

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

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

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

AVIZANDUM. To make avizandum with a process, or part of it, is to take it from the public court to the private consideration of the judge. When a Lord Ordinary [or other judge], after hearing parties, considers the case intricate, and requiring greater deliberation, instead of pronouncing a decision at once in court, he takes the cause to avizandum. The process is then transmitted to him by the clerk of court; and, after considering it, the Lord Ordinary issues his decision in the usual form. [When a case is removed to the Inner House on report by a Lord Ordinary, *great avizandum* is said to be made. Thus, in provings of the tenor, which are appropriate to the Inner House, the summons is called and enrolled in the Outer House, but the Lord Ordinary at

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

AVULSIO; takes place where lands are, by an inundation or current, separated from the property to which they originally belonged, and added to the lands of another person; or where a river changes its course, and, in place of continuing to run between two properties, cuts off part of one, and joins it to the other. The property of the part thus separated continues in the original proprietor; in which respect the term *avulsio* may be contrasted with the term *alluvio*, by which an addition is insensibly made to a property by the gradual washing down of a river, and which addition becomes the property of the owner of the lands to which the addition is made. *Ersk.* B. ii. tit. 1, § 14; *Bank*. i. 506; *Bell's Princ.* § 936; [*Rankine on Land-Ownership*, 100.] See *Alluvio*.

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

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

B

BACK-BOND; is a deed attaching a qualification or condition to the terms of a conveyance or other instrument. This deed is used when particular circumstances render it necessary to express in a separate form the limitations or qualifications of a right. [*Jurid. Styles*, ii. 440.] See *Absolute Disposition*.

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

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

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

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

BAGIMONT'S ROLL; was the rent roll

of benefices in Scotland made up by *Bene-mundus de Vicci*, vulgarly called Bagimont, who was employed, in the reign of Alexander III. (A.D. 1275), to collect the tenth of benefices. Skene's account of this roll is erroneous. See *Hailes' Annals*, iii. 200; *Bank*. ii. 53; *Skene, h. t.*; [*Innes' Legal Antiquities*, 189.]

BAIL; is the security given for the appearance of a person accused of a crime. [The Bail Act, 1888 (51 & 52 Vict. c. 36), has altered the former law both as to the kind of offences which are bailable, and as to the amount of bail exigible. Prior to that act, the right to bail rested on the act 1701, c. 6, by which] persons committed, or about to be committed, for trial, were entitled to be liberated on bail, provided the crime charged against them was not capital. [And the exclusion of capital crimes was extended to all such as were capital at the date of the act 1701, even though by long custom they had ceased to be punishable by death. See list of non-bailable offences in *Macdonald*, 266 (note).] By 39 Geo. III. c. 49, the *maximum* for bail was fixed at £1200 sterling for a nobleman, £600 for a landed gentleman, £300 for any other gentleman, burgess, or house-holder, and £60 for any inferior person. [Where the offence was not bailable as of right, the Lord Advocate had a discretion to liberate on such bail as he judged sufficient; and in extreme cases, the Court of Justiciary had the power of interfering with the Lord Advocate's decision; *Hume*, ii. 90. See *City of Glasgow Bank Directors*, 15 Nov. 1878, 6 R. (J.C.) 4, (also separate report by Couper); in which bail was refused, first by the Lord Advocate, and then by the Court of Justiciary, to prisoners charged with theft, aggravated by the great value of the thing stolen. The court had special discretionary power, both to accept bail, and to fix its amount, in forgery cases, by 5 & 6 Will. IV. c. 73, § 2; and in post-office offences, by 7 Will. IV. & 1 Vict. c. 36, § 38.]

[By the act of 1888, all crimes except murder and treason are bailable; § 2. Any magistrate (*i.e.*, sheriff or sheriff-substitute, § 9) having jurisdiction to try the offence or to commit the accused until liberated in due course of law may at his discretion, on the application of the person so committed, and after the prosecutor has had opportunity to be heard thereon, admit or refuse to admit such person to bail; and the application must be disposed of within twenty-four hours after its presentation, failing

[which the accused is forthwith liberated; *ib.* The sheriff admitting a person to bail fixes it at such amount as he considers sufficient to ensure his appearance to answer at all diets to which he may be cited on the charge; § 4. The accused may appeal to the Court of Justiciary, if an application for bail after commitment is refused; or the prosecutor may appeal, if bail be allowed; or either may appeal, if dissatisfied with the amount fixed by the sheriff; § 5. Written notice of such appeal must be immediately given by the appellant to the opposite party; and the appeal is disposed of by the High Court or any Lord Commissioner thereof in court or in chambers after such inquiry and hearing of parties as seems just; *ib.* No fees or expenses are exigible from, or awarded against, an accused in respect of such application for bail or appeal; but expenses may be awarded against a public prosecutor unsuccessfully appealing; §§ 5, 6. When the prosecutor appeals, the accused may not be liberated until seventy-two hours after the application is granted (or ninety-six hours, if the application is in any island in the outer Hebrides, or in the Orkney or Shetland islands), unless the appeal has been disposed of before that time; but on the expiry of that time, he is liberated on the bail fixed by the sheriff, unless the High Court orders his further detention pending consideration of the appeal; §§ 5, 7. Notice of such order by telegraph to the gaoler justifies detention until arrival of the order in due course of post; § 7. In computing the hours, Sundays, fasts and public holidays are not included; *ib.* The act does not affect the right of the Lord Advocate or Court of Justiciary to admit to bail any person charged with any offence; § 8. Admission to bail before commitment until liberation in due course of law is competent under § 18 of the Criminal Procedure Act, 1887 (see *Criminal Prosecution*, p. 259); and where that is refused, the application for bail may be renewed after such commitment; 1888, § 3.]

The application for liberation on bail ought to be made in writing, and may be addressed to the judge committer, or to the Commissioners of Justiciary, or other judge competent to try for the crime. On the requisite bail being found, the magistrate is bound immediately to liberate the prisoner. A failure in any part of the magistrate's duty subjects him to an action for wrongous imprisonment; 1701, c. 6. The bail found is, that the person admitted

to bail shall appear and answer to any libel for the offence charged, which shall be raised within six months after the date of the bail-bond; and if the trial is to proceed in an inferior court, and the party fail to appear, the bail-bond is declared forfeited, and warrant granted for apprehending him, inferior judges having no power to outlaw for non-appearance. [All bail-bonds must specify the domicile at which the accused may be cited for trial, so that no person liberated on bail need be cited edictally; 31 & 32 Vict. c. 95, § 18. See *Hume*, ii. 87; *Ersk. B.* iv. tit. 4, § 85; *Alison's Prac.* 160; *Macdonald*, 265; *Bell's Princ.* § 2035; *Jurid. Styles*, iii. 883. See *Criminal Prosecution. Commitment.*]

BAIL in Civil Actions. See *Caution*.

BAILIARY, LETTER OF; is a commission, by which an heritable proprietor, entitled to grant such a commission, appoints a baron-bailie, with the usual powers to hold courts, appoint officers under him, &c. See *Jurid. Styles*, ii. 39; *Brown's Synop.* 1104. [See *Baron.*]

BAILIE; a magistrate; also an officer appointed by a precept of sasine to give infestment in land.

1. *A Magistrate*.—The bailie of a burgh, whether a royal burgh or a burgh of barony, is a magistrate possessed of certain jurisdiction by common law as well as by statute. Thus, at common law, he is held to possess the same power within his territory as the sheriff in his county; and by special statute, 1644, c. 35, 1668, c. 6, the provost and bailies of royal burghs have power to value and sell ruinous houses to the highest offerer. Their criminal jurisdiction extends to petty riots; but none except the magistrates of the burghs of Edinburgh, Stirling, and Perth, have jurisdiction in bloodwits. The chief magistrate of the burgh is named in all commissions of the peace. By 3 & 4 Will. IV. c. 76, when any of the bailies go out at the annual retirement of a third of the councillors, their places are directed to be supplied from the councillors, on the third day after the election of the council, by a plurality of voices in the council, the first attending magistrate having a casting vote in cases of equality. The newly-elected bailie is generally made lowest in rank. [A bailie appears to hold office so long as he remains a councillor; see *Marwick's Municipal Elections*, 278.] See *Ersk. B.* i. tit. 4, § 21. See *Burgh, Royal*.

The Bailie of the Abbey, is appointed by the Duke of Hamilton as heritable keeper of the palace of Holyroodhouse, and has

jurisdiction in all civil debts contracted within the precincts of the Sanctuary. *Bell's Com.* ii. 464.

2. *An officer appointed by precept of sasine to give infestment*.—Anciently any person might have been named as bailie to give infestment; but by 1606, c. 15, all sasines on precepts from Chancery in favour of heirs, upon retours, are ordered to be given by the sheriff as bailie; because, when an heir is to enter by retour to lands held of the Crown, he becomes debtor to the Crown; and it is the duty of the sheriff, as the King's bailie, to receive payment, or to take security for the casualties due on the heir's entry. In every other case, any person may be bailie; and the precept, although blank in the bailie's name, is a sufficient warrant for any person to perform the office. The blank in the precept of sasine is not filled up after the office is exercised. *Ersk. B.* ii. tit. 3, § 33; [*Bell's Princ.* §§ 764, 770.] See *Precept of Sasine*.

BAILIFF; in English law, is a keeper or superintendent. *Bailiffs of sheriffs* are officers appointed by the sheriff to execute all processes directed to him. *Bailiffs of manors* are stewards appointed by the lord to superintend the manor. *Tomlins' Dict. h. t.*

BAILMENT; an English law term, defined to be, "a delivery of goods for a particular purpose, upon a contract, express or implied, that the purpose shall be carried into effect, and that, when that is done, the goods shall be restored by the bailee, or person to whom they are delivered, to the owner or bailor, or according to his directions." *Tomlins' Dict. h. t.*; [*Sweet's Dict.*]

BAIRMAN; a dyvour or bankrupt. *Skene, h. t.* See *Dyvour*.

BAIRNS; according to Erskine, "is a known term used to denote one's whole issue." In destinations of heritage to the heirs and bairns of a marriage, the estate is carried to the eldest son. On the other hand, when the word heirs is left out, and the destination is to "the bairns," or to "the bairns and children," all the children succeed equally. The term "heirs and bairns," or "bairns," in destinations of moveables, leaves the ordinary rule of law to take effect, whereby, in moveable succession, all the children succeed equally. *Ersk. B.* iii. tit. 8, § 48; *Bell's Princ.* § 1964; *Sandford on Heritable Succession*, i. 173. See *Destination. Heirs and Bairns*.

BAIRNS' PART OF GEAR; or legitim; is the share of the father's free moveable property, to which, on the father's death,

the children are entitled by law. See *Legitim.*

BALLIVUS; a bailiff, bailie, or judge. *Skene, h. t.*

[BALLOT. The system of voting by ballot, in parliamentary and municipal elections, was introduced by 35 & 36 Vict. c. 33. See *Election Law*. See also *Encyc. Brit., voce Ballot.*]

BANERET; is a knight made in the field of battle. Banerets created by the King under the royal standard in battle take precedence of baronets. *Tomlins, h. t.; Skene, voce Banrentes.*

BANISHMENT; the punishment of exile from Scotland, [formerly] inflicted on persons convicted of certain crimes, for which that punishment was provided by special statute. See *Transportation*.

BANK; in English common law, is usually taken for a seat or bench of judgment.

BANK; the place or office where a corporation or company of money-dealers carry on their business. The term also applies to the corporation itself; and in this sense banks are said to be either public or private. Public banks may be constituted by act of Parliament, or by charter from the King. The constitution of the company, its office-bearers, extent of capital, and the rights of the partners, must depend upon the powers conferred by the Crown or by Parliament, and on the bye-laws which the corporation may frame, or on the conditions of the original contract. In banks instituted by act of Parliament, the partners are sometimes relieved from liability beyond the value of their respective shares; whereas the partners in other banks, like the partners in a private trading company, incur [at common law] an unlimited responsibility for the debts of the bank. See *Joint Stock Companies*. [But this has been modified by statute; see *infra*.] The older chartered banks in Scotland are,—

1. *The Bank of Scotland*, erected by a private act of the Scotch Parliament (July 17, 1695), with a capital of £1,200,000 Scots (£100,000 sterling), increased by several British statutes (the last of which is 44 Geo. III. c. 23) to £1,500,000 sterling. The shares are declared assignable, the transfers being entered in a book subscribed by the assignor and assignee. They are also disposable by will entered in the book of transfers without confirmation; and they may be transmitted “by adjudication, or other legal conveyance, in favour of one person alienably, who, in like manner, shall

succeed to be a partner in his predecessor's place; so that the foresaid sums of subscription may neither be taken out of the stock, nor parcelled among more persons by legal diligence in any sort, to the diminishing or disturbing of the stock of the said company and good order thereof.” On the bankruptcy or forfeiture of a shareholder, the governor and directors may order his share to be sold by public roup, after such intimations as are prescribed for the sale of bankrupt lands. The act does not say whether the stock is to be heritable or moveable.

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

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

In addition to these there are now other banks in Scotland, on which certain privileges have been conferred by charter; such are, *The Commercial Bank of Scotland*, *The National Bank*, and some others; but those charters do not affect the responsibility of the partners of these establishments for the debts and obligations of the company. By 7 Geo. IV. c. 67, joint stock banking companies may sue and be sued in name of their manager or other principal officer, on condition of their giving in to the stamp-office annual returns, upon oath, of the name of the firm, of the names of the individual members, and of their manager, and of giving, in the course of the year, an account of any persons ceasing to be members or officers, and of those entering in their stead.

[By the Companies Act, 1862 (25 & 26 Vict. c. 89), § 4, no company or partnership consisting of more than ten persons can be formed for carrying on the business of banking, unless it is registered under that act, or is formed in pursuance of some other act of Parliament, or of letters patent. Under § 180 of that act, banking companies may be registered on the principle of

[limited liability; and by 42 & 43 Vict. c. 76, § 4, a bank registered as an unlimited company may be converted into a limited company. But by § 6 of that act, a bank of issue registered as limited is not entitled to limited liability in respect of its notes. And by § 7, the accounts of every bank registered as limited must be audited annually. By § 188 of the act of 1862, notice must be given to all its customers by every bank registering itself with limited liability. As to the rights and liabilities of shareholders, see *Joint Stock Companies*. As to the responsibility of managers or directors of banks for mismanagement, or for misrepresentation or concealment in regard to the condition of the bank, see *Cullen*, 28 July 1862, 4 Macq. 424; *National Exchange Co.* 27 July 1860, 23 D. 1; *Tulloch*, 23 Feb. 1860, 3 Macq. 783; *Addie*, 20 May 1867, 5 Macph. (H.L.) 80; *Houldsworth*, 12 March 1880, 7 R. (H.L.) 53; *City of Glasgow Bank Directors*, 21 Jan. 1879, 6 R. (J.C.) 19 (also separate report by Couper). By 42 Vict. c. 11, a copy of an entry in a banker's book is to be received in all legal proceedings as *prima facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded; provided that the book was at the time of making the entry one of the ordinary books of the bank, and is still in its custody or control, that the entry was made in the usual and ordinary course of business, and that the copy has been examined with the original entry and found correct; §§ 3-5. A banker or officer of a bank cannot, in any legal proceeding to which the bank is not a party, be compelled to produce any banker's book, the contents of which may be proved under the act, or to appear as a witness to prove matters therein recorded, unless by order of a judge made for special cause; § 6. Inspection of bankers' books may be ordered by the court, and copies of entries; § 7. See also 45 & 46 Vict. c. 72, § 11 (2). Entries in a customer's pass-book of sums paid into the bank, duly initialled by a bank official, are *prima facie* evidence against the bank that the money has been paid in; *Couper's Trs.* 6 Feb. 1889, 16 R. 412. See *Bell's Com.* i. 101; *Bell's Princ.* § 1344; *Stephen's Com.* iii. 230; *Grant on Bankers*; *Morse on Banks and Banking*; *Robertson's Handbook of Bankers' Law*; *Mitchell on Scotch Banks*.]

BANK AGENT. The national banks, as well as private bankers, generally employ persons to act as their agents for conduct-

ing their banking operations in provincial towns. The powers of these agents depend upon the rules and regulations of the particular bank for which they act; but, in the ordinary case, they are authorised to discount bills, &c., for behoof of the bank, either on their own responsibility, or at least under a responsibility for a certain proportion of the discounts. The power of granting cash-credits is generally reserved to the principal bank. Caution to a large amount is required for bank agents; and on the failure of the agent, it seems to be held that the money found in the desks, drawers, or boxes, used for carrying on the business of the bank, is the specific property of the bank, and may be reclaimed by it; and this although the identical notes issued by the bank may have been replaced by others. A clause empowering the bank summarily to terminate the agency, and to seize and carry off the whole notes, cash, obligations, and effects belonging to the bank, is usually inserted in the bond of caution taken by the bank from the agent. See *Bell's Com.* i. 283, 380, 514; *Bell's Princ.* §§ 231, 290; [*N. Scot. Bank*, 23 Nov. 1882, 10 R. 217.]

BANK CREDITS; are credits peculiar to Scotch banking, by which, on proper security given to the bank, a person is permitted to draw to a certain amount agreed upon; for which, with the interest that may fall due upon the sum drawn out, security is given. The account opened with the bank on this credit is carried on by occasional money transactions; the person receiving the credit drawing out or lodging money as his occasions require. The balance is thus continually fluctuating; the sum which the person is due to the bank one day being perhaps repaid the next day, and drawn out again on the day following. [The credit and loan are secured by a bond for such amount of debt, not exceeding a certain limited sum, as shall ultimately arise on a balance of the deposits and drafts. A ready mode of ascertaining the balance due is provided by the stipulation, that a certificate of the amount due on the account, extracted from the bank books and signed by the cashier or other principal officer, shall be sufficient to constitute and ascertain the debt due under the bond. The bond being the ground of charge, summary diligence may proceed at once upon the certificate so made up, without registration of the account.] The fluctuating nature of this balance, as well as the provision of the act 1695, c. 5, that no heritable security shall be given for a future

debt, formed an obstacle to heritable security being given to banks for cash credits. The only way formerly of managing such a transaction was for the person desirous of obtaining such a credit on heritable security, to procure friends whose personal security was sufficient, who might join with him in an obligation to the bank; and to those friends he gave an heritable bond of relief. But even this was not held to remove the difficulty; for although the bond was given to relieve the cautioners of their obligation, yet it was thought that the fluctuating nature of the original debt affected even the cautionary engagement, and rendered it ineffectual; *Creditors of Brough*, 1791, M. 1159. But this has been since provided for by a clause in the act 54 Geo. III. c. 137, § 14, [repealed by 19 & 20 Vict. c. 79, § 2, but re-enacted, in almost the same terms, by 19 & 20 Vict. c. 91, § 7. The clause runs thus:—"It shall be lawful for any person possessed of lands, or other heritable property, and desiring to pledge the same in security of any sums paid or balances arising, or which may arise upon cash-accounts or credits, or by way of relief to any persons who may become bound with him for the payment of such sums or balances, although paid or arising posterior to the date of the infetment, to grant heritable securities accordingly upon his lands, or other heritable property, containing procuratory of resignation and precept of sasine, for infetting any bank or bankers, or other persons who shall agree to give such cash-accounts or credits, or for infetting such persons as shall become cautioners for him or jointly bound with him, in such cash-accounts or credits: provided always, that the principal and interest which may become due upon such cash-accounts or credits shall be limited to a certain definite sum, to be specified in the security, such definite sum not exceeding the amount of the principal sum, and three years' interest thereon, at the rate of 5 per centum: provided also, that it shall be lawful for the person to whom any such cash-account or credit is granted to operate upon the same, by drawing out and paying in such sums, from time to time, as the parties shall settle between themselves; and that the sasines or infetments taken upon such heritable securities shall be equally valid and effectual, as if the whole sums advanced upon such cash-account or credit had been paid prior to the date of the sasine or infetment taken thereon; and that any such heritable security shall remain

[and subsist to the extent of the sum limited, or any lesser sum, until the cash-account or credit is finally closed, and the balance paid up and discharged, and the sasine or infetment renounced."] On compliance with this regulation, an heritable security may be given for a cash-credit. [Any doubt as to the applicability to cash-credit bonds of the new forms of heritable securities introduced by 10 & 11 Vict. c. 50, was removed by 20 & 21 Vict. c. 19, § 8, and 31 & 32 Vict. c. 101, §§ 3, 134. The use of inhibition against a debtor does not destroy the effect of a cash-credit heritable bond, recorded prior to the date of the inhibition, as a security to a bank for advances made after the date of the inhibition; *Campbell's Trs.* 9 Dec. 1870, 9 Macph. 252. The accumulation of interest at each annual balance converts the interest so accumulated into an advance by the bank; *Reddie*, 9 Jan. 1863, 1 Macph. 228; *Gilmour*, 19 March 1880, 7 R. 734. See *Ersk.* B. ii. tit. 8, § 36; B. iii. tit. 3, § 70; B. iv. tit. 1, § 43; *Bell's Com.* i. 385, 715; *Bell's Princ.* § 299; *Menzies' Conv.* 227; *M. Bell's Conv.* i. 267; ii. 1172; *Jurid. Styles*, i. 426; *Craigie's Digest* (Moveables), 136. See *Heritable Securities. Cautionry. Co-obligant.*]

BANKER; is the partner or manager of a bank, who deals in discounting bills. Some of the rules of bankers concerning bill transactions may be here stated. [The general principle is that "where a banker fails, possessed of his customer's property, distinguishable from his own, it does not pass to his creditors, but may be vindicated by the true owner, subject to such liens as the banker may have over it."] A bill, regularly discounted, is held to be a bill purchased by a banker, and, on his failure, is the property of his creditors. Bills sent merely for negotiation are the property of the sender, if distinguishable; the banker, as to them, being merely an agent. Where bills are blank indorsed to a banker, on the understanding that the indorser is to be allowed to draw for a certain proportion of their amount, the bills belong to the indorser, under a lien for the advances. Long-dated bills, deposited in security of bills at a shorter date, discounted by a banker, are held to be impledged to the banker; and, on retiring the short-dated bills, the customer is entitled to receive the long-dated bills, notwithstanding the intervening bankruptcy of the banker. Bills blank indorsed to a banker, and deposited for a special purpose, may be discounted

or paid away by the banker to whom they are so indorsed; and, on his failure, the indorser cannot reclaim the bills, but must rank as a mere personal creditor. A banker has a lien for the general balance of his account over all bills deposited with him, "unless they have been discounted, in which case they are taken out of the account between the parties." [But this lien does not extend to debts not yet due, unless the debtor be either bankrupt or *vergens ad inopiam*; *Paul & Thain*, 14 Jan. 1869, 7 Macph. 361.] See *Bell's Com.* i. 290; ii. 113; *Ersk. B.* iii. tit. 4, § 21; *Bell's Princ.* §§ 32, 1451; *Thomson on Bills*, 548; *Hume*, i. 65; [*Grant on Bankers*; *Morse on Banks and Banking*. See *Retention*.]

BANK NOTES; are notes issued by a bank for value received, and made payable to the bearer on demand, but bearing no interest. They supply the place of coin, either by authority of public law, in the case of the Bank of England, or by public consent, in the case of private or joint-stock banks. They are, properly speaking, *nomina debitorum*, or obligations which may be the ground of an action, rather than *corpora* of moveables, and will be so interpreted in a conveyance of moveables. [The issue of notes by banks in England is regulated by 7 & 8 Vict. c. 32 (1844); and in Scotland by 8 & 9 Vict. c. 38 (1845). The Scotch Currency Act contains provisions as to the registration of the banks authorised to issue notes, and limitations as to the amount to be issued by them. It further enacts that all bank notes shall be expressed to be for payment of a sum in pounds sterling, without any fractional parts of a pound. In England no bank note can be issued for a less sum than five pounds. The term bank note, in the sense of these Currency Acts, is defined by 17 & 18 Vict. c. 83, § 11.] See *More's Notes on Stair*, xlix.; *Ersk. B.* iii. tit. 5, § 6; tit. 6, § 20; tit. 7, § 29; *Bell's Princ.* § 1337; *Thomson on Bills*, 120; *Hume*, i. 140, 156-8; ii. 390; [*Chitty on Bills*, 14, 367; *Grant on Bankers*, 340. See *Bank. Cheque*.]

BANK OF ENGLAND. This bank, which has been the subject of various statutes, is under the management of a governor and directors, possessed of certain qualifications prescribed in the charter. [See 5 & 6 Will. and Mary, c. 20; 3 & 4 Will. IV. c. 98; 7 & 8 Vict. c. 32. Besides ordinary banking business, the Bank of England is employed as a great engine of state, in paying the interest due to the public creditors, in circulating exchequer

[bills, in accommodating the government with immediate advances, on the credit of distant funds, and in assisting generally in all the great operations of finance; *Stephen's Com.* iii. 232. See also *Grant on Bankers*, 305; *Hallam's Const. Hist.* iii. 135.]

BANK STOCK; is the capital of a bank divided into shares, according to the original constitution of the company. These shares are held by the partners of the bank, and may be disposed of, and are transferred by an entry in the books of the bank, under such forms as may have been prescribed by the contract or charter of the particular bank, for the security of the bank and partners. [As to the purchase and sale of stock or shares, see 30 Vict. c. 29 (Lee-man's Act); *Mitchell*, 20 May 1879, 6 R. (H.L.) 66. Bank stock is moveable in questions of succession; but the appropriate diligence for attaching it is frequently regulated by the act of Parliament constituting the bank.] See *Ersk. B.* ii. tit. 2, § 8; B. iii. tit. 9, § 4; *Bell's Com.* i. 101; *Bell's Princ.* § 1344; [*Menzies' Conv.* 265; *M. Bell's Conv.* i. 326.]

BANKRUPTCY. [Bankruptcy, according to the law of Scotland, is public or notorious insolvency. When a debtor in an obligation cannot fulfil his obligation as undertaken—a position which constitutes insolvency—and makes public acknowledgment, in manner determined by statute, of his inability, the status or condition of bankruptcy has arisen, and the insolvent debtor is, in the language of the statutes, a "notour" bankrupt.

As thus defined, bankruptcy is an advanced stage of insolvency, being insolvency become public: the third and final stage is sequestration, which is public insolvency accompanied by divestiture of the bankrupt in favour of a judicial administrator for creditors. See *Insolvency. Sequestration*.

The law of notour bankruptcy is mainly statutory. Legislation has fixed the circumstances which constitute the status, and determined all the most important results.

[I. CONSTITUTION OF NOTOUR BANKRUPTCY, UNDER THE ACTS 1696, c. 5; 19 & 20 VICT. c. 79; AND 43 & 44 VICT. c. 34 (pp. 88-90).]

