admitted or proved by the instrumentary witnesses to be genuine, and the usual mode of signing (*b*). 3. That the party must either subscribe in presence of witnesses who know him, or acknowledge to them his subscription (*c*). 4. That witnesses capable of identifying the deed must sign the deed, and be named and designed in the testing clause (*d*). 5. That the writer of the deed must be designed in the testing clause (*e*), but the writer of the testing clause need not be mentioned (*f*). 6. That the testing clause may be filled up at any time before being produced in judgment: a very dangerous practice (*g*). 7. That where the party cannot write, the deed must be subscribed by two notaries before four subscribing witnesses, all present at the time, and by mandate of the party expressed in the doquet of the notaries (*h*).

(*a*) Moncreiff, July 14. 1710; M. 15936; Rob. App. Ca. 26. Robertson, Dec. 20. 1744; Elch. *Writ.* 18. Crosbie, Nov. 30. 1749; M. 16814; Elch. 25. Falconar, Jan. 9. 1751; Elch. 26.

(*b*) Thomson, July 1729; M. 16810. M'Ilwrath, June 23. 1785; M. 16820; 2 Hailes, 970. Cockburn, Dec. 8. 1815; F. C.

(*c*) Campbell, Nov. 29. 1698; M. 16887. Walker, June 8. 1716; M. 16896. Forbes, Feb. 19. 1698; 4 Br. Sup. 404. Sim, Nov. 23. 1708; M. 16891. Young, Aug. 2. 1770; M. 16905; 1 Hailes, 364. Condie, June 26. 1823; 2 S. D. 432. Earl of Fife, Dec. 22. 1825; 4 S. D. 335; 2 W. S. 166.

(*d*) Grant, Nov. 29. 1698; M. 16913. Abercromby, July 15. 1707; M. 17022. Halden, Nov. 9. 1714; M. 16924; 1 Cr. and St. 56. Humbie, Dec. 1. 1736; Elch. *Writ.* 3. Wallace, July 13. 1749; M. 16900. Archibalds, Nov. 17. 1787: F. C.; 2 Hailes, 1035. Douglas and Co. Nov. 28. 1787; M. 16908. Wemyss, June 5. 1821; 1 W. S. 140.

(*e*) Kirkpatrick, Nov. 21. 1704; M. 17022. Duncan, Feb. 15. 1706; M. 16914. Logie, Jan. 4. 1710; M. 17026. Dronnan, July 26. 1716; M. 16869. Ewing, July 20. 1739; 5 Br. Sup. 211. D. of Gordon, June 16.

1761; M. 16870. M'Farlane, May 22. 1790; M. 8459; 2 Hailes, 1080. Lockhart, Feb. 16. 1815; F. C.

(*f*) Laird of Edmonston, June 10. 1722; M. 16862, note. Gray, Jan. 21. 1703; M. 12602. Andrews, March 2. 1836; 14 S. D. 589. See § 2230.

(*g*) Dury, March 11. 1753; M. 16936; Elch. *Writ.* 27. Bank of Scotland, Feb. 17. 1790; M. 16909. Brown, March 11. 1809; F. C. Blair, Nov. 15. 1827; 6 S. D. 51. Reid, June 24. 1834; 12 S. D. 781.

(*h*) Phillip, July 26. 1667; M. 16835. Birrel, June 17. 1745; M. 16846; Elch. *Writ.* 19. Yorkston, Dec. 2. 1794; M. 16856. Earl of Fife, Nov. 30. 1819; 1 Sh. 498.

2227. The tests by which the authenticity of a deed is to be judged of when challenged, are the following:—

1. Comparatio literarum.
2. The examination of the instrumentary witnesses.
3. The examination of the writer.

2228. *Comparatio Literarum.* This is a kind of proof the most doubtful and least to be relied on. In almost every trial where the opinions have been taken of engravers, post-office clerks, and others professing a discriminating knowledge of handwriting, the numbers are found equal on either side. And it seems to be only where persons well acquainted with the handwriting, and who have seen the person write, concur with the result of the professional testimony, that any reliance is to be placed on it.

NOTE.—See the trial of Mr Justice Johnson, 29 State Trials, 475, and Bishop Atterbury's case, 16 State Trials, 323.

See Renton, July 11. 1662; M. 12652.

2229. *Instrumentary Witnesses.* An obvious objection to the evidence of one who admits his subscription to be genuine, is, that he comes at a distance of time, when his memory may play him false, and under circumstances which may ex eventu influence his recollection or judgment, to contradict what by his written testimony he has solemnly asserted. But the only effect of this is to cast suspicion on the witness's testimony, not to render him inadmissible, and to require the clearest evidence to invalidate the deed.

3 Ersk. 2. § 22. et seq. Tait on Evidence, 56. et seq. Bell on Testing of Deeds. Frank, July 9. 1793; M. 16822; Bell's Cases; also March 3. 1775; M. 16824. Swany, Dec. 12. 1807; M. *Writ.* App. 7. Richardson, Feb. 28. 1811; F. C. Condie, June 26. 1823; 2 S. D. 432. Smith, Jan. 25. 1821; F. C.; and in House of Lords, June 16. 1823; and again, June 4. 1824; 2 Shaw's App. Cases, 265. Lord Fife's case in House of Lords, May 22. 1826; 2 W. S. 166, and the previous reports there referred to Wemyss, April 19. 1825; 1 W. S. 140. Cleland, Dec. 15. 1838; 1 D. B. M. 254.

2230. *Writer of the Deed.* There is not the same objection

to the examination of the writer as to that of the instrumentary witnesses; and the Legislature has been anxious to secure the evidence of one so intimately connected with the framing and execution of the deed, by requiring his name and description to be inserted, under the pain of nullity. The principle of this rule should require also the name and designation of the writer of the testing clause: But it has not been so held. See above, § 2226.

2231. 2. *Holograph Deeds* are probative for twenty years; after which time they must be proved by the writing or oath of the granter, or of his heir after his death, admitting the authenticity of the writing, and of the subscription.

1665, c. Ellis, July 1. 1630; 1 Br. Sup. 312. Inglis, July 1. 1631; M. 16962. Wauchope, July 11. 1662; M. 12605. Currence, June 1688; 2 Br. Sup. 121. Buchanan, March 4. 1831; 9 S. D. 557. See Miller, March 29. 1835; 13 S. D. 838.

2232. 3. *Privileged Writings* are, 1. Mercantile writings,—bills, notes, bank checks, orders, mandates, guarantees, letters in re mercatoria. These require nothing but the genuine subscription of the party. 2. Last wills must be regularly attested, or holograph, if not executed by notarial interposition; but one notary is sufficient to sign for the party, or in absence of a notary a clergyman.

NOTE.—The clergyman of the parish is not required.

Ramsay, July 12. 1632; M. 16964. Earl of Northesk, Feb. 28. 1671; M. 16967. Goodlet Campbell, Dec. 18. 1739; Kilk; M. 16979. See Fogo, Dec. 20. 1746. Walker, Dec. 9. 1785; M. 16979. Wallace, Nov. 25. 1782; M. 17056; 2 Hailes, 912; Ersk.

2. *Casual and Unilateral Evidence.*

2233. Books or letters of one of the parties, not communicated to the other, are to be received against the person who keeps them (*a*): Against others only as circumstances which, by the concurrence of other proofs, may become evidence (*b*). Books of a company afford proof against a partner (*c*).

(*a*) Pentland, May 23. 1822; 1 S. D. 426. Anderson, Jan. 16. 1824; 2 S. D. 620. Blair, May 22. 1828; 6 S. D. 836. Bell, Dec. 16. 1833; 12 S. 554.

(*b*) Forbes and Co. March 18. 1822; 3 Murr. 46. Smith, Nov. 23. 1826; 5 S. D. 32; affirmed, March 10. 1830; 4 W. S. 47.

(*c*) Smith *v.* Mitchell, House of Lords, 3 W. S. 47. Kennedy, May 20. 1836; 14 S. D. 803. See 105.

2234. In contradistinction to preconcerted evidence, that which, ex post facto, is found to exist, may competently be

brought in proof of circumstances or contracts which are past. Such are letters, notes, jottings; with regard to which three points are of importance:—1. the proof of the authenticity of the writ; 2. the fact of its having been sent or communicated; and, 3. the inference from its tenor (*a*). Among these may be included writings or entries by third parties having, 1. knowledge of the fact; 2. no interest to falsify it. Such are the books of a law-agent, midwife, physician, or surgeon (*b*); in regard to which it is necessary only to guard, 1. against fraud; 2. against negligence.

NOTE.—Fraud may not be in the particular note, but in some other requiring a conformity of entries to fortify it.

(*a*) Stewart, May 14. 1816; 1 Murr. 40. White, May 20. 1817; Ib. 241. Houldsworth, Jan. 29. 1819; Ib. 32. Toofey *v.* Williams, 1 Mood. and Malk. 129. M'Kenzie, May 11. 1830; 5 Murr. 263. Taylor, Nov. 14. 1833; 12 S. 39. M'Farlane, May 23. 1837; 15 S. 978. Wright *v.* Tatham, House of Lords, 4 Bing. 489. Smith, Jan. 27. 1835; 13 S. 323. Robertson, Dec. 12. 1835; 14 S. 139.

(*b*) Doe *v.* Robertson, 15 East. 31.

2235. 4. Usage is admissible to construe contracts.

Robertson *v.* French, 4 East. 135. Smith, *v.* Wilson, 3 B. and Adol. 728. Haynes *v.* Holiday, 7 Bing. 587. Blacket *v.* R. E. Ass. Co. 2 Cr. and J. 249. Lord Hardwick in Baker's case, 1 Ves. 459.

2. PAROLE EVIDENCE.

2236. This is the great source of evidence, not only in those unforeseen circumstances which form the object of inquiry in criminal law, or which are the subject of redress in actions of damages; but also in the daily transactions of life, or interruptions and embarrassments in the course of the fulfilment of contracts. One great benefit of jury trial is, that it requires less the exclusion of any kind of evidence; leaving the collected materials to be disposed of on the footing of credibility, by an impartial tribunal of men accustomed to judge of the ordinary transactions of life. But still there are certain technical rules of exclusion of testimony; in which, what may be called the *law* of parole evidence consists. The questions on all such matters are two;—1. what is *admissible* testimony? 2. what is *sufficient* evidence? the former being matter of law for the Court; the latter, matter of deliberation and decision for the jury, but still with some aid from the law as to what shall not in particular cases be held sufficient evidence.

1. Admissible Testimony.

2237. 1. RULES OF EXCLUSION OF TESTIMONY. The system of exclusion depends on two principles:—1. The danger of trusting a court or jury with certain descriptions of evidence; and, 2. The danger of perjury, or extreme hardship on witnesses, in allowing or requiring them to give testimony in particular cases.

2238. The general rule is, that all persons are competent witnesses, who, not being convicted of a crime inferring infamy, have the use of reason, and such religious belief as to feel the obligation of an oath; and who are not influenced by interest; or connected with the party for whom they are called by near relationship; or biassed in his favour by confidential connexion or communication; or actuated by hostility against the adverse party.

Even this general statement differs materially from the statement of the older law; and the prevailing tendency now is to convert some of these disqualifying circumstances (as relationship, confidential connexion, and hostility), into matter of credit with the jury, rather than exclusion of the witness. But this general rule must be taken more in detail.

See this bias stated by Lords Hardwick, Mansfield, and Kenyon, in Walton *v.* Shelley, 1786; 1 Term. Rep. 300; The King *v.* Bray, Rep. temp. Hardwick, 360; and Burt *v.* Baker, 3 Term. Rep. 32. See also Ralston *v.* Rowat, in the House of Lords, 6 W. S. 468.

2239. 1. *Disqualification on Account of Incapacity.* Incapacity must be marked by plain and palpable characters,—pupilarity, insanity, idiocy.

2240. 1. Pupils are not admitted, if they are incapable of the obligation of an oath, or unfit to comprehend the subject of inquiry. As to the oath, it is the practice of Courts of justice to examine the infant, and to put the oath only if it be understood. In point of intelligence a child is admitted (with reservation of credibility) in facts of injury and crime, but not in matters of civil contract (*a*). And as witnesses to facts happening during pupilarity, they are admissible after they have passed that age (*b*).

(*a*) 4 Stair, 4. § 437. 4 Ersk. § 22. Tait, 356. 2 Hume, p. 2. Burnet, 391. 6. Charteris, Dec. 12. 1738; Elch. *Wit.* 12; M. 16899.

(*b*) Douglas, July 4. 1694; 4 Br. Sup. 180. Ballantine, Nov. 9. 1705; Ib. 620.

2241. 2. Insanity of course disqualifies; unless when the fact and the examination both occur within a lucid interval.

4 Stair, 43. § 7. Tait, 357.

2242. 2. *Disqualification from Defect of Religious Impression.* Law trusts not to the mere sense of honour, or regard to character, or dread of punishment; it requires also the sanction of religion. But whatever the sect or form of religion of the witness may be, if he believe, or profess to believe, in the existence of God and a future state; or is willing to take the oath,—acknowledging it as an appeal to God binding on his conscience, he is admissible; certain indulgences in form being given to quakers, moravians, and separatists.