The earliest definition of notour bankruptcy is given in the act 1696, c. 5. The constituent elements are the execution of diligence against a debtor by horning and caption; imprisonment, or alternatively, retiral to the Abbey or other privileged

{place, or flight or absconding, or defence of the person by force; and "sentence" of insolvency. On these "three joint grounds," it is declared, a debtor is to be holden and reputed a "notour bankrupt." The subsisting rule is contained in the Bankruptcy Act of 1856 (19 & 20 Vict. c. 79), § 7, taken along with § 6 of the Debtors Act, 1880 (43 & 44 Vict. c. 34). The former enactment runs thus:—

"Notour bankruptcy shall be constituted by the following circumstances:—

1st, By sequestration, or by the issuing of an adjudication of bankruptcy in England or Ireland;

2d, By insolvency, concurring either—

(a) With a duly executed charge for payment, followed, where imprisonment is competent, by imprisonment, or formal and regular apprehension of the debtor, or by his flight or absconding from diligence, or retreat to the Sanctuary, or forcible defending of his person against diligence, or where imprisonment is incompetent, or impossible, by execution of arrestment of any of the debtor's effects not loosed or discharged for fifteen days, or by execution of poinding of any of his moveables, or by decree of adjudication of any part of his heritable estate for payment or in security; or

(b) With sale of any effects belonging to the debtor under a poinding, or under a sequestration for rent, or with his retiring to the Sanctuary for twenty-four hours, or with his making application for the benefit of *cessio bonorum*."

The Debtors Act and the Civil Imprisonment Act, 1882 (45 & 46 Vict. c. 42), abolish imprisonment for debt in the general case (see *Imprisonment*); and the former statute provides—with regard to the constitution of notour bankruptcy, thus practically affected in a leading particular—as follows (§ 6; see also § 9 of the Imprisonment Act):—

"In any case in which, under the provisions of this act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency, concurring with a duly executed charge for payment, followed by the expiry of the days of charge without payment, or, where a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment followed by the lapse of the days intervening prior to execution

[without payment having been made. Nothing in this section contained shall affect the provisions of § 7 of the Bankruptcy (Scotland) Act."

The terms of the act of 1856 cover wider ground than those of 1696, c. 5. Thus provision is found in it for cases where diligence against the debtor's person was inapplicable, *e.g.*, persons enjoying privilege of Parliament, or personal protection—such as married women or pupils, absentees, corporations, &c.; and, in accordance with a principle introduced in 1772, diligence against the estate of such debtors is made an alternative constituent of notour bankruptcy. The new alternative, introduced by § 6 of the Debtors Act, is available wherever imprisonment is made incompetent by that statute (see § 4; query as to 45 & 46 Vict. c. 42, §§ 3, 7)—but in these cases only; in other cases the terms of the act of 1856 must be fulfilled; *Black*, 29 Nov. 1881, 9 R. 167. The modern definition of notour bankrupt has superseded the original one, even for the purposes of the act of 1696 itself—the "notour bankrupt" in whose case the other provisions of that act operate being the "notour bankrupt" as now constituted by the acts of 1856 and 1880. Certain *dicta* in *Macrae*, 9 Feb. 1889, 16 R. 476, are not meant, it is thought, to regard the notour bankruptcy of 1880 as inapplicable, *e.g.*, to §§ 12 and 13 of the act of 1856. It is not necessary, for notour bankruptcy, that the debtor should be engaged in trade.

The various clauses of § 7 of the Bankruptcy Act have been illustrated by numerous decisions: only a few of these, of more recent date, can be referred to. (See "Notes" in *Murdoch's Bankruptcy*; *Goudy on Bankruptcy*; also *Imprisonment. Apprehending of a Debtor*.) Thus, the requisite element of insolvency, which is held, in *Kerr*, 19 March 1886, 13 R. 833, in a question under 1696, c. 5, and the Debtors Act, to be inability to meet obligations as they arise, does not always require to be proved. In *Knowles*, 1 Feb. 1865, 3 Macph. 457, incarceration for payment of admittedly just debts was held to infer insolvency; and the presumption was not removed by payment out of a third party's funds. With regard to questions of "flight or absconding from diligence," Lord Pres. Inglis, in *Nicolson*, 6 Dec. 1872, 11 Macph. p. 188, accepts it as settled that the execution of a search is *prima facie* evidence of absconding, which, unless re-dargued, fixes absconding as a fact. Such

[executions are strictly construed. It was held, in *M'Bean*, 24 Oct. 1868, 7 Macph. 23, that the presumption was not overcome by an averment that the absentee, who was admittedly insolvent, had openly left the country to fill a permanent situation abroad. In *Union Bank*, 28 Feb. 1880, 7 R. 655, the First Division decided unanimously that an order of personal protection, obtained after absconding, was no bar to sequestration—applied for on the ground of notour bankruptcy as constituted by insolvency concurring with a duly executed charge and flight. Notour bankruptcy is not effected by an appeal to the House of Lords as to the validity of a sequestration; *Fleming*, 1 Dec. 1883, 21 Sc. L.R. 164; affirmed p. 722.

Notour bankruptcy of a company is constituted, under the Act of 1856 (§ 8), by the company's notour bankruptcy, or by that of any partner or member for a company debt (see *M'Bean*, *Union Bank*, *supra*). The act (§ 4) defines company to include bodies corporate, politic, or collegiate, and partnerships. (See, as to partnerships and 1696, c. 5, *Bell's Com.* ii. 158; and as to incorporated companies, *Sequestration*; *Clark*, 18 Dec. 1884, 12 R. p. 353; *Goudy*, 73, 78.)

By § 9 of the same statute notour bankruptcy commences from the time when the several requisites concur; and it continues, where there is sequestration, till discharge, and in other cases until insolvency ceases, without prejudice to its being anew constituted within that period. The case of *M'Kellar*, 1791, M. 1114, *Bell's* Oct. Ca. 22, illustrates, under the old law, in connection with the reduction of preferences, the continuance of notour bankruptcy during a period of at least four years, in respect of the absence of proof of recovered solvency: see *Goudy*, 83.

II. EFFECTS OF NOTOUR BANKRUPTCY.

The chief effects of notour bankruptcy fall under these heads:—

1. *Invalidation of preferences under the act 1696, c. 5* (pp. 90–96).
2. *Equalisation of diligence, and pari passu ranking of creditors* (pp. 96, 97).
3. *Liability to sequestration and to cessio bonorum* (p. 97).
4. *Effects in international relations* (p. 97).

(For invalidation of preferences, and of gratuitous alienations, at common law, and of gratuitous alienations under the act 1621, c. 18, see *Insolvency*; for effects of

[notour bankruptcy in *cessio bonorum*, under the Debtors Act, see *Cessio*.)

1. *Invalidation of preferences to creditors, under the act 1696, c. 5.* It was in connection with the particular matter of the prevention of preferences, by way of securities, granted to favoured creditors by a bankrupt or by an insolvent on the eve of failure (including securities for future debts, p. 95 *infra*), that the earliest definition of notour bankruptcy, that of the act 1696, c. 5, above quoted, had its origin. The relation of public bankruptcy to a general attachment and equal division of insolvent estates, and to a universal incapacity of the insolvent debtor to transact, is of more recent date by nearly a century: (*Bell's Com.* ii. 155: see *Sequestration*.) As Professor Bell (*Com.* ii. 156) observes, “A debtor may be notour bankrupt without any visible effect being made to follow from it.” He is undivested of his property: farther, he may do all that a solvent person can do, and, so far as his acts and deeds do not benefit any creditor unduly, they are unchallengeable: (see *Com.* ii. 207).

The act of 1696 aims at preventing the class of frauds referred to—for it considers such preferences as in the general case fraudulent—by a series of enactments, following on the definition there given of the notour bankrupt. The leading provision is as follows:—“His Majesty, with consent of the Estates of Parliament, declares all and whatsoever voluntar dispositions, assignments, or other deeds, which shall be found to be made and granted, directly or indirectly, by the fore-said dyvour or (notour) bankrupt, either at or after his becoming bankrupt, or in the space of sixty days of before, in favours of his creditors, either for his satisfaction or farder security, in preference to other creditors, to be void and null.”

The statute, as the preamble states, had been preceded by “Acts of Parliament already made against fraudulent alienations by bankrupts, in prejudice of their creditors,” the act 1621, c. 18, being the principal of the acts referred to. Decisions, too, of earlier date than 1696 seem to indicate the prior existence at common law of a remedy against preferences as frauds towards creditors, founded upon the principle that after notorious and public failure creditors are the true owners of their debtors' funds (*Bell's Com.* ii. 193: see *Insolvency*). The disability of the bankrupt thus arising has been, in more recent times, stated as follows:—“It is

[the duty of a person notoriously insolvent to abstain from every act which can affect the preferences of his creditors" (*per* Lord Corehouse, in *M'Ewen*, 30 May 1828, 6 S. 889); and, more broadly, "A bankrupt cannot effectually do any deed to alter the condition of his creditors, and confer preferences on his friends" (*Bell's Com.* ii. 191). The act 1696, c. 5, proceeding on this general ground, introduced, by the enactment above quoted, a most important and valuable change. The disability in question of a notour bankrupt, as he is there defined, is not only legislatively declared to exist "at or after his becoming bankrupt" (see *M'Kellar*, M. 1114, *supra*), but is carried back over the space of sixty days preceding the notour bankruptcy. What has been called a retrospective and constructive bankruptcy is created—to certain effects, founded on the presumption that during the period specified there must have been knowledge of irretrievable insolvency and coming failure. Proof of fraud, as at common law, is rendered unnecessary, the presumed knowledge of impending bankruptcy carrying with it presumption of fraudulent intention in the grant of preferences—and bankruptcy, to the effects in question, having, by construction, already occurred. It is not, however, the case, as certain well ascertained exceptions presently to be mentioned show, that this statute operates to antedate bankruptcy, even in questions with creditors, to all effects—to the paralysis or disturbance of business (see *per* Lord Deas, in *Loudon*, 7 Dec. 1877, 5 R. p. 299, and *per* Lord Pres. Inglis, in *Anderson's Tr.* 17 Mar. 1871, 9 Macph. p. 722). In *Loudon*, the First Division declined to hold that the mere result of actual benefit or preference was conclusive in favour of the application of the act, and reserved, with regard to the bearing of intention, the question whether the *bona fides* of both parties was or was not of itself a complete defence; see *Monteath*, 1794, M. 1146. It does not seem to be doubtful that the creditor's *mala fides* is not a necessary condition of the operation of the act (see *Blincov's Trustee*, 28 Aug. 1833, 7 W. & S. pp. 57, 62. For observations on intention and *bona fides*, see also *Matthew's Tr.* 28 June 1867, 5 Macph. p. 961; *Nicol*, 13 July 1882, 9 R. p. 1100.

The application of this enactment has been matter of judicial interpretation during now nearly two centuries, and the interpretation has been liberal—in favour of the

[general body of creditors (see *Anderson's Tr. supra*, *per* Lord Pres. Inglis). The terms "dispositions, assignations, or other deeds" have been construed to cover not only formal writs conveying lands or assigning debts, but, *inter alia*, delivery of moveables; bills, and the indorsation of bills and of cheques; and even a minute of abandonment of a defence (*Wilson*, 20 Dec. 1853, 16 D. 275), and a decree by default, under which as part of certain writings and actings property had changed hands (*Lindsay*, 5 Dec. 1867, 6 Macph. 85). Mr Hunter (*Landlord and Tenant*, ii. 580) thinks that a lease would be included: see also *Rankine on Leases*, 47. The scope of the terms employed to describe the character of the conveyances prohibited—"voluntary," "directly or indirectly in favours of his creditors, either for his satisfaction or farder security, in preference to other creditors"—has been determined in two ways, positively and negatively, by the cases brought under the act, and by the cases or classes of cases excepted in practice. A trust deed for creditors, where all do not accede, is covered by the prohibition; *Bell's Com.* ii. 390; *Mackenzie*, 26 May 1868, 6 Macph. 833. Professor Bell (*Com.* ii. 198; see also, note 4) gives this positive definition, as his reading of cases and as the settled rule:—"From the moment of constructive bankruptcy the debtor can do no act by which the situation of his creditors may be altered, even to the effect of establishing equality among them;" and this statement was approved by Lord Rutherford, in *Wilson*, 16 D. p. 278, note. But, in *Matthew's Tr. supra*, 5 Macph. 957, it was held (dissenting Lord Deas) that the act does not apply to a mere acknowledgment or vouching of an existing debt, on the ground that the preference in its view is preference in the strict sense, not every advantage acquired with regard to an ordinary ranking. (See *Williamson*, 29 May 1882, 9 R. p. 864; *cf. Nicol, supra*, 9 R. p. 1100). This definition, however, in either sense of it, leaves much undetermined, which a review of the classes of recognised exceptions, or rather cases which in practice the act is held not to strike at (Lord Shand, in *Carter*, 5 Mar. 1886, 13 R. p. 707), best helps to bring out. Those cases are—

(1) *Payments in cash*.—The terms "dispositions or other deeds" are not readily construed so as to include transferences of cash; but in justifying this exception the farther words of the enact-

[ment, giving the character and import of the dispositions, are also taken into account. The money must pass, not for "farder security," but properly in payment—because due at the time, or in other words paid in ordinary course, as stipulated or expected (as *e.g.*, in *Thomas*, 13 Jan. 1865, 3 Macph. 358). This is the ground of the exception, or non-application of the enactment. Prepayment—before the debt is due—is for security, and falls within the scope of the prohibition (*Spier*, 22 May 1826, 2 W. & S. 253; *Guild*, 16 Jan. 1858, 20 D. p. 397). Wherever a cash payment would stand good, payment by any recognised equivalent for cash is equally safe, under the act, *e.g.*, by the debtor's cheque, or by bank order or draft, or even, in foreign transactions, by bill of exchange, but not by indorsation of cheques, nor by inland bills or their indorsations (see *Carter*, *Nicol*, *supra*; *Horsburgh*, 26 June 1885, 12 R. 1171). Bills before maturity are assignments in satisfaction or for security (*Horsburgh*). Prepayment here, too, is a security and voidable (see *Macfarlane*, 24 Dec. 1870, 9 Macph. 370; especially *per* Lord Neaves, p. 375). It is obvious that actual preference occurs where there is cash payment: the statute, however, recognises no presumption of fraud in this the ordinary method of settling a debt, and leaves extraordinary cash transactions to the common law of fraud.

(2) *Transactions in the usual course of trade*.—This exception, too, has its rationale in the absence of intention to prefer one creditor before another; and, as being the ground of the safety of cash payments, is often found stated along with that defence in reported cases. The transfer, *ex hypothesi*, is fully accounted for by the ordinary procedure of business dealing—where there is no purpose or necessity to suspend or stop; and the terms of the act, "in preference to other creditors," appear intended to exclude only those settlements of a creditor's claims which the debtor has gone out of his way to effect. In the leading case of *Blinco's Trustee*, above cited (7 W. & S. 26), Lord Brougham throughout his judgment connects the question of the course of business with the questions of contemplation of bankruptcy and intention to give a preference. Under this rule, too, payments of debts due through any medium recognised as an equivalent for cash—a debtor's cheque, bank drafts, foreign bills, &c. (see last paragraph), and consignations in bank to await decision of

[competing claimants' titles (*Brock*, 24 June 1839, M'L. & R. 617, see p. 642), are exempt. Professor Bell (*Com. ii.* 205) submits, as his generalisation from decisions, the following rule:—"Wherever the transaction is in the ordinary course of dealing, and requisite or suitable to the fair purpose of the debtor proceeding with his trade, and unaccompanied by indications of collusion or notice of insolvency, it is not challengeable, although the effect may be to give a preference to one creditor over the rest"—a statement which well brings out the elements involved in these questions. (See *per* Lord Pres. Inglis, in *Anderson's Tr. supra*, 9 Macph. p. 722; and *per* Lord Mure, in *Loudon, supra*, 5 R. p. 298). The decided cases necessarily turn on specialties, viz., the character and circumstances of the particular trade or course of dealing. Thus, recent decisions (above cited) have recognised distinctions in usage, and therefore in law, in the cases of cheques and bills, running accounts, &c. In *Loudon, supra*, it was held that the return of a lathe by a firm of rivet makers to the manufacturer, because the buyers had failed to sell an old machine and so make room for the lathe, was made in the ordinary course of business, or was, in Lord Pres. Inglis' words (p. 301), "not out of the ordinary course of business," but "incident to transactions in which the parties are ordinarily engaged." The cases of *Carter, Horsburgh, supra, Gourlay*, 2 June 1875, 2 R. 738, and *Mitchell*, 10 Feb. 1871, 9 Macph. 516, give fair illustrations of transactions outside of an ordinary course of dealing.

(3) *Nova debita*.—New debts, the result of new transactions—which is the meaning of this term in law—plainly do not infer the prior existence of the relation of debtor and creditor. In the absence of that relation, the transaction is at once outside the operation of the act, as the dispositions, &c., there prohibited are those "in favour of . . . creditors," and "in preference to other creditors." If the relation does exist, the debt arising is still a *novum debitum*, provided the transaction is really new—one in which, to use the language of Professor Bell (*Com. ii.* 205), "a fair and present value is given for the conveyance or other deed executed by the bankrupt." The act does not antedate bankruptcy, nor tie up the hands of the honest trader, to the effect of preventing even within the sixty days, or after notour bankruptcy, conveyances for full value, whether to a person already a creditor or

[to a third party. Where money is borrowed and security given, or where there is a just price paid, says Lord Kilkerran (*Johnston*, 1751, M. p. 1136), "no creditor can complain, as the bankrupt's funds are not . . . lessened." (See *Macfarlane*, 24 Dec. 1870, 9 Macph. 370; *Molleson*, 15 June 1880, 7 R. 951: also *White*, 8 June 1843, 5 D. 1164, *per* Lord Fullarton.)

In view of this exception, so far defined, and of the two prior classes, it is seen that the object against which this part of the act is aimed, is advantage granted to existing creditors "in preference to other creditors," by way—not of payment—but, broadly, of "security." But the ascertainment of what is or is not "security" has been often found a difficult matter; and in the determination of these cases the old, ambiguous, formula of *novum debitum* has been little used, and new terms—embodying the same principle, of a present equal consideration (see *Goudy*, 87, 94–100)—are employed. The modern definition of this class of exception may be thus stated:—

Deeds or transactions in specific implement of obligations ad factum præstandum, —in the case of securities, obligations to grant presently or instantly a particular security. Securities granted at the same time with payment or delivery, as part of the stipulated consideration, and completed before the sixty days begin, are plainly not "in preference" under the act; and those interposed during the sixty days, and not forming part of the original consideration, are as plainly preferences. The difficulty arises with those securities which have been granted but not completed before the sixty days, and those conveyances or securities promised or agreed on, but not completed till within that period.

That objection could not be sustained, on the statute, to a heritable security granted of the date of an advance, though infeftment was not taken by the lender till after the borrower's bankruptcy, was decided in the early case of *Johnston*, 1751, *supra*. The court did not express the *ratio decidendi*, but Lord Kilkerran in his report (M. p. 1134) indicates that the judges went upon the ground that the debt secured was a *novum debitum*, to which the terms of the statute, "in favours of his creditors," &c., were inapplicable. Where, previous to the sixty days, there is only a promise or undertaking to grant security, Professor Bell suggests (*Com.* ii. 206, 211) that it would be expedient, for the solution of the questions thus arising, "to follow out

[decisively the great distinction between real right and personal obligation." The course of decisions, however, in this matter, has taken another direction, and the strict rule has been relaxed and modified (see opinion of Lord Deas, in *Gourlay*, *supra*, 2 R. 742).

In *Taylor v. Farrie*, 8 March 1855, 17 D. 639, on a review of the previous series of decisions, and full consideration of the terms of the statute, the whole court, unanimously, sustained the conveyance there challenged, and that on general grounds of principle applicable not merely to the circumstances of the case (one of sale), which were very special, but to all challenges under this branch of the act. The judgment was that the transference and possession of certain moveable and heritable subjects, obtained within the sixty days, under a written agreement dated the sixty-first day before bankruptcy, whereby the one party sold the subjects to the other for a consideration instantly paid, were not in fraud of the legal rights of creditors; and the rule was laid down that specific implement of an obligation *ad factum præstandum* was not to be viewed as a voluntary deed in favour of a creditor for his satisfaction, the principle being that where an obligation is prestable, or a debt has become payable, the statute does not disable from doing without compulsion what the law itself would compel to be done. The term "voluntar," as used in the enactment, is explained to denote deeds which the granters "could not have been compelled to make"—the analogy of the language of the act 1621, c. 18, being, *inter alia*, founded on; and the words "for his (the favoured creditor's) satisfaction" are interpreted as meaning, after Lord Stair's interpretation of "satisfaction," "in lieu of, or as a substitute for, regular payment of a (prior) debt in cash." (See *per* Lord Curriehill, in *Matthew's Tr.* *supra*, 5 Macph. p. 968.) As authority for the views given effect to, the judgment and opinions in *Cranstown v. Bontine*, both in the Court of Session and the House of Lords, 2 Feb. 1830, 8 S. 425, and 6 July 1832, 6 W. & S. 79, and in *Gibson*, 9 July 1833, 11 S. 916, on this point (especially Lord Fullarton's opinion), are strongly founded on—cases that well illustrate the development of the law as fixed in the earlier case of *Johnston* (*supra*).

In the case of *Stiven* (*Paton Gordon & Co.'s Trustee*), 30 June 1871, 9 Macph. 923, the whole subject was again discussed,

[and the principle of *Taylor's* case restated and confirmed—but here favourably to the challenge. The case was one of loan and security, not of sale. Money had been advanced, by way of accommodation bills, and security stipulated for in the shape of delivery of invoices of goods ostensibly sold to the acceptors—the goods remaining in the possession and at the disposal of the borrowers: subsequently, within the sixty days, when the lenders had become aware that the supposed security was of no avail in law, delivery of goods had been required in security and also part payment in cash. It was held, unanimously, that the delivery of goods and the cash payment were preferences under the statute 1696, c. 5, the ground of judgment being that the advance was not granted on the footing of security—as ultimately given, but of security expressly in another form, and—as to the cash payment—that it was not due. Lord President Inglis (pp. 932, 933) accepts the case of *Taylor* as a leading authority, and approves the rule there laid down. His Lordship also adopts the statement of the rule given by Professor Bell (*Com. ii. 211*)—a rule which Professor Bell himself suggests is inexpedient—viz., “Whenever there is stipulated a *specific security* over a particular subject, in consideration and on the faith of which an advance of money or transfer of goods is made, the completion of that security, though after an interval of time, and after the term of constructive bankruptcy has begun, is not within the meaning and intent of the act;” and similarly expresses the rule thus:—“If the party come under an obligation to do something immediately and unconditionally it shall have the effect of creating a good security; and when I say come under an obligation I mean nothing short of this, that he subjects himself to an obligation instantly and absolutely enforceable. When he comes under such an obligation as that, then the fulfilment of that obligation, although within sixty days, will not make a case under the statute, because there the security is substantially granted before the sixty days, and at the same time that the debt is contracted. It is a security contemporaneous in that point of view with the contraction of the debt.” The Lord President, farther, in his opinion, reviews the decisions on the subject which seem adverse to the judgment in question or inconsistent with the precedents founded on, and explains them, so far as subsequent

[in date to the case of *Inglis v. Mansfield* (1833), by the other rule laid down (and approved) by Professor Bell, viz., “wherever money is paid or advanced, or property made over, in consideration of a general promise of security, not over a specific subject, the distinction is sanctioned between the debt and the security subsequently granted; and in its true intent and meaning, the rule of the statute is understood to apply to the security, when it comes to be granted, as being truly a security for a previous debt” (*Com. ii. 211*). The cases thus reconciled were *Inglis v. Mansfield*, 28 June 1833, 11 S. 813, affd. 10 April 1835, 1 S. & M.L. 203; *Moncrieff*, 16 Dec. 1851, 14 D. 200; *Rose*, 26 June 1868, 6 Macph. 960—in all which the challenge was successful—and *Taylor* (*supra*), and *Lindsay*, 19 March 1862, 24 D. 821—where the conveyances were sustained.

The subsequent First Division case of *Gourlay v. Hodge*, 2 June 1875, 2 R. 738, was decided on the same ground, the Lord President and Lord Deas both referring back to their expositions of the law in *Stiven* (*Paton & Co.'s Trustee*), and Lord Deas emphasising the circumstance in the cases of this class where the challenge failed, that the security was a fixed and specific subject. In *Lindsay* (*Macgregor's Trustee*), 2 July 1880, 7 R. 1036, the First Division again applied (in favour of the defence) the rule of legal obligation and specific implement, and that, expressly, as following the line of decisions in previous cases. In *Scot. Provident Institution*, 20 Nov. 1888, 16 R. 112, it was decided, in connection with § 110 of the Bankruptcy Act, that it was completion of securities by the debtor, not the creditor, that was there struck at. The Second Division of the court have recognised the same distinction, in *Rose* (*supra*), and, on the other hand, *Stiven v. Watson*, 27 Jan. 1874, 1 R. 412, where the law was thus stated:—“I know of no authority for the proposition that the specific performance of a contract either in money or goods down to the very day of sequestration can be interfered with” (*per* Lord Benholme). In the recent case of *Gourlay v. Mackie*, 27 Jan. 1887, 14 R. 403, their lordships, following *Moncrieff* (*supra*), reduced a transfer of shares, executed within the sixty days, which the borrowers, when getting an advance and handing over the scrip, had in writing bound themselves to execute if desired. Their Lordships regarded this transaction

[as separate from, not simultaneous and contemporaneous with, the advance, and as not absolute but conditional. Lord Young emphasised his view that, in such circumstances, a particular subject of security was in no better position than a general security.

The clause of the statute immediately succeeding this enactment, whereby all dispositions, bonds, &c., on which infetment may follow, are declared, for the purposes of the act, to be of the date of the sasine, was found, in *Johnston*, M. 1130, not to apply to the security there granted (see *supra*, p. 93; and *Bell's Com.* ii. 206, 207, 213). Under § 6 of the Bankruptcy Act of 1856, the date of registration takes the place here of the date of sasine: farther, the rule is provided for other than heritable securities, that the date of completion by delivery, or intimation, &c., shall be the date of such securities.

With respect to the special case of securities granted to cautioners, Professor Bell (*Com.* ii. 211) lays down this rule:—"Wherever, the creditors cannot establish . . . a device to defeat the statute, in which the cautioner is participant, or at least of which he has notice, they will not succeed against the cautioner"—founding chiefly on the decision in *Monteath's Trustee*, 1794, M. 1146, Bell's Fol. Ca. 127. (But see *Mitchell*, 26 June 1834, 12 S. 802, and as to it *Moir's Note in Ersk. Princ.* 17th ed., 606; see also *Moore*, 8 July 1869, 7 Macph. 1016; and *Thomas*, 19 Dec. 1866, 5 Macph. 198.) A cautionary obligation by a debtor for the debts of another debtor, not being a security for the cautioner's debts, is outside of the statutory prohibition; *Ferguson*, 2 March 1869, 7 Macph. 592.

The title to challenge belongs, under the act of 1696, to those only of the creditors whose debts are of earlier date than the deeds challenged (see *Smith*, 5 Feb. 1889, 16 R. 392), or to a trustee who represents prior creditors. By the Bankruptcy Act, § 11, the right is extended to all creditors, as represented by a trustee in sequestration. In all cases the debt must be liquid. In *Stiven*, 27 Jan. 1874, 1 R. p. 417, the question was raised, but not decided, whether a third party—not a creditor nor trustee—could found upon the right given by the act; see also *Smith*, *supra*. The challenge was formerly only by action of reduction: under the provisions of the Bankruptcy Act, § 10, it may now be by way either of "action or exception" (see *Mackay's Prac.*

[ii. 123.) Exception is held to cover replication, *i.e.*, a pursuer's plea in answer to a defence (*Mackenzie*, 26 May 1868, 6 Macph. 833). This change is extended to sheriff court procedure, by 20 & 21 Vict. c. 19, § 9; but, as actions of reduction are still incompetent in those courts, pursuers must proceed by way of petitory conclusions (*Moroney*, 5 Nov. 1867, 6 Macph. 7), and—so far as heritable right is concerned (see *Dickson*, 7 June 1886, 4 Macph. 797)—within the limits allowed by 40 & 41 Vict. c. 50, § 8. Where proof is required, the challenge is now generally tried by a judge without a jury: (see *per* L. Barcaple in *Moore*, *supra*, 7 Macph. p. 1018; *Goudy*, 1088). The usual form of issue will be found in *Mackay's Prac.* ii. 151. The result of a successful reduction is restoration of the rights which would have been enjoyed but for the deed reduced; *Bell's Com.* ii. 217.

Future debts and debts of uncertain amount.—Following on this enactment against preferences within sixty days of bankruptcy, and on the clause defining the date of securities, there is contained, in the act 1696, c. 5, a second substantive enactment—to the effect that dispositions or other rights in relief or security of future debts should be of no force as to debts contracted after the date of the sasine (registration, under § 6 of the act of 1856, as above mentioned). The enactment is not expressly limited to the case of bankrupts; but the separate preamble—that such securities were "often found to be the occasion or covert of fraud," and the position of the provision, in the middle of a bankruptcy statute, indicate a special relation to the subject of bankruptcy. Professor Bell (*Com.* ii. 218) states that, before the date of the act, landed proprietors in difficulties made large use of this form of security, as a means of conferring preferences; and it is obvious that such a provision is necessary to make the prohibition of preferences effectual—heritable security for future debts being very readily granted and completed before the sixty days preceding notour bankruptcy.

The futurity of a debt is enough to infer this statutory nullity: that a security is for an indefinite sum is a separate, common law, ground of reduction (*Stein's Creditors*, 1791 and 1794, 3 Pat. 345). Till comparatively recent times, heritable securities for future debts could, by force of this act, only be created by absolute disposition with back-bond or letter. Now, and for some time past, heritable security may be

[given for cash accounts or credits with bankers or others, or for bonds of caution for such accounts or credits, although the debts so arising are "posterior to the date of the infeftment," provided, *inter alia*, the amount be definite and specified in the security (see 19 & 20 Vict. c. 91, § 7; *Mitchell*, 14 Nov. 1868, 6 Sc. L. R. 107). Neither the early nor this later legislation has reference to securities in the shape of moveables.

2. *Equalisation of diligences and pari passu ranking of creditors, under the acts 1661, c. 62, 1672, c. 19, 1681, c. 17, and 1690, c. 20, as to diligence against heritable estate; and under 19 & 20 Vict. c. 79, as to diligence against moveable estate* (pp. 96, 97).—The equalisation, in the event of bankruptcy, of diligences used against the estate of a debtor, now subsisting along with the equitable system of sequestration, is an effect of public bankruptcy which dates partly prior and partly subsequent to the legislation of 1696 against voluntary preferences. As sequestration is now applicable to all classes of debtors, and is the usual way of winding up estates, except small ones under *cessio*, equalisation apart from sequestration has become of little importance (*Mitchell*, 29 June 1881, *per* Lord Pres. Inglis, 8 R. p. 879)—save in *cessio* (*Goudy*, 451).

By the act 1661, c. 62, equality of diligences against the heritable estate of a debtor was introduced, within certain limits: all comprisings (the form of real diligence then in vogue) decerned for before or within year and day after the date of decree in the comprising first completed were made, in the words of the act, to "come in *pari passu* together." The act 1672, c. 19, substituted adjudication for comprising, continuing the "power competent to other creditors exprest in the said Act," of 1661. The later statutes 1681, c. 17, and 1690, c. 20, explicitly connected the system of (comprisings and) adjudications, as existing, with bankruptcy; and farther developed adjudication, as a means of realising for the common behoof a bankrupt debtor's heritable estate, by the institution of a process of judicial sale and distribution of the price or division of the subjects, through a common agent, among the creditors according to their rights and preferences. The remedy was made to apply where the heritor-debtor was "notoriously bankrupt," or "bankrupt or utterly insolvent;" but no definition of these conditions was given, while the particular features of

[excess of burdens over existing rental, and possession by creditors, were referred to. The process thus originating, which finally developed into the action of Ranking and Sale, was at first conceived only in favour of heritable creditors, but in course of time included the claims of personal creditors—affecting always only the heritable estate of the debtor, and within the defined limits always maintaining the *pari passu* ranking of the original legislation. The action of Ranking and Sale, with its multitude of conclusions (*Jurid. Styles*, iii. 2d ed. 435, see 3d ed. 189; A.S. 17 Jan. 1756), is still competent, but is almost obsolete, being superseded by sequestration, which, under one branch of its operation, effects an adjudication of the heritable estate of the bankrupt for payment of his whole debts (according to the creditors' rights and preferences), and, when the decree of sequestration is dated within the old limits of year and day of any effectual adjudication, effects the adjudication under which the estate is distributed; § 107 of Bankruptcy Act of 1856; *Bell's Com.* ii. 233; *Baird*, 26 Jan. 1872, 10 Macph. 414. See also *Sequestration. Ranking and Sale*.

In the case of diligence against a debtor's moveable estate, equalising procedure only came into existence at the same time with the (then limited) system of sequestration, towards the end of last century. The early legislation against voluntary and fraudulent preferences (statutes 1621, c. 18, and 1696, c. 5) had rather tended to encourage preferences through individual diligence, by throwing difficulties in the way of *bona fide* trusts for creditors. See *supra*, p. 91. Equality of diligence used a certain time before and a certain time after public bankruptcy was the principle of the remedy provided, alongside of a general and so far adverse equalising procedure—of attachment for behoof of all creditors, under the successive sequestration statutes (12 Geo. III. c. 72; 22 Geo. III. c. 12; 33 Geo. III. c. 18; 54 Geo. III. c. 137; 2 & 3 Vict. c. 41). See *Bell's Com.* ii. 73, 333. The subsisting specific enactment with regard to diligence against a debtor's moveables, for the case of notour bankruptcy (apart from sequestration), is contained in § 12 of the Bankruptcy Act of 1856, of which the leading provision is as follows:—"Arrestments and poindings which shall have been used within sixty days prior to the constitution of notour bankruptcy, or within four months thereafter, shall be ranked *pari passu* as if they all had been used of the same date."

[The diligences specified are, practically, the whole forms of individual diligence available against moveables (as to arrestment by a seller in his own hands, under the Merc. Law Amend. Act, see *Wyper*, 27 Feb. 1861, 23 D. 606); but, where the notour bankruptcy is constituted by the general diligence of sequestration (under § 7, 1st), the operation of this section is materially affected. Section 108, by one of its clauses—in harmony with the prohibition of voluntary preferences under 1696, c. 5—declares arrestments, or poindings executed on or after the sixtieth day prior to the sequestration not “effectual”; i.e., in other words, cuts down attempted preference, or equalises diligence, not as with other diligence, but as with all claims upon the bankrupt estate: (see *Hume*, 23 Jan. 1857, 19 D. 305; *National Bank*, 13 July 1881, 18 Sc. L.R. 683). The principle of equality, within the limits defined, is carried out in the subsequent clauses of § 12, by provisions that, for *pari passu* ranking, arrestments on dependence or for illiquid debts must be followed up without undue delay; that creditors producing liquid grounds of debt in any process relative to the subject of the arrestment or poinding are ranked as if they had executed arrestment or poinding (see *Gallacher*, 6 June 1876, 13 Sc. L.R. 496; *Clark*, 18 Dec. 1884, 12 R. 347); and that creditors obtaining payment through diligence are bound to account to others entitled to rank *pari passu*. With regard to arrestments for attachment after the four months, it is further provided that they shall not compete with those used within the specified periods before and after the bankruptcy, but may rank with each other on any reversion.

The cases of *Nicolson*, 6 Dec. 1872, 11 Macph. 179, *Gallacher*, *supra*, and the case of *Dobbie*, 30 May 1854, 16 D. 881, exhibit the application of this enactment (§ 12) to cases of notour bankruptcy constituted by absconding or diligence. (See also *Mitchell*, *supra*, 8 R. p. 879; *Clark*, *supra*, 12 R. p. 353.) In *Nicolson*, the important question was stated, but not decided, whether sequestration following within four months after notour bankruptcy, being itself under § 108 equal to an arrestment in execution, is an arrestment within the meaning of the 12th section—ranking *pari passu* with individual diligence used within sixty days before the notour bankruptcy, on behalf of all the creditors, and operating to cut down all such diligence.

[See *Goudy*, 246; *Bell's Com.* ii. 75; Lord Deas, in *Wyper*, *supra*, p. 628. The opinion of Lord Curriehill, in *Hume*, *supra*, 19 D. 314, 315, brings out the fact that previous to the Sequestration Act, 2 & 3 Vict. c. 41, there was no means of equalising preferences in the case of deceased insolvent debtors. (See *Bell's Com.* ii. 84.)]

Ranking of secured and ordinary creditors.—With regard alike to voluntary securities and those created by diligence, the common law and the old statutes possess no equalising rules or procedure for ranking in bankruptcy, in a question with unsecured creditors. The holders of securities, whether by way of real right (excepting the old heritable bond) or of collateral obligations by third parties, rank in competition, apart from statutory sequestration, on their full debts without deduction of the value of securities; and even part payment previous to or in the course of the competition leaves the securities available for the whole debt, up to twenty shillings in the pound (*Bell's Com.* ii. 424–427). Under the Sequestration Acts the rule is that, in ranking for a dividend, real securities must be valued and deducted, and, if the trustee so demand, assigned at the value to the trustee, and the ranking is only for the balance; but no farther change is made on the common law (§ 65 of act of 1856). The combined result is thus stated by Professor Bell (*Com.* ii. 427):—“The effect of securities, and the claim against co-obligants, is left by the legislature to the disposition of the common law; while the claim against the *universitas* of the personal estate is regulated by a very equitable rule, requiring deduction of the value of such securities as the creditor holds over any particular estate or fund of the bankrupt.” See *Ranking*.

3. *Liability to Sequestration*; and to *Cessio Bonorum*.—Under § 13 of the Bankruptcy Act of 1856, notour bankruptcy is a condition, along with personal residence or localisation of business in Scotland, of sequestration of an individual debtor or of a company, at the instance of creditors. Petitions for sequestration by creditors are, by § 15, competent only within four months after the date of notour bankruptcy, i.e., the constitution—and each constitution—of notour bankruptcy. (See *Balfour*, 20 Feb. 1841, 3 D. 612; see also *Sequestration*.) See *Cessio Bonorum*; and 43 & 44 Vict. c. 34, §§ 7–9.

4. *International effects of bankruptcy.*—

[The international relations of bankruptcy concern chiefly the vesting of the bankrupt estate in a trustee or other assignee, for administration on behalf of creditors. The principles and rules of international law adopted in Scotland will be found stated under *Sequestration*, the leading principle being that expressed in the words *mobilia sequuntur personam*. The more recent authorities are *Phosphate Sewage Co.* 5 July 1878, 5 R. 1125; *Goetze*, 27 Nov. 1874, 2 R. 150; and, of earlier date, *Joel*, 10 June 1859, 21 D. pp. 938, 939. The operation of the statute 1696, c. 5, on foreign creditors was very fully discussed in *White (Bell & Co.'s Trustee)*, 8 June 1843, 5 D. 1148, with the result that the statute was held applicable—to the effect of reduction and repayment. The decision was one of the whole court, but arrived at only by a majority: the minority included Lord Fullarton and Lord Moncreiff. The argument of the leading (joint) opinion for reduction was that as foreigners are admitted to the benefit of the provisions of the statute, they ought to be subject to the disabilities created by it, the disabilities implying nothing absurd or unjust. The minority took the view that, with regard to a right already vested, it was not to be held that the foreign law was bound to recognise the retrospective effect of the Scotch statute, however reasonable the presumption under the statute might be as a municipal regulation. Lord Moncreiff farther held that the statute did not disable, but only bound to restore—a kind of obligation affecting only natives, not foreigners. The earlier cases bearing on the question are referred to in the various opinions of the judges, which contain the whole law on the subject.]

On the subject generally, see *Ersk. B.* ii. tit. 12, §§ 59–63; *B. iv. tit. 1*, §§ 41–45; *Bell's Com.* ii. 73–77, 152–170, 191–244, 375–381, 568–587; *Bell's Princ.* § 2325–2337; *Moir's Note in Ersk. Princ.*, 17th ed., 597; *Murdoch's Law of Bankruptcy*, 9–12, 164–169, 191, 223–227; *Mackay's Prac.* ii. 123–124, 149–152; the treatises on Bankruptcy of *Alexander*, *Hill Burton*, and *Boyd Kinnear*; also the treatise of Mr Henry Goudy, advocate, published since the date of the last edition of this Dictionary.]

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

BANNITUS; from *bannum*, a trumpet; banished for a crime or other cause; or being put, as it were, to the horn or trumpet, by three blasts, according to the old Scotch consuetude. *Skene, h. t.*

BANNS. [Proclamation of banns was, until recently, an indispensable requisite of a regular marriage. But by the Marriage Notice Act, 1878 (41 & 42 Vict. c. 43), a registrar's certificate of the publication of a notice of marriage is made equivalent to a certificate of proclamation of banns; and either certificate is sufficient warrant for the celebration of a regular marriage.] Proclamation of banns is made in church, immediately before the commencement of divine service. It is done with an audible voice; and consists in calling the names and designations or additions of the parties who intend to intermarry; and inviting those who know of any sufficient objection, to state it before it be too late. [It must be made in the parish church of the parish in which each of the parties resides, whether that be a parish *quoad omnia*, or only *quoad sacra*; *Hutton*, 9 March 1876, 3 R. (H.L.) 9.] By 10 Anne, c. 7, “no Episcopal minister residing in Scotland shall marry any person but those whose banns have been duly published three several Lord's days in the Episcopal congregation which the two parties frequent, and in the churches to which they belong as parishioners, by virtue of their residence.”

[In strict law, proclamation must be made in every case on three successive Sundays; but in practice, proclamation on two Sundays, or on one only, is held sufficient. The parties must have resided six weeks in the parishes where they are to be proclaimed. The proclamation is evidenced by a certificate of the session-clerk.] Marriages contracted without proclamation of banns [or publication of notice] are valid; but the parties, celebrator and witnesses of such marriages, are liable in certain penalties. See *Ersk. B. i. tit. 6*, §§ 10, 11; *Bell's Princ.* § 1510; [*Fraser on Husband and Wife*, i. 282. See *Marriage. Clandestine Marriage*.]

BANRENTES; banerets; in old law language, a kind of estate, greater and more honourable than barrones. Barons were permitted to choose commissioners to the Scotch Parliament; but banrentes were summoned personally to Parliament. The term would seem also to signify the rent or yearly duty (*quasi* banner-rent) of one of the King's banner or standard-bearers. *Skene, h. t.*

[BAR, PERSONAL. See *Personal Objection*.]

BARATRY; is the crime committed by a judge who is induced by a bribe to pronounce a judgment. *Baratriam committit qui propter pecuniam justitiam baractat*, he commits baratry who barter justice for money. This practice seems in former times to have been very general in Scotland. See 1540, c. 104; *Ersk. B. iv. tit. 4, § 30*.

BARATRY; amongst ecclesiastical persons, was the offence of exporting money out of Scotland to purchase benefices at Rome, and was prohibited by several old acts of Parliament. See 1426, c. 106; 1567, c. 2; *Acta Parl. iii. 14*; *Ersk. B. iv. tit. 4, § 30*; *Kames' Stat. Law Abridg. h. t.*; *Skene, h. t.*; *Hume, i. 587*.

BARATRY of mariners; is gross fraud on the part of the master or mariners, tending to their own benefit, and to the prejudice of the owners of the ship. See *Bell's Princ. § 479*; [*Abbott on Shipping, 137*; *Arnould on Mar. Insurance, ii. 774*. See *Insurance*.]

BARGAIN; is a consensual contract or agreement, and is generally used to signify such contracts as may be completed without the intervention of writing, *e.g.*, sales of moveables, locations, &c. By the stat. 1669, c. 9, such bargains, which are proveable by witnesses, prescribe in five years after the bargain. *In re mercatoria*, bargains of great importance may be proved by letters of correspondence, or even by less formal writings. *Bell's Com. i. 343*.

BARGAIN AND SALE; in English law, is an instrument whereby the property of lands and tenements is, for valuable consideration, granted and transferred from one person to another. *Tomlins' Dict. h. t.*; [*Williams on Real Property, 213*.]

BARON; in its more ordinary acceptance, is the degree of nobility next to a viscount; but anciently, in Scotland, all those vassals who held their lands immediately of the Crown were termed barons. When titles of nobility were conferred on barons, they were called the *greater barons*; but both the greater and the lesser sat indiscriminately in the Scotch Parliament until 1427, when, by the act 102 of that year, the attendance of the lesser barons was dispensed with, on condition of their sending representatives from each county, to be called "*commissioners of the schire*."

But although every person holding of the Crown came under one or other of the above denominations of greater or lesser barons, yet, to constitute a baron in the

strict legal sense of the word, his lands must have been erected, or at least confirmed, by the King *in liberam baroniam*. And, as such, a baron had a jurisdiction both civil and criminal, which he might exercise either in his own person, or by his bailie. This jurisdiction was, however, reduced by 20 Geo. II. c. 43, to the right of recovering from his vassals and tenants the feu-duties and rents of their land, and compelling them to perform the services to which they may be bound, and to the right of deciding in civil questions where the debt or damage did not exceed 40s. Beyond this the baron or his bailie's civil jurisdiction cannot be prorogated. The criminal jurisdiction of the baron is, by the same statute, limited to assaults, batteries, and smaller offences, which may be punished by a fine not exceeding 20s., &c. Where a fine is inflicted, it is to be recovered by poinding, or, in default of goods, by one month's imprisonment at farthest. But this jurisdiction is put under so many regulations and restrictions that is now seldom, if ever, exercised. The act 20 Geo. II. farther provides, that no future charter of erection of a barony shall convey any higher jurisdiction than for recovering the rents of lands, multures, and mill services. An exception has, however, been made to this by the statute 35 Geo. III. c. 122, by which the Crown is authorised to erect free and independent burghs of barony in those parts of the sea-coast in which the fisheries are carried on. The magistrates in such burghs are to exercise the power of justices cumulatively with the justices of the county. See *Ersk. B. i. tit. 4, § 25*; *Stair, B. ii. tit. 3, §§ 2, 62*; *Bank. i. 55, 564*; *Hunter on Landlord and Tenant, ii. 351, 354*; [*Brown's Supp. v. 750*. See *Barony*.]

BARON OF EXCHEQUER; the judges of the Scotch Court of Exchequer were termed Barons of Exchequer. See *Exchequer*.

BARON AND FEME; the English law term for husband and wife. *Tomlins' Dict.*

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

BARONY; is the territory over which the rights of barony extend; it also signifies the right itself. The right of barony can be conferred only by the Crown, and cannot be transmitted by the baron to be held base of himself. Where it is trans-

mitted, it must be by a public holding, which enables the disponent to renew the title from the Crown by resignation or confirmation, and so to come into the place of the disponent. The right of barony also incorporates the whole parts of which the barony consists, so that a conveyance of the barony, in general terms, carries every part and parcel of the barony, though not named, and every right connected with a barony, though these rights be not expressed. One effect of the right of barony is to unite the whole separate subjects of which the barony consists, so that one sasine taken on any one part of the barony, carries the whole. And while a clause of union unites only lands which are locally discontinuous, the union effected by a charter of barony unites lands though flowing from different superiors, or held by different tenures, as well as where the subjects are discontinuous in place. [This privilege is now of little consequence, since infeftment need not be given on the lands at all; 8 & 9 Vict. c. 35, § 1.] By the act 1595, c. 93, the inhabitants of all barony lands are amenable to the courts within whose jurisdiction the lands are situated. [The legal effects of a barony title were thus summarised by Lord Pres. Inglis, in *L. Adv. v. Cathcart*, 19 May 1871, 9 Macph. 744:—“(1) A general conveyance of a barony carries all parcels of land which belong to the barony, or have been prescriptively possessed, without the necessity of special enumeration. (2) If the charter of erection gives right to any of the *regalia*, these will be transmitted by a conveyance of the barony without special mention. (3) But the mere erection of a barony does not convey any of the *regalia*. (4) A barony title, without mention of salmon-fishing, or of fishing at all, is a good title to prescribe salmon-fishing. This is laid down by our institutional writers, and confirmed by the case of *Milne's Trs.* 1 July 1868, 6 Macph. 972. (5) A barony title *cum piscationibus* is, in a question of salmon-fishing, no better than a barony title without the clause; *D. Richmond*, 16 Feb. 1870, 8 Macph. 530 (6) Possession of part of a barony is equivalent to possession of the whole, in this sense, that, if it can be shown from the original charter of erection, or other authentic writs, that a certain parcel of land, of which the baron has had no possession, belongs to the barony, the possession of the other parts will be as effectual as if he had possessed that part.” See also *Salmon-Fishing*.]

See *Stair*, B. ii. tit. 3, § 60; *Ersk.* B. ii. tit. 3, § 46; tit. 6, § 18; *Bank.* i. 564; *Bell's Princ.* § 750; [*Jurid. Styles*, i. 355; *Menzies' Conv.* 576, 826; *M. Bell's Conv.* i. 574, 589, 604, 660. See *Baron. Union. Dispensation*.]

BARRATRY. See *Baratry*.

BARRENNESS. See *Sterility*.

BARRIER ACT. See *Act of Assembly*.

BARRISTER, or *Barraster*; in English law, a counsel learned in the law, admitted to plead at the bar, and there to take upon him the protection and defence of clients. Where Scotch and English counsel appear in the same cause, precedence is generally determined by their standing at their respective bars. *Tomlins' Dict. h. t.*; [*Wharton's Lex.*] See *Advocate*.

BARTER; called in the Roman law, *permutatio*, is a contract by which one thing is given in exchange for another. The distinction between barter and sale is, that, in the former, money, which is an essential of sale, is never one of the things exchanged. By the Roman law, if one of the things exchanged were evicted, the party so losing it had a right of recourse to the thing which he gave. But with us this right of recourse is confined to the contract of excambion, *i.e.*, the exchange of heritable subjects, and has no place in the exchange of moveables. *Stair*, B. i. tit. 14, § 1; *Bank.* i. 407. See *Excambion*.

BASE RIGHTS. Where a person disposes feudal property to be held under himself, instead of under his superior, the right which the disponent thus acquires is called a base right. In the original charter, the lands are disposed to the receiver, to be held by him of the granter either in feu or in blench, there being no other species of holding in modern conveyancing. In the feu-holding, a feu-duty or annual payment in money or victual is given. In the blench-holding, an elusory duty, as a penny Scots money, or the like, is stipulated as an acknowledgment of superiority. Where lands are given out on either of these holdings, the charter describes the subject, the disponent or vassal, the holding, and the nature of the warrandice undertaken by the granter; it assigns the rents to the disponent, and contains a mandate to the granter's bailie to give infeftment to the vassal. This is the base right, by which, in modern conveyancing, subinfeudation is effected. The granter remains vassal to his own superior, and the subinfeudation makes no change on the titles he holds from his superior. Thus, suppose A to hold of the

Crown blench, and that he subfeus his lands to B, to be held in feu. A is the vassal of the Crown, and B is the subvassal in the lands. B, the subvassal, has thus two superiors: A, from whom he derives his right, who is his immediate superior, and the Crown, which is his mediate superior. The right in A is termed the *dominium directum*, in reference to B's right over the property, and B's the *dominium utile*, or property. A's right is termed a public one; B's a base or subaltern right. These two rights stand on different sets of titles, entirely unconnected with each other. A's title stands on his own Crown charter and sasine; B's on his base right. The base right in favour of B can never be confirmed by the Crown, to the effect of making B hold of the Crown. This would be to deprive A of his subvassalage, which no act of the Crown or of B can accomplish. Formerly, when the casualty of recognition existed, by which the whole land in consequence of the acts of the immediate superior (that is of A in the case supposed), might have recognised, it was common for a subvassal to take a confirmation from his mediate superior; because such a confirmation, though it did not make the subvassal hold of his mediate superior, freed him from the consequences of this casualty. But now that wardholding is abolished, the necessity of this measure is at an end, and a confirmation of this kind is not sought for. The only confirmation in modern practice is the confirmation of a right given to a purchaser to be held of the seller's superior, as is elsewhere explained. The modern disposition to a purchaser, from considerations of expediency, gives the disponee the alternative either of a public or a base holding; and infeftment taken on the precept of sasine in such a disposition constitutes a complete base right, which may be afterwards rendered public by a charter of confirmation from the disposer's superior. [Since the Conveyancing Act of 1874, entry with the superior is implied, by force of statute, in the case of every registered conveyance; and a charter of confirmation, or other writ by progress, is neither necessary nor competent. Such implied entry, however, does not validate any subfeu, where subinfeudation has been effectually prohibited; 37 & 38 Vict. c. 94, § 4 (2). Prohibitions to subfeu in feu rights granted after the date of the act are incompetent; *ib.* § 22.] See *Stair*, B. ii. tit. 3, § 27; *App.* § 2; *More's Notes*, clxvi.; *Ersk.* B. ii.

tit. 7, § 8; *Bell's Princ.* § 816; [*Duff's Feudal Conv.* 146; *Menzies' Conv.* 635; *M. Bell's Conv.* i. 687.] See *Disposition. Charter.* [*Conveyancing. Infeftment. Confirmation.*]

BASTARD; a child born of a woman who was not married to the father at the time of conception, and who was never thereafter married to him. Bastards are termed illegitimate children, in contradistinction to legitimate or lawful children born in wedlock. But although the act 1600, c. 20, declares, that a marriage contracted after a divorce for adultery between the divorced person and the paramour is unlawful, and that the issue are incapable of succeeding to their parents, such children are not to be regarded as illegitimate or bastards. *Stair*, B. iii. tit. 3, § 42; *Ersk.* B. i. tit. 6, § 51. A bastard can have no heirs except of his own body, because succession is through the father only, and bastards have no lawful father. *Stair*, *ib.* § 44. [See *Samson*, 26 Nov. 1886, 14 R. 113.] On the failure of heirs of a bastard's body, the King succeeds as *ultimus hæres*. But although a bastard cannot succeed as heir or executor either to his father or mother, he may succeed by destination. He may also dispose of his own estate, heritable or moveable, by a deed *inter vivos*; and he may even settle his heritable estate on any person he pleases, by a destination which is not to take effect until after his death. But prior to the passing of 6 Will. IV. c. 22, if a bastard had no lawful children of his own body, he could neither dispose of his heritable or moveable estate on deathbed, nor make a testament to the prejudice of the Crown's right. Where he had lawful issue, however, he might make a testament either in their favour or in favour of a stranger; for the King, being excluded by the mere existence of such issue, has no interest to challenge any destination of the bastard's property which he may think proper to make. And now, by the statute referred to, bastards have the power of disposing of their moveables by testament, in like manner as other persons. The widow of a bastard, whether there be issue or not, enjoys her legal rights of terce and *jus relictæ*; and creditors are entitled to use the ordinary diligence for attaching the heritable or moveable estate of a bastard, both before and after his death. [As to the proof of legitimacy, see *Legitimacy. Filiation.* As to the custody and aliment of bastards, see *Aliment. Parent and Child.*] And as to their legitimization,

and its effects, see *Legitimation*. See *Stair*, B. iii. tit. 3, §§ 42, 44; *More's Notes*, xv. xxxii.; *Ersk.* B. i. tit. 6, § 51; B. iii. tit. 10, § 5; *Bank.* i. 46, 119, 276; *Bell's Princ.* § 2058; *Kames' Princ. of Equity* (1825), 497; *Hume*, i. 290, 452; ii. 124; [*Fraser on Parent and Child*, 119. See also *Parent and Child*.]