1 Phillips, 20. Tait, 359. 53 Geo. III. c. 127. § 23. 9 Geo. IV. c. 32, 3 and 4 Will. IV. c. 49. and c. 82. 1 Vict. 15. Menzies, Jan. 19. 1712; M. 16732. Nicolson, Dec. 6. 1770; M. 16770; 1 Hailes, 371; affirmed, M'Farlane, May 15. 1824; 3 Murray, 411.

2243. 3. *Disqualification from Infamy.* Infamy may be infamia facti, or infamia juris: the former resulting from a depraved and infamous course of life and abandoned character; the latter from conviction of a crime. The former goes only to credibility (*a*). But even to the effect of credibility, the law of Scotland does not admit any inquiry into the conduct and character of a witness (*b*); nor is it permitted to affect the credibility by proving that the witness had formerly given a different account of the matter (*c*). Infamia juris alone can exclude. And, 1. The infamy must be by conviction or sentence of the Supreme Court (*d*). 2. It must be conviction of an infamous crime, *i. e.* either in its nature inferring a disregard to truth and honesty,—as perjury, forgery, theft, robbery; or a crime to which the punishment of infamy is specially annexed (*e*). A reversal of the conviction removes the exclusion(*f*). A pardon also discharges the objection, leaving the effect on credibility (*g*); but not if the infamy be a part of the punishment imposed by the law. Suffering the punishment discharges the infamy, except in perjury and subornation (*h*).

(*a*) Trial of Anderson and Fogharty, July 8. 1822; 2 Hume, 352. S. D. Just. Cases, 22.
(*b*) Lord Fife's case, 1 Murray, 131. Baillie, ib. 320.
(*c*) Hislop, 1 Murray, 49. Auchmutie, Ib. 212. M'Kenzie, 2 Murr. 218. Wight, 4 Murr. 328. Walker, July 13. 1836; 14 S. D. 1128.

(*d*) 2 Hume, 354. Armstrong's Ass. Feb. 13. 1834; 12 S. D. 440. Aitchison, Dec. 28. 1836; 15 S. D. 360.
(*e*) 4 Ersk. 2. § 33. Hume, ut supra. Tait, 358. Burnet, 396. 54 Geo. III. c. 137. § 33. The enactment has not been renewed in 2 and 3 Vict. c. 41.
(*f*) Lord Lovat's case, Howel's State Trials, vol. 18. 1004, 1011.
(*g*) 2 Starkie, 720, and cases cited. Hume, ut supra.
(*h*) 9 Geo. IV. c. 32. 1 Will. IV. c. 37. § 9.

2244. 4. *Disqualification on Account of Interest.* No one can be a witness in his own cause; and interest in the event of the suit makes him a party. The necessity of proceeding on general rules, and the consideration that a Court has no scales fine enough to detect the preponderance of self-interest in its effect on testimony, have led to an indiscriminate exclusion of all witnesses interested in the cause, however trifling the interest may be.

1 Phillips, 42, 52. 2 Starkie, 744. Tait, 361. Earl of Fife, March 2. 1817; 1 Murr. 126, 138. Clark, July 16. 1824; 3 Murr. 451. Watson, Dec. 6. 1824; Ib. 483.

2245. The interest must, in order to disqualify, be present, certain, and immediate, either in the question put, as it affects the result of the cause; or as the verdict or judgment may serve, as an instrument of evidence or other occasion of benefit to the witness himself: Otherwise it goes only to credibility (*a*). And so when one is not immediately concerned in the cause, and has no interest in the event in support of which the verdict in that cause may be given in evidence by him in any other proceeding instituted by or against him; he is a competent witness (*b*).

(*a*) Houldsworth, Jan. 29. 1819; 2 Murr. 84. M'Kenzie, March 8. 1820; 2 Murr. 219. Mitchell, Dec. 20. 1820; Ib. 375. Clark, July 16. 1824; 3 Murr. 451. Clark, Jan. 14. 1825; Ib. 465. Campbell, March 14. 1827; Ib. 176. Chatto and Co., July 24. 1827; 4 Murr. 356. Bayly and Co., March 20. 1828; Ib. 482.
(*b*) Lord Ellenborough in Rex *v.* Boston, 4 East. 581. Ralston, July 18. 1832; 10 S. D. 848; reversed, July 1833; 6 W. S. 468. Syme, House of Lords, May 12. 1835; 1 S. M. 723.

2246. The interest may be *pecuniary* or *protective*. 1. *Pecuniary interest* to the smallest amount disqualifies (*a*). So a creditor on an estate, in a cause for establishing the right to it, is rejected (*b*); so one having a servitude over ground, the boundaries of which are in question (*c*); and a legatee under a testament in a reduction of it (*d*); and a cautioner in the

suspension of a bill, when called as witness in a reduction improbation of it (*e*); and office-bearers in a chartered bank, holding shares (*f*); and witnesses in many similar cases.

(*a*) 1 Phillips, 61; 2 Starkie, 750; Tait, 361, and cases cited by those authors. Duke of Argyle, March 12. 1819; 2 Murr. 106. Watson, May 10. 1836; 14 S. D. 734.
(*b*) Stewart, Feb. 8. 1677; M. 16673. See 2047 (*a*).
(*c*) Magistrates of Falkland, Feb. 22. 1724; M. 16740.
(*d*) Wilson, Nov. 17. 1699; M. 16702.
(*e*) Alison, Dec. 17. 1701; M. 16705.
(*f*) Padon *v.* Bank of Scotland, July 10. 1824; F. C.; 3 S. D. 250.

2247. A creditor has a direct pecuniary interest in the increase or diminution of his debtor's estate (*a*); and a bankrupt has a similar interest to enlarge his funds. They are not admissible in cases having such effect (*b*).

Interest in the event of the suit disqualifies; as if the witness be to share the sum awarded (*c*); or if he be promised an advantage by the gaining of the suit, as a lease on an estate in question; or if he be bound to pay money on the failure of the party by whom he is called.

If the verdict is to be available as an instrument of evidence to the witness in another case, the interest is held to be direct (*d*). But this in England is altered by the late statute making such a verdict or judgment unavailing to the witness (*e*).

(*a*) See 2046 (*b*). Brisbane, Nov. 23. 1692; M. 16698. M'Gavin, 11 Sh. 575. Bryson, 12 Sh. 937. Kennedy, July 11. 1837; 15 S. D. 1294.
(*b*) 2 Bell, Com. 482. Anderson, July 18. 1826; 4 Murr. 104. Gordon, July 13. 1825; 2 Murr. 516. See Hoffman *v.* Pitt, 5 Esp. 22. Binns *v.* Tilley, M'L. and Y. 404. Sayer *v.* Garnet, 7 Bing. 103.
(*c*) Forbes, March 18. 1822; 3 Murr. 45. Watson, March 7. 1837; 15 Sh. 753.
(*d*) 1 Phillips, 50. 2 Starkie, 747. Campbell, March 14. 1827; 4 Murr. 176. Forbes, March 18. 1832; 3 Murr. 44. See 3 and 4 Will. IV. c. 42. § 26. Kerrison *v.* Coatsworth, 1 Car. and Pay. 645. Wake *v.* Lock, 5 Car. and Pay. 454. Sherman *v.* Barnes, 1 Mood. and Rob. 69.
(*e*) 3 and 4 Will. IV. c. 42. § 26.

2248. It is not a disqualifying interest, 1. That the witness has a wish for the success of the party who calls him; or a strong bias in his favour; or some other eventual prospect or hope of advantage in the issue. These, though they may influence his testimony, go to his credibility only (*a*). 2. It is not enough that the witness has a similar case to maintain, if the verdict or judgment cannot be used in his favour (*b*): 3. It is not enough that one has an impression or apprehension of

an interest, though this may affect his credit (*c*). 4. It is not a disqualification if the interest be uncertain (*d*).

(*a*) 1 Phillips, 44. Urquhart, March 12. 1833; 11 S. D. 567. Hunter, March 1. 1837; 15 S. W. 693.
(*b*) 1 Phillips, 45. Bent *v.* Baker, 3 Term. Rep. 27, and 7 Term. Rep. 604. King *v.* Bray, Rep. Temp. Hardwicke, 358. See 3 and 4 Will. IV. c. 42. § 26. Hudson, 5 Bing. 368.
(*c*) 1 Phillips, 50. 2 Starkie, 746. See L'Amitie, Villeneuve, 5 Rob. Adm. Rep. 354, note. Golen, 2 Dodson, Adm. Rep. 20. Britton, March 21. 1826; 4 Murr. 46. Ralston, in House of Lords, 6 W. S. 488.
(*d*) R. *v.* Cole, 1 Esp. 98. Abrams *v.* Bunn, 4 Burr. 225. Smith, 7 Term. Rep. 60. Clark *v.* Gannon, Ry. and Mo. 31.

2249. *Protective Interest.* Interest is protective where the witness is called on to save character, or avoid punishment. This will disqualify where clear and certain, as much as pecuniary interest (*a*). A witness may decline to answer what may criminate himself, or expose him to any penalty or forfeiture; but he cannot plead such exemption to avoid liability in civil matters (*b*).

(*a*) Nicolson, Dec. 1770; M. 16770; 1 Hailes, 371, 418. Buchanan, 1774; 5 Brown's Sup. 551. Marshall, June 26. 1798; M. 16787; reversed.
(*b*) 46 Geo. III. c. 37.

2250. Exceptions to the rule of disqualification from interest are admitted in the following cases,—

1. Shipmasters, and mariners for their owners; and agents, factors, carriers, clerks, servants, for their principal, are admissible witnesses; a rule in some degree necessary to the common intercourse of trade (*a*). The interest which they may have in establishing a contract, or in the delivering of articles, &c. goes to their credit (*a*).

2. Where the interest is discharged, the witness is admissible. This of course still leaves the question of credibility: And often there are such palpable manifestations of preparing evidence in this way, that the case is open to observations seriously affecting the credibility of the witness. The interest may be taken away, 1. by a discharge of any responsibility of the witness arising out of the matter or cause; 2. by a general discharge of responsibility for any thing which has happened previous to the date of the discharge; 3. by the witness discharging all demand that may accrue to him from the effect of the judgment; 4. by previously paying the witness what, as legatee, or creditor, or otherwise, he could gain by his testi-

mony; and, 5. it is held, that neither is the adverse party entitled to prevent a discharge of the witness's interest, nor is the witness entitled to persist in his disqualification by refusing to accept of a discharge or satisfaction (*b*). But, 6. There are interests which cannot be discharged, and the witness must continue disqualified.

(*a*) Innes, Feb. 26. 1827; 4 Murr. 163–6. But see Hawkins, 3 Car. and Pay. 305. Sherman *v.* Barnes, 2 Mood. and Malk. 69. 1 Phillips, 120. 2 Starkie, 753, 767. Fairlie, Dec. 16. 1757; M. 16768. Inverury, July 11. 1705; M. 16710. Harrington *v.* Caswell, 6 Car. and Pay. 352. Harding *v.* Cobley, Ib. 664. See Taylor and Co. Nov. 21. 1827; 4 Murr. 373. Hunter, March 1. 1837; 16 S. D.

(*b*) 1 Phillips, 125. 2 Starkie, 758. Reid, March 15. 1820; 2 Murr. 239. Scott, 1 Camp. 249. Cartwright, 2 Starkie, 342. Radburn *v.* Bottomby, 4 Bing. 652. Wilson *v.* Hirst, 4 Barn. and Ald. 760. Jones, 2 M. and Wil. 169.

2251. 5. *Disqualification on Account of Relationship.* This vestige of a rule of evidence suited to a tribunal which does not see the witness, ought now to go to credibility only. It is a disqualification, grounded on the presumed identification of the witness with the party with whom he stands related, and not capable, like interest, of being discharged (*a*). And, 1. The witness must be related to one of the actual parties in the suit; the nearest relationship to one who is only interested (however deeply) in the suit, will not disqualify (*b*). 2. The same degree of relationship which disqualifies as a judge (parent and child; brother and sister, even by affinity (*c*); uncle and nephew, or aunt and niece, if by consanguinity) (*d*), will disqualify a witness. But the tendency is to admit the witness, reserving all objections to credit. 3. A bastard, after much vacillation of opinion, has been held not within the rule —leaving the connexion to go to credit (*e*). 4. The same relationship to both parties has not been held to neutralize the witness (*f*). A parent may decline to give testimony against his child in a criminal cause (*g*).

(*a*) 4 Ersk. 2. § 24. Tait, 372.

(*b*) M'Dowal, Nov. 15. 1800; M. *Witness*, App. 1.

(*c*) Brown, July 15. 1679; M. 16679. Erskine, Feb. 26. 1685; M. 16692. Laings, Nov. 16. 1814; F. C. Humphrey, Feb. 18. 1822; 1 Shaw's App. Cases, 111. Cadzow, Jan. 4. 1830; 5 Murr. 103. Cowper, June 18. 1828; 4 Murr. 552. Mills, Sept. 20. 1826; 4 Murr. 145. Smellie, July 19. 1834; 13 S. D. 700. Watson, May 10. 1836; 14 S. D. 734.

(*d*) Perth, Nov. 30. 1716; M. 16737. Strang, July 20. 1748; M. 16756; Elch. *Wit.* 28. Brown, Nov. 20. 1786; M. 16778. Leys, Nov. 6. 1610; M. 16656. Grant, Nov. 22. 1622; M. 16658. M'Dowal, Nov. 15. 1800; M. *Wit.* App. 1. Dougal, 11 Sh. 1020.

(*e*) Tait, 374. See Forrester, Feb. 28. 1837; 15 S. D. 690.
(*f*) Park, Dec. 19. 1752; M. 16765; Elch. *Wit.* 35. Blair, Nov. 21. 1749; Ib. 30. Gordon, June 1747; Ib. 27. Beugo, June 27. 1757; M. 16767.
(*g*) Lord Advocate, 13 Sh. 1170.

2252. *Disqualification by Malice.* Enmity must, in order to prevail as an objection to admissibility, be deep and serious, and clearly proved.

M'Kenzie, May 11. 1830; 5 Murr. 259.

2253. 7. *Disqualification by Agency.* This has in our practice been extended, beyond professional agency, to that spontaneous adoption of another's cause which gratuitously supplies advice, suggestions, aid, in carrying it on. And, 1. Professional agency disqualifies, while it continues, as to all matters of the cause (*a*). 2. Even after one has ceased to be agent, he is not admissible in regard to such matters as he has himself conducted in that capacity (*b*). 3. Partial counsel disqualifies; and consists in the instigating of the prosecution; being present at consultations; corresponding about the cause; suggesting witnesses, pleas, or inquiries; examining witnesses, and collecting information (*c*): the tendency, however, now being to leave all this to credit. And accidental perusal of papers in the cause is not enough to disqualify the witness (*d*). 4. The objection grounded on the witness ultroneously coming forward seems now to be nearly limited to credit (*e*).

(*a*) 4 Ersk. 2. § 25. Adam, July 2. 1743; M. 16745. Elch. *Wit.* 18. Lindsay, July 12. 1743; M. 16746; Ib. 19. Govan, June 18. 1752; M. 16764. Gibson Carmichael, Dec. 7. 1822; F. C.; 4 Murr. 102, and cases cited.
(*b*) Scott, Dec. 19. 1786; M. 16779. M'Alpine, Dec. 2. 1806; M. *Wit.* App. 4. Ker, 1822; 3 Murr. 134. See M'Latchie, Nov. 27. 1771; M. 16776. Gilchrist, 1823; 3 Murr. 364. Wight, July 25. 1828; 4 Murr. 587. Campbell, March 1834; 12 S. D. 573.
(*c*) 4 Stair, 43. § 9. 4 Ersk. 2. § 28. M'Gregor, July 11. 1801; M. *Wit.* 3. Richardson, Nov. 30. 1815; F. C. See Scott, 1825; 3 Murr. 521. M'Lean, April 13. 1819; 2 Murr. 129. Hackney, Feb. 20. 1820; Ib. 192. Hart, July 19. 1827; 4 Murr. 310. M'Gavin, April 18. 1833; 11 S. D. 525. Duncan, July 16. 1834; 12 S. D. 935.
(*d*) M'Kie, March 4. 1822; 3 Murr. 23. M'Kenzie, May 11. 1830; 5 Murr. 259.
(*e*) Duke of Athole, Nov. 28. 1809; F. C.

2254. 8. *Disqualification by Confidential Communication.* This entitles the *party* to object to a betraying of the confidence reposed in a counsel or law-agent, and the witness is bound to respect this privilege (*a*). But the objection extends

no further (*b*). So, 1. The witness cannot waive the privilege. 2. If the party should waive it, the witness cannot refuse his testimony. 3. A party cannot insist for the production of a memorial and opinion by counsel (*c*). 4. Being intentionally present at the precognition of other witnesses, or having the depositions of others sent to him, is an objection to the witness (*d*).

(*a*) 1 Phillips, 131. Cromack *v.* Heathcote, 2 Brod. and Bing. 4. M'Leod, Feb. 21. 1744; M. 16744. Bower, May 26. 1810; Lady Bath, Nov. 12. 1811. Lumsden, Nov. 13. 1828; 7 S. D. 7. Gavin, Dec. 17. 1830; 9 S. D. 213.
(*b*) Wilson *v.* Restall, 4 Term. Rep. 753; Brambell *v.* Lucas, 2 Barn. and Cress. 745. Stewart, May 26. 1834; 14 S. D. 837.
(*c*) Thomson's Trustee, March 4. 1823; 3 Murr. 262. Clark, July 16. 1824; 3 Murr. 455. Lumsden, Nov. 18. 1828; 7 S. D. 7. Gavin, Dec. 17. 1830; 9 S. D. 213. Cullen, March 14. 1832; 10 S. D. 497.
(*d*) Scott, July 15. 1823; 3 Murr. 321. Kerr and Co., Jan. 11. 1830; 5 Murr. 145. Wight, Jan. 9. 1829; 5 Murr. 47.

2255. A party is not allowed to be present in Court during the examination of other witnesses unless when as a professional man he is called to the construction of testimony.

Stewart, July 17. 1833; 11 S. D. 1004. Potts, March 15. 1837; 15 S. D. 879.

2256. 2. EXCEPTION FROM THE RULES OF EXCLUSION. These exceptions are introduced from necessity, to the effect of reducing the objection from disqualification to credibility. Such is the case in penuria testium. This is confined chiefly, 1. to criminal acts, where secrecy is studied; or, 2. to domestic occurrences, which necessarily exclude the presence of strangers; or, 3. to the case of witnesses necessary to the act in question.

4 Stair, 43. § 8, 19. 4 Ersk. 2. § 26. Tait, 383. Boyd, Jan. 20. 1770; M. 16770. Nicolson, Dec. 6. 1770; M. 16370; affirmed, 1 Hailes, 371, 418. Laing, Nov. 16. 1814; F. C. Martin, Feb. 8. 1816; F. C. Brown, 1821; 2 Murr. 455. Young, 1820; Ib. 229. Wilkie, March 4. 1834; 12 S. 520. Menzies, Feb. 5. 1835; 13 S. 408.

2. Sufficiency of Evidence.

2257. It is the undoubted province of the jury alone to weigh the evidence; but still this has been placed under the restraint of certain rules in regard to what shall in particular circumstances amount to legal evidence. And,

1. Written evidence alone is competent in bargains and

conveyance of land, and in proof of trust. But to these rules there are exceptions,—1. When rei interventus bars locus pœnitentiæ; see above, § 12 (*a*); and, 2. When the question of trust is between the trustee and third parties; see § 1994 (*b*).

2. Parole proof is not sufficient, and so excluded as proof to establish a loan of money, or simple promise, or qualification of a document of debt, or alteration of a written agreement, or acceptance of a bill (*c*).

3. Non-onerosity of a bill is proveable only by writ or oath (*d*).

4. A single witness is not sufficient to prove a fact (*e*). This rule in England is confined to cases of treason and perjury, and equity cases (*f*). But still there is a certain practical approximation to the same principle in the laws of England and of Scotland; one witness being enough in Scotland, if corroborated by circumstances, or if several acts going to the same result are proved by different witnesses (*g*).

(*a*) Rait, Nov. 26. 1833; 12 S. 131.
(*b*) Scott and Gifford, Nov. 16. 1832; 11 S. 21.
(*c*) Watson, May 14. 1834; 12 S. 588. Cullen, June 16. 1833; 11 S. D. 733.
(*d*) See Young, June 27. 1837; 15 S. 1202. M'Ewan, Nov. 21. 1833; 12 S. 110. Hunter, 7 W. S. 333.
(*e*) 4 Stair, 43. § 1, 2, 3. Tait, 435. Dougal, July 22. 1833; 11 Sh. 1020. Cleland, July 6. 1837; 15 S. 1246.
(*f*) 1 Ed. VI. c. 12. § 22. 7 and 8 Will. III. c. 3. § 2, 4. But see 39 and 40 Geo. III. c. 93.
(*g*) Tait, 435. Landles, 1816; 1 Murr. 81. Lee, 980, Dig. Ramsay, Aug. 1833; 11 Sh. 1033.

2258. 5. The best Evidence alone can be relied on. That is to say, in point of law (as well as in just reasoning), no evidence is to be received, which necessarily implies the existence of better evidence.

1 Phillips, 206. 1 Starkie, 103, 389, 396. Bryson, July 17. 1834; 12 S. 937.

2259. 6. Hearsay is in general not admissible; partly because it is not on oath; partly on the principle which requires the best evidence; partly because no opportunity is afforded of cross examinations (*a*). But, 1. Where the person is dead, his evidence may thus be given at second hand, provided he had no interest at the time he spoke (*b*). 2. Where a person examined on an interim warrant has become incapable of testimony, the same rule applies (*c*); but not where merely he cannot attend, at least there must be a new examination

for the trial (*d*). 3. In order to invalidate testimony, proof may in England be brought of what the witness had solemnly said formerly, or on another occasion (*e*). This is not yet the law of Scotland.

(*a*) 1 Phillips, 218. et seq. 1 Starkie, 40, 47. Tait, 429. et seq. Earl of Fife, Oct. 29. 1816; 1 Murray, 95. Christian, July 6. 1818; Ib. 424. Cochrane, April 12. 1820; 2 Murray, 298. Smith, Dec. 7. 1826; 5 S. D. 98. Watson, May 10. 1836; 14 S. 734.
(*b*) Lord Fife's case, 1 Murray, 95. Watson, March 7. 1837; 15 S. 753.
(*c*) Tait, 438.
(*d*) Gunn, Feb. 28. 1820; 2 Murray, 197. Aitcheson, Dec. 28. 1836; 16 S. 360. Watson, May 7. 1837; 15 S. 753.
(*e*) Doe *v.* Ridgway, 4 B. and Ald. 55.

3. Presumptions.

2260. CIRCUMSTANTIAL EVIDENCE is not the same with presumptive proof; except in so far as an inference may be called a presumption. PRESUMPTIONS are legal rules to exclude, or to abridge, or to aid the inquiry, by regulating the onus probandi. A presumption of fact, is an inference from circumstances; a presumption of law, is a rule of exclusive, or inclusive, or prima facie proof. There are some cases in which the law has settled certain presumptions, of force sufficient to guide the jury in weighing evidence. And, 1. Presumptio juris et de jure is absolute; and must be so received by the jury (*a*);—such is the negative prescription (*b*); deathbed (*c*); fraudulent preference in bankruptcy (*d*). 2. Presumptio juris is not an absolute but a prima facie proof, yielding to evidence. Such is the presumption of life (*e*); of prepositura (*f*); of property in moveables from possession (*g*), and many others.

(*a*) 4 Ersk. 2. § 35. Tait, 447.
(*b*) Ib. § 606.
(*c*) Ib. § 1786.
(*d*) 1696, 5. 2 and 3 Vict. c. 41.
(*e*) 4 Ersk. 2. § 36. § 1640.
(*f*) § 1565.
(*g*) § 1313.

3. EVIDENCE BY CONFESSION OR OATH OF PARTY.

2261. It is competent to apply to the conscience of the party,—1. for a confession or denial of such facts as he must necessarily be acquainted with; and, 2. by reference to his oath, to peril on his answer the whole matter in contest.

2262. 1. ORDER TO CONFESS OR DENY. The Court may call upon either party, where a statement is made of a suspi-

cious nature, to confess or deny the fact by solemn declaration. This is frequently done in the Inferior Court (*a*), and it is not competent to apply against such an order by advocation (*b*); and by a recent act it is made a competent and final mode of disposing of small causes before the Sheriff (*c*). The same course is also occasionally followed in the Court of Session; but it is entirely discretionary to the Judge, and not what either party has a right to demand (*d*). The cases in which it is proper are those in which there is a suspicion of fraud or concealment (*e*).

(*a*) Act of Sederunt, July 11. 1839, § 66.
(*b*) Turner, Feb. 11. 1826; 4 S. D. 449.
(*c*) 6 Geo. IV. c. 24. Finlay, Feb. 4. 1826; 4 S. D. 793.
(*d*) 4 Ersk. 2. § 22. Tait, 303. Act of Sederunt, Feb. 1. 1715.
(*e*) Goodfellow, July 27. 1785; M. 1483. Campbell, Nov. 27. 1826; 5 S. D. 54. Fell, Feb. 16. 1830; 8 S. D. 543. Wilson, Feb. 19. 1831; 9 S. D. 485. Nisbet, 15 S. 439. Scott, Ib. 924.

2263. 2. REFERENCE TO OATH is competent, as the last resource of a party who fails in, or despairs of, any other evidence. This is ultimate and conclusive, it not being competent to refute the oath, in so far as that cause is concerned. It is a transaction by which the party who refers places the cause on the sole issue of his antagonist's oath, and agrees to stand by it as decisive (*a*). This mode of proof may competently be resorted to at any stage of the proceedings, even after verdict or judgment. See also § 2264 (*b*). But,

1. It is not competent in crimes; nor is any one bound to swear where his guilt or innocence of a crime, or his liability to punishment or penalty may follow; with certain exceptions in the late Justice of Peace Acts (*c*).

2. It is not competent where writing is de solemnitate required, as in transferences and bargains relative to land.

3. It is not competent to refer to the oath of an agent, by whom the alleged contract was made for the party, the terms of the contract (*d*).