BASTARDUS; (old French) bastard; a child unlawfully begotten "outwith the band of marriage," according to the old definition. The word is said by Skene to be barbarous. *Skene, h. t.*

BASTARDY, GIFT OF; is a gift by the Crown of the heritable or moveable effects of a bastard who has died without leaving lawful issue, and without having disposed of his property in *liege poustie*. By this deed the Crown gives, grants, and dispones to the donatory, the bastard's estate and effects, with power to institute an action of declarator of the bastardy, which is necessary to entitle the donatory to take the benefit of the gift. [See *Ersk.* B. iii. tit. 10, § 5;] *Jurid. Styles*, i. 461, 504, 2d edit.; *Hunter's Landlord and Tenant*, i. 222. See *Gift*.

BASTARDY, DECLARATOR OF. [See *Last Heir*.]

BATON; a staff. This is the proper symbol of resignation, though a pen has, by immemorial custom, been made use of as the symbol in the act of resignation. *Ersk.* B. ii. tit. 3, § 36; *Ross's Lect.* ii. 216; A.S. 11 Feb. 1708.

[**BATTERY**. A battery in English law, as distinguished from an assault, is where the person of a man is actually struck or touched in a violent, angry, rude, or insolent manner; whereas there may be an assault by simply touching, without any violence, or even by merely threatening; *Addison on Torts*, 139.]

BATTERY PENDENTE LITE; assaulting an adversary in a lawsuit, during the dependence of the suit. [This was formerly a statutory offence, under 1584, c. 138, and 1594, c. 219. But these acts were repealed by 7 Geo. IV. c. 19.] See *Ersk.* B. iv. tit. 4, § 37; *Kames' Stat. Law Abridg. h. t.*

BEASTS, WILD. See *Animals*.

BEATING OF JUDGES. To beat, strike, or insult any judge sitting in judgment, or on account of his judicial conduct, was at one time a capital offence; 1593, c. 177; 1600, c. 4; and threats of violence used to a judge on account of his conduct in that capacity will subject the offender to an arbitrary judgment; *Hume*, i. 406.

Erskine includes under this crime all offences against the law or its execution, e.g., deforcement of messengers, breach of arrestment, battery *pendente lite*. *Ersk.* B. iv. tit. 4, § 32. See *Deforcement*. *Breach of Arrestment*.

BEES; are not private property unless they are in a skep, or are working in the hollow of a tree, wall, or house. When they hive, they remain the property of their former owner, so long as he continues in pursuit of them; but thereafter they belong to the first occupant. *Ersk.* B. ii. tit. 1, § 10; *Stair*, B. ii. tit. 1, § 33; *Hume*, i. 82. [See *Animals*.]

BEFORE ANSWER. In judicial proceedings this expression signifies,—before deciding the main question raised. It frequently happens that the full bearing of written or of parole evidence is not apparent when permission to adduce the evidence is asked; or the relevancy of the proof offered may be questionable; or in accountings, the precise state of the balance may affect the legal questions raised; or in questions about farms, buildings, machinery, or the like, it may aid the judge in deciding, if he has correct information as to the state of the subject-matter of the suit. In these and similar cases, our courts, both supreme and inferior, are in use to pronounce interlocutors allowing proofs, or granting diligence for the recovery of writings, or ordering judicial reports from accountants or from persons of skill, "before answer," that is, reserving for after consideration the relevancy as well as the legal effect of the proof, productions, or reports, on the merits of the legal questions at issue. The words "before answer," are perhaps not absolutely indispensable in such cases; but they have the advantage of barring all dispute as to the purpose of the inquiry so authorised, and preventing the plea that the relevancy of the proof was determined before it was ordered by the court. [See *Robertson*, 7 Dec. 1867, 6 Macph. 114; *Thomson*, 30 Oct. 1868, 7 Macph. 39; *Macvean*, 8 March 1873, 11 Macph. 506; *Simpson*, 14 May 1875, 2 R. 673. See also *Ivory's Forms of Process*, i. 219; *Mackay's Prac.* ii. 15.] See *Proof. Evidence. Commission*. [Relevancy.]

BEGGARS. See *Vagabonds*.

BEHAVIOUR AS HEIR; or *gestio pro hærede*; is a passive title, by which an apparent heir, by intromission with his ancestor's heritage, [formerly] incurred a universal liability for his debts and obligations. This passive title was introduced

into the law of Scotland as early as the institution of the College of Justice; for the purpose, it would appear, of checking the frauds to which creditors were exposed under the more ancient law, according to which the heir was liable to the extent of his actual intromissions only. The passive title of *gestio pro hærede* was incurred,—1. By the heir's immixing with the heritable subjects of the ancestor, letting tacks, &c. 2. By intromitting with heirship moveables, which, in questions of succession, were reckoned heritage. [Heirship moveables were abolished by 31 & 32 Vict. c. 101, § 160.] 3. By intermeddling with the title-deeds of the ancestor's heritable estate, in such a manner as to give rise to a reasonable presumption that he intended to represent him. 4. By the heir's making over to a third party any part of the ancestor's heritable estate, or by granting discharges to any of the ancestor's debtors. But the simple renunciation by the heir of all claim to the succession in favour of the heir-male or of provision, even for a valuable consideration, inferred no passive title, because creditors were not hurt by such a renunciation. 5. The passive title of *gestio pro hærede* was incurred under the act 1695, c. 24, if the heir, without service or entry as heir, "either entered to possess his predecessor's estate or any part thereof, or purchased," either by himself or by means of another person for his behoof, any right to his predecessor's estate, or any legal diligence or other right affecting the estate, redeemable or irredeemable, except as highest bidder at a judicial sale. See *Calland*, 1796, M. 9759. The question, whether or not this passive title had been incurred, depended a good deal upon circumstances; and as its consequences might be highly penal, it would seem that, where the intromission had been inconsiderable, and where there had been evidently no intention of defrauding creditors, the heir might be relieved from the effects of his intromission. The court even authorised an actual service as heir, to be set aside, in order to free the heir from his passive title; *Ayton*, 1784, M. 9732. [The law as to *gestio pro hærede* was altered by 37 & 38 Vict. c. 94, § 12, which provided that "an heir shall not be liable for the debts of his ancestor beyond the value of the estate of such ancestor to which he succeeds."] See *Ersk.* B. iii. tit. 8, § 82; *Stair*, B. iii. tit. 6, § 1; *More's Notes*, cccxxxvii.; *Bank.* ii. 366; *Bell's Com.* i. 704, 750; *Bell's Princ.* § 1919; [*M'Laren on Wills*, ii.

[§ 2266. See *Passive Titles. Heir. Apparent Heir.*]

BENCH; in English law, has different significations: thus, *Free Bench* signifies that estate in copyholds, which the wife, being espoused a virgin, has, after the decease of her husband, for her dower, according to the custom of the manor; *Tomlins' Dict. King's (Queen's) Bench*; a court in which the King was formerly accustomed to sit in person; and which, on that account, was moved with his household. See *King's Bench*. [*Common Bench*; the ancient name of the Court of Common Pleas; because the pleas of controversies between common persons were there tried and determined. See *Common Pleas*.]

BENCHERS; in the inns of court, are the senior members of the society, who are invested with the government of the body to which they belong. [*Wharton's Lex.*]

BENEFICE; a church living. Prior to the Reformation, benefices were of two kinds. They consisted either of lands or teinds; the former were called the temporality, the latter the spirituality of benefices. In consequence of the Reformation, James VI. considered himself proprietor of all the church lands, and erected several abbacies and priories into temporal lordships. Those to whom he gave these grants were termed lords of erection, or titulars, as having a title to the erected benefices. Abbacies and priories, and even bishoprics, were erected into temporal lordships, the proprietors of which received the titles of lords of erection, titulars, or commendators; and the property which formerly belonged to the bishops and their chapters was, to a considerable extent, brought back into the hands of the Crown by the restoration of Episcopacy, and its subsequent abolition. The lords of erection, and other lay proprietors of church lands, exercised the same rights in drawing the teind which has formerly been exercised by the clergy; when fortunately this state of matters was put an end to by the decrees-arbitral pronounced by Charles I. on the surrender of tithes. *Stair*, B. ii. tit. 8, § 10; *Ersk.* B. ii. tit. 10, § 4; *Bank.* ii. 1; *Bell's Com.* i. 123. See *Teinds. Annexation*.

BENEFICIUM CEDENDARUM ACTIONUM. This was a right conferred by the Roman law, whereby a co-cautioner, who had paid the debt for the principal debtor, was entitled to compel the creditor to assign his right of action against the other co-cautioner, so as to enable the cautioner who had paid to operate his

relief from those who were bound along with him. By the law of Scotland a co-cautioner, who has paid, has an action of relief, without the necessity of any such conveyance from the creditor. In the practice of Scotland, a catholic creditor, who has a security extending over several subjects, must, if he draws his payment from one subject only, convey his security to the other creditors on that subject, to the effect of enabling them to draw from the other subjects over which the security extends so as in the end to make the catholic debt rank proportionally on all the subjects over which the security extends. *Ersk. B. ii. tit. 12, § 66; B. iii. tit. 3, § 68; [Bell's Princ. §§ 268, 557; Kames' Equity (1825), 76;] Brown's Synop. h. t. See Catholic Creditor. [Cautionry.]*

BENEFICIUM COMPETENTIÆ. By the Roman law, the granter of a gratuitous obligation, who was reduced to indigence, before fulfilling his obligation, had *beneficium competentie*, or the privilege of retaining a sufficiency for his own subsistence. The law of Scotland confers this privilege on fathers and grandfathers against their children and grandchildren, even although the effect of it should be to reduce the children to indigence; but it does not extend it to the case of strangers, or to collateral relations, or even to the case of a brother against a sister; *Hog, [1750, 1 Paton, 469;] Hardies, 1 July 1813, F.C.* According to *Erskine (B. iv. tit. 3, § 27)*, a bankrupt who has obtained the benefit of a *cessio bonorum*, and who afterwards acquires property, has *beneficium competentie*; but this doctrine is not sanctioned by any reported case; on the contrary, it has been held that a bankrupt, in such circumstances, has not *beneficium competentie*, and that he is only entitled to reserve his working tools and his wearing apparel. *Ersk. B. ii. tit. 3, § 89; More's Notes to Stair, cccxxxvii.; Brown's Synop. h. t.; Kames' Princ. of Equity (1825), 295; Bell's Com. ii. 483, 486; [Goudy on Bankruptcy, 358.]*

BENEFICIUM DIVISIONIS; in the Roman law, was an equitable privilege, by which a co-cautioner, who was required to pay the debt, might insist that the creditor should make the demand on him only *pro rata*, or for his proportion along with the other solvent cautioners. By the law of Scotland, a co-cautioner enjoys this privilege when he is bound simply as cautioner, along with another, for the principal debtor. But where cautioners bind themselves "con-

junctly and severally" with and for the principal debtor, the benefit of division is lost, and the creditor may select any of them he pleases, and recover the whole debt from him. *Stair, B. i. tit. 17, § 12; Ersk. B. iii. tit. 3, § 63. See Cautionry.*

BENEFICIUM INVENTARIÏ; was a privilege enjoyed by an apparent heir in heritage, who was doubtful whether the value of the inheritance would be adequate to the payment of his predecessor's debts. This privilege was conferred by 1695, c. 24, whereby an apparent heir within year and day after his predecessor's death, that is within the *annus deliberandi*, was permitted to enter to his predecessor *cum beneficio inventariï*, or upon inventory, according to the practice in moveable succession. The effect of entering in this way was that the heir became liable for his predecessor's debts and deeds, to the value of the heritage given up in the inventory only, and no farther. The statute required the heir, within the *annus deliberandi*, to make up and exhibit upon oath a full and particular inventory of "all lands, houses, annual rents, or other heritable subjects," to which he "may or pretends to succeed;" which inventory was regularly subscribed before witnesses, and recorded in the sheriff court books of the county where the heritage was situated, within the year and day. Where any part of the defunct's heritable estate had been accidentally, and without fraud, omitted in the inventory, the omission might be supplied by what was called an *eik*, or addition to the inventory; provided such *eik* was made and recorded within forty days after the heir came to the knowledge of the omission. By intromitting with the heritage without attending to the provisions of this statute, the heir incurred a universal responsibility for the debts of the defunct. (See *Behaviour as Heir.*) The statute did not require the heir to serve within the year. If the inventory was given in and recorded within the statutory period, the heir might serve at any time he pleased; and the only change produced in the form of the service was, that the heir was declared to be served *cum beneficio inventariï*. [A simpler mode of avoiding universal liability for an ancestor's debts was provided by the Service of Heirs Act, 1847 (10 & 11 Vict. c. 47), which enacted (§ 23) that a special service should not infer a general representation, active or passive, beyond the value of the lands embraced in it; and (§ 25) that a general service might be obtained to

[a limited effect, by annexing a specification, the party served being liable in respect of such service only to the extent or value of the lands contained in the relative specification. These provisions were incorporated in the Consolidation Act of 1868, §§ 47 and 49; but they are practically superseded by § 12 of the Conveyancing Act of 1874, which enacts that "an heir shall not be liable for the debts of his ancestor beyond the value of the estate of such ancestor to which he succeeds."] See *Ersk. B. iii. tit. 8, § 68*; *Bank. ii. 311*; *Bell's Com. i. 706*; *Bell's Princ. § 1926*; *Stair, B. iii. tit. 4, § 32*; *More's Notes, cccxxi*; [*Menzies' Conv. 803*; *M. Bell's Conv. ii. 1114*. See *Service. Succession.*]

BENEFICIUM ORDINIS; or the benefit of discussion. By the Roman law, and by the [former] law of Scotland, a cautioner who was bound simply as such, might insist, before paying the debt, that the principal debtor should be discussed. [See *Discussion.*]

BENEFIT OF CLERGY; in the criminal law of England, was a privilege which a person convicted of a capital felony (not excluded from the benefit of clergy), might plead in arrest of judgment for the first offence. This privilege operated as a species of statutory pardon, and was originally confined to the clergy, or to persons in holy orders. It was afterwards extended to all persons who could read; and at that time it was the practice, on the conviction of a felon whose crime was not denied the benefit of clergy, to present him with a book in which he was required to read, and on the proper officer pronouncing the words "*legit ut clericus*," the convicted person was burnt on the hand and discharged. If he could not read he suffered the statutory punishment for his crime. By 5 Anne, c. 6, the benefit of clergy was extended to all persons convicted of clergyable offences whether they could read or not; and by the same statute, and several subsequent ones, instead of burning on the hand, a discretionary power was given to the judge to inflict a pecuniary fine or imprisonment. In the more enormous capital offences, the benefit of clergy was always excluded; and in the criminal code of England, there are many enactments creating felonies "without benefit of clergy." [The privilege was entirely abolished by 7 & 8 Geo. IV. c. 28, § 6.] See *Tomlins' Dict.*; [*Wharton's Lex.*; *Stephen's Com. iv. 454.*]

BENEVOLENCE; in English law, was a species of forced loan or gratuity from the subjects to the King; one of the

arbitrary modes of obtaining money, which, in violation of Magna Charta, were formerly resorted to by the kings of England. *Tomlins' Dict. h. t.*

[**BEQUEST.** See *Legacy.*]

BERTHENSEK, or *Birdinsek*; according to the orthography of Skene, the same word with *Burdenseck*. *Skene, h. t.* See *Burdenseck*.

BERWICK-UPON-TWEED. This town, which was originally part of the kingdom of Scotland, was ceded to England by Edward Balliol; and its liberties and customs, as an English town, were afterwards confirmed by Edward IV. and James VI. Although therefore, it has some local peculiarities derived from the ancient laws of Scotland, it is clearly a part of England, being represented by burgesses in the House of Commons; and bound by all acts of the British Parliament, whether expressly mentioned or not; see 20 Geo. II. c. 42. Indictments and other local matters in the town of Berwick may be tried by a jury from the county of Northumberland. [*Stephen's Com. i. 90.*]

BESTIALITY; carnal intercourse with the lower animals is a crime [which was, till 50 & 51 Vict. c. 35, § 56,] punishable by the Scotch law with death. The attempt to commit the crime may be punished arbitrarily; [*M'Givern, 16 May 1845, 2 Broun, 444.* See *Hume, i. 470*; *Alison's Princ. 567*; *Macdonald, 200.*]

BETTING. See *Gaming.*

BIGAMY; is the contracting of a second marriage during the subsistence of a former one. By 1551, c. 19, this crime, whether committed by the man or the woman, is punishable with the pains of perjury; these are, confiscation of goods, imprisonment, and infamy. [It is now generally punished by imprisonment, but in aggravated cases penal servitude is inflicted.] Bigamy is not committed if the first marriage was unlawful through near relationship, or if it was dissolved by divorce (unless the divorce was obtained by the fraud of the accused, and is afterwards set aside), or if the accused believed, on reasonable grounds, that the first marriage was dissolved by death. [It is not necessary that either marriage be regular; but it is still undecided whether a marriage not constituted by any ceremony, but only by habit and repute, or promise *subsequente copula*, can be libelled to constitute bigamy; see *Langley, 9 June 1862, 4 Irv. 190.*] The clergyman and second spouse are art and part if they were aware that the former marriage subsisted. The

witnesses also are art and part, if they concealed the former marriage from the second spouse, or from the clergyman, who were ignorant of it. In proof of bigamy, the extract of proclamation of banns, and the marriage certificate of the clergyman, in regard to both marriages, ought to be produced. The clergyman, if alive, must swear to his certificate; and if he be dead, some one acquainted with his handwriting must prove it. If the extract of proclamation or certificate has been destroyed or lost, or if it never existed, the testimony of those present at the marriage will be held sufficient; and in case of their death, of those who heard by report that the parties were married, and lived openly as man and wife. The first wife's evidence is inadmissible against her husband; but the establishment of the first marriage, by annulling the second, removes the objection to the second wife's testimony. When both marriages and the existence of the first spouse are proved, the burden of proving his belief, on reasonable grounds, that the first marriage was dissolved, lies upon the panel. See *Hume*, i. 459; *Burnett*, 433; [*Alison's Princ.* 536; *Macdonald*, 196.]

BILL; in Scotch judicial proceedings, is the name given to the application or petition to the Court of Session, praying the court to authorise those signet letters, which require such a warrant to pass the King's signet. In the case of diligences against the property or person, and in some other instances owing to the peculiar nature of the case, signet letters [were formerly necessary], proceeding on an immediate warrant from the Court of Session, which warrant was interposed in the shape either of a decree, or of a deliverance or interlocutor on a *bill*, i.e., a petition praying for the letters. Signet letters on decrees were said to pass *per decretum*, and on bills, *ex deliberatione Dominorum Concilii*. [Signet letters are now, for the most part, superseded by the simpler forms introduced by the Personal Diligence Act, 1838. See *Diligence. Bill-Chamber*.] Petitions to the Court of Session, or reclaiming petitions (when in use) against judgments of the court, or of the Lords Ordinary, and in general all applications or pleadings not ordered by the court, were formerly denominated *bills*; and the roll in which petitions and reclaiming notes are first set down to be moved in court is still called the roll of *single bills*. See *Stair*, B. iv. tit. 2, § 12; B. iv. tit. 40, *passim*. See *Reclaiming Note*. [As to bills presented to the Court

[of Justiciary, for the purpose of raising criminal letters, see *Criminal Letters*.]

BILL-CHAMBER; a particular department of the Court of Session, [which formerly existed] chiefly for determining upon applications for warrants to expedite signet letters. The Royal Signet in Scotland was placed under the direction and control of the judges of the Court of Session; and it was in the form of letters passing under it that all ordinary civil actions [were formerly] instituted, or legal execution against either person or property authorised. Some of these letters, such as ordinary summonses, were allowed to pass the signet without any special warrant from the court; but a variety of signet letters required the authority of the Court of Session to be interposed in the shape of a deliverance or *fiat* on a bill or petition as their warrant. [See *Privileged Summons. Bill*. Several changes, however, have been made in the functions of the Bill-Chamber. In particular, diligence does not now usually proceed upon signet letters, but upon warrants inserted in extract decrees, as provided by 1 & 2 Vict. c. 114, § 1. See *Diligence*. And the necessity of proceeding by bill in any summons before the Court of Session was abolished by 13 & 14 Vict. c. 36, § 18. In advocations and suspensions, procedure by note was substituted for bills and signet letters by 1 & 2 Vict. c. 86. Appeals, which have now taken the place of advocations, go directly to the Inner House; 31 & 32 Vict. c. 100, §§ 64-66. Notes of suspension still originate in the Bill-Chamber; but as soon as an interlocutor passing the note has become final, the cause becomes for all purposes an action depending in the Court of Session; *ib.* § 90. See *Appeal. Suspension*. Applications for *fiats* of imprisonment under the Personal Diligence Act are presented in the Bill-Chamber; and bills for letters of arrestment and loosing of arrestment, letters of inhibition, letters of supplement, letters of ejection, letters of lawburrows, and letters of publication of interdiction, where these are still used, must pass through the Bill-Chamber. It is also competent to apply by bill for letters of any kind of diligence, under the forms in use prior to the Personal Diligence Act. A farther statutory jurisdiction has been conferred on the Lord Ordinary on the Bills in sequestrations, under 19 & 20 Vict. c. 79 (see *Sequestration*); in summary applications connected with admiralty causes, under 1 Will. IV. c. 69, § 21; in railway and canal valuation appeals, under

BILL OF EXCHANGE

107

[17 & 18 Vict. c. 91, § 25; in applications connected with commissions from the English and Irish courts, under 6 & 7 Vict. c. 82, §§ 5, 6; and in petitions for forfeiture of superiority, under 31 & 32 Vict. c. 101, § 104. In vacation, the Lord Ordinary on the Bills has a statutory jurisdiction to dispose of various other petitions and applications, as representing the Court of Session; and in a few well-defined classes of petitions (*e.g.*, for appointment of interim officers), the *nobile officium* of the court may, on the ground of urgency, be exercised by the Lord Ordinary on the Bills in vacation; *Greig*, 20 July 1866, 4 Macph. 1103; *Staveleys*, 16 April 1883, 20 S.L.R. 565; *Beveridge, Forms of Process*, i. 228. The Lord Ordinary on the Bills sits on the fifth lawful day after each box-day, for the purpose of granting or recalling decrees in absence, disposing of motions in regard to preparation of the record, granting commission and diligence, &c.; 31 & 32 Vict. c. 100, § 93.

[During session the duties of the Bill-Chamber are discharged by the junior Lord Ordinary; 53 Geo. III. c. 64, § 2; or, in case of his necessary absence, by another Lord Ordinary appointed by the Lord President; 31 & 32 Vict. c. 100, § 12; see also 1 & 2 Geo. IV. c. 38, § 4. The divisions of the Inner House act as Bill-Chamber judges, in reviewing decisions of the Lord Ordinary on the Bills. In vacation, all the judges of the Court of Session, except the Lord Justice General, the Lord Justice Clerk, and such of the judges as were Lords Commissioners of Justiciary on 16 Sept. 1887, act in rotation as Lords Ordinary on the Bills; 53 Geo. III. c. 64, § 2; 2 & 3 Vict. c. 36, § 7; A.S. 8 Aug. 1839, § 1; 50 & 51 Vict. c. 35, § 44. There are in the Bill-Chamber one Clerk of the Bills, one assistant clerk, and two ordinary clerks. The Clerk of the Bills receives bonds of caution and receipts for money consigned in Bill-Chamber processes, and is responsible for the reputed solvency of cautioners, and for consigned money; see 20 & 21 Vict. c. 18; A.S. 10 Feb. 1858, 21 June 1883; *Goudy on Bankruptcy*, 423. See *Shand's Prac.* i. 71; *Mackay's Prac.* i. 59, 364; *Beveridge on the Bill-Chamber*. See *Reclaiming Note. Report*.]

BILL OF ADVOCATION. [See *Advocation*.]

BILL OF EXCEPTIONS. See *Exceptions, Bill of*.

BILL OF EXCHANGE. Bills of exchange form a class of documents of most

extensive use in the mercantile dealings, not of this country only, but of all civilised nations. The instrument is thus described with equal correctness and perspicuity, in Thomson's Treatise on the Law of Bills: "A bill of exchange is a written request, addressed by a person who is called the drawer, to another person called the drawee, desiring him to pay a certain sum of money, either to the drawer himself, or to a third party called the payee, within a certain time after its date, or after it is presented for payment, or on demand. If the drawee signs the bill in token of his agreeing to this request, he is called the acceptor."