(*a*) Yule, Nov. 13. 1788; M. 9419. Elliots, July 11. 1749; M. 9363. Anderson, 1769; 5 Br. Sup. 553. Hardy, Jan. 4. 1709; M. 12248. Graham, Nov. 1775; M. 12249. Holson, Nov. 16. 1533.
(*b*) Clark, Nov. 20. 1819; F. C. Campbell, Jan. 15. 1822; F. C; 1 S. D. 538. Law, June 24. 1747; M. 12158. Dalziel, Feb. 4. 1792; M. 9407. Aitchison, May 23. 1823; 2 S. D. 329. M'Lennan, July 1. 1826; 4 S. D. 781. Young, Dec. 16. 1826; 5 S. D. 151. Shirreff, 15 S. 115.
(*c*) 46 Geo. III. c. 37.
(*d*) Kirkwood, June 26. 1823; 2 S. D. 425.

2264. As a reference to oath is a transaction, it follows,— 1. That the whole cause must be periled on the oath (*a*). 2. That the oath is conclusive; and no conviction of falsehood and perjury will alter the effect of the oath on the cause (*b*). 3. That it is not, however, a bar to a trial and conviction and punishment for perjury. 4. That the party referred to is entitled to insist that his antagonist shall declare that he has no other, at least no written evidence, to which to refer (*c*). 5. The reference may be retracted before the oath is sworn, on paying the expenses occasioned by it (*d*). 6. The reference may be made after verdict or final interlocutor (*e*). 7. It is in the equity of the Court to admit the reference, and to judge whether truth is likely to be obtained by such an examination (*f*).

(*a*) Ogle, March 5. 1825; 3 S. D. 629. Butters, May 29. 1830; 8 S. D. 843. Phœnix Fire Office, July 10. 1834; 12 S. D. 921.
(*b*) Kincaid, Feb. 27. 1673; M. 12143. Thomson, June 9. 1688; 2 Br. Sup. 121. Wylie, Nov. 30. 1832; 11 S. D. 151.
(*c*) 4 Stair, 44. § 2. 4 Ersk. 2. § 8.
(*d*) Chalmers, Feb. 18. 1813; F. C. Binnie, Jan. 28. 1832; 10 S. D. 255.
(*e*) Kirkwood, June 26. 1823; 2 S. D. 425. M'Lennan, July 1. 1826; 4 S. D. 781. See above, § 2263.
(*f*) Ritchie, March 7. 1825; 4 S. D. 534; 3 W. S. 484.

2265. As a transaction between the parties, the oath affects only them. Co-obligants are not bound by the result; or at least not by an affirmative oath, though they seem to have the benefit of the negative.

2266. The party referred to may *defer*, or refer back to the referrer where the case suggests that he must have better knowledge of the fact; yet a party cannot thus escape from swearing to a fact well known to him.

4 Stair, 44. § 13. 4 Ersk. 2. § 8. Tait, 241.

2267. The answer must be special, and to fact, not inference; the referrer being entitled to put questions in minute detail, so as to expose any falsehood, or any assumed legal inference.

Callender, July 10. 1709; M. 9416. A. *v.* B. Feb. 1757; M. 12475. Swan, June 30. 1786; M. 9418; 2 Hailes, 998.

2268. The construction of such oath gives rise to difficult questions, which are for the Court, not for a jury (*a*). The chief questions relate to qualifications adjected to oaths. A

qualified oath is one in which the deponent acknowledges what is referred to his oath to be true; but adds what he affirms to be necessary to a complete answer for determining the cause. And the difficulty is to ascertain, whether such addition be truly necessary to the complete answer, and such as the party referring is bound to take as part of the answer to his reference: In that case it is called an *intrinsic quality*. If it be unnecessary and superfluous, so that the referrer is not bound to admit it into the answer, the deponent having the onus probandi; in that case it is called an *extrinsic quality* (*b*). And it is of importance to mark the effect of the party who refers placing his whole cause upon the oath. In the ordinary case, the pursuer proves his libel, the defender his exception; the pursuer his reply, the defender his duply: But where the oath alone is relied on, every point essential and necessarily implied in the case of the referrer is put to the test of that oath; and every quality in the oath which goes to the essence of the case of the referrer is intrinsic. So, 1. The pursuer who refers resting owing to the defender, must admit *payment* as an intrinsic quality in the answer, although in the ordinary case, where he could prove the debt aliundé, this would be an exception to be proved by the defender (*c*). In the same way, where he refers a libel grounded on a contract of sale, a condition in the contract is intrinsic (*d*). The defender also who refers to oath, must admit as an answer whatever goes to the essence of his defence (*e*). But, 2. The deponent is not entitled to relieve himself from the onus probandi, where his case depends on a ground not necessarily involved in, or connected with, the matter referred; so a counter claim of compensation is extrinsic, not to be proved by the defender's oath (*f*).

(*a*) See Allan, 1822; 3 Murray, 3.

(*b*) 4 Stair, 44. § 11. 4 Ersk. 2. § 11, 12, 13. Dirleton, voce *Oath qualified*, 5 Br. Sup. 914. Brown, June 26. 1828; 6 S. D. 1022.

(*c*) 4 Ersk. 2. § 11, to be corrected. Campbell, Jan. 12. 1676; M. 13203. Trotter, Jan. 1687; Ib. M'Lean, June 13. 1700; 4 Br. Sup. 487. Aitken, Nov. 10. 1702; M. 13205. Sinclair, Dec. 18. 1703; Ib. Lauder, Jan. 1727; M. 13206. Meikle, July 26. 1737; M. 13225. Howie, July 1765; M. 13208. Same case, 5 Br. Sup. 913. Campbell, Nov. 28. 1778; M. 9530; 2 Hailes, 812. Douglas, Nov. 18. 1794; M. 11116; Bell's Cases. Robertson, June 26. 1824; 3 S. D. 186. Minty, Dec. 14. 1824; 3 S. D. 394. Carnegy, Feb. 22. 1825; 3 S. D. 566. See Anderson, June 1. 1827; 5 S. D. 744. Brown, 1828, sup. (*b*). Robertson, May 26. 1830; 8 S. D. 810.

(*d*) Howie, Nov. 19. 1765; 5 Brown's Sup. 913. Forbes, June 5. 1711; M. 13212. Greig and Scott, Jan. 23. 1830; 8 S. D. 382.

(*e*) 4 Ersk. 2. § 12.
(*f*) Learmonth, Dec. 9. 1664; M. 13241. Gordon, Jan. 3. 1674; M. 13234. Gilchrist, June 26. 1675; M. 13210. Mitchell, Feb. 11. 1761; M. 13241. See Grant, June 1793; M. 13221. Hay, June 21. 1786; M. 13220; 2 Hailes, 995. Rankin, June 29. 1799; M. 13245. Halliday, Dec. 13. 1826; 5 S. D. 116. Brown, June 26. 1828; 6 S. D. 1022.

2269. It is not competent to refer a matter of law to oath.

Taylor, March 10. 1829; 7 S. D. 565. See Lawson, Feb. 10. 1829; Ib. 380. Conachar, Nov. 27. 1829; 8 S. D. 141. Grub, March 3. 1835; 13. S. 603.

II. OF EXECUTION OR DILIGENCE FOR THE ENFORCEMENT OF DECREES.*

2270. Every sentence of a Court (unless in declaratory actions) contains a warrant, on which execution of the sentence may proceed.

1. Extracts of the decrees of registration of Inferior Courts, contain a direct warrant or precept under which they may be executed by the officers of the Court. Moveables within the shire or burgh may be attached or arrested, and thereafter, by sentence of the Court, adjudged to the creditor; or they may be poinded, and access got by opening lockfast places; and by order of the Judge sold, and the price adjudged to the creditor. The person may also be imprisoned after registration of the unanswered charge, on a warrant issued by the Sheriff-clerk. The same execution may proceed against the moveables or the person in other sheriffdoms, by means of concurring warrants (*a*).

2. The extracts of decrees of the Court of Session contain a warrant for charging the debtor to pay; for arresting; poinding; and registering to the effect of denouncing the debtor; on which a warrant for imprisonment may proceed in the Bill-Chamber (*b*).

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* The modes of proceeding in execution of sentences to affect the person and the moveable property, with the processes of sequestration and cessio bonorum, have been greatly changed by recent acts of Parliament and of sederunt. A full explanation of those acts, with practical remarks, will be found in a Supplement to my Commentaries.

3. Another very formidable kind of execution against the moveable estate, proceeds on the warrant of the Court of Exchequer, for the recovery of Crown debts. § 2280.

(*a*) 1 and 2 Vict. c. 114. § 9–15.
(*b*) 1 and 2 Vict. c. 114. § 1–8.

I. DILIGENCE AGAINST THE MOVEABLE ESTATE.

2271. Besides mercantile sequestration, which is a universal diligence (§ 2341), and landlord's sequestration, which is peculiar to landlords, the diligences proper to moveables for the accomplishing of decrees are,—1. Arrestment and forthcoming; 2. Poinding; 3. Confirmation as executor-creditor; and, 4. Writ of extent.

1. *Arrestment and Forthcoming.*

2272. The operation of this diligence depends on the combined effect of an immediate *attachment* with a subsequent *adjudication;* and it is accordingly divisible into two parts, the one called ARRESTMENT, the other FORTHCOMING.

4 Stair, 50. § 26. et seq. 3 Ersk. 6. § 2. 2 Bell, Com. 65.

2273. i. ARRESTMENT is the attaching of a pecuniary fund or of a moveable, so to remain till the debt be satisfied. It may proceed, 1. at the instance of a creditor in a debt actually due; or, 2. at the instance of a creditor in a future or contingent debt, or of a claimant whose jus crediti is not yet established by decree. In the former case, the arrestment is intended for immediate *execution;* in the latter, it is an arrestment *in security.*

2274. 1. *Arrestment for Execution.* This proceeds in execution of a decree pronounced in an action, or a decree of registration; or without decree on a liquid document of debt. The warrant to arrest on a decree, whether of the superior or of an inferior Court, is contained in the extract. It gives authority "lawfully to fence and arrest all and sundry moveable goods and gear, debts and sums of money, and other moveable effects, all to remain under sure fence and arrestment, at the complainer's instance, aye and until he be completely satisfied and paid." Where the groundwork is a liquid debt, but without decree, the arrestment is "to remain till sufficient caution

be found to be made forthcoming to the complainer in terms of law." Upon such arrestment in either form the forthcoming follows, to make the arrested fund effectual to the creditor. See below, § 2283.

Stair and Ersk. ut supra. 2 Bell, Com. 66; 3 Jurid. Styles, 547. et seq. 1 and 2 Vict. c. 114. § 2, 4, 9, 13, 16, 21.

2275. 2. *Arrestment for Security.* A creditor may arrest the debt or moveables of his debtor, in security of a debt for which he has raised an action, or which is not yet due. This may be done by a warrant contained in the summons, or separate (*a*). The arrestment may proceed on a summons containing an alternative conclusion ad factum præstandum, and for damages (*b*). The warrant in such cases "is to arrest, &c. to remain under sure fence and arrestment, aye and until sufficient caution be found, that the same shall be made forthcoming to the complainer as accords of the law." In this case, as in the other, as soon as the term of payment arrives, or when decree on the dependence has been obtained, the action of forthcoming may proceed, and the fund or subject arrested may be adjudged to the creditor (*c*). When an arrestment has been used on a summons, or on letters of arrestment raised on a summons, the warrant of citation must be executed within twenty days after the date of the arrestment, and the summons called in Court within twenty days of the day of compearance, or on the first sederunt-day after, if in vacation, otherwise the arrestment will be unavailing (*d*).

(*a*) Ersk. ut supra. 2 Bell, Com. 67. 54 Geo. III. c. 137. § 2. 1 and 2 Vict. c. 114. § 16, 17, 19.
(*b*) Moore, July 5. 1822; 1 S. 547.
(*c*) Oliphant, Feb. 21. 1750; M. 678.
(*d*) 1 and 2 Vict. c. 114. § 17.

2276. 3. *What may be Arrested.* The debtor's funds are equally liable to be attached for execution or for security. And, 1. Personal debts and moveables in the possession of another than the debtor, are the proper subjects of arrestment (*a*). 2. A sum due is held as in possession of the debtor: In his hands, or in those of persons identified with him, arrestment is to be used; not in the hands of those indebted to such debtor (*b*). A trustee is a debtor in this sense; or any one who is bound to account (*c*). And arrestment in a trustee's hand

is competent, although the fund be not turned into money (*d*). 3. Debts by bill are not arrestable (*e*). 4. Goods or money specially appropriated, cannot be arrested (*f*). 5. The subject must be already in possession of the arrestee (*g*), with the exception of, 1. an insurance broker for premiums (*h*); and, 2. a trustee, or one under obligation to do diligence and account (*i*). 6. Rents, interests, and annuities, may be arrested currente termino (*k*). 7. Alimentary funds are not arrestable (*l*). But the salary of an extractor in the Court of Session was held arrestable (*m*).

(*a*) 3 Stair, 1. § 25. 3 Ersk. 6. § 5. 2 Bell, Com. 73. Appin's Creditors, Dec. 10. 1760; M. 749. Cunningham, Nov. 18. 1760; M. 747. Davidson, Dec. 11. 1784; M. 761. Glendinning, June 8. 1745; M. 2573.

(*b*) 3 Ersk. 6. § 4. Campbell, Dec. 12. 1752; M. 742. Henderson, Dec. 14. 1796; M. 5534.

(*c*) Cross, Feb. 21. 1775; M. 757; 2 Hailes, 615. Wilson, May 31. 1809; F. C. Ramsay, Feb. 25. 1780; M. 759; 2 Hailes, 855. Douglas, June 29. 1796; M. 16213. Lothian, Nov. 27. 1823; 7 S. D. 72. Cameron, Feb. 4. 1830; 8 S. D. 440.

(*d*) Kyle, Nov. 14. 1827; 6 S. D. 40.

(*e*) 2 Bell, Com. 71, 72. Thomson on Bills, 318. More, Dec. 9. 1766; M. 12259, and the other cases cited.

(*f*) Baillie, Jan. 15. 1674; M. 703. Couper, Jan. 23. 1756; M. 744; 5 Brown's Sup. 308. Stalker, Feb. 9. 1759; M. 745; 2 Bell, Com. 12, 75.

(*g*) Stalker, ut supra. Hunter, Jan. 19. 1733; M. 736.

(*h*) Pitcairn and Scott, Feb. 7. 1809.

(*i*) See above, Kyle's case (*d*).

(*k*) Wright, June 23. 1802; M. 15919. Handyside, Jan. 15. 1813; F. C.

(*l*) 3 Ersk. 6. § 7. 1 Bell, Com. 129. et seq. See Irvine, Jan. 24. 1829; 7 S. D. 317.

(*m*) Miller, July 11. 1827; 5 S. D. 926.

2277. 4. *Formalities requisite.* The warrant to arrest is executed by leaving in the arrestee's hands, if within Scotland, a schedule or short copy, and returning indorsed on the warrant, or separately, an execution bearing that the arrestment was duly executed. If the arrestee is forth of Scotland, the arrestment is executed by delivery of a schedule at the Record Office of Citations in the Court of Session (*a*). If the warrant be from the Sheriff, and the arrestee is not in his sheriffdom, the arrestment may be executed in another sheriffdom, by a concurring warrant from the Sheriff of that shire (*b*).

An arrestment must be executed at the domicile, or personally; not at the counting-house of a company of which the arrestee is a partner (*c*). Arrestment of a trust-fund must be made in the hands of such trustees as are by the trust-deed entitled to act (*d*). By statute it is required, that in the exe-

cution the messenger and the witness shall be named and described, and shall sign the execution, otherwise the execution is null (*e*). 2. It is required at common law, that the execution shall describe all that is essential to the execution; and, 3. It is required by statute, that the copy delivered shall be signed by the messenger, and shall bear the date of the execution, and the name and description of the witness; but there is no declaration of nullity (*f*); and it has, in construing these requisites, been held, that although in summonses, where the party appears, less strictness is to be exacted (*g*), in arrestments, and all such diligences, the omission of any thing essential in the execution, the incorrect description of the debt (*h*), or a disregard of the requisites of the Act 1681 (*i*), will be fatal; but the omission of the requisites of the Act 1693, respecting short copies, will not annul the diligence (*k*). An erroneous or faulty return of execution may be replaced by a correct one, before being produced in judgment (*l*).

(*a*) 1 and 2 Vict. c. 114. § 18.
(*b*) Ib. § 19.
(*c*) Sharp, Fairlie, and Co. Feb. 21. 1822; 1 S. D. 314.
(*d*) Black, Jan. 22. 1830; 8 S. D. 367.
(*e*) 1681, 5.
(*f*) 1693, 12.
(*g*) 2 Ersk. 5. § 55. Stewart, May 22. 1824; 3 S. D. 56.
(*h*) Montgomery, Nov. 19. 1632; M. 3749. Crichton, Feb. 8. 1684; M. 3750. Wight, May 23. 1822; 1 S. D. 462. Scott, Dec. 2. 1825; 4 S. D. 261. Opinion of Judges in Holmes, March 4. 1829; 7 S. D. 541.
(*i*) Ib.
(*k*) Holmes, ut supra. Thomson, June 15. 1830; 8 S. D. 921.
(*l*) May, June 7. 1825; 4 S. D. 76. Hog, June 2. 1797; M. 8346.

2278. 5. *Effect of the Arrestment.* 1. The arrestment confers a preference, while the thing arrested remains with the arrestee, and subjects the arrestee to a claim for the value if he part with it; but it creates no further real right, so as to entitle the creditor to follow and vindicate it from third parties acquiring it in bona fide. 2. Arrestment on a depending action remains in force notwithstanding a decree of absolvitor, where an appeal is entered (*a*). 3. It covers not the principal only, but also the interest of the debt pursued for, and the expense of the action (*b*). 4. A trustee after arrestment in his hands, is not entitled to make advances to the truster (*c*). 5. There are differences between the effect of arrestment for execution, and arrestment for security. The former subsists

for three years from the date of arrestment; the latter, for five years from the time at which the debt is due or constituted (*d*). A creditor arresting for a future debt, ranks with other creditors, with an abatement of interest; a contingent creditor, only for a dividend to be deposited. And an arrestment for security may be loosed on caution, or removed altogether if nimious; an arrestment for execution only on payment of the debt, unless where the decree or obligation is brought under suspension (*e*).

(*a*) Countess of Haddington, March 8. 1822; 1 S. D. 433.
(*b*) M'Donald, Feb. 2. 1825; 3 S. D. 494. May, June 7. 1825; 4 S. D. 76.
(*c*) Bank of Scotland, July 7. 1826; M. 804.
(*d*) 1 669, 9, 2. Altered by 1 and 2 Vict. c. 114. § 22.
(*e*) 3 Ersk. 6. § 12. White, July 23. 1741; M. 802. Elchies, *Arrestment*, 17.

2279. 6. *Recall and Loosing of Arrestment.* Arrestment in security may be recalled without caution, or loosed on caution, in the following cases:—

2280. 1. Recall. Where arrestment in security is used *oppressively*, and even where used *nimiously* (*i. e.* where it is a superfluous and vexatious precaution), the Lord Ordinary in the cause, or the Sheriff, when the arrestment is on the dependence, or the Lord Ordinary on the Bills, may recall or restrict it, or grant warrant for loosing on caution, or without caution (*a*). This remedy may be applied in a future or contingent debt where there is no change in the debtor's credit, or where the creditor is already secured by diligence, caution, lien, &c. and there is no ground to suspect the security (*b*).

(*a*) Maule, May 14. 1828; 6 S. D. 790. Elliot, July 8. 1828; 6 S. D. 1097. Maule, May 22. 1829; 7 S. D. 639. 1 and 2 Vict. c. 114. § 20, 21.
(*b*) Stewart Jolly, Jan. 21. 1830; 8 S. D. 361.

2281. 2. Loosing on Caution. When the arrestment is loosed on caution, the arrestee may deliver up the subject, or pay the debt (*a*). The proceeding is either, 1. for a special loosing of some particular arrestment; or, 2. for a general loosing of all arrestments used or to be used by the creditor (*b*).

(*a*) 1617, c. 17.
(*b*) Act of Sederunt, July 11. 1826. See Paterson, Feb. 16. 1826; 4 S. D. 477. 2 Bell, Com. 69, 70.

2282. The caution is received by the clerk of Court; and he must satisfy himself of its sufficiency (*a*). The cautioner's obligation is, 1. to make the goods, &c. forthcoming while un-

removed and extant; or, 2. to give up the effects in as good condition as at first (*b*); or, 3. to pay the arrester's debt, to the amount of the value of the arrested goods (*c*); and, 4. while the goods remain, the arrester's preference continues.

(*a*) 1617, c. 17.
(*b*) Middlemas, Feb. 9. 1828; 6 S. D. 511.
(*c*) 2 Bell, Com. 70. Anderson, Child, and Co. Feb. 4. 1826; 3 S. D. 498.

2283. ii. FORTHCOMING. This is an accessory action of adjudication of moveables; the parties being the arrester, the arrestee, and the debtor: and the points of the action are, 1. to ascertain precisely the subject, or the reality and extent of debt arrested (*a*); and, 2. to adjudge the debt to the arrester, or so much of it as may pay his debt; or where the subject is corporeal, not a debt, to authorize a sale and payment out of the proceeds (*b*); and this sentence establishes judicially in the purchaser a right to the subject arrested (*c*).

See below, as to Bankruptcy and Competition, § 2327, et seq.

(*a*) 3 Ersk. 6. § 16.
(*b*) Stevenson, Nov. 12. 1684; M. 5405.
(*c*) Muirhead, Feb. 17. 1735, M. 687. Stevenson, June 27. 1767; M. 2762.

2. *Poinding.*

2284. Poinding is an adjudication and judicial sale of moveables for the payment of debt, and is either real or personal.

2285. 1. Real Poinding, is POINDING OF THE GROUND for a debt forming a real burden on the land (see above, § 699). This diligence proceeds by summons either in the Court of Session or before the Sheriff. The title to pursue is the feudal right of the superior, or the completed right of one holding a real burden, or debitum fundi (*a*). The parties to be called are the vassal, where the debt is the feu-duty due to the superior, and in all cases the tenants and possessors of the ground. The conclusion of the summons is not personal, but only for a warrant to messengers-at-arms to pass and seek for, fence, arrest, comprise, poind, and distrain, all the moveable goods on the lands; but, in so far as the moveables there belong to the tenants, only to the amount of the rent due by them. The decree of poinding of the ground is in terms of the conclusions; and thereupon is issued a warrant for poinding; and the diligence is completed by the messenger's execution. There is no

occasion for a previous charge, as in personal poinding, before proceeding to poind, there being no personal conclusion in the summons (*b*). A creditor holding a security preferable to the trustee in sequestration, may proceed to poind the ground for the interest of the present term and one year's arrears (*c*).

(*a*) See above, § 699. 4 Ersk. 1. § 11. Wilson, Feb. 13. 1822; 1 S. D. 350; affirmed, April 15. 1824; 2 Shaw, 162.
(*b*) 4 Ersk. 1. § 12.
(*c*) 2 and 3 Vict. c. 41. § 95.

PERSONAL POINDING, is the direct diligence for transferring to the creditor in personal obligations, moveables in possession of his debtor, or of another.

2286. Poinding proceeds either under the extracted decree of the Sheriff, where the moveables are within his territory, or under letters of horning and poinding, by warrant of the Court of Session, or on the warrant contained in the extracted decree of that Court (*a*). But in no case, till the debtor has been regularly charged to pay the debt, and the days of the charge have expired, can this poinding be executed (*b*).

(*a*) 1 and 2 Vict. c. 114. § 1, 4, 9.
(*b*) Ib. § 4.

2287. This diligence, as regulated by the recent statutes, consists of two parts. 1. The messenger has by the warrant, whether of the Court of Session or of the Sheriff, authority to open lockfast places. 2. He, with two sworn appraisers, values the things poinded; proclaims the value; offers the goods to the debtor at the appraised value; and on the debtor's refusal, adjudges them to belong to the creditor in payment of his debt. He leaves them, with a signed note of the value, in the debtor's hands, and reports his execution of poinding to the Sheriff (*a*). 3. The rest of the proceeding is judicial. If any stranger claims the goods, his remedy is before the Sheriff (*b*). Any person carrying off, or intromitting with the goods to disappoint the poinding, is liable in double the appraised value. The debtor may, on cause shewn, be deprived of the possession. A report is made to the Sheriff within eight days specifying the diligence, the debt, the name of the creditor, the effects, their value, the names and designations of the valuators, and the person in whose hands the goods were left (*c*). The Sheriff directs a sale to be made within twenty days, but not sooner than eight days after notice of

the day of sale. And a note of the sale being lodged with the Sheriff-clerk, the nett sum is paid to the poinding creditor (*d*).

(*a*) 1 and 2 Vict. c. 114. § 24.
(*b*) Scotland, June 12. 1828; 6 S. D. 961. Clark, June 15. 1824; 3 S. D. 143.
(*c*) 1 and 2 Vict. c. 114. § 25.
(*d*) Ib. § 27-8.

2288. *Subjects of Poinding.* These are, 1. moveables. But doubts have been raised as to such moveables as are not marketable; as a man's shop-books, to the effect of levying his book-debts; or bonds, bills, bank-notes; or money not separated and made specific. The general rule is, that only things corporeally valuable, and capable of being sold by the Sheriff's warrant, are poindable. Debts must be arrested. The competency of poinding bank-notes, or money in a man's pocket, or the ring on his finger, has not yet been expressly decided (*a*). The things poinded may be in the custody of others, or in the possession of the debtor.

(*a*) Ross on Conveyancing, vol. i. Hamilton, June 12. 1741; Elchies, voce *Abbey*, No. 2, and notes, 5; 5 Brown's Sup. 708. Alexander, Feb. 10. 1826; 4 S. D. 439.

2289. Poinding is not competent within the palace of Holyroodhouse.

Earl of Strathmore, Nov. 14. 1821; 1 S. D. 134; reversed, Feb. 26. 1826; 2 W. S. 1. 1 and 2 Vict. c. 114. § 23.

2290. Other creditors may concur, and insist on being conjoined in the poinding; in which case the appraisement, adjudication, and report, proceeds for all the debts jointly, and all the concurring creditors share in the proceeds of the sale.