The following will serve as an example of the ordinary inland bill; but no prescribed form of words is necessary to constitute a bill.

£100 sterling. *Edinburgh.*

Three months after date, pay to me (or to some third party, E. F.), or order, at your shop in Glasgow, the sum of One hundred pounds sterling, for value received.

(Signed) A. B. (the drawer.)

To C. D., Grocer, Glasgow.

This document admits of being passed, to the effect of assigning the debt from the drawer to a third party, and from him to others by indorsation, either before or after acceptance; and in practice, most bills of exchange are so transferred to bankers, who, by means of their correspondents and otherwise, possess facilities for negotiating them; and generally the banker advances the amount at the time the document is indorsed to him, discounting the interest up to the day of payment.

A foreign bill of exchange differs little, either in its form or qualities, from an inland bill. To provide against the risk of loss or detention in the course of transmission, it is usual to draw foreign bills in sets, and to transmit each bill by a different conveyance; by which means the due negotiation of the document is with greater certainty insured. In accordance with this practice, foreign bills, whether drawn in this country or by merchants abroad, are generally in such terms as these:—

£100 sterling. *Rotterdam.*

At sixty days after sight of this our first of exchange (second and third of same tenor and date being unpaid) pay to our order (or to C. D. or order), the sum of One hundred pounds sterling, for value as advised.

(Signed) A. B. & Co.

*To Messrs P. L. & Son, }
Merchants, Edinburgh. }*

Such a bill of exchange, or an indorsed bill, is thus, in effect, an assignment to the payee or indorsee, of a debt due by the drawee to the drawer. This form of assignment took its origin entirely from the practice of merchants, to whose transactions it is peculiarly adapted. Its utility and extensive application to commercial transactions, which, among merchants residing at a distance from each other, would have been greatly encumbered by an adherence to more formal writings, early recommended the bill of exchange to the attention of the law in every country in Europe.

In Scotland, peculiar privileges have been conferred upon bills both by statute and by the common law. By 1681, c. 20, payment of foreign bills may be enforced summarily, without the necessity of an action for constituting the claim; and the same privilege was extended to inland bills, by 1696, c. 36. [See also 5 Geo. III. c. 49, §§ 4-6; 12 Geo. III. c. 72, §§ 42, 43; 1 & 2 Vict. c. 114, §§ 1, 9.] At common law also, bills, both in their constitution and mode of transmission, have acquired an exemption from the strict form of other legal documents. [They do not require to be holograph of any of the parties; nor need they be tested in the manner required in other probative writings. But they must completely prove their own authenticity, without the necessity of any extrinsic evidence. Hence the full legal subscription of the party, or, if he cannot write, the subscription of a notary with two witnesses, is necessary to give the document all the privileges of a bill. A bill signed by initials, or by mark, or signed by one person for another (unless by a notary for one unable to write) may be a good document of debt and ground of action, but cannot warrant summary diligence. See *Fraser*, 21 June 1853, 15 D. 756. Summary diligence cannot proceed upon a bill or note issued without a date; 19 & 20 Vict. c. 60, § 10; 45 & 46 Vict. c. 61, § 98; see *Cameron*, 20 Jan. 1869, 7 Macph. 382. By 8 & 9 Vict. c. 38, § 16, bills or notes for less than 20s. are not negotiable in Scotland, and to issue such is an offence.

[The Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61) codifies the law of the United Kingdom in regard to bills of exchange, cheques, and promissory notes. As no exposition of the law can be so satisfactory as the words of the act itself, its provisions, so far as relating to bills of exchange, are here set forth *in extenso*. It is to be noted that the rules of the common

law are not abrogated, save in so far as inconsistent with the express provisions of the statute, and that the rules of the law of Scotland in regard to summary diligence, bankruptcy, and prescription, are expressly saved.

PART I.

PRELIMINARY.

1. *Short title*.—This act may be cited as the Bills of Exchange Act, 1882.

2. *Interpretation of terms*.—In this act, unless the context otherwise requires,—“Acceptance” means an acceptance completed by delivery or notification. “Action” includes counter claim and set off. “Banker” includes a body of persons whether incorporated or not who carry on the business of banking. “Bankrupt” includes any person whose estate is vested in a trustee or assignee under the law for the time being in force relating to bankruptcy. “Bearer” means the person in possession of a bill or note which is payable to bearer. “Bill” means bill of exchange, and “note” means promissory note. “Delivery” means transfer of possession, actual or constructive, from one person to another. “Holder” means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof. “Indorsement” means an indorsement completed by delivery. “Issue” means the first delivery of a bill or note, complete in form to a person who takes it as a holder. “Person” includes a body of persons whether incorporated or not. “Value” means valuable consideration. “Written” includes printed, and “writing” includes print.

PART II.

BILLS OF EXCHANGE.

Form and Interpretation.

3. *Bill of exchange defined*.—(1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer. (2) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange. (3) An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with (a) an indication of a particular fund

BILL OF EXCHANGE

109

[out of which the drawee is to reimburse himself or a particular account to be debited with the amount, or (b) a statement of the transaction which gives rise to the bill, is unconditional. (4) A bill is not invalid by reason (a) that it is not dated; (b) that it does not specify the value given, or that any value has been given therefor; (c) that it does not specify the place where it is drawn or the place where it is payable.

4. *Inland and foreign bills.*—(1) An inland bill is a bill which is, or on the face of it purports to be, (a) both drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill. For the purposes of this act “British Islands” mean any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of Her Majesty. (2) Unless the contrary appear on the face of the bill, the holder may treat it as an inland bill.

5. *Effect where different parties to bill are the same person.*—(1) A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee. (2) Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note.

6. *Address to drawee.*—(1) The drawee must be named or otherwise indicated in a bill with reasonable certainty. (2) A bill may be addressed to two or more drawees whether they are partners or not, but an order addressed to two drawees in the alternative or to two or more drawees in succession is not a bill of exchange.

7. *Certainty required as to payee.*—(1) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty. (2) A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees. A bill may also be made payable to the holder of an office for the time being. (But such bill would not warrant summary diligence; *Fraser, supra.*) (3) Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer. (*Vagliano*, 22 Q.B.D. 103.)

[8. *What bills are negotiable.*—(1) When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable. (2) A negotiable bill may be payable either to order or to bearer. (3) A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank. (4) A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable. (5) Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.

9. *Sum payable.*—(1) The sum payable by a bill is a sum certain within the meaning of this act, although it is required to be paid—(a) with interest; (b) by stated instalments; (c) by stated instalments, with a provision that upon default in payment of any instalment the whole shall become due (see *Instalment*); (d) according to an indicated rate of exchange or according to a rate of exchange to be ascertained as directed by the bill. (2) Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable. (3) Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated from the issue thereof.

10. *Bill payable on demand.*—(1) A bill is payable on demand—(a) which is expressed to be payable on demand, or at sight, or on presentation; or (b) in which no time for payment is expressed. (2) Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand.

11. *Bill payable at a future time.*—A bill is payable at a determinable future time within the meaning of this act which is expressed to be payable—(1) At a fixed period after date or sight. (2) On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain. An instrument expressed to be payable on

[a contingency is not a bill, and the happening of the event does not cure the defect.

12. *Omission of date in bill payable after date.*—Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly. Provided that (1) where the holder in good faith and by mistake inserts a wrong date, and (2) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date.

13. *Ante-dating and post-dating.*—(1) Where a bill or an acceptance or any indorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be. (2) A bill is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday.

14. *Computation of time of payment.*—Where a bill is not payable on demand the day on which it falls due is determined as follows:—(1) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace (see *Days of Grace*). Provided that—(a) when the last day of grace falls on a Sunday, Christmas Day, Good Friday, or a day appointed by Royal proclamation as a public fast or thanksgiving day, the bill is, except in the case hereinafter provided for, due and payable on the preceding business day; (b) when the last day of grace is a bank holiday (other than Christmas Day or Good Friday) under the Bank Holidays Act, 1871, and acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a bank holiday, the bill is due and payable on the succeeding business day (see *Holidays*). (2) Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment. (3) Where a bill is payable at a fixed period after sight, the time begins to run from the date of the

[acceptance if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance, or for non-delivery. (4) The term “month” in a bill means calendar month.

15. *Case of need.*—The drawer of a bill and any indorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonoured by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he may think fit.

16. *Optional stipulations by drawer or indorser.*—The drawer of a bill, and any indorser, may insert therein an express stipulation—(1) negating or limiting his own liability to the holder; (2) waiving as regards himself some or all of the holder's duties.

17. *Definition and requisites of acceptance.*—(1) The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. (2) An acceptance is invalid unless it complies with the following conditions, viz.,—(a) it must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient. (b) It must not express that the drawee will perform his promise by any other means than the payment of money. (See *Walker's Trs.* 14 June 1880, 7 R. (H.L.) 85.)

18. *Time for acceptance.*—A bill may be accepted (1) before it has been signed by the drawer, or while otherwise incomplete; (2) when it is overdue, or after it has been dishonoured by a previous refusal to accept, or by non-payment; (3) when a bill payable after sight is dishonoured by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance.

19. *General and qualified acceptance.*—(1) An acceptance is either (a) general or (b) qualified. (2) A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn. (See *Walker's Trs. supra.*) In particular an acceptance is qualified which is—(a) conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated; (b) partial, that is to say, an acceptance to pay part only of the amount

[for which the bill is drawn; (c) local, that is to say, an acceptance to pay only at a particular specified place; an acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere; (d) qualified as to time; (e) the acceptance of some one or more of the drawees, but not of all.

20. *Inchoate instruments*.—(1) Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a *prima facie* authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit. (See *Cameron, supra*; *M'Meekin*, 9 March 1881, 8 R. 587; *London & S. W. Bank*, 1880, 5 Ex. D. 96; but see *Bazendale*, 1878, 3 Q.B.D. 525.) (2) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact. Provided that if any such instrument after completion is negotiated to a holder in due course it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.

21. *Delivery*.—(1) Every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto (see *Martini*, 18 Dec. 1878, 6 R. 342): provided that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable. (2) As between immediate parties, and as regards a remote party other than a holder in due course, the delivery—(a) in order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing, as the case may be; (b) may be shown to have been conditional or for a special purpose only, and not for the purpose of

[transferring the property in the bill. But if the bill be in the hands of a holder in due course a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed. (3) Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved.

Capacity and Authority of Parties.

22. *Capacity of parties*.—(1) Capacity to incur liability as a party to a bill is co-extensive with capacity to contract: provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations. (2) Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto.

23. *Signature essential to liability*.—No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such (see *Walker's Trs. supra*): provided that (1) where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name; (2) the signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm.

24. *Forged or unauthorised signature*.—Subject to the provisions of this act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority (see *Mackenzie*, 11 Feb. 1881, 8 R. (H.L.) 8): provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery.

25. *Procurator signatures*.—A signature by procurator operates as notice that the agent has but a limited authority to sign,

[and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority.]

26. *Person signing as agent or in representative capacity.*—(1) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability. (See *M'Meekin*, 25 Jan. 1889, 16 R. 363.) (2) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted.

The Consideration for a Bill.

27. *Value and holder for value.*—(1) Valuable consideration for a bill may be constituted by,—(a) any consideration sufficient to support a simple contract; (b) an antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time. (2) Where value has at any time been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time. (3) Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien. (By the common law of Scotland, which is not affected by this section, non-onerosity is not in itself a good defence to an action on a bill; *Law*, 21 Nov. 1875, 3 R. 1192. But it is a relevant defence if the bill was an accommodation bill, or if it is challenged on the ground of illegality, fraud, or failure of the consideration.)

28. *Accommodation bill or party.*—(1) An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. (2) An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not. (See *Accommodation Bill*.)

29. *Holder in due course.*—(1) A holder

[in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, viz.,—

(a) that he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact; (b) that he took the bill in good faith, and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it. (2) In particular the title of a person who negotiates a bill is defective within the meaning of this act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud. (3) A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

30. *Presumption of value and good faith.*—(1) Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value. (2) Every holder of a bill is *prima facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.

Negotiation of Bills.

31. *Negotiation of bill.*—(1) A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill. (2) A bill payable to bearer is negotiated by delivery. (3) A bill payable to order is negotiated by the indorsement of the holder completed by delivery. (4) Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor. (5) Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in

BILL OF EXCHANGE

113

[such terms as to negative personal liability.

32. *Requisites of a valid indorsement.*—An indorsement in order to operate as a negotiation must comply with the following conditions, *viz.*,—(1) It must be written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill, without additional words, is sufficient. An indorsement written on an allonge, or on a “copy” of a bill issued or negotiated in a country where “copies” are recognised, is deemed to be written on the bill itself. (2) It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill. (3) Where a bill is payable to the order of two or more payees or indorsees who are not partners all must indorse, unless the one indorsing has authority to indorse for the others. (4) Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is mis-spelt, he may indorse the bill as therein described, adding, if he think fit, his proper signature. (5) Where there are two or more indorsements on a bill, each indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved. (But see *Macdonald*, 1883, 8 App. Ca. 733.) (6) An indorsement may be made in blank or special. It may also contain terms making it restrictive.

33. *Conditional indorsement.*—Where a bill purports to be indorsed conditionally, the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not.

34. *Indorsement in blank and special indorsement.*—(1) An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer. (2) A special indorsement specifies the person to whom, or to whose order, the bill is to be payable. (3) The provisions of this act relating to a payee apply with the necessary modifications to an indorsee under a special indorsement. (4) When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person.

[35. *Restrictive indorsement.*—(1) An indorsement is restrictive which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed and not a transfer of the ownership thereof, as, for example, if a bill be indorsed “Pay D. only,” or “Pay D. for the account of X,” or “Pay D. or order for collection.” (2) A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorise him to do so. (3) Where a restrictive indorsement authorises further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement.

36. *Negotiation of overdue or dishonoured bill.*—(1) Where a bill is negotiable in its origin it continues to be negotiable until it has been (a) restrictively indorsed or (b) discharged by payment or otherwise. (2) Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had. (3) A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact. (4) Except where an indorsement bears date after the maturity of the bill, every negotiation is *prima facie* deemed to have been effected before the bill was overdue. (5) Where a bill which is not overdue has been dishonoured, any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this subsection shall affect the rights of a holder in due course.

37. *Negotiation of bill to party already liable thereon.*—Where a bill is negotiated back to the drawer, or to a prior indorser, or to the acceptor, such party may, subject to the provisions of this act, reissue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable.

38. *Rights of the holder.*—The rights

[and powers of the holder of a bill are as follows:—(1) He may sue on the bill in his own name. (2) Where he is a holder in due course he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill. (3) Where his title is defective (a) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and (b) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill.

General duties of the Holder.

39. *When presentment for acceptance is necessary.*—(1) Where a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument. (2) Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment. (3) In no other case is presentment for acceptance necessary in order to render liable any party to the bill. (4) Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers.

40. *Time for presenting bill payable after sight.*—(1) Subject to the provisions of this act, when a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time. (2) If he do not do so, the drawer and all indorsers prior to that holder are discharged. (3) In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case.

41. *Rules as to presentment for acceptance, and excuses for non-presentment.*—(1) A bill is duly presented for acceptance which is presented in accordance with the following rules:—(a) the presentment must be made by or on behalf of the holder to the drawee or to some person

[authorised to accept or refuse acceptance on his behalf at a reasonable hour on a business day and before the bill is overdue; (b) where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, then presentment may be made to him only; (c) where the drawee is dead presentment may be made to his personal representative; (d) where the drawee is bankrupt presentment may be made to him or to his trustee; (e) where authorised by agreement or usage, a presentment through the post-office is sufficient. (2) Presentment in accordance with these rules is excused, and a bill may be treated as dishonoured by non-acceptance—(a) where the drawee is dead or bankrupt, or is a fictitious person, or a person not having capacity to contract by bill; (b) where, after the exercise of reasonable diligence, such presentment cannot be effected; (c) where, although the presentment has been irregular, acceptance has been refused on some other ground. (3) The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse presentment.

42. *Non-acceptance.*—When a bill is duly presented for acceptance and is not accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance. (See *Bank of Van Diemen's Land*, L.R. 3 P.C. 526.) If he do not, the holder shall lose his right of recourse against the drawer and indorsers.

43. *Dishonour by non-acceptance and its consequences.*—(1) A bill is dishonoured by non-acceptance—(a) when it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or (b) when presentment for acceptance is excused and the bill is not accepted. (2) Subject to the provisions of this act when a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary.

44. *Duties as to qualified acceptances.*—(1) The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonoured by non-acceptance. (2) Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorised the holder to take a qualified acceptance, or

BILL OF EXCHANGE

115

[does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill. The provisions of this sub-section do not apply to a partial acceptance, whereof due notice has been given. Where a foreign bill has been accepted as to part it must be protested as to the balance. (3) When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder, he shall be deemed to have assented thereto.

45. Rules as to presentment for payment.—Subject to the provisions of this act, a bill must be duly presented for payment. If it be not so presented the drawer and indorsers shall be discharged. A bill is duly presented for payment which is presented in accordance with the following rules:—(1) Where the bill is not payable on demand, presentment must be made on the day it falls due. (2) Where the bill is payable on demand, then, subject to the provisions of this act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable. In determining what is a reasonable time regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case. (3) Presentment must be made by the holder or by some person authorised to receive payment on his behalf at a reasonable hour on a business day, at the proper place as hereinafter defined, either to the person designated by the bill as payer, or to some person authorised to pay or refuse payment on his behalf if with the exercise of reasonable diligence such person can there be found. (4) A bill is presented at the proper place:—(a) Where a place of payment is specified in the bill and the bill is there presented. (b) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented. (c) Where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business if known, and if not, at his ordinary residence if known. (d) In any other case if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence. (5) Where a bill is presented at the proper place, and after the exercise

[of reasonable diligence no person authorised to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required. (6) Where a bill is drawn upon, or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all. (7) Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found. (8) Where authorised by agreement or usage a presentment through the post-office is sufficient.

46. Excuses for delay or non-presentment for payment.—(1) Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence. (2) Presentment for payment is dispensed with,—(a) Where, after the exercise of reasonable diligence presentment, as required by this act, cannot be effected. The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment. (b) Where the drawee is a fictitious person. (c) As regards the drawer where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented. (d) As regards an indorser, where the bill was acceptor or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented. (e) By waiver of presentment, express or implied.

47. Dishonour by non-payment.—(1) A bill is dishonoured by non-payment (a) when it is duly presented for payment and payment is refused or cannot be obtained, or (b) when presentment is excused and the bill is overdue and unpaid. (2) Subject to the provisions of this act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder.

48. Notice of dishonour and effect of non-notice.—Subject to the provisions of this act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the

[drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged: provided that—(1) where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission, shall not be prejudiced by the omission. (2) Where a bill is dishonoured by non-acceptance and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted.

49. *Rules as to notice of dishonour.*—Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules:—(1) The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill. (2) Notice of dishonour may be given by an agent either in his own name, or in the name of any party entitled to give notice whether that party be his principal or not. (3) Where the notice is given by or on behalf of the holder, it ensures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given. (4) Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided, it ensures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given. (5) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonoured by non-acceptance or non-payment. (6) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour. (7) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby. (8) Where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf. (9) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found. (10) Where the drawer or indorser is bankrupt, notice

[may be given either to the party himself or to the trustee. (11) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others. (12) The notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter. In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless—(a) where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill; (b) where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter. (13) Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder. (14) Where a party to a bill receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour. (15) Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any mis-carriage by the post-office.

50. *Excuses for non-notice and delay.*—(1) Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the notice must be given with reasonable diligence. (2) Notice of dishonour is dispensed with—(a) when, after the exercise of reasonable diligence, notice as required by this act cannot be given to or does not reach the drawer or indorser sought to be charged: (b) by waiver express or implied; notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice: (c) as regards the drawer in the

BILL OF EXCHANGE

117

[following cases, namely—(1) where drawer and drawee are the same person, (2) where the drawee is a fictitious person or a person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill, (5) where the drawer has countermanded payment: (d) as regards the indorser in the following cases, namely—(1) where the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation.

51. *Noting or protest of bill.*—(1) Where an inland bill has been dishonoured it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be; but it shall not be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser. [But see *Noting. Protesting of Bills.*] (2) Where a foreign bill, appearing on the face of it to be such, has been dishonoured by non-acceptance it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment it must be duly protested for non-payment. If it be not so protested the drawer and indorsers are discharged. Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonour is unnecessary. (3) A bill which has been protested for non-acceptance may be subsequently protested for non-payment. (4) Subject to the provisions of this act, when a bill is noted or protested, it must be noted on the day of its dishonour. When a bill has been duly noted the protest may be subsequently extended as of the date of the noting. (See *M'Pherson*, 19 May 1885, 12 R. 942.) (5) Where the acceptor of a bill becomes bankrupt or insolvent, or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers. (6) A bill must be protested at the place where it is dishonoured: provided that—(a) when a bill is presented through the post-office, and returned by post dishonoured, it may be protested at the place to which it is returned, and on the day of its return if

[received during business hours, and if not received during business hours, then not later than the next business day; (b) when a bill drawn payable at the place of business or residence of some person other than the drawee has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary. (7) A protest must contain a copy of the bill, and must be signed by the notary making it, and must specify—(a) the person at whose request the bill is protested; (b) the place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found. (8) Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof. (9) Protest is dispensed with by any circumstance which would dispense with notice of dishonour. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence.

52. *Duties of holder as regards drawee or acceptor.*—(1) When a bill is accepted, generally presentment for payment is not necessary in order to render the acceptor liable. (2) When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures. (3) In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonour should be given to him. (4) Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it.

Liabilities of Parties.

53. *Funds in hands of drawee.*—(1) A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this act is not liable on the

[instrument. This sub-section shall not extend to Scotland. (2) In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee. (See *Watt's Trs.* 21 Dec. 1853, 16 D. 279; *Brit. Linen Co.* 6 June 1883, 10 R. 923; *Brit. Linen Co.* 13 March 1885, 12 R. 825.)

54. *Liability of acceptor.*—The acceptor of a bill, by accepting it—(1) Engages that he will pay it according to the tenor of his acceptance: (2) Is precluded from denying to a holder in due course: (a) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill; (b) in the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement; (c) in the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement.

55. *Liability of drawer or indorser.*—(1) The drawer of a bill by drawing it—(a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken; (b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse. (2) The indorser of a bill by indorsing it—(a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken; (b) is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements; (c) is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto.

56. *Stranger signing bill liable as indorser.*—Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course. (See *Aval.*)

57. *Measure of damages against parties*

[to dishonoured bill.—Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows: (1) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser—(a) the amount of the bill; (b) interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case; (c) the expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest. (2) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment. (See *Exchange and Re-exchange*; also *Robarts*, 18 Q.B.D. 286.) (3) Where by this act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.

58. *Transferor by delivery and transferee.*—(1) Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a "transferor by delivery." (2) A transferor by delivery is not liable on the instrument. (3) A transferor by delivery who negotiates a bill thereby warrants to his immediate transferee being a holder for value that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless.

Discharge of Bill.

59. *Payment in due course.*—(1) A bill is discharged by payment in due course by or on behalf of the drawee or acceptor. "Payment in due course" means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective. (2) Subject to the provisions hereinafter contained, when a bill is paid by the drawer or an indorser it is not discharged; but (a) where a bill payable to,

BILL OF EXCHANGE

119

[or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not reissue the bill; (b) where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill. (3) Where an accommodation bill is paid in due course by the party accommodated the bill is discharged.

60. *Banker paying demand draft whereon indorsement is forged.*—When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority. (See *Clydesdale Bank*, 11 March 1876, 3 R. 586; *Ogden*, L.R. 9 C.P. 513.)

61. *Acceptor the holder at maturity.*—When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged.

62. *Express waiver.*—(1) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged. (See *Muir*, 4 May 1875, 2 R. (H.L.) 148.) The renunciation must be in writing, unless the bill is delivered up to the acceptor. (2) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation.

63. *Cancellation.*—(1) Where a bill is intentionally cancelled by the holder or his agent, and cancellation is apparent thereon, the bill is discharged. (2) In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorser who would have had a right of recourse against the party whose signature is cancelled is also discharged. (3) A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but

[where a bill or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority. (See *Dominion Bank*, 10 Feb. 1888, 15 R. 408.)

64. *Alteration of bill.*—(1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers. Provided that, where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor. (See *Leeds Bank*, 1883, 11 Q.B.D. 84.) (2) In particular, the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.

Acceptance and Payment for Honour.

65. *Acceptance for honour suprà protest.*—(1) Where a bill of exchange has been protested for dishonour by non-acceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *suprà* protest, for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn. (2) A bill may be accepted for honour for part only of the sum for which it is drawn. (3) An acceptance for honour *suprà* protest in order to be valid must—(a) be written on the bill, and indicate that it is an acceptance for honour: (b) be signed by the acceptor for honour. (4) Where an acceptance for honour does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer. (5) Where a bill payable after sight is accepted for honour, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour.

66. *Liability of acceptor for honour.*—(1) The acceptor for honour of a bill by accepting it engages that he will, on due presentment, pay the bill according to the

[tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment, and protested for non-payment, and that he receives notice of these facts. (2) The acceptor for honour is liable to the holder and to all parties to the bill subsequent to the party for whose honour he has accepted.

67. *Presentment to acceptor for honour.*—

(1) Where a dishonoured bill has been accepted for honour *suprà* protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honour, or referee in case of need. (2) Where the address of the acceptor for honour is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity; and where the address of the acceptor for honour is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him. (3) Delay in presentment or non-presentment is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment. (4) When a bill of exchange is dishonoured by the acceptor for honour it must be protested for non-payment by him.

68. *Payment for honour *suprà* protest.*—

(1) Where a bill has been protested for non-payment any person may intervene and pay it *suprà* protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn. (2) Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill shall have the preference. (3) Payment for honour *suprà* protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honour which may be appended to the protest or form an extension of it. (4) The notarial act of honour must be founded on a declaration made by the payer for honour, or his agent in that behalf, declaring his intention to pay the bill for honour, and for whose honour he pays. (5) Where a bill has been paid for honour all parties subsequent to the party for whose honour it is paid are discharged, but the payer for honour is subrogated for, and succeeds to both the rights and duties of, the holder as regards the party for whose honour he pays,

[and all parties liable to that party. (6) The payer for honour on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonour is entitled to receive both the bill itself and the protest. If the holder do not on demand deliver them up he shall be liable to the payer for honour in damages. (7) Where the holder of a bill refuses to receive payment *suprà* protest he shall lose his right of recourse against any party who would have been discharged by such payment.

Lost Instruments.