See below, as to Bankruptcy and Competition, § 2417.

3. *Of Extent for Crown Debts.*

2291. The writ of extent is an Exchequer process now issued by authority of a Judge of the Court of Session (*a*), having, like poinding, two objects; first, the attachment and appraisement of the subjects against which it is directed; and, secondly, their sale and adjudication in payment of the king's debt.

This writ makes effectual a preference for payment of all debts due to the Crown. But, 1. It does not reach heritage; on which account the distinction of heritage and moveables

(§ 1470, et seq.) is here of importance (*b*). 2. It does not affect what is not truly the debtor's property (*c*); the criterion being the completion of the real right (*d*).

(*a*) 2 Will. IV. c. 54. 5 and 6 Will. IV. c. 45. 1 Vict. c. 65.
(*b*) 1594, 210. Peebles, July 10. 1631; M. 11824. Act of Union, § 19. 6 Anne, 25.
(*c*) 6 Anne, c. 25. § 62. Burnet's Creditors, July 17. 1754; Elchies' Notes, 16 and 400. 1 Bell, Com. 746, and 2, 41, et seq.
(*d*) West on Extents, 102. 2 Bell, Com. 53, et seq. King *v.* Lambton, 5 Price, 428. King *v.* Cotton, Parker, 112. Ogilvie, June 29. 1791; reversed, June 13. 1792. Robertson, July 6. 1802. King *v.* Johnson, June 29. 1809. King *v.* Lee, 6 Price, 369. King *v.* British Linen Company, June 1829; 2 Bell. Com. 56, note 4.

2292. 1. *Extent in Chief.* This is a direct execution given to the Crown, or the Crown's officer or collector, against the immediate debtor of the Crown. And, 1. The debt must be made to appear, either, 1. by a bond to the Crown with an affidavit; or, 2. by an inquisition, which, on an affidavit, is authorized to proceed by the oaths of "good and lawful men," on the testimony on oath of credible persons. 2. Affidavit is made, that there is danger of the Crown's debt being lost by the insolvency of the debtor, unless the remedy be granted. 3. The fiat signed by the Judge, is the warrant for the writ; and the date of the fiat is the date of the writ. 4. The writ of extent requires the Sheriff to inquire what goods and chattels, debts, credits, and sums of money, the debtor has, and to take, and to appraise and extend them, and seize the same into the Queen's hand: And the effect of it is to complete the Queen's right preferably to all, except real rights, over all the debtor's moveables. 5. The execution of the writ is by the Sheriff's taking inquisition of all the moveable estate belonging to the debtor, and debts due to him, and having the effects appraised and extended, and the whole returned or reported to Exchequer. 6. Venditioni exponas is a new warrant issued on the return of the inquisition or extent; ordering the Sheriff to sell effects to the amount of the Crown's debt, and to have the proceeds before the Judge for the use of the Crown: And out of those proceeds the debt is ordered to be paid: But the Sheriff is not empowered to levy debts: Payment is exacted by means of another process, called an extent in the second degree. See next section.

West on Extents, 22, et seq. 2 Bell, Com. 42, et seq.

2293. 2. *Extent in Chief, in the Second, &c. Degree.* This is a process for recovering from the debtors to the Crown's debtor, the amount of their debts, as seized by the Sheriff under the original writ. The execution is exactly similar against such debtors as if they had been directly debtors to the Crown. And on the return under the writ against them, of debts due to such debtor, new writs of extent in the third and fourth degrees may proceed against the successive debtors.

West, ut supra. 2 Bell, Com. 46.

2294. 3. *Extent in Aid*, is a remedy of the same nature given to the Crown's debtor, when called upon to pay the debt to the Crown. It proceeds on the ground of his inability to pay to the Crown, unless his debtors shall be compelled to pay to him: and proceeding on this fiction (called the Quo minus), a very oppressive use was formerly made of this diligence under various devices; persons having no character of Crown debtor having been allowed to take benefit by it. A remedy in some degree was given by a recent statute, whereby no extent in aid is to be issued for more than the debt due to the Crown; the amount of such debt being specified in the fiat and in the writ; and no other debtors are entitled to the use of it but those who become indebted in the course of collecting the revenue, or who are indebted by bond to the Crown.

57 Geo. III. c. 117. King in aid of Malcolm against Lindsay, June 1820; 2 Bell, Com. 48, note 3.

4. *Diligence against the Moveable Estate of Persons Deceased.*

2295. After the death of a debtor, his estate continues still liable to the diligence of his creditors. And the diligence, so far as the moveable estate is concerned, is either by a private creditor, or for a debt to the crown.

2296. 1. *Confirmation as Executor-creditor*, is the diligence by which the creditor in a private debt may effect his payment; and it has already been sufficiently explained (§ 1895).

2297. 2. *Writ of Diem Clausit Extremum*, is the proceeding by which a Crown debt is recovered. It proceeds, like the writ of extent, on a bond debt, or on a simple contract debt proved by inquisition; and contains a warrant to the Sheriff, 1. to inquire when and where the debtor died; and, 2. what goods, chattels, debts, sums of money, &c. he had then; and to ap-

praise, extend, and seize the same into the Queen's hand. The subsequent proceeding is by venditioni exponas.

2 Bell, Com. 51.

II. DILIGENCE AGAINST THE HERITABLE ESTATE.

2298. Land may be attached, either in execution or in security; the former by adjudication; the latter by inhibition or by adjudication in security.

1. *Of Adjudication for Debt.*

2299. Adjudication is an action of execution, following upon a decree or liquid document of debt not prescribed, and not contingent. The object of it is to transfer to the creditor the land or other heritable estate of the debtor, in security and satisfaction of his debt; with a power of redemption to the debtor by payment within a certain time. It may by a certain proceeding be converted into an absolute right of property in the creditor, after the term of redemption has expired (see § 830 and 2301.) Adjudication, although a diligence by an individual creditor, is capable of combination with other adjudications, as a complex diligence for the use of many.

1672, 19. M'Kenzie's Obs. 2. Par. Char. II. Sess. 3. c. 17. 3 Stair, 2. § 14, et seq. 2 Ersk. 12. § 39. 1 Bell, Com. 701. Ferguson, Feb. 20. 1816; F. C. Scott, Dec. 12. 1828; 7 S. D. 192. See Walwood, Nov. 14. 1693; 4 Brown's Sup. 89.

1. Adjudication of the Debtor's own Estate during his Life.

2300. 1. NATURE AND EFFECT. The summons contains an alternative conclusion for special or general adjudication.

1. *Special Adjudication.* By one conclusion, though now never made use of to any good purpose, the debtor is called upon to produce the titles to his lands; to concur in a fair valuation and appropriation of as much as will satisfy the debt; and to consent to a transference of it redeemable within five years.

2. *General Adjudication.* If the debtor do not thus concur, the conclusion is for a general adjudication of all the debtor's lands and estate in satisfaction of the debt, redeemable in ten years.

3. *Proceeding and Decree.* The proceeding is judicial. The first step of proceeding is a judicial intimation to all other creditors. In consequence of this such creditors as hold a decree, or liquid ground of debt, may move to be conjoined in the adjudication (*a*). The decree of general adjudication adjudges particular lands, by name and description, with all right and interest competent to the debtor concerning the same; and generally decerns and declares them to pertain and belong to the pursuer, and his heirs, heritably, for payment and satisfaction of the debt, interest, &c.; and it is decerned and ordained, that the pursuer shall be infeft, &c. to be held of the superior; and there is also a warrant for letters of horning to charge the superior to enter the adjudgers.

4. *Abbreviate and Recording.* The decree is extracted with an Abbreviate, and is recorded in the register of abbreviates of adjudication, within sixty days after the date of the decree.

5. *Completion of the Creditor's Right.* 1. If the subject be heritable, but not such as to require sasine, the decree duly recorded gives the complete right as from its date. 2. If it consist of a proper feudal subject, the creditor's title is completed by a charter of adjudication and infeftment (*b*).

(*a*) 54 Geo. III. c. 137. § 9.
(*b*) Stair and Ersk. ut supra. Juridical Styles, 324, et seq. 2 Bell, Com. 703, and cases cited.

2301. *Conversion of the Redeemable into an Absolute Right.* The right of an adjudger in a general adjudication, is redeemable within ten years. But, 1. The expiration of the term and the penal effect of a conversion into an irredeemable right, must, in order to be effectual, be declared by a DECREE OF DECLARATOR OF EXPIRY OF THE LEGAL; it being in the action competent to the debtor to call on the creditor to account for his intromission (*a*). 2. The same effect is produced if the creditor shall have completed his feudal investiture by sasine, and this shall have been followed by forty years' possession from the date of expiration of the legal (*b*). See below, as to insolvency and Competition, § 2414.

(*a*) 2 Bell, Com. 705. Campbell, March 7. 1794; Ormiston, Nov. 7. 1809; F. C. Stewart, Nov. 26. 1811; Bell, ut supra. Robertson, May 10. 1815; 3 Dow, 114.
(*b*) Johnson, June 7. 1743. Spence, Jan. 21. 1807; 2 Bell, Com. 706. Robertson, ut supra (*a*).

2. Adjudication of Estates to which the Debtor has succeeded.

2302. If the debtor have entered heir, and completed his titles, adjudication proceeds as against his own original estate. If not, he may be compelled to enter, or to leave the estate to his creditors. This is done by charges to enter heir (see above, § 1855); after which, if unanswered, the adjudication proceeds as if the heirs were entered.

1621, 27. 2 Bell, Com. 709.

3. Adjudication of the Debtor's Property after Death.

2303. This diligence proceeds either, 1. against a representative of the deceased, or against his hæreditas jacens; the debt being constituted by action against the heir in the former case, or against the hæreditas jacens in the latter; and there is required, 2. a title in the heir to the estate to be adjudged; or a renunciation, so that access may be had to the hæreditas jacens. Hence, 1. A general charge and decree of constitution form the first step of this diligence (*a*); the constitution being either against the heir, if he do not renounce, or against the hæreditas jacens, if he do. 2. The special charge is the next step; and being in execution of the decree of constitution, it can proceed only after that decree (*b*). And on the heir's entry, or on the certification of that charge, the adjudication proceeds against the estate as vested in the heir; or on renunciation, contra hæreditatem jacentem.

(*a*) 1540, 106. 3 Ersk. 8. § 93. 2 Bell, Com. 7, 11, 713. § 1856.
(*b*) Earl of Cassillis, Feb. 15. 1627; M. 2167. Catrine's Creditors, Dec. 1. 1738; M. 2173. Maxwell, Dec. 10. 1751; M. 176.

2304. This species of adjudication was competent before the introduction of adjudication in the ordinary case, and may still proceed before the Sheriff, while the other is competent only to the Court of Session.

2. *Adjudication in Security.*

2305. This differs from the common adjudication, in being intended only for those cases in which the creditor is not yet entitled to have execution for satisfaction. And, 1. In point of form there is no essential difference. 2. The power of redemption or legal does not expire. 3. It is a remedy given only where there is impending insolvency, or an accidental loss,

of security, or the likelihood of being cut off from competing with other adjudgers.

2 Ersk. 12. § 42. 2 Bell, Com. 714.

3. *Adjudication in Implement.*

See supra, § 835.

4. *Inhibition.*

2306. A creditor may be secured against the alienation of his debtor's heritable estate to the disappointment of his diligence, not only by adjudication in security, but by INHIBITION. This is a writ passing under the signet, prohibiting the debtor from alienating any part of his estate and from contracting debt, by means of which it may be carried off, to the prejudice of the creditor inhibiter; and interdicting third parties from taking conveyances of the heritage. In form it is directed against the whole estate, but it has force only against heritage. To make this diligence effectual, it is necessary, 1. to execute it against the debtor; 2. to publish it edictally against third parties, at the head burgh of the county where the lands lie; and, 3. to record it in the register of inhibitions within forty days of its publication.

4 Stair, 1. § 2. 2 Ersk. 11. Dirleton and Stewart, voce *Inhibition*. 1 Bell, Com. 141. Scott and Langton's Creditors, June 15. 1750; M. 6988. Oliphant, Dec. 31. 1703; M. 5562.

2307. GROUNDS. Inhibition may proceed on any liquid ground of debt, although the term of payment should be future or contingent (*a*); or, on an action of constitution upon production of the summons duly executed (*b*), or at any time prior to the final decision in the House of Lords (*c*).

(*a*) 2 Ersk. 11. § 3. 2 Bell, Com. 144.
(*b*) Rosehill's Creditors, Nov. 22. 1714; M. 6968. Milne, Dec. 27. 1698; M. 8158. Ranking of Tofts, Nov. 1722; M. 6970. See Ivory's Ersk. p. 566. note 322.
(*c*) Heron, July 2. 1744; M. 7007.

2308. RECALL. Inhibition may be recalled, if nimious or oppressive, where the debt is future, contingent, or not yet constituted; not where the debt is already due.

2309. OPERATION AND EFFECT. Inhibition is merely prohibitory. It is only by an accompanying adjudication that a real right is constituted. The inhibition gives no preference as by a transference: But still it has an important effect in

two ways; and, 1. As a prohibition of alienation, while it annuls a subsequent sale in so far as prejudicial to the inhibiter, it leaves it untouched and valid in all other respects: The consequence of which is, that it enables the inhibiter to acquire by reduction ex capite inhibitionis, followed by adjudication, a preference in which no other creditor posterior to the sale can participate (*a*). 2. A prohibition of burdens, it excludes creditors holding voluntary securities granted subsequent to the date (*b*). 3. As a prohibition of debts prejudicial to the inhibiter, it entitles the inhibiter, in competition with adjudgers, to a preference over those whose debts were contracted after the inhibition (*c*). But, 4. Inhibition is no bar to what the debtor is already bound specifically to do: and so sasine on a deed already granted, or a conveyance taken in implement of a minute of sale, will not fall by the inhibition. 5. As inhibition is no bar to adjudication by those creditors whose *debts* are not affected by it, and will not entitle the inhibiter to compete with such adjudication; the inhibition will not even give security against such debts, though future or contingent, without also adjudging, where such creditors proceed to adjudge. See above, § 2385.

(*a*) Horn, May 28. 1824; 3 S. D. 81. Carlyle, Feb. 1. 1739; M. 6971. Monro, July 19. 1777; M. *Inhib.* App. 1. 2 Bell, Com. 147. note 2. M'Lure, Nov. 19. 1807; M. *Competition*, App. 3.
(*b*) 4 Stair, 1. § 90. 2 Ersk. 9. § 91. 2 Bell, Com. 150.
(*c*) Watson, June 19. 1782; M. 7009. Rutherford, June 27. 1745; M. 6973. M'Math, March 1791; Bell's Cases, 22.

2310. By the form of letters of inhibition, the debtor is prohibited from alienating his moveables, or contracting any debt. But it has been long settled, 1. That it affects not moveables; and, 2. That no debt is objectionable on the ground of inhibition, unless it be shewn to be injurious to the inhibiter, as directly or indirectly an alienation of the heritage.

III. DILIGENCE AGAINST THE PERSON.

1. *Of Imprisonment.*

2311. Imprisonment for debt, formerly requiring the authority of the Court of Session, by signet letters of horning and caption, is now made competent directly on a warrant from the Sheriff-court or Bill-Chamber (*a*). And though formerly competent for debt of any amount, it is now abolished as a mode

of execution for debts of the amount of L.8, 6s. 8d. (*b*). The old warrant of horning and caption is still competent, but under this condition, that the debtor shall not be liable for the expense of such diligence (*c*).

(*a*) 1 and 2 Vict. c. 114. § 6, 7, 11, 12, 14, 15, 35.
(*b*) 5 and 6 Will. IV. c. 70.
(*c*) 1 and 2 Vict. c. 114. § 8.

2312. WARRANT OF IMPRISONMENT FROM THE COURT OF SESSION. The extract of a decree in foro, or of registration, contains a warrant to charge the debtor to pay within a certain number of days, under the pain of poinding and imprisonment (*a*). And on expiration of the days of charge, and within year and day, the execution of charge may be registered in the Register of Hornings at Edinburgh, to the effect of denouncing the debtor as rebel, and of accumulating the debt and interest into a principal or capital sum to bear interest (*b*). The warrant for caption is on this applied for by a minute signed by a Writer to the Signet, presented in the Bill-Chamber, on which the Clerk of the Bills enters a *fiat* which authorizes imprisonment as on a caption (*c*): And when the diligence is sued out by an assignee, on the assignation being produced with an accompanying minute, the warrant is granted in his name (*d*).

(*a*) 1 and 2 Vict. c. 114. § 1.
(*b*) Ib. § 5. and Act of Sed. Dec. 24. 1838, § 1.
(*c*) Ib. § 6.
(*d*) Ib. § 7.

2313. WARRANT OF IMPRISONMENT FROM THE SHERIFF-COURT. A warrant to imprison may now be issued from the Sheriff-court. The extent of the decree bears a warrant of charge to pay, under the pain of poinding and imprisonment: And on expiration of the days of charge, the execution of charge may be recorded in a Register of Hornings kept by the Sheriff-clerk, to the effect of denunciation, as in the case of the Court of Session diligence (*a*): Thereupon the creditor himself, or a procurator of Court, may, by a minute subscribed, apply for a warrant of imprisonment, which is granted by a *fiat* written out and signed by the Sheriff-clerk (*b*). And if the debtor is beyond the sheriffdom, a warrant of concurrence may be obtained on application to the Sheriff within whose shire execution is required (*c*).

(*a*) 1 and 2 Vict. c. 114. § 10.
(*b*) Ib. § 11, 12.
(*c*) Ib. § 13, 14, 15.

2314. 3. ACT OF WARDING. Decrees of magistrates of burghs may be followed by an Act of Warding, which authorizes the town-officers, after due search for the goods of the debtor, to take his person, and keep him in sure ward until he shall make payment of the debt, if above L.8, 6s. 8d.

2 Bell, Com. 583. 5 and 6 Will. IV. c. 70.

2. *Indulgence to Debtors, and Relief against the Hardships of Imprisonment.*

2315. The spirit of the law of Scotland is mild, in regard to the imprisonment of debtors; while it is sufficiently vigilant to prevent fraudulent absconding.

2316. 1. SANCTUARY. Every man's house is his sanctuary in Scotland against an Act of Warding (§ 2313), but not against a warrant for imprisonment from the Court of Session or Sheriff, § 2311, 2312. The Abbey of Holyroodhouse is a sanctuary; not as an ancient religious establishment, but as a royal residence (*a*). It is a sanctuary to a debtor; but not to a criminal (*b*); nor to one under diligence for performance of a fact within his power (*c*); nor to a debtor of the Queen (*d*). And imprisonment may take place within the abbey, 1. for debts contracted within the sanctuary (*e*); 2. on meditatio fugæ warrants (§ 2317) (*f*).

(*a*) Dirleton, 52. Earl of Strathmore, Feb. 22. 1826; 1 W. S. App. Cases, 1.
(*b*) 1535, 23. Park *v.* Brown, Feb. 10. 1787; M. 7.
(*c*) Turner, Dec. 2. 1709; M. 11802.
(*d*) 4 Ersk. 3. § 25. Munro, June 25. 1736; Elch. *Abbey*, 1.
(*e*) Cockburn, June 12. 1708; M. 2877. Bing. Feb. 24. 1820; F. C.
(*f*) Leechman's case, June 3. 1797; M. 8559.

2317. The benefit of sanctuary is attained by merely entering within the precincts. But this protection lasts only for twenty-four hours; after which the debtor must have his name entered in the record of the Abbey Court, on which a certificate of protection is given to him (*a*). This protection is available only within the precincts.

(*a*) See 2 Bell, Com. 572. Grant, Feb. 15. 1779; M. 5; 2 Hailes, 816.

2318. 2. MEDITATIO FUGÆ WARRANT. No debtor can be

arrested for debt in Scotland till the expiration of the days of charge. But a warrant of imprisonment against the debtor as in meditatione fugæ is competent, on proof of just ground to suspect the debtor of an intention to abscond. And,

1. The creditor who applies for such warrant, must swear to his debt, and his belief of an intention on his debtor's part to abscond; and he must justify his belief by the statement of the grounds on which it rests.

2. Before a warrant to imprison is granted, the debtor must be brought up for examination.

3. The Magistrate must look to any collateral evidence that may be offered. And,

4. If, after due inquiry, it appear that the debtor is not merely going to another part of Scotland, or to the sanctuary, or in the course of his duty as a soldier or sailor, but that he is about to leave Scotland, warrant will be granted to imprison him until he shall find caution de judicio sisti (§ 274).

2 Bell, Com. 557. et seq.

2319. 3. BILL OF HEALTH. In case of a prisoner's sickness and danger of life, he may, on a certificate from a physician, surgeon, apothecary, or minister of the gospel, apply to the Magistrates for liberty to reside out of prison during the continuance of his sickness; and this, on calling the creditor, the Magistrates are empowered to grant, under such precautions as may seem just.

Act of Sederunt, June 14. 1671. See 2 Bell, Com. 548.

2320. 4. ALIMENT AND ACT OF GRACE. A prisoner for debt, if unable to maintain himself in prison, is entitled to call upon his creditor to aliment him. And although this was intended directly as a relief only to Magistrates, it operates indirectly to give greater mildness to the law of imprisonment. The original act is much improved by a recent statute (*a*); and under these laws,

1. The creditor, at incarcerating his debtor, must deposit ten shillings, to be returned in thirty days if the prisoner do not apply, &c. or to be applied to the prisoner's aliment if necessary.

2. The debtor applies by petition, and the creditor must be called.

3. If there be no appearance for the creditor, or if he shall not settle an aliment on the debter, the prisoner is to be liberated on the expiration of ten days.

The debtor, on his being thus liberated, grants a disposition omnium bonorum for behoof of all his creditors (*b*).

(*a*) 1696, 32. 6 Geo. IV. c. 62.
(*b*) 2 Bell, Com. 553. Statute ut sup. (*a*).

2321. LIBERATION. This takes places on payment of the debt; or in Cessio bonorum; or by Discharge in mercantile bankruptcy. These shall be considered below (§ 2432 and 2438).

IV. EFFECTS OF INSOLVENCY.

2322. While a debtor is solvent, his creditors proceed, each in his course of diligence, to compel payment or satisfaction either against the estate or by constraint of the person. But with insolvency commences a species of common interest in the debtor's estate, and a humane consideration of the debtor's condition; which the law has interfered to regulate according to the principles of equity and humanity suitable to such a case. This interposition of the law has, 1. with respect to the estate the great object in view of introducing a perfect equality among all those creditors who have not, previous to the debtor's insolvency, acquired by voluntary grant or legal diligence a preferable right over the rest; and, 2. in respect to the debtor's person, he is admitted to freedom, or even obtains a discharge in certain cases. For the attainment of these objects, there are laws directed against voluntary preferences, and to the regulation of diligence.

1. RESTRAINT ON VOLUNTARY DEEDS, AND PREFERENCES OVER THE ESTATE.

2323. The statutes by which the Legislature has endeavoured to prevent or annul fraudulent preferences, were enacted in the seventeenth century; have received some improvements of recent date; and still farther and very exten-

sive improvements have of late been proposed by the Law commissioners.

1. *Remedy to Creditors against Gratuitous or Confidential Conveyances.*

2324. No one is permitted, after insolvency, to convey gratuitously, and by direct or indirect means, to relations or confidential friends, the funds which truly belong to his creditors. And by statute (as construed by decisions), deeds of conveyance are presumed to be fraudulent, and so null, if gratuitous, and made after the contracting of debt, and in favour of a near relation (conjunct person), or confidential friend.

1621, c. 18, with an ample Commentary by Sir George M'Kenzie. See 2 Bell, Com. 183. et seq.

2. *Fraudulent Preferences after Bankruptcy.*

2325. To prevent a debtor on the eve of bankruptcy from unduly favouring particular creditors, it has been enacted, that all deeds conferring preferences on particular creditors, to the exclusion of the rest, not completed till within sixty days of bankruptcy, or after that event, are null, as legal frauds. And bankruptcy to this effect is ascertained by the fact of sequestration; or imprisonment (§ 2310); or by the debtor resisting the officer; or absconding, or taking sanctuary after a charge to pay, in order to avoid caption (*a*). Where a debtor is abroad; or not subject to imprisonment, by reason of privilege or personal protection, arrestment unloosed for fifteen days, or a poinding, or decree of adjudication, together with an expired charge for payment completes the bankruptcy (*b*). Securities for prior debts not completed sixty days before a debtor's death, are of no effect in a sequestration awarded within seven months of that event (*c*).

(*a*) 1696, c. 5. 1 and 2 Vict. c. 114. § 6, 7, 8, 11, 35. 2 and 3 Vict. c. 41. § 25.
(*b*) 54 Geo. III. c. 137. § 1.
(*c*) 2 and 3 Vict. c. 41. § 74.

2326. 1. The remedy introduced by these statutes is competent only to a prior creditor. 2. The challenge must be of a preference directly or indirectly conferred, by means of a conveyance, security, or obligation, in favour of one who is already a creditor; payment in money not being challengeable.

See ample Commentary on these statutes, 2 Bell, Com. 205–233, and cases there cited.

2327. 2. In order to prevent the evasion of the statute, dispositions, &c. for relief or security of debts to be contracted for the future, are declared to be of no force as to what shall be contracted after sasine on the conveyance (*a*). But this law has so far been relaxed as to give sanction to securities for cash-accounts on particular conditions (*b*).

(*a*) 1696, 5.
(*b*) 54 Geo. III. c. 137. § 14.

2. EQUALIZATION OF DILIGENCE AGAINST THE DEBTOR'S ESTATE.

2328. It is consistent with equity that all creditors who come at the same time to demand satisfaction of the debtor's personal obligation, should be made equal in the division of his inadequate fund. And this has served as the groundwork of several legislative measures, respecting both the moveable and heritable estate.

1. *Equalization of Diligence on the Moveable Estate.*

2329. 1. CREDITORS OF A DECEASED DEBTOR. 1. Confirmation as an executor-creditor can take place only after notice in the Gazette to all other creditors to appear and take their share.

4 Geo. IV. c. 98. See above, § 1896.

2330. 2. CREDITORS INSISTING AGAINST EXECUTOR. A period of six months after death has been appointed, within which the executor cannot be compelled, and is not safe, to pay to any creditors of the deceased.