69. *Holder's right to duplicate of lost bill.*—Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again. If the drawer on request as aforesaid refuses to give such duplicate bill, he may be compelled to do so.

70. *Action on lost bill.*—In any action or proceeding upon a bill, the court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question.

Bill in a Set.

71. *Rules as to sets.*—(1) Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill. (2) Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if the said parts were separate bills. (3) Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed the true owner of the bill; but nothing in this sub-section shall affect the rights of a person who in due course accepts or pays the part first presented to him. (4) The acceptance may be written on any part, and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable

BILL OF EXCHANGE

121

[on every such part as if it were a separate bill. (5) When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof. (6) Subject to the preceding rules, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged.

Conflict of Laws.

72. *Rules where laws conflict.*—Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows: (1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *suprà* protest, is determined by the law of the place where such contract was made. Provided that—(a) where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue; (b) where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom. (2) Subject to the provisions of this act, the interpretation of the drawing, indorsement, acceptance, or acceptance *suprà* protest of a bill, is determined by the law of the place where such contract is made. Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom. (3) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured. (4) Where a bill is drawn out of but payable in the United Kingdom, and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable. (5) Where a bill is drawn in

[one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

Part III. (§§ 73 to 82) and Part IV. (§§ 83 to 89) deal respectively with cheques and promissory notes, and their provisions are set forth in the articles on these subjects.

PART V.

Supplementary.

90. *Good faith.*—A thing is deemed to be done in good faith, within the meaning of this act, where it is in fact done honestly, whether it is done negligently or not.

91. *Signature.*—(1) Where, by this act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority. (2) In the case of a corporation, where, by this act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing be sealed with the corporate seal. But nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal.

92. *Computation of time.*—Where, by this act, the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded. "Non-business days" for the purposes of this act mean—(a) Sunday, Good Friday, Christmas Day; (b) a bank holiday under the Bank Holidays Act, 1871, or acts amending it; (c) a day appointed by Royal proclamation as a public fast or thanksgiving day. Any other day is a business day.

93. *When noting equivalent to protest.*—For the purposes of this act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting.

94. *Protest when notary not accessible.*—Where a dishonoured bill or note is authorised or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them,

[attesting the dishonour of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill. The form given in schedule 1 to this act may be used with necessary modifications, and if used shall be sufficient.

95. *Dividend warrants may be crossed.*—The provisions of this act as to crossed cheques shall apply to a warrant for payment of dividend.

96. *Repeal.*—The enactments mentioned in the second schedule to this act are hereby repealed as from the commencement of this act to the extent in that schedule mentioned. Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

97. *Savings.*—(1) The rules in bankruptcy relating to bills of exchange, promissory notes, and cheques, shall continue to apply thereto notwithstanding anything in this act contained. (2) The rules of common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this act, shall continue to apply to bills of exchange, promissory notes, and cheques. (See *Robarts*, 1886, 18 Q.B.D. 286.) (3) Nothing in this act or in any repeal effected thereby shall affect—(a) the provisions of the Stamp Act, 1870, or acts amending it, or any law or enactment for the time being in force relating to the revenue; (b) the provisions of the Companies Act, 1862, or acts amending it, or any act relating to joint-stock banks or companies; (c) the provisions of any act relating to or confirming the privileges of the Bank of England or the Bank of Ireland respectively; (d) the validity of any usage relating to dividend warrants, or the indorsements thereof.

98. *Saving of summary diligence in Scotland.*—Nothing in this act or in any repeal effected thereby shall extend or restrict, or in any way alter or affect the law and practice in Scotland in regard to summary diligence. (See *Diligence*.)

99. *Construction with other acts, &c.*—Where any act or document refers to any enactment repealed by this act, the act or document shall be construed, and shall operate, as if it referred to the corresponding provisions of this act.

100. *Parole evidence allowed in certain judicial proceedings in Scotland.*—In any

[judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may be proved by parole evidence: provided that this enactment shall not in any way affect the existing law and practice whereby the party who is, according to the tenor of any bill of exchange, bank cheque, or promissory note, debtor to the holder in the amount thereof, may be required, as a condition of obtaining a sist of diligence, or suspension of a charge, or threatened charge, to make such consignment, or to find such caution as the court or judge before whom the cause is depending may require. (See *Simpson*, 9 June 1888, 15 R. 716.) This section shall not apply to any case where the bill of exchange, bank cheque, or promissory note has undergone the sexennial prescription.

FIRST SCHEDULE.

Form of protest which may be used when the services of a notary cannot be obtained (§ 94).

Know all men that I, *A. B.* (householder), of _____ in the county of _____, in the United Kingdom, at the request of *C. D.*, there being no notary public available, did on the _____ day of _____ 188____ at _____ demand payment [or acceptance] of the bill of exchange here-under written, from *E. F.*, to which demand he made answer [state answer, if any] wherefore I now, in the presence of *G. H.* and *J. K.* do protest the said bill of exchange.

(Signed) *A. B.*
G. H. } Witnesses.
J. K. }

N.B.—The Bill itself should be annexed, or a copy of the bill and all that is written thereon should be underwritten.

SECOND SCHEDULE.

Enactments repealed.

9 Will. III. c. 17; 3 & 4 Anne, c. 8; 17 Geo. III. c. 30; 39 & 40 Geo. III. c. 42; 48 Geo. III. c. 88; 1 & 2 Geo. IV. c. 78; 7 & 8 Geo. IV. c. 15; 9 Geo. IV. c. 24, §§ 2, 4, 7–11; 2 & 3 Will. IV. c. 98; 6 & 7 Will. IV. c. 58; 8 & 9 Vict. c. 37, § 24; 19 & 20 Vict. c. 97, §§ 6–7; 23 & 24 Vict. c. 111, § 19; 34 & 35 Vict. c. 74; 39 & 40 Vict. c. 81; 41 & 42 Vict. c. 13.

Enactment repealed as to Scotland.

19 & 20 Vict. c. 60, §§ 10–16.

[*Stamp Duty.* Every bill and promissory note must be duly stamped. The present duties are regulated by 33 & 34 Vict. c. 97, §§ 48–55, and schedule. An unstamped bill or note is inadmissible in evidence (except in criminal proceedings), is not available in law or equity, and involves in a penalty of £10 every person who issues, indorses, transfers, negotiates, presents for payment, or pays such bill or note; §§ 17, 54. The duty of 1d. on a bill for the payment of money on demand may be denoted by an adhesive stamp; § 50. In other cases, the paper on which an inland bill is written must have the stamp previously impressed upon it. It cannot be after-stamped, except in the case of its having been impressed with a stamp of sufficient amount, but of improper denomination; § 53. With regard to bills or notes drawn or made out of the United Kingdom, the *ad valorem* duties chargeable thereon are to be denoted by adhesive stamps; and every person, into whose hands any such bill or note comes in the United Kingdom, is required, before presenting for payment, or indorsing, or in any way negotiating, to affix thereto and cancel a proper adhesive stamp of sufficient amount; § 51; *Crofton*, 33 Ch.D. 612. Bills and notes purporting to be drawn or made out of the United Kingdom, are, for the purposes of the act, deemed to have been so drawn or made; § 52. When one of a set of bills is duly stamped, the others of the set, unless separately negotiated, are exempt from duty; § 55.]

As to [the sexennial limitation] of bills, see *Prescription*; as to discounting of bills, see *Banker*; [as to the ranking in bankruptcy of parties to bills, see *Goudy on Bankruptcy*, 552;] and, in general, on the subject of this article, see *Thomson on Bills*; *Bayley on Bills*; *Chitty on Bills*; [*Byles on Bills*; *Chalmers on Bills*; *Thorburn on Bills of Exchange Act*;] *Bell's Com.* i. 411; *Bell's Princ.* § 305; *Ersk.* B. iii. tit. 2, § 25; [*Menzies' Conv.* 325; *M. Bell's Conv.* i. 454; *Ross's L. C.* vol. i.; *Robertson's Banker's Law*, 22; *Addison on Contracts*, 751; *Jurid. Styles*, ii. 1. See *Donation*.]

BILL OF HEALTH; is a certificate of the health of the crew of a ship, required where the vessel has come from a suspected port. Under the obligation in the charter-party to furnish the ship “with everything needful and necessary for the voyage,” the master will be bound to procure a bill of health, where that is necessary; and if,

from a neglect to procure it when it might have been got, the vessel is prevented from delivering her cargo, the master or owners will be liable to make good to the freighter any loss thence arising. *Bell's Com.* i. 601; [*Maude & Pollock on Shipping*, 143.]

BILL OF LADING; is an acknowledgment granted by the master of a ship to the shipper of goods, specifying the particular description of goods, and the quantity shipped. [A contract for conveyance in a general ship, *i.e.*, when the master and owners of a vessel offer her generally for carriage of goods to the port of her destination, is usually constituted by bill of lading.] The bill contains an obligation on the master to deliver the goods shipped at the port to which the vessel is bound, [in the like good condition in which he received them. Sometimes, however, the bill expresses “quality or quantity unknown,” in which case the master is responsible only for the external and apparent quality or quantity. Under the ordinary form, the ship-owners are expressly relieved from liability for all perils of the sea and enemy, and all inevitable accidents; and they may stipulate for exemption from liability for any other kind of damage; *Moes, Molière & Tromp*, 5 July 1867, 5 Macph. 988; *Steel & Craig*, 20 July 1877, 4 R. (H.L.) 103; *Craig & Rose*, 15 July 1879, 6 R. 1269. As to the meaning of the term “clean bill of lading,” see *Maude & Pollock*, i. 341; *Arrospe*, 11 March 1881, 8 R. 602.] It is usual to sign three copies of the bill of lading, one for the buyer or consignee, another to go with the cargo, and a third for the seller or consignor, each bill containing a clause that, one being fulfilled, the rest shall be void. [Bills of lading are liable to a stamp-duty of sixpence. They cannot be stamped after execution, and a penalty of £50 is incurred by making a bill of lading not duly stamped; 33 & 34 Vict. c. 97, § 56. The obligation to deliver the goods is either general, to the bearer, or in blank; or filled up to a particular person, as consignee, or to his order, or to his assigns; or to the consignor and his assigns.] See the form of bill of lading, in *Jurid. Styles*, ii. 806.

The bill of lading is transferable by indorsation without intimation to the master; and the property of the goods specified in the bill is transferred to an onerous and *bona fide* indorsee unaffected by any claim of retention of the goods on the part of the original seller, or any right in him to stop them *in transitu*. [See

[*Lickbarrow*, 1 H. Bl. 357; *Smith's L. C. i.* 737; *Dracachi*, L.R. 3 C.P. 190. But though the assignee has thus, by the law merchant, a fuller right of property in the goods than the assignor himself had, he has not such absolute right as is conveyed by indorsement of a bill of exchange; for his right is limited by the title of the assignor. "Although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him, or transferred without his authority, a subsequent *bona fide* transferee for value cannot make title under it as against the shipper of the goods. The bill of lading only represents the goods, and the transfer of the symbol does not operate more than a transfer of what is represented;" *Gurney*, 3 E. & B. 622. And formerly, though indorsement of a bill of lading transferred the property in the goods, it did not transfer the contract, nor the right of action thereon. This defect was remedied by 18 & 19 Vict. c. 111, which provides that every consignee of goods named in a bill of lading, and every indorsee, to whom the property of the goods therein mentioned may pass by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself (§ 1). This, however, is not to affect any right of stoppage *in transitu*, or any right to claim freight against the original shipper or owner, or any liability of the consignee or indorsee as such, or in consequence of his receipt of the goods (§ 2). The property transferred by indorsement is only such property as it was the intention of parties to transfer; hence, indorsement of a bill of lading by way of pledge for a loan does not pass the property in the goods to the indorsee, so as to transfer to him all liabilities in respect thereof, within the meaning of § 1; *Sewell*, 1884, 10 App. Ca. 74; see also *Tod & Son*, 21 June 1883, 10 R. 1009. By § 3 of the act cited, a bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, is declared to be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped, unless the holder, when he received the

[bill, had actual notice that the goods were not on board, or unless there is fraud on the part of the shipper or holder. As against the owner of a vessel, a bill of lading signed by the master is *prima facie* evidence that the quantity therein specified was put on board, but it is competent for the owner to prove that the quantity shipped was less than that specified; and he is not bound for a greater quantity of goods than was actually shipped; *M'Lean & Hope v. Fleming*, 27 March 1871, 9 Macph. (H.L.) 38; *M'Lean & Hope v. Munck*, 14 June 1867, 5 Macph. 893; *Grieve & Co.* 23 Jan. 1880, 7 R. 521. A bill of lading remains in force as a symbol of property, until delivery of the goods has been completed; but no longer, unless the delivery was wrongful. See *Barber*, 1870, L.R. 4 H.L. 317; *Pirie & Sons*, 11 Feb. 1871, 9 Macph. 523. When different parts of a bill of lading are acquired by different persons *bona fide* and for value, the person who first gets any one of the parts acquires the property; *Barber*, *supra*. But the shipowner, or master, or warehouseman having custody of the goods, is justified in delivering to the consignee on production of one part, if he have no knowledge of a prior indorsement; *Glyn, Mills & Co.* 1882, 7 App. Ca. 591. See also *Sanders*, 1883, 11 Q.B.D. 327. See *Bell's Com. i.* 212, 590; *Bell's Princ.* § 414; *Brown on Sale*, 483; *Smith's Merc. Law*, 297; *Anson on Contract*, 239; *Maclachlan on Shipping*, 389; *Maude & Pollock*, i. 338; *Abbott on Shipping*, 254; *Benjamin on Sales*. See *Stoppage in Transitu*.]

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

[BILL OF SALE; the universal instrument of transfer of a ship. Registered ships, or shares thereof, can only be transferred by bill of sale, which must be attested by one witness; 17 & 18 Vict. c. 104, § 55. See *Shipping Law*. See also *Bell's Princ.* § 1330; *Abbott on Shipping*, 2, 47; *Maude & Pollock*, 42; *Maclachlan*, 32; *Jurid. Styles*, ii. 761.

[In England, various deeds assigning personal property are called bills of sale. The most usual kind is a bill of sale of chattels (*e.g.*, furniture, horses, stock-in-trade, &c.) by way of mortgage to secure a debt, being an assignation with a covenant for reconveyance on payment of the debt, similar in most respects to a mortgage of land. The Bills of Sale Acts were passed to prevent

[frauds committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property which really belongs to others. *Sweet's Law Dict.* See 41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43.]

BILL OF SUSPENSION. See *Suspension*.

BISHOPS; the higher dignitaries of the Church of Rome or of England. When the church government of Scotland was Episcopal, there were two archbishops, the Archbishop of St Andrews and the Archbishop of Glasgow; the former had the title of *Primate of all Scotland*, the latter that of *Primate of Scotland*. In Scotland, under 1540, c. 125, the nomination of bishops was in the sovereign, who sent to the chapter or clergy of the cathedral a *congé d'élire*, at the same time recommending a particular churchman, whom they were bound to choose. After being chosen by the chapter, he was called bishop-elect; and the king's patent under the Great Seal, confirming the election, established in him a right to the spirituality of the benefice. The king then granted a mandate for the consecration of the bishop, at which it was requisite that three bishops should officiate. The last step was that of doing homage, and swearing obedience to the king. These ceremonies being gone through, the bishop acquired full right to the fruits of his benefice from the day of his election. [The office of bishop is not now legally recognised in Scotland; *Dunbar*, 3 March 1849, 11 D. 945.] See *Stair*, B. ii. tit. 8, § 35; *Ersk.* B. i. tit. 5, § 3; *Bank.* i. 53, 560; *Brown's Synop.* 794, 2570.

BISHOP'S TEINDS. See *Teinds*.]

BLACK ACTS; are the acts of the Parliament of the five Jameses, with those of Mary's reign, and of James VI. down to 1586 or 1587. They were called the Black Acts, from the circumstance of their being printed in the Saxon character. *Ersk.* B. i. tit. 1, § 37.

BLACK LIST; a list of defaulters; specifically applied to printed lists of insolvents and bankrupts, published officially. *Imperial Dict.* It is not libellous for a body of merchants to publish to each other the names appearing upon the Register of Protests, of persons who have dishonoured their bills; *Fleming*, 17 Feb. 1848, 6 Bell's App. 175. But see *Andrews*, 5 March 1887, 14 R. 568. See *Defamation*.]

BLACK MAILL, was a yearly payment for security and protection made to those

bands of armed men who, about the middle of the 16th century, laid many parts of the country under contribution. The legislature, in order to put a stop to this unlawful violence, enacted that whoever, under pretence of securing his lands against "rievers," should pay to them a yearly contribution in money, should suffer death; 1567, c. 21; 1578, c. 182. It does not appear, however, that the punishment of death was ever inflicted, either on the payer or the taker of this exaction. *Hume*, i. 476. See a singular example of a contract of black maill of so late a date as 1741; *Hume*, ii., App. No. 9, 531. See *Ersk.* B. iv. tit. 4, § 64; *Bank.* i. 70; *Kames' Stat. Law Abridg. h. t.*

BLACK ROD. The gentleman usher of the black rod is chief gentleman usher to the Sovereign, and has his title from the rod which he carries as the badge of his office. During the sitting of Parliament he attends on the House of Lords. To his custody all Peers called in question for any crime are first committed. See *Tomlins, h. t.*; [*May's Parl. Prac.* 256.]

BLANCH-HOLDING; is one of the tenures of the law of Scotland. The duty payable to the superior in blanch-holding is in general trifling, as a penny Scots; or merely elusory, as a peppercorn, *si petatur tantum*. It may happen, however, that the duty is of greater value; and then the distinction received in practice is founded on the nature of the duty. Where it is of yearly growth, if it be not asked within the year, the right to exact it is understood to be lost; whereas, if it be not of yearly growth, it founds a claim at any time within the years of prescription. In Exchequer, the blanch-duty is always exacted; and where it is not converted into money in the investiture, it is valued and ascertained. The casualties common to this and to feu-holding are non-entry, relief, disclaimer, purpresture, and liferent escheat. See these titles, and also *Feu-holding*. This manner of holding was anciently in use; and many estates were held both of the Crown and of the subjects superior in blanch. On the abolition of ward-holding, by 20 Geo. II. c. 50, all the lands which held formerly of the Crown were converted into blanch-holding; and by 25 Geo. II. c. 20, and the royal warrant under the Privy Seal, January 1753, all lands held ward of the Prince were declared in future to be held blanch; whereby the extent of land held by this tenure was much increased. But the tenure is now seldom adopted in the constitution of what is termed an

original right. *Stair*, B. ii. tit. 3, § 33; *Ersk.* B. ii. tit. 4, § 7; *Bank.* ii. 556; *Bell's Princ.* §§ 682, 692; *Jurid. Styles*, i. 5, 34. [See *Charter. Holdings.*]

[BLANK BILLS. See *Skeleton Bills.*]

BLANK BONDS; were bonds, formerly known in practice, blank in the name of the creditor. They passed, like bills, by mere delivery, the bearer being at any time at liberty to fill up his name and pursue for payment. The ostensible reason, and perhaps the original one, for introducing these bonds into practice, was to save the expense of conveyances, and to facilitate the transmission of the right. Experience, however, having proved that they were capable of being easily converted to fraudulent purposes, the act 1696, c. 25, declared all deeds in which the creditor's name is left blank to be null. But the insertion of the creditor's name, posterior to the delivery of the deed by the granter, must be proved in order to found the objection under the statute; *Sinclair*, 1746, M. 11,559; *Ruddiman*, 1746, M. 11,562. The statute excepts the notes of trading companies, and indorsations of bills of exchange. See *Ersk.* B. iii. tit. 2, § 6; *Stair*, B. i. tit. 4, § 17; B. iii. tit. 1, § 5; *Bank.* ii. 194; *Bell's Com.* ii. 15; *Bell's Princ.* § 1459; *Brown's Synop. voce Blank Writ*; *Thomson on Bills*, 48; [*Menzies' Conv.* 133; *M. Bell's Conv.* i. 239.]

BLASPHEMY; is the denying or vilifying of the Deity, by speech or writing. This is termed, *divine lese majesty*, or treason against the Deity. A distinction is made between ascribing anything inconsistent with the divine attributes of God, and oaths and imprecations tending to throw contempt on religion. The former crime was, under the old law, punishable with death; the latter by an arbitrary punishment, proportioned to the circumstances of the offence. The acts 1661, c. 21, and 1695, c. 11, which provided capital punishment for offences of this description, were repealed by 53 Geo. III. c. 160. The punishment is now arbitrary at common law; and by 6 Geo. IV. c. 47, the publication of blasphemy, or of statements denying the existence or attributes of God, or the authority of the Holy Scriptures, is declared a cognisable offence, and punishable with fine and imprisonment. That statute also declares the criminal to be punishable on a second offence with banishment, a provision which is, however, repealed by 7 Will. IV. c. 5. [In *Ramsay and Foote*, 24 April 1883, *Law Times Rep.*

[xlvi. 733, Lord Chief Justice Coleridge directed a jury that "if the decencies of controversy are observed, even the fundamentals of religion may be attacked without a person being guilty of blasphemous libel." This doctrine is based on *Folkard's Starkie on Libel*, 599. See it questioned by Lord Justice Stephen in *Fortnightly Review*, March 1884. See *Hume*, i. 568; *Ersk.* B. iv. tit. 4, § 16; *Alison's Princ.* 643; *Macdonald*, 203; *Stephen's Hist. of Crim. Law*, ii. 469; *Stephen's Digest*, 108.]

BLAZON of a messenger-at-arms; the badge of his office displayed by a messenger in the act of apprehending a debtor. *Stair*, B. iv. tit. 47, § 14; *Bank.* ii. 503; *Bell's Com.* ii. 436; *Hume*, i. 389. See *Apprehending of a Debtor*.

BLEACHING. The bleaching of linen cloth has been the subject of various statutory regulations, [all repealed by 33 & 34 Vict. c. 62, which makes the Factory Acts applicable to works for bleaching and dyeing.] The bleacher has a lien upon the cloth in his hands for the price of bleaching, not only that particular parcel, but also former parcels, when there has been a regular course of dealing between him and his debtor. [See *Anderson's Trs.* 17 March 1871, 9 Macph. 718. See *Ersk.* B. iii. tit. 4, § 21;] *Bell's Com.* ii. 104; *Bell's Princ.* § 1435; *Brown's Synop.* 1253; *Hume*, i. 111. [See also *Servitude.*]

[BLENCH. See *Blanch-Holding.*]

BLIND PERSONS. [As to the execution of deeds by blind persons, see *Deeds, Execution of.*]

BLOCKADE. Neither neutrals nor any other vessels can trade with a port under blockade, without danger of capture. [But, to affect a party penally with the consequences of a breach of blockade, three things must be proved: (1) the existence of an actual blockade; (2) the knowledge of the party; and (3) some act or attempted act of violation, whether the violation be by going in, or by coming out with a cargo laden after the commencement of blockade; *Manning's Law of Nations*, 402. See also *Abdy's Kent's Internat. Law*, 340;] *Bell's Com.* i. 325; *Bell's Princ.* § 43. [See *Declaration of Paris.*]

BLOOD-WITS; riots in which blood is spilt. The sheriff of the county and justices of the peace have a cumulative jurisdiction in judging of these offences. *Ersk.* B. i. tit. 4, § 4; *Stair*, B. ii. tit. 3, § 62; *Bank.* i. 567.

BLOODY-HAND; in English law, one of the four circumstances taken as pre-

sumptive proof that the offender has killed deer in the King's forest. *Tomlins' Dict. h. t.*

BLUDUEIT; an unlaw or fine for wrong or injury, such as blood. A party infet in the ancient law with bludueit, was entitled to hold courts and recover fines for effusion of blood. *Skene, h. t.*

[**BOARD**. See *Aliment. Wages. Master and Servant.*]

[**BOARD OF SUPERVISION**. See *Poor.*]

[**BOARD OF TRADE**; a committee of the Privy Council, entrusted with the general superintendence of matters relating to trade. There are six departments of the Board, *viz.*, commercial, railway, marine, harbour, finance, and fisheries. The President of the Board is usually a Cabinet minister. See *Encyc. Brit.*; *Stephen's Com.* ii. 490.]

BONA FIDES. A *bona fide* possessor is a person who possesses a subject upon a title which he honestly believes to be good. A *bona fide* possessor, from whom the subject has been evicted by a person having a better title, will be entitled to retain the fruits or profits which he has reaped or received during his *bona fide* possession. This is an equitable rule founded not only on the hardship of subjecting a person who has lived in the belief that the property was his own, to a claim for repetition of what he has drawn from it, but also on the negligence of the real proprietor, who has himself to blame for his delay to vindicate his property. A crop of corn belongs to the person by whom it has been *bona fide* sown; and where the *bona fides* continues until after the legal terms of payment of rent, the rent, although still in the tenant's hands unuplifted, will belong to the *bona fide* possessor. *Erskine* (B. ii. tit. 1, § 26) is of opinion that interest of money erroneously paid to a person *bona fide* believing himself the creditor, is in the same situation with fruits and rents; [and the decision in *Oliphant*, 1790, M. 1721, which is apparently adverse to this view, is explained in Lord Ivory's note, as having proceeded on the special circumstance "that the particular action before the court, as being a *condictio indebiti*, admitted no claim for annual rents, *bona fide percepta*."] As to *bona fide* payment made in error or ignorance, see *Bell's Princ.* § 561. In *Andrews*, 27 May 1885, 12 R. 1001, *bona fides* was sustained as a defence to trustees against personal liability. With regard to the plea of *bona fide* perception and consumption,

[in *Huntly's Trs.* 5 Nov. 1880, 8 R. 50, there was a division of opinion on the bench as to whether the plea is only applicable when a person has been in possession of a heritable subject upon an apparently good, but invalid title, and has been evicted and called to account for the rents. See farther, in regard to this plea, *Menzies*, 3 July 1863, 1 Macph. 1025; also *Violent Profits*, and cases there cited. As to the right of a *bona fide* possessor to recompense for meliorations, see *Recompense*.] *Bona fides* ends when the possessor becomes aware of the insufficiency of his title, whether by private knowledge or otherwise. But this is obviously a point which there must be considerable difficulty in fixing. When the defect of title is apparent at once, the execution of a summons for trying its validity will be held as a sufficient interruption of the *bona fides*. Where, however, the question of right is attended with difficulty, the interruption of the *bona fides* may not be held to have taken place until after litiscontestation, or even until a final decree in the action has been pronounced. The question, indeed, is evidently one which must depend on the special circumstances of the particular case. The following Roman law maxims are applicable to this subject: *Bona fides non patitur ut idem bis exigatur. Bona fide possessor facit fructus consumptos suos.* Contracts and actions in the Roman law, termed *bonæ fidei*, in contradistinction to *stricti juris*, are those in which the interpretation is not confined to the express terms of the convention, but may be extended according to equity and the presumed intention of the parties. See *Ersk.* B. ii. tit. 1, § 25; *Stair*, B. i. tit. 7, § 11; B. ii. tit. 1, § 23; tit. 12, § 5; *More's Notes*, xv., xlviii, lxx., cli.; *Hunter's Landlord and Tenant*, ii. 526; *Brown's Synop. h. t.*; *Kames' Princ. of Equity* (1825), 94, 306, 349-50, 368, 372-3-8; *Hume*, i. 25, 73-4, 452, 456, 461; [*Rankine on Land-Ownership*, 68; *Rankine on Leases*, 490.] See *Mala Fides. Adjunction. Teinds.*

BONAGIUM, or *Villenagium*; slavery or servitude. In the ancient law language of Scotland, *bondi*, *nativi*, and *villani* are synonymous. *Skene, h. t.*

BONA PATRIA; in our older law, an assize of countrymen, or of good neighbours. *Skene, h. t.*

BOND. A bond is a written obligation to pay or perform; and is, of course, as various in its nature as the circumstances vary relatively to which it may be granted.