Act of Sederunt, Feb. 28. 1762. See above, § 1901.

2331. 3. CREDITORS POINDING OR ARRESTING. By recent statutes it is enacted, 1. That in all cases creditors who shall arrest or poind the moveables of their debtor within sixty days preceding his bankruptcy (§ 2324), or four months after it, shall be equal: arresters to rank pari passu, as if all their arrestments were of the same date (*a*); poinders being bound to communicate to all having liquidated grounds of debt, or decrees for payment, and summoning the poinders, or judicially producing the same in a process of competition (*b*). 2. That in mercantile bankruptcy, no arrestment or poinding executed on or after the sixtieth day prior to the sequestra-

tion, or executed after the sequestration, is effectual; but the subject is to be taken into the general fund: the expense of such diligence, if done in bona fide, being paid out of the fund (*c*).

(*a*) 54 Geo. III. c. 137. § 2. continued in those sections by 2 and 3 Vict. c. 41. § 1.
(*b*) Ib. § 5.
(*c*) Ib. § 40. 2 and 3 Vict. c. 41. § 83.

2. *Equalization of Creditors on the Heritable Estate, and Proceedings for that purpose.*

2332. 1. ADJUDICATIONS. The first statutes for equalizing adjudications, and preventing accidental and undue preferences, were confined to a pari passu preference of all creditors who should adjudge within a year and day from the date of the decree pronounced in the adjudication first made effectual by sasine, or a charge to the superior (*a*). The next step in the progress was to require notice by the first adjudger, to enable every creditor ready to adjudge to be conjoined in the first adjudication, instead of adjudging separately (*b*). The last step has been to introduce and improve the processes of ranking and sale (§ 2132), and sequestration (§ 2340); and to declare these proceedings to be equally available to every creditor, superseding all separate adjudications (*c*).

(*a*) 1661, 62. 1672, 19. See 2 Bell, Com. 717.
(*b*) 23 Geo. III. c. 18. 33 Geo. III. c. 74. § 10. 54 Geo. III. c. 137. § 9.
(*c*) 54 Geo. III. c. 137. § 10 and 30. See 1 Bell, Com. 718. See below, § 2333. 9. and 2344.

2333. 2. JUDICIAL SALE AND RANKING. This process may be regarded as the most complete and perfect of the diligences against land, where there are several creditors, and an inadequate fund of payment. It is, in respect of the RANKING, a process of competition; in respect of the SALE, a diligence against the land. It is of two kinds,—one by creditors, the other by the proprietor himself, before he has completed his title.

2334. 1. *Judicial Sale at the Instance of Creditors.* This action proceeds at the instance of a creditor holding a real right, the creditors being in possession of the estate; and concludes, that, on proof of insolvency, the estate shall be sold by authority of the Court of Session, and irredeemably ad-

judged to the purchaser, and the superior ordained to enter him; and that the price shall be divided in the process of ranking. The decree of sale being an adjudication by all the creditors.

1681, 17. 1690, 20. 54 Geo. III. c. 137. § 10. 2 Bell, Com. 254. et seq.

2335. 1. Title to Pursue. The pursuer must be a creditor holding a real right, and the creditors must be in possession either actually; or by decree of maills and duties; or by sequestration of the rents; and the whole estate must be included.

1681, 17. 1690, 20. 2 Bell, Com. 258.

2336. 2. Sequestration of Land. This was, before the introduction of judicial sale, the only method of making the estate available to several creditors; at present, it is an intermediate and preservative proceeding; for collecting and accounting for the rents. It is competent wherever the estate is in competition, and an action of sale in dependence. It is a summary proceeding by petition: a factor is appointed on the recommendation of the creditors, accountable according to fixed rules.

Act of Sederunt, Jan. 17. 1756. 2 Bell, Com. 262, and cases there cited.

2337. 3. Common Agent. The creditors, assembled according to certain rules, elect a person to attend to the common interest of all, in conducting the sales, and receiving the claims, and arranging the ranking, so as to have the rights and interests of the creditors fairly discussed.

Act of Sederunt, July 11. 1794.

2338. 4. Committee of Creditors. A committee for superintendence and advice is named by the creditors from their own number.

Act of Sederunt, July 11. 1794.

2339. 5. Sale. The Court of Session fixes the upset price, and the day and place of sale; and, certain notices being given, the sale proceeds on articles of roup in presence of the Lord Ordinary before whom the process of sale depends. The price is secured by caution and consignation for the purpose of division in the ranking; and the purchaser's title is an irredeemable decree of sale and adjudication, fortified by assig-

nations to the debts and securities of the creditors holding real rights over the estate.

2 Bell, Com. 270, et seq. with cases there cited.

2340. 2. *Judicial Sale at the Instance of an Apparent Heir.* It is made competent to the apparent heir of the debtor to bring his predecessor's estate to a judicial sale, whether there be insolvency or not (*a*). And,

1. Apparency alone is a sufficient title.

2. Where the heir is actually entered, he cannot thus sell the estate (*b*).

The apparent heir is regarded as a trustee for all the creditors; and so the sale is an adjudication for them all (*c*). But in this respect, both kinds of judicial sale are now on the same footing; the decree of sale being held as an adjudication for all concerned, as at the date of the first calling of the process of sale, and all separate adjudications are discharged (*d*).

(*a*) 1695, 24.
(*b*) 3 Ersk. 8. § 69. 2 Bell, Com. 259.
(*c*) Irvine, Jan. 29. 1748; M. 5264. Haldane, Nov. 15. 1791; M. 5299. Massey, July 12. 1785; M. 8377.
(*d*) 54 Geo. III. c. 137. § 10. See above, § 2333.

3. MERCANTILE SEQUESTRATION.

2341. This process includes the whole estate, heritable and moveable, of merchants and manufacturers; and has been by a late statute greatly reformed (*a*). It may be sufficient to present a very slight and general idea of this system of proceeding,—the details of which require a very anxious study of the statute.

(*a*) 2 and 3 Vict. c. 41.

2342. 1. *Title to Sequestrate.* 1. It is competent to creditors having a debt of a certain extent, to apply to the Lord Ordinary on the Bills for sequestration of the estates of his debtor, if a merchant or manufacturer in Scotland, or a company within that description, and bankrupt in terms of the Act 1696 (*a*); or having retired to and remained in the sanctuary for twelve months (*b*). 2. The debtor himself, though not bankrupt, may apply for sequestration to the same effect (*b*); and, 3. The estate of a person deceased who shall have given a mandate to that effect, or died notour bankrupt, or after having been for sixty days in the sanctuary, may be sequestrated (*c*).

The proceedings which formerly were conducted in the

Court of Session are now sent to the Sheriff, his orders and judgments being subject to the review of the Court of Session (*d*).

(*a*) 1696, c. 5. 2 and 3 Vict. c. 41. § 5 and 6.
(*b*) Ib. § 7.
(*c*) Ib. § 5.
(*d*) Ib. § 13, et seq.

2343. 2. *Trustee and Commissioners.* A trustee is elected by the creditors, under superintendence of the Sheriff; and he proceeds with advice of three commissioners, and of the creditors themselves, to have the estate and effects sold and realized, and the proceeds divided.

2344. 3. *Vesting and Sale of the Estate.* 1. Confirmation of the trustee's election vests him with the heritable estate in Scotland, as by absolute and irredeemable adjudication in implement; and also with estates in other countries under certain observances (*a*). He has thereby right also to future acquisitions of the bankrupt (*b*), and to all his moveable estate (*c*). The general adjudication operates as such to all the creditors; accumulating their debts as at the date of the first deliverance, and ranking with any prior effectual adjudication within year and day (*d*). 2. The creditors may direct the estate thus vested in the trustee to be sold by the old process of judicial sale, or by public voluntary sale on articles of roup. The price is lodged in bank, subject to division in the sequestration (*e*).

(*a*) 2 and 3 Vict. .c 41. § 78-80.
(*b*) Ib. § 81.
(*c*) Ib. § 83.
(*d*) Ib. § 82.
(*e*) Ib. § 90, 3, 4.

2345. PROOF OF DEBTS. It is necessary to produce such accounts and vouchers of his debt in the creditor's possession as are necessary to prove the debt, and also to swear to the verity of the debt, specifying in his oath all his securities (*a*); and in order to vote respecting any of the questions in the sequestration, he is required to deduct such securities and collateral obligations as afford a right of relief to the bankrupt (*b*). Those proofs undergo a certain scrutiny in case of contested elections or disputed resolutions (*c*). And in preparing for payment of a dividend, it is the duty of the trustee to examine and judge of the admissibility of the several claimants, his judgment being subject to the review of the Sheriff or the Lord

Ordinary on the Bills (*d*), and finally to the judgment of the Inner-House of the Court of Session and House of Lords (*e*).

(*a*) 2 and 3 Vict. c. 41. § 9, 10, 11.
(*b*) Ib. § 33, 34, et seq.
(*c*) Ib. § 46–7, and 54.
(*d*) Ib. § 103, 4, 5.
(*e*) Ib. § 128–9, and 131.

2346. PAYMENT OF DIVIDENDS. The dividends are to be paid, the first at the end of eight months; the second at the end of twelve months; and the subsequent dividends at the end of every four months.

2 and 3 Vict. c. 41. § 107–110.

4. DISPOSAL OF THE PERSON OF THE DEBTOR.

2347. Where a debtor has failed by innocent misfortune, and gives up to his creditors for their satisfaction all his means of payment, it is equitable, and consistent with humanity and good policy, that his person should be freed from imprisonment. This is done, 1. in sequestration; either, 2. as an intermediate proceeding, or as a final discharge; or, 3. by cessio bonorum.

2348. 1. IN SEQUESTRATION. At awarding the sequestration the Sheriff is empowered to grant an interim protection against arrest or imprisonment for civil debt, or a warrant of liberation until the meeting of creditors for the election of a trustee (*a*). And the protection may be renewed on the resolution of a majority of the creditors to that effect (*b*).

(*a*) 2 and 3 Vict. c. 41. § 13, 17, 18.
(*b*) Ib. § 58.

2349. Allowance to the Bankrupt. The creditors at the meeting for choosing a trustee, or for examination of the bankrupt, or when called for the purpose, may, by a majority of four-fifths in value of those present, grant an allowance to the bankrupt of three guineas per week till the time of paying the second dividend.

§ 59.

2350. Discharge. The bankrupt after he has undergone his examinations may apply for a discharge with the unanimous consent of the creditors who have produced their oaths; or on the expiration of eight months from the seques-

tration he may apply with consent of a majority in number and four-fifths in value; and in twenty-one days after a Gazette notice, the Lord Ordinary or Sheriff shall determine on any objections that may be stated in opposition to the demand, and either grant the discharge or refuse it, or allow it under certain conditions; certain precautions being provided against collusive and undue discharges.

§ 122–3.

2351. Composition. It is declared competent at the meeting for electing a trustee, or at any meeting called for the purpose after the examination of the bankrupt, to propose the payment of a composition to the creditors on the whole debts; which being intimated by Gazette notice, and by letter to each creditor—if accepted by a majority in number and nine-tenths in value assembled at a subsequent meeting, and caution found to the satisfaction of the creditors, shall be confirmed, and the bankrupt discharged.

§ 113–116.

2352. 2. CESSIO BONORUM. This process, which formerly was a remedy to the debtor against the evils of imprisonment, has, under the late statute for its reformation, been also made to supply the place of sequestration in small bankruptcies. The great objects of the statute have been to reduce the expense and lessen the delays of this process; to prevent the necessity of protracted confinement in jail; to bring the debtor and his creditors at once together before the Judge for a strict investigation into the state of his affairs; and to make the surrender by the bankrupt available to the creditors.

2353. 1. *Sheriff Process of Cessio.* On receiving a charge for payment, a debtor may apply by petition to the Sheriff of his domicile for the benefit of cessio: His creditors are cited either as formerly, or by letter accompanied by a Gazette notice to appear in Court within thirty days: The debtor may then, on producing his books and instructions of his debt, apply for protection or liberation; and appearing personally in Court to undergo an examination in presence of his creditors, the merits of his case are disposed of either by the refusal of the cessio, or the granting of it unconditionally, or qualified

by a certain term of exposure to personal diligence. The decree of cessio vests his creditors with a full right to all his moveables, and he is bound to grant a conveyance of his heritage (*a*). The judgment of the Sheriff is subject to the review of the Court of Session (*b*).

(*a*) 6 and 7 Will. IV. c. 56, and Act of Sederunt, June 6. 1829.
(*b*) Ib. § 8, 9, 10.

2354. 2. *Process of Cessio in the Court of Session.* This action proceeds as formerly by summons: public notice being given by a Gazette advertisement, and the creditors being cited on the summons, or called on by letter; the debtor must produce his books and instructions of debt, and satisfy the Court of his right to the benefit of cessio: And when there are doubts to be cleared, the process is remitted to the Sheriff for the purpose of having the personal examination of the debtor. All these proceedings are before the Inner-House during session, or the Lord Ordinary on the Bills in vacation, the Court or the Lord Ordinary having power to grant interim warrant of liberation or protection, on caution de judicio sisti.

6 and 7 Will. IV. c. 56, and Act of Sederunt, Dec. 24. 1838.