The most important bonds, in Scotch practice, are those of an heritable kind; but these, as well as the varieties of the personal bond, will be explained under other titles. See *Heritable Bond*. [*Heritable Securities*.] *Bond of Corroboration*, &c. The present observations shall therefore be confined to the simple moveable bond for repayment of borrowed money. The style of this bond commences with an acknowledgment by the granter of the receipt of the money. The common and safe form in this part of the bond is to declare that the money has been "instantly" received. Sometimes the money is stated to have been received at a bygone period; but it is expedient, if possible, to avoid this form of expression, as it may expose the bond to reduction under the act 1696, c. 5, in so far as it is a security for a prior debt. The style then takes the borrower, his heirs, executors, and successors, bound to repay to the lender and his executors or assignees (and sometimes to *nominatim* substitutes) the sum lent at a definite period, generally [at the first term of Whitsunday or Martinmas which shall happen more than three months after the date of the bond,] with interest [at such rate as may be agreed on,] from the time of advance until repayment, and a fifth part more of the principal sum of penalty in case of failure. On this part of the deed, it may be observed, that as the granter may be succeeded by various descriptions of heirs, some of whom would, by law, be liable *subsidiarie* only, and in a certain order, it is not unusual to add to the terms "heirs, executors, and successors," the words, "renouncing the benefit of discussion," which have the effect of rendering all the borrower's successors liable, conjunctly and severally, to the creditor, reserving, of course, to the person who pays, his relief against the heir primarily liable. Under the penalty in the bond, the creditor on the debtor's failure in punctual payment is not entitled to recover more than the actual expense incurred in making the bond effectual; and it is not usual in moveable, as it is in heritable bonds, to annex any penalty to a failure in the termly payments of interest. The form of the bond concludes with a consent to registration, in order that letters of horning, on a charge of six days, may proceed against the debtor if he should fail to pay; [31 & 32 Vict. c. 101, § 138;] and the deed is closed with the usual testing clause. Moveable bonds, like other deeds, may be granted by one or more obligants, who may bind themselves,

either jointly and severally, or *pro rata* only; or they may be granted by bodies politic; and, like every other liquid obligation, may be made the ground of the diligence of adjudication against the debtor's heritage. Moveable bonds are transferred by assignation. Since 1661, c. 32, they descend in all cases to executors, and are taken up by confirmation. Prior to that act, when a bond bore interest, it was regarded as a *quasi feudum*, and held to be heritable in questions of succession. The statute, however, altered that rule, except only in so far as regards the rights of husband and wife, and the fisk; that is to say, the principal sums in moveable bonds, in questions as to the legal rights of husband and wife, do not form part of the goods in communion; and did not fall under the single escheat before the abolition of that casualty. It is always practicable, however, to confer an heritable character on the bond, though it have no relation to a particular heritable subject, by merely making it payable to heirs, secluding executors; in which case, it necessarily becomes heritable by its own terms, and not because any heritable subject is impledged for the repayment. See *Ersk. B. ii. tit. 2, § 9*; *Bell's Princ. § 67*; *Bell's Illust. § 68*; *Jurid. Styles, ii. 308*; *Kames' Princ. of Equity* (1825), 45, 281; *Ross's Lectures, i. 1*; *Duff on Deeds, 1*; [*Menzies' Conv. 192*; *M. Bell's Conv. i. 244*; *Craigie's Digest* (Moveables), 118.]

BOND OF BOTTOMRY. [See *Bottomry*.]

BOND FOR A CASH-CREDIT IN A BANK. Where heritable security is not granted to the bank, this is a simple personal bond by the person in whose favour the credit is granted, and his cautioners, who are in the ordinary case bound along with him as principal debtors to the bank. As to the manner of granting heritable security for such credits, see *Bank Credits*.

BOND OF CAUTION; is an obligation by one person as surety for another, either that he shall pay a certain sum, or perform a certain act. The terms of this bond must necessarily depend upon those of the principal obligation to which it is an accessory. In the ordinary case, the principal debtor and the cautioner are taken bound in the same deed; but it may happen that the obligation by the cautioner is undertaken in a separate deed. Separate bonds of caution are necessary in various steps of judicial procedure—as in processes of suspension, in which, in the ordinary case, before the letters are expedite, the suspender

must lodge in the Bill-Chamber a bond of caution to the satisfaction of the opposite party, and of the clerk of the bills, containing an obligation on the cautioner to fulfil the decree to be pronounced in the cause, and to pay whatever damages or expenses may be awarded. Judicial caution is also required to be found in loosing arrestments, in law-burrows, by tutors and curators for the faithful discharge of their duty, and in many other instances which need not be enumerated here. [See *Menzies' Conv.* 224; *M. Bell's Conv.* i. 274; *Jurid. Styles*, ii. 369. See *Cautionary*.]

BOND OF CORROBORATION. A bond of corroboration is an additional obligation granted by the debtor in a bond, by which he corroborates the original obligation. This deed may be used—1. For the purpose of accumulating arrears of interest into a principal sum, and adding it to the original debt, so as to make the whole bear interest. 2. Where the debtor in a bond dies, his heir may grant a bond of corroboration of his ancestor's debt, which will save the expense of constituting the debt against the heir. [But a bond of corroboration is not now necessary in this case, as the personal obligation transmits along with the heritable security against the heir of the debtor, and also against his disponee, if the conveyance contains an agreement to that effect; 37 & 38 Vict. c. 94, § 47.] 3. Where the creditor in a bond dies, the debtor may grant a bond of corroboration to his heir, which will save the expense of a confirmation, or of completing a title in the person of the heir. It may be thought that, in those cases, the transaction would be simplified by cancelling or discharging the old bond and taking a new one; but it is to be observed—(1) That an inhibition which might strike at a new bond, of the date of the bond of corroboration, may have no effect against the original bond; and, (2) That a bond of corroboration may fall under the act 1696, c. 5, in case the granter should become bankrupt within the sixty days; in which case, the original bond must be resorted to, or the debt must be constituted precisely as if no bond of corroboration had been granted. See examples of this deed, *Jurid. Styles*, ii. 340. See also *Ersk. B. iii. tit. 3, § 60*; *Bell's Com.* i. 369, 713; ii. 5, 197; [*Menzies' Conv.* 236; *M. Bell's Conv.* i. 292.]

BOND OF PRESENTATION; is an obligation granted for behoof of a person in custody on a legal warrant, in order to ob-

tain his temporary liberation. The obligant in such a bond becomes bound to present the person so liberated, to the officer holding the warrant, at a particular day and place. A failure to produce the debtor in terms of this obligation will subject the granter of the bond in fulfilment of the obligation, for the non-performance of which the apprehension had taken place; e.g., to pay the debt where the debtor has been relieved from custody under a caption, or to produce the debtor at all diets of court, where he has been freed from an arrest, under a *meditatio fuge* warrant. But, although independently of express stipulation, this is the legal consequence of undertaking such an obligation, it is usual, in formal bonds of presentation, to insert an express clause to that effect. It will afford the obligant in a bond of presentation no defence, for his failure to implement his obligation, to allege that the debtor, during his temporary liberation, has obtained a sist on a bill of suspension; or has retired to the Sanctuary; or has done any thing to evade the presentation, which he could legally have avoided doing, it being the very object of the bond to provide against acts of that description. On the other hand, it is equally clear that the obligant is freed by the intermediate death of the debtor, and that he is entitled to have implement postponed on account of the debtor's sickness, or any other inevitable accident. It appears also to be clear, that he is liberated by the debtor's imprisonment, previously to the time of presentation, on another warrant, for by that means the object of the bond is accomplished, and the creditor cannot possibly allege detriment. The most effectual form of the bond of presentation is a deed regularly tested and executed on a proper stamp, containing, besides the clause of presentation, a specific obligation on the granter to pay the debt in case of failure to present, and a clause of registration, on which the obligant may be immediately charged with horning, should he not duly implement the principal obligation. It is not uncommon in practice, however, to accept of a simple letter of presentation with a similar clause; but such a letter can afford a ground of action only, and is no warrant for summary diligence. The letter ought to be regularly tested; but an informality in this respect will seldom affect its validity; for if the debtor has been liberated on the faith of the letter, that will be held a sufficient *rei interventus*; and the objection that it is

not regularly tested will not avail; *Dunmore Coal Co.* 1 Feb. 1811, F.C. [The obligation must be in writing, and cannot be proved by parole; *Chaplin*, 5 Feb. 1842, 4 D. 616.] See *Bell's Com.* i. 401; *Bell's Princ.* § 277; *Jurid. Styles*, ii. 447.

BOND OF RELIEF; is a bond by the principal debtor, granted in favour of a cautioner, declaring the nature of the cautioner's obligation, and that it was undertaken solely for behoof of the granter of the bond of relief,—who binds himself to relieve the cautioner from the consequences of his obligation. [The bond secures to the cautioner summary enforcement of his right of relief, which would otherwise be made available only by ordinary action.] Sometimes heritable security is granted to the cautioner for his relief, or the friends of the principal debtor become bound along with him in the bond of relief. [A bond of relief does not confer upon the holder of it the character and privileges of cautioner as against the creditor, unless it be intimated to him at the time of delivering the bond. See *Menzies' Conv.* 235; *M. Bell's Conv.* i. 264, 283; *Jurid. Styles*, ii. 430. See *Relief. Cautionry*.]

BOND OF RESPONDENTIA. See *Respondentia*.

BONDING OF GOODS. [See *Warehousing*.]

[**BONUS**; a sum given or paid over and above what is statedly due. The term is most frequently applied to an extra dividend or allowance paid to the shareholders of an insurance or other joint stock company, out of accumulated profits. In *Rollo*, 1801, M. 8282, revd. 4 Pat. 521, a bonus on bank-stock was held by the House of Lords to be of the nature of capital, not income; and a liferenter was therefore found entitled only to the interest on the bonus. But see *Carr v. Griffiths*, 1879, 12 Ch. D. 655; where a bonus accruing on shares in a life assurance society was held to be apportionable under the Apportionment Act, 1870. See also *Last*, 1884, 12 Q.B.D. 389.]

BOOK DEBTS; are debts by open account. The proof of debts of this description may sometimes be attended with difficulty. The evidence of furnishings made by merchants and retail dealers is generally parole; and the creditor's books, together with the evidence of the delivery by his clerks or porters, will, in the ordinary case, be held sufficient. If delivery cannot be proved, it would seem that circum-

stantial evidence of various kinds will be admitted on the part of the creditor; and it has been held that the books of a regular merchant afford a *semiplena probatio*, to the effect of allowing the claim to be supported by the evidence of a single witness, and the oath of the merchant in supplement. [Book debts are subject to a limitation or prescription of three years. See *Prescription*.] See *Bell's Com.* i. 347; [*Bell's Princ.* § 629; *Ersk. B.* iv. tit. 2, § 4; *Dickson on Evidence*, § 1225.]

BOOKING OF A PRISONER FOR DEBT. When a debtor has been apprehended and removed to prison, the amount of the debt for which he is incarcerated, and the prisoner's name, are recorded in the jail books, which is termed *booking the prisoner*. This record was originally introduced by the magistrates, in order to inform themselves of the amount of their responsibility; and it is the jailor's, not the creditor's, duty to see the proper entry made. It is the practice to enter the whole sum of debt; though formerly the creditor was safe in only entering a part of it, and arresting the debtor in prison for the remainder. By the former practice, a debtor, after being once entered, could not be liberated without obtaining letters of relaxation and liberation from the King, after intimation to the creditor, and a charge to the magistrates to set him at liberty; but now, if the debtor pay the debt as it stands in the prison books, he is free. *Bell's Com.* ii. 437; *Ross's Lect.* i. 334, 343. See *Act of Grace. Imprisonment*.]

[**BOOKING, TENURE OF**; a tenure of lands peculiar to the burgh of Paisley. Conveyances of lands held by this tenure contained, instead of an obligation to infest, an obligation "to book and secure." They were followed by minutes of booking, of which extracts were given out by the town-clerk. The provisions of the Titles Acts of 1860 and 1868, relative to lands held burgage, are declared to be applicable also to lands held by booking tenure; 23 & 24 Vict. c. 143, § 23; 31 & 32 Vict. c. 101, § 152. Under these acts, the registration or booking of the conveyance, with warrant of registration, in the register of booking, is equivalent to the booking and minute thereof as formerly. The provisions also of the Conveyancing Act of 1874, as to burgage lands, apply to lands held by this tenure. Conveyances of lands held by booking may now be in the same form as those of lands held feu; but all writs affecting lands in Paisley held by booking

[tenure must be recorded in the register of booking; 37 & 38 Vict. c. 94, §§ 25, 26. See *M. Bell's Conv.* ii. 800. See *Burgage-Holding*.]

BOOKS OF ADJOURNAL; the records of the Court of Justiciary. In these books are engrossed [or inserted] the acts and regulations of the Court of Justiciary, and the relative procedure; and in other respects, the books of adjournal are analogous to the books of sederunt of the Court of Session. The power of the Court of Justiciary to pass acts of adjournal regulating the procedure of the court is conferred by 1672, c. 16. [See 11 & 12 Vict. c. 79, § 7; 50 & 51 Vict. c. 35, § 76. See *Adam's Acts of Sederunt and Acts of Adjournal*.]

BOOKS OF SEDERUNT; the books in which the acts of sederunt of the Court of Session are recorded. Besides the acts of sederunt, these books contain the names of the judges present at each meeting of the court, the dates of the admission of the judges, clerks of session, and other officers of the court, advocates, &c. Formerly, indeed, most of the public papers of importance were recorded in these books; and even matters totally unconnected with the business of the court, such as eclipses and other remarkable events. See *M'Kenzie's Obs. on Stats.* 164. See *Acts of Sederunt*.

BORCH; in old law language, a cautioner, pledge, or security. *Skene, h. t.*

BORDER WARRANT; is a warrant issued by the judge ordinary, on the borders between Scotland and England, on the application of a creditor, for arresting the person or effects of a debtor residing on the English side of the border, and detaining him until he find caution *judicio sisti* (i.e., that he shall sist himself in judgment), in any action which may be brought for the debt within six months. The creditor applying for such a warrant must swear to the verity of the debt; and, as in *meditatio fugæ* warrants, to which these warrants are analogous, it is necessary to examine the debtor as to the *fuga* before warrant to incarcerate is granted; so in border warrants it is proper to examine the debtor as to his domicile, &c., before issuing a warrant for incarceration. [See *Landell*, 26 Jan. 1838, 16 S. 388.] See *Ersk. B. i. tit. 2, § 21*; *Bell's Com.* ii. 449; [*Mackay's Prac. i. 171*; *M'Glashan's Sher. Court Prac.* 394.] See *Meditatio Fugæ*. [*Diligence*.]

BOROUGH-ENGLISH; in English law, is a customary descent of lands or tene-

ments, whereby in all places where this custom holds, lands and tenements descend to the youngest son; or if the owner of the land have no issue, to the younger brother. *Tomlins' Dict. h. t.*; [*Williams on Real Property*, 155.]

BOROUGH LAWS. This name is given to a collection of ancient laws relative to burghs. These laws are not considered as obligatory, but are useful in tracing ancient manners and customs. *Ersk. B. i. tit. 1, § 36*. See *Regiam Majestatem*.

BOTE; an old Saxon word, signifying compensation or satisfaction. *Skene, h. t.* [See also *Estover*.]

BOTHNA; according to Skene, is a park where cattle are fed and inclosed. *Skene, h. t.*

BOTTOMRY. A bond of bottomry is a real security over a ship, granted by the owner or by the master, for payment of the money advanced for the outfit of the vessel, or for repairs. This form of security is of the nature of a contract of hazard, for the loan is repayable only in the event of the ship's safe arrival at the port of destination; and, in consideration of this risk, the lender exacts a certain rate of premium, greater or less, according to the risk. [Any one who has a vested assignable interest in the ship may grant a bond of bottomry to the effect of constituting an hypothec over it. The master can grant such bond only when the ship is in a foreign port, or in a situation where he cannot communicate with the owners; or when in absolute want of necessary supplies; or where there is dissension amongst the owners, and a necessity of borrowing for the minority's share of the outfit. The master has no power to bind the owners personally; *Cochrane*, 14 Feb. 1854, 16 D. 548; *Miller & Co.* 9 Nov. 1875, 3 R. 105. See also *Dymond*, 23 Nov. 1877, 5 R. 196.] When bonds of bottomry are granted by the owner to raise money for the outfit of the vessel, they are preferable according to the priority of their dates. But when they are granted by the master in foreign ports for repairs at different periods of the voyage, the last in date is entitled to priority in payment. It is proper to attend particularly to the description of the voyage, and to specify the ports at which the vessel is to touch, so as to avoid disputes as to the nature of the risk. [In *Lucovich*, 12 June 1885, 12 R. 1090, warrant was granted to arrest a ship, on a summary petition by the creditor in a bond of bottomry.] See

examples of this bond, *Jurid. Styles*, ii. 777. See *Ersk. B. iii. tit. 3, § 17*; *Bank. i. 399*; *Bell's Com. i. 578*; *Bell's Princ. § 452*; [*M. Bell's Conv. i. 443*; *Smith's Merc. Law*, 413; *Abbott on Shipping*, 104; *MacLachlan on Shipping*, 51. See *Responsentia*.]

BOUGHT AND SOLD NOTE; [a note of a bargain made by a broker on behalf of two parties, one of whom has authorised him to sell, and the other to buy. See *Broker*.]

BOUNDING CHARTER OR INFETTMENT; a charter or infettment which describes the lands by their meaths or marches. Such a description confers right to all within the bounds, and, on the other hand, excludes what lies beyond. No prescription can confer right to that which is without the boundary, as part and pertinent. [See *Reid*, 25 Oct. 1879, 7 R. 84. But a right of servitude, e.g., of pasturage, may be acquired by prescriptive possession on subjects beyond the bounds; *Beaumont*, 11 July 1843, 5 D. 1337; or an incorporeal right, such as salmon-fishing; *E. Zetland*, 26 Feb. 1873, 11 Macph. 469.] In describing boundaries, the walls surrounding the subject will be held as conveyed, if the subject be conveyed with the walls by which it is surrounded. If it be described as bounded by certain walls, the walls will not be held as conveyed: and where it is intended that the wall is to be mutual, this must be expressed. See *Stair*, B. ii. tit. 3, §§ 26, 73; *Ersk. B. ii. tit. 6, § 2*; *Bank. i. 552*; *Bell's Princ. § 738*; [*Menzies' Conv. 543*; *M. Bell's Conv. i. 597, 599*; *Rankine on Land-Ownership*, 91. See *Dispositive Clause. Parts and Pertinents. Measurement. Marches. Sea and Seashore*.]

BOVATA TERRÆ; an oxengate of land; sometimes erroneously written *davata terre*. *Skene, h. t.*

[BOWING. A bowing contract is a contract of location, known in some parts of Scotland, chiefly in Ayrshire and Galloway, whereby "a proprietor or principal tenant, who is owner of a stock of cows, lets them, with the privilege of grazing them on the farm, to a party who is called a 'bower.' A certain sum is paid annually by the bower, who replaces it, together with a fair profit, by the sale of the dairy produce;" *Hunter, infra cit.* The lessor remains owner of the cows, and bears the risk of their dying or otherwise becoming unfit to give milk; see *Logan*, 1872, *Journ. of Jurisp.* xvi. 271. The lessor is also regarded as in possession or charge of the cows, so as to

[be responsible for the duty of reporting to the local authority any outbreak of contagious disease; *Robertson*, 13 June 1883, 10 R. (J.C.) 68. The contract is generally verbal. See *Hunter's Landlord and Tenant*, i. 358; *Rankine on Leases*, 255; *Dunsmore's Agricultural Tenants, &c.*, 165; *Jurid. Styles*, ii. 300.]

BOX-DAY. In the Court of Session, box-days are two days appointed by the judges, in each of the spring and autumn vacations, and one day in the Christmas recess, on one or other of which days papers ordered by the court, or by the Lords Ordinary, towards the close of the preceding session, are usually appointed to be lodged. [Summonses may be called, and defences and other pleadings may be returned, at any of the box-days in vacation or recess; 31 & 32 Vict. c. 100, § 93. *Coldstream's Procedure*, 32. See *Reclaiming Days*.]

BREACH OF ARRESTMENT; is the contempt of the law, committed by an arrestee who disregards the arrestment used in his hands, and pays the sum, or delivers the goods arrested, to the common debtor. The person guilty of breach of arrestment was formerly liable to a prosecution both civil and criminal. The criminal action was competent either before the Court of Session or the Court of Justiciary; the punishment was arbitrary, with escheat of moveables, out of which the debt of the arrestee and damages were given. There is no example in modern times of such a prosecution; [and it has been held that breach of arrestment does not, like breach of interdict, necessarily infer contempt of court; *Inglis & Bow*, 26 Jan. 1867, 5 Macph. 320.] The civil action is for payment of the debt a second time by the arrestee, and for damages to the arrester, though even this rigour is not now countenanced; and at present the only consequence of breach of arrestment is, that the person guilty of it is liable in damages to the extent of the funds paid away, and the expenses; *Grant*, 1792, M. 786. Where goods are arrested, and the arrestment loosed on caution, if the goods themselves cannot be restored, or their value cannot be clearly ascertained, the cautioner is held to be liable for the debt. *Stair*, B. i. tit. 9, § 29; B. iv. tit. 50, § 30; *More's Notes*, cxc.; *Ersk. B. iii. tit. 6, § 14*; B. iv. tit. 4, § 36; *Bank. i. 290*; *Jurid. Styles*, 2d edit. iii. 101. See *Arrestment*.

[BREACH OF INTERDICT. Breach

[of an interdict granted by the Court of Session is punishable by it criminally. The procedure is by petition and complaint, presented to the Inner House; and as it is of a criminal nature, the concurrence of the Lord Advocate is necessary. The punishment is arbitrary. See *Usher*, 7 March 1839, 1 D. 639; *McNeill*, 17 March 1866, 4 Macph. 608; *D. Athole*, 9 Jan. 1872, 10 Macph. 298; *Dudgeon*, 5 July 1876, 3 R. 974; *Fraser's Trs.* 7 Jan. 1879, 6 R. 451; *Macleod's Trs.* 15 March 1883, 10 R. 792. The respondent is a competent witness, under 16 Vict. c. 20, § 3; *Miller*, 9 July 1879, 6 R. 1215. See *Mackay's Prac.* i. 244; *Rankine on Land-Ownership*, 16. See *Interdict*.]

[BREACH OF PEACE. A minor disturbance of the public peace, where there is no great concourse of people with a common illegal purpose, such as is necessary in the crime of mobbing, is generally prosecuted as a breach of the peace. See *Deakin*, 27 Oct. 1882, 10 R. (J.C.) 22; *Bewglass*, 10 Feb. 1888, 15 R. (J.C.) 45. Creating disturbance in a church or religious meeting is punishable under this head; *Dougal*, 18 Nov. 1861, 4 Irv. 101; *Hendry*, 13 June 1883, 10 R. (J.C.) 63; and so also is persistently behaving in a disorderly manner at a public meeting; *Sleigh*, 12 June 1850, J. Shaw, 369; but see *Armour*, 9 March 1886, 13 R. (J.C.) 41. The mere use of insulting language does not amount to breach of peace; *Galbraith*, 17 Nov. 1856, 2 Irv. 520; *Banks*, 16 Nov. 1876, 4 R. (J.C.) 8; *Marr*, 28 May 1878, 5 R. (J.C.) 38. See *Macdonald's Crim. Law*, 187; *Barclay's Digest*. See *Mobbing*.]

[BREACH OF PROMISE. See *Marriage*.]

BREACH OF TRUST. [Breach of trust and embezzlement is the *nomen juris* properly applicable to the offence of felonious appropriation, in violation of a contract of trust, where the circumstances do not amount to the crime of theft. A pawnbroker appropriating a pledge before the period of forfeiture is guilty of breach of trust, his limited right of ownership being the element which distinguishes his offence from theft; *Bradley*, 6 Feb. 1850, J. Shaw, 301. When goods or money are committed to a person, not to be delivered or returned *in forma specifica*, but to be held by him as agent and to be accounted for, the appropriation is breach of trust. Thus a manager, put in charge of a branch establishment, with control over the stock, whose obligation is to account periodically

[for the price of the stock sold, if he appropriate any part of the price to his own use, is guilty not of theft, but of breach of trust. Even the slightest power of control or administration given by the owner to the holder, lowers the offence from theft to breach of trust. Thus, where a panel had received £17, for the special purpose of paying £9 to one person, and handing over the balance of £8 to another, the charge of theft was held irrelevant; *Climie*, 21 May 1838, 2 Swin. 118. If two separate parcels had been given to the accused, containing respectively £9 and £8, with express instructions to deliver them to two different persons named, the crime would have been theft; *Macdonald*, 67. See also *Macdonald*, 6 Feb. 1860, 3 Irv. 540; *McLeod*, 28 April 1858, 3 Irv. 79. In *Sutherland*, 21 March 1836, 1 Swin. 162, the appropriation by a bookbinder of books left with him to be bound was held to be breach of trust; but this case, and that of *Walker*, 3 Sept. 1836, 1 Swin. 294, have been overruled by subsequent decisions, and such an offence would now be dealt with as theft. The distinction is not now of the same consequence as formerly, since by the Criminal Procedure Act, 1887 (50 & 51 Vict. c. 35), § 59, a person indicted for breach of trust and embezzlement may be convicted of theft, and *vice versa*. The punishment of breach of trust and embezzlement is imprisonment or penal servitude. See *Hume*, i. 58; *Alison's Princ.* 354; *Ersk.* B. iv. tit. 4, § 58; *Macdonald*, 64. See *Theft. Fraud. Reset.*]

BREAKING BULK; or making use of an article, debars a buyer from afterwards objecting to it, and returning it to the seller. [But see *Johnston*, 2 Dec. 1875, 3 R. 202.] See *Bell's Princ.* § 99.

BREAKING INCLOSURES. There are several statutes for the encouragement of planting and inclosing, which provide for the punishment of those who destroy planting or break inclosures, or who allow their cattle to do so. The penalties are pecuniary, with right to detain cattle found trespassing, until the fine is paid, along with the damage and expense. The chief statutes are 1661, c. 41; 1685, c. 39. [Such offences would now generally be prosecuted at common law under the charge of *Malicious Mischief*.] See *Ersk.* B. iv. tit. 4, § 39; *Hume*, i. 82, 124; [*Rankine on Land-Ownership*, 124, 509.] See *Planting and Inclosing*.

BREAKING OF PRISON; is the crime of escaping out of prison. In order to

constitute this crime, it is necessary that the person guilty of it shall have escaped out of a lawful prison, in which he was confined on a legal warrant, whether as a criminal, or as a person accused of a crime, or as a debtor. It makes no difference whether the offence has been committed by violence or by corrupting the jailor. The punishment is arbitrary, and must necessarily be regulated by the circumstances attending the commission of the crime. See *Hume*, i. 401; [*Alison's Princ.* 555; *Macdonald*, 217. See *Prison. Escape.*]

BREVE; a word used in the old law language of Scotland, and also in the civil law, signifying a short compendious writ. *Breve testatum* is a writ or instrument subscribed by a notary public.

Breve de morte antecessoris, the brieve of mortancestrie; from which the [more] modern law concerning the service of heirs was derived. See a full account of the ancient form, which in all essential particulars resembles and illustrates the [later] practice, in *Skene, h. t.* See *Service*.

Breve de recto, the brieve of right; anciently used before the Justice-General on the decision of the ground-right and property of lands, and the reduction of infetments; transferred to the Lords of Council and Session as early as the period of the *Regiam Majestatem*.

Breve de nova dissasina; in the *Regiam Majestatem* this means the brieve or summons of ejection or spulzie.

Breve de divisio faciendis, the brieve of division.

Breves Pleadable are all such breves as are pursued and defended by an ordinary form of process before a competent judge, where there may be a pursuer and defender. See *Skene, h. t.* See *Brieve*.

BREVE TESTATUM. The *breve testatum* was an acknowledgment in writing, which, by the ancient practice, was made out on the lands, at the time of giving possession to the vassal, and attested by the seals of the superior, and *pares curiæ*; afterwards the *breve testatum* was signed by the superior wherever he happened to be, and possession was given separately by the superior's bailie. See *Ersk. B. ii. tit. 3, § 17*; *Bell's Princ. § 757*; *Ross's Lect. ii. 121*; [*Menzies' Conv. 529*; *M. Bell's Conv. i. 577*. See *Infetment*.]

BREVI MANU; is an expression used to signify the performance of an act by a party on his own authority. Thus, for example, it was anciently the practice in Scotland for an heritable proprietor, on his

own authority, to poind his tenant's moveables for payment of his rent, without applying to any other judge. The landlord, in like manner, exercised the power of *brevi manu* removal when his tenant refused to remove at the stipulated term. The practice of poinding or detaining cattle found trespassing seems to be a remainder of the *brevi manu* poinding. *Brevi manu* in the Roman law is usually applied to a kind of constructive delivery. A thing is said to be transferred by *brevi manu* tradition, when it has been previously in the buyer's possession on some other title, as pledge or loan. Some interesting historical details connected with this subject will be found in *Ross's Lectures*, i. 385. See also *Kames' Stat. Law Abridg. h. t.*; *Bell on Leases*, i. 367; ii. 28; *Hunter's Landlord and Tenant*, ii. 413; *Brown's Synop. h. t.*; *Ross's Lect. ii. 510*.

BREWING. Anciently the right of brewing was given by a license from the superior, and there was generally a clause in the charter, *cum brueritis*. But neither this clause nor a license is now held to be necessary to entitle a feuar to brew for his own use. A person, however, with a right of barony may prevent a feuar or a stranger from importing and vending ale within the barony without his license. *Ersk. B. ii. tit. 6, § 8*; *Stair, B. ii. tit. 3, § 72*; *Bank. i. 592*; *Brown's Synop. 3, 371, 2356*.

BRIBERY; is the offering or taking of a reward, unduly to influence the conduct of the person receiving it in the exercise of his duty. This is an offence of peculiar atrocity, when it extends to the administration of justice. The punishment of the crime, when committed by a judge of the Court of Session, is infamy, loss of office, confiscation of moveables, and an arbitrary punishment in the person; 1579, c. 93. And there are many enactments directed against inferior judges who may be guilty of this offence. [If such a thing were to occur now, impeachment in Parliament would seem to be the proper course; *Stirling*, 28 Feb. 1873, 11 Macph. 480 (Lord Deas).] See *Hume*, i. 407; *Bank. ii. 480*; *Bell's Princ. §§ 36, 37*; *Kames' Stat. Law Abridg. h. t.*; *Macfarlane's Jury Prac. 156*; *Kames' Equity* (1825), 311; [*Mackay's Prac. i. 100*.] As to bribery at parliamentary elections, [see *Election Law*.]

BRIEVE. A brieve is a writ issuing from Chancery, in the name of the king, addressed to a judge, ordering trial to be made by a jury of certain points stated in the brieve. [See *Breve*.] These writs seem

at one time to have been the foundation of almost all civil actions in Scotland. [They are still in use, though rarely,] in the election of tutors to minors, [see *Tutor*,] in the ascertaining the widow's terce, and in dividing the property belonging to heirs-portioners, [see *infra*.] The *briefe of perambulation*, which was in use long after the institution of the Court of Session, by which all questions relative to marches were settled, is now supplied by a declaratory action; and the apprising of land, which proceeded before a jury, was converted into an action before the court by the summons of adjudication. See *Adjudication*. [The old mode of serving an heir by *briefe of inquest* is described in the article *Service*; and the old mode of cognoscing lunatics and idiots by *briefes of idiocy and furiosity*, in the article *Insanity*.] See *Stair*, B. iv. tit. 1, § 2; *Bank*. ii. 554; *Bell's Com.* i. 4; *Kames' Stat. Law Abridg.* h. t.; *Ersk.* B. iv. tit. 1, § 3; [*Mackay's Prac.* i. 267.]

Brieve of Terce.—The object of this brieve is to cognosce the widow to her terce. It is directed to the sheriff of the county where the lands lie, [or to the sheriff of Edinburgh, if the lands are in different counties]; and the jury are directed to inquire—1. Whether the claimant was the lawful wife of the deceased? and this is presumed, if she was habit and repute his wife. 2. Whether the husband died infeft in the lands? which is proved by production of the husband's sasines. This is not a retourable brieve. The sentence of the jury serves the widow to her terce; and it is the duty of the judge to “ken” her to it, by dividing the lands between her and the heir. *Stair*, B. iv. tit. 3, § 11; [*Ersk.* B. ii. tit. 9, § 50; *M'Laren on Wills*, i. § 213; *Fraser on Husband and Wife*, ii. 1101;] *Jurid. Styles*, i. 342. See *Terce*.

Brieve of Division amongst Heirs-Portioners.—An heir-portioner who wishes to separate her share of the lands to which she succeeds, from that belonging to another heir-portioner, must apply to Chancery for a brieve, directed to the sheriff of the county in which the lands lie. This brieve is proclaimed at the market-cross, and also served upon the parties concerned; and, at the diet appointed, the rights and allegations of the parties being settled, the judge remits to an inquest of fifteen persons to measure the land and make a division. The jury report to the judge; and lots being cast for the different shares, the judge decerns in the division, and ordains

possession to follow in terms of it. An extract of the decree is held conclusive, and may be enforced by the authority of the judge. This form is now but seldom resorted to, the parties, in general, settling the matter extrajudicially by arbitration, or otherwise by action [of declarator and division. See *Division*. The last instance of a brieve of division was *M'Neight*, 30 Nov. 1843, 6 D. 128. See *Jurid. Styles* (4th edit.), i. 330;] *Stair*, B. iv. tit. 3, § 12; *Bell's Princ.* § 1081; [*Bell's Com.* i. 62; *Mackay's Prac.* ii. 306; *Shand's Prac.* ii. 605; *Rankine on Land-Ownership*, 492.]

BROCAGE; is properly the hire or commission due to a broker for managing a transaction. Brocage contracts (as they are termed), by which a reward is stipulated for the promotion of a particular marriage, by means of influence to be exerted over one of the parties, are held to be *contra bonos mores*, and can afford no ground of action. *Bell's Com.* i. 321; *Bank*. i. 114. [See *Pactum Illicitum*.]

BROCARDS; law maxims, founded on inveterate custom, or borrowed from the Roman law, and accounted part of our common law; such is the maxim, *Jus superveniens auctori accrescit successor*; and many others. [The term is said to be derived from *Burchardus*, Bishop of Worms in the 11th century, who digested the canon law in sentences.] *Bank*. i. 24. See *Maxims*.

BROCCARII. In the ancient law language of Scotland, these are described as lockers, brokers, mediators, or intercessors in any transaction, paction, or contract, as in buying and selling, or in contracting marriage. In the civil law they are called *Proxenetæ*. *Skene, h. t.*

BROKER. A broker is a person who negotiates sales of goods and other mercantile transactions. [He usually acts as agent for both seller and purchaser, with power to bind both; but the general law of agency is sometimes modified by local usage. When a broker has concluded a contract on behalf of his principals, he forwards to each a note of the transaction (“bought and sold note”), and should also make a signed entry of the transaction in his book, though in practice this is not always done. In the bought and sold note, the broker either discloses the names of both parties, and professes to act for both, thus: “Bought for A. B. from C. D.,” “Sold for C. D. to A. B.,” or he does not disclose in the bought note the name of the seller, nor in the sold note the name of the purchaser, the note to the

[seller being "Sold for C. D.," and that to the purchaser being "Bought for A. B.;" or, the broker may appear *ex facie* of the note to be a principal; in which case he cannot escape the responsibility of a principal by parole proof of agency. In England, there have been numerous decisions as to the completion of the contract in the event of variance between the bought and sold notes, or between them and the signed entry in the book; but these relate for the most part to the requirements of the Statute of Frauds, § 17 (see *Statute of Frauds*), which is of no force in Scotland. "Where, with us, the broker has no absolute power to buy or sell without reference to his principals, or one of them; where, in short, he is a mere *internuntius* proposing terms and conducting the negotiation, but with a power of dissent in the parties, the sending of a bought note to the one, and a sold note in the same terms to the other, not *debito tempore* rejected by either, will complete the contract as being evidence of *consensus ad idem* on the part of both principals;" *Bell's Com.* i. 460 (note by Lord McLaren). See *Towill & Co.* 12 Nov. 1875, 3 R. 117. If the broker sells on credit, and the buyer's name has not been previously communicated to the seller, the latter appears to be entitled to withdraw within a reasonable time, on disclosure of the buyer's name; *Bell's Princ.* § 89; *Benjamin on Sales*, 271. The broker's duty is to establish privity of contract between the two principals. If he converts himself from an agent employed to buy into a principal selling for himself, he acquires an interest adverse to his duty, and he loses his right of action on the contract; *Mollett*, 1875, L.R. 7 E. & I. App. 802. As to stock-broking transactions, see *Risk*, 27 May 1881, 8 R. 729; *Gillies*, 16 Oct. 1885, 13 R. 12; *Mackenzie & Aitken*, 22 Jan. 1886, 13 R. 494; *Maffett*, 4 March 1887, 14 R. 506; *Mollison*, 24 Jan. 1889, 16 R. 350. See also *Stock Exchange*. As to ship-brokers and their right to commission, see *Moss*, 20 March 1875, 2 R. 657; *White*, 11 July 1876, 3 R. 1011; *Walker*, 21 Dec. 1883, 11 R. 369. See generally *Bell's Com.* i. 458, 507, 646; ii. 115; *Bell's Princ.* §§ 89, 219, 1452; *Campbell's Merc. Law*, 145; *Smith's Merc. Law*, 106, 504; *Addison on Contracts*, 460, 917; *Blackburn on Sale*, 78; *Benjamin on Sales*, 249. See *Principal and Agent*. *Factor*. *Insurance*.]

[**BROTHEL.** See *Criminal Law Amendment Act*. *Disorderly House*.]

BUBBLE ACT. By the statute which went under this name, [6 Geo. I. c. 18], joint stock companies were prohibited as prejudicial to the public; but there were difficulties attending the construction of the act, and it does not seem to have been observed. It was repealed in 1825. See *Joint Stock Companies*.

[**BUILDING SOCIETIES.** See 6 & 7 Will. IV. c. 32; 37 & 38 Vict. c. 42; 38 Vict. c. 9; 40 & 41 Vict. c. 63; 47 & 48 Vict. c. 41; A.S. 17 March 1882 (winding-up). See cases in Digest 1877-1885; also *Tosh*, 30 July 1886, 14 R. (H.L.) 6; *Auld*, 15 Feb. 1887, 14 R. (H.L.) 27; *N. B. Building Society*, 23 June 1887, 14 R. 827. See *Sweet's Law Dict.*; *Davis on Building Societies*.]

BULL; a brief or mandate by the Pope. By 13 Eliz. c. 2, the procuring, using, or publishing bulls is declared to be high treason; and by 7 Anne, c. 21, §§ 1-3, the English treason laws are extended to Scotland. *Ross's Lect.* ii. 102.

BULLION; uncoined silver or gold. See *Regulations of the Scots Parliament as to Bullion*. *Skene, h. t.* [By 33 & 34 Vict. c. 10, § 9, the Treasury may, from time to time, issue to the Master of the Mint, out of the growing produce of the Consolidated Fund, such sums as may be necessary to enable him to purchase bullion, in order to provide supplies of coin for the public service. See *Wharton's Lex.*]

BURDENS. In a general acceptation the word burden may signify any restriction, limitation, or incumbrance affecting either person or property. In the present article, however, the term is to be considered as applicable solely to burdens in money, imposed either on the receiver of a right or on the subject of the right itself, in the deed by which the right is constituted. Burdens in this sense are said to be either personal or real. Where the grantee is taken bound by acceptance of the right to pay a certain sum either to the granter or to a third party, but where there is no clause charging the subject conveyed with the sum, the burden is said to be personal, that is, it will be binding upon the receiver and his representatives, but will constitute no real incumbrance on the lands, or other subject conveyed, nor amount, indeed, to anything more than a mere personal obligation on the grantee. But where the right is expressly granted under the burden of a specific sum which is declared a burden on the lands themselves, or where the right is declared null if the sum be not paid, and

where the amount of the sum and the name of the creditor in it can be discovered from the records by having entered the instrument of sasine, the burden is said to be real. Where the burden amounts to nothing more than a mere personal obligation on the receiver of the right, there can be little difficulty either as to the mode of constituting or of exercising it. But there are several points in regard to the constitution and effect of real burdens which deserve attention. In order to create a real burden, it is necessary—1st, To declare the debt imposed, or to be imposed, to be a burden on the lands themselves. Where the burden is laid upon the disponee merely, and not upon the lands, even although the conveyance should bear expressly to be granted and accepted under that condition; or, although the condition should be appointed to be engrossed in the infeftments, the debt will form no real burden; [*Mackenzie*, 1721, Robertson's App. 355; *Martin*, 1808, M. App. Pers. and Real, No. 5; *Mags. of Arbroath*, 19 March 1872, 10 Macph. 630; *Ross's L. C.* iii. 1.] But where the right is declared void in case the sum be not paid, it is held to be a real burden. 2d, The next essential is, that the debt be properly expressed as a burden on the lands, in the dispositive clause of the conveyance; [*Allan*, 1780, M. 10,265, 2 Pat. 572.] This clause is the criterion for determining the character of the burden, and it is only in case of ambiguity in the dispositive clause, that other clauses, or particular expressions in the deed, will be admitted to explain the nature of the burden. 3d, In order to render the burden effectual against the creditors of the disponee, it must be expressed and incorporated in the sasine, so as to enter the record; [*Broughton*, 1739, M. 10,247, 5 Br. Sup. 665; *Place*, 1821, Hume, 544.] While the disponee remains uninfeft, however, the burden, if properly expressed as a real burden, will be effectual against him and his creditors as a qualification of the personal right. Lastly, As no indefinite and unknown incumbrance can be created on land, it is necessary that, both in the disposition and in the sasine, the burden should be specific in its amount, and in the name of the creditor, in order that creditors contracting with the disponee may know the extent of the burden, and whether or not it has been paid or extinguished; [*Stein's Crs.* 1794, 3 Pat. 345; *Broughton*, *supra*; *Place*, *supra*; *Baird's Trs.* 6 Feb. 1846, 8 D. 464; *Erskine*, 1 March 1843,

[8 D. 863. These rules, however, must now be read in connection with the provision of the Consolidation Act, 1868, whereby it is made competent, in any conveyance of lands affected by real burdens, instead of inserting, to refer to such real burdens as set forth at length in the original conveyance, or in any subsequent recorded deed forming part of the progress of titles (31 & 32 Vict. c. 101, § 10; see also § 146); and also with the provision of the Conveyancing Act, 1874, whereby, in an original conveyance, lands may be validly affected by real burdens or other conditions, by a reference, in form prescribed, to a recorded deed relating to such lands, or to the estate of which they form a part, in which such real burdens or other conditions are set forth at length (37 & 38 Vict. c. 94, § 32).]

The terms in which a real burden may be imposed are various. Thus, the disponent may expressly burden the lands conveyed with a sum payable to himself,—or he may create a burden in favour of a third party,—or he may either reserve to himself, or delegate to a third party, a power or faculty as it is termed, to impose a real burden on the lands. See *Faculty to Burden*. And with regard to reserved burdens generally, it may be observed that the real security which they afford depends on the disponee's sasine. The right under the burden is not a right of property, but in security merely, depending for its existence on the existence of the debt. A general service has been held a sufficient title in the heir of the disponent to discharge such a burden; (*Cuthbertson*, 1806, M. App. Serv. and Conf. No. 2); and the principle on which the security depends, applies equally to the case where the burden is reserved in favour of the disponent, and to that in which a third party is made the creditor. In neither case is it necessary to complete the transference of the real security, as in the case of an heritable bond, by sasine. [The creditor's right is transmitted by assignation; and prior to 1874, though the assignation was sometimes recorded, the proper mode of completing the transfer was by intimation to the debtor; see *Miller*, 1820, Hume's Dec. 540. By the Conveyancing Act, 1874, any writing by which a real burden on land is assigned, conveyed, or transferred, or is extinguished, or restricted, may be recorded in the appropriate register of sasines; registration is made the criterion of preference in case of competition; and intimation is declared to be unnecessary, when such deed is recorded; 37 & 38 Vict. c. 94, § 30. The provisions of the acts of

[1868 and 1874, relative to the transference and extinction or restriction of heritable securities requiring infeftment, and to the completing of titles thereto, apply, as nearly as may be, to real burdens upon land; *ib.* Real burdens, except ground-annuals, are made moveable as to the succession of the creditor to the same extent as heritable securities; *ib.* See *Mowbray's Conv. Act*, 48 *et seq.*]

The creditor in a real burden may make his right effectual—1st, By pointing of the ground; 2^d, By adjudication, without which the creditor has no means of entering into possession, and no title to pursue an action of maills and duties. Although the burdened land have been sold to another, and although the purchaser be not personally liable for the debt, yet the creditor may adjudge the lands to the extent of the burden. [In regard to real burdens in the wider sense, including all burdens which directly affect the land, see *Conditions in Feudal Grants*.] See *Stair*, B. ii. tit. 3, § 54; tit. 10, § 1; *Ersk.* B. ii. tit. 3, § 49; *Bell's Com.* i. 726; *Bell's Princ.* §§ 892, 915; *Bell on Purchaser's Title*, 93; *Kames' Equity* (1825), 281; *Ross's Lect.* ii. 353; [*Duff's Feudal Conv.* 296; *Menzies' Conv.* 603; *M. Bell's Conv.* ii. 1151. See *Heritable Securities. Ground-Annuals.*]

BURDENS, PUBLIC. See *Public Burdens*.

BURDENSECK; is the name given to the provision of our ancient law, by which it is said that a man was not punishable for the theft of as much meat as he could carry on his back; provided the theft was committed to satisfy the cravings of hunger. There is some difference amongst authorities both as to the justice of this rule and the extent of its application; and it is not now recognised in the law of Scotland. *Hume*, i. 55; *Kames' Stat. Law*, h. t.

BURGAGE-HOLDING; is that tenure by which the property in royal burghs is held under the Crown. It is originally constituted by a charter from the Crown in favour of the burgh; the effect of which is to make every proprietor of property situated within the burgh hold that property directly under the crown as superior, for the *reddendo* (now merely nominal), of watching and warding; or, as it is commonly termed, "service of burgh, used and wont." [Burgage, as a separate tenure, was for the most part abolished by the Conveyancing Act of 1874, which enacts that all persons having any estate in land held burgage shall have the same right and

interest in such estate as would have belonged to them, had the tenure been feu instead of burgage, and that there shall not in future be any distinction between burgage and feu holdings, in so far as regards the conveyances relating thereto, or the completion of titles, or any other matter to which the provisions of the act relate; 37 & 38 Vict. c. 94, § 25.] The title of a disponee to burgage property [formerly] proceeded on a resignation made by delivery of staff and baton (see A.S. 11 Feb. 1708), in the hands of the magistrates in virtue of a procuratory granted by the vassal last infeft, and followed by an immediate infeftment given by the magistrates in favour of the disponee, without the intervention of any precept or charter by progress. As such infeftment was of the nature of a charter, and was the only evidence of the interposition of the superior, it was properly the duty of the town-clerk to expedite it; and this was enjoined by 1567, c. 27. And by 1681, c. 11, such sasine was ordained to be recorded with sixty days of its date in a particular register kept by the town-clerk for the burgh. [By 12 & 11 Vict. c. 49, the ceremony of resignation and infeftment was dispensed with, and it was made competent to resign and obtain infeftment by presenting the disposition or other warrant to the town-clerk, being a notary, and by his giving sasine by subscribing and recording an instrument in form prescribed, the instrument being registrable at any time during the life of the party in whose favour it was expedite. By 23 & 24 Vict. c. 143, the provisions of the Titles to Land Act of 1858 were generally extended to lands held by burgage tenure. By § 3, instruments of sasine, or of resignation and sasine, on conveyances of lands held burgage, were declared to be unnecessary, the recording of the conveyance itself, in the appropriate register of sasines, being sufficient. By § 6, it was made unnecessary to insert a clause of obligation to infeft, or a procuratory or clause of resignation. By § 21, the exclusive privilege enjoyed by town-clerks, of preparing and expediting conveyances, was taken away. These provisions are incorporated in the Consolidation Act of 1868; see §§ 7, 15, 16, 136, 151, 153.] The title of an heir in burgage subjects was [formerly] completed sometimes by a precept of *clare constat* and infeftment, but much more frequently by a single act, called a cognition and sasine; the magistrate appearing on the ground and taking a proof of the heir's propinquity, and afterwards

giving him infeftment as heir, under the usual *salvo jure cujuslibet*. [See *Cognition and Sasine*. Service and entry *more burgi* were specially excepted from the operation of the Services of Heirs Act of 1847 (10 & 11 Vict. c. 47, § 26). But by the Titles Act of 1860 (23 & 24 Vict. c. 143, § 7), an heir in burgage subjects was empowered to make up his title by obtaining a writ of *clare constat* from the magistrates, or by obtaining decree of special service from the sheriff, as if the lands had not been burgage. See 31 & 32 Vict. c. 101, §§ 27, 46, 102. Under the act of 1874, as has been already stated, the distinction between feu and burgage has been done away with. Both heirs and singular successors in burgage subjects now complete their titles in the same way as if the tenure had been feu, entry with the superior being implied in the case of every recorded conveyance. Conveyances of burgage lands may be either in the forms allowed by the act of 1868, in regard thereto, or in the forms applicable to lands held by feudal tenure; § 26. But all writs affecting lands previously held burgage must be recorded in the burgh register of sasines; § 25. Feurights may now be granted by proprietors of burgage subjects; and no feuright granted before the act is challengeable on the ground that it is a feu of land held by burgage tenure, or that it was recorded in the burgh register of sasines; *ib.*] The proper vassal in burgage-holding being the whole community, which, in a legal sense, never dies, the casualties of non-entry, relief, &c., are not known in this holding. [Formerly no widow's terce was due from burgage subjects, but this exemption was taken away by the Conjugal Rights Act, 1861 (24 & 25 Vict. c. 86, § 12).] The nature of the holding also properly excluded subinfeudations, although a base infeftment in an annual rent out of burgage property, given by a bailie of the burgh, as bailie in that part, and the town-clerk, as a common notary, was held effectual; *Bennet*, 1711, M. 6895. The Crown, in granting the charter of the burgh, could not prejudice the rights of other superiors, so that it sometimes happened that property situated within the limits of the burgh was not held by this tenure; nor did property acquired by the burgh, subsequently to the date of the charter, fall under this holding, except by a new erection. See *Stair*, B. ii. tit. 3, § 38; *Ersk.* B. ii. tit. 3, §§ 33, 38, 41; [tit. 4, §§ 8, 9; tit. 9, § 49; B. iii. tit. 8, § 72; *Bell's Com.* i. 721, 784; *Bell's Princ.*

[§§ 685, 840; *Ross's Lect.* ii. 504, 550; *Duff's Feudal Conv.* 509; *Menzies' Conv.* 833; *M. Bell's Conv.* ii. 792, 1116; *Craigie's Digest* (Herit.), 58.]

BURGESS; is a member of the corporation of a burgh, admitted either by the charter of erection, or by birth, as being the son of a burghess, or by serving an apprenticeship to a burghess, or by marrying the daughter of a burghess, or by election by the magistrates of the burgh. The oath taken by a burghess on admission is to the following effect: "I confess and allow, with my heart, the true religion presently professed within this realm, &c. I shall be leal and true to our sovereign lord (or lady) the King's (or Queen's) Majesty, and to the provost and bailies of the burgh; I shall obey the officers thereof, fortify, maintain, and defend them in the execution of their offices with my body and goods; and I shall not colour unfree-men's goods under colour of my own: In all taxations, watchings, and wardings to be laid on the burgh, I shall willingly bare my part thereof, as I am commanded by the magistrates: I shall not purchase nor use exemptions to be free thereof, renouncing the benefit of the same for ever: I shall do nothing hurtful to the liberties and commonweal of the burgh: I shall give the best counsel I can, and conceal the counsel shown to me: I shall not consent to dispose the common goods of the burgh, but for a common cause and a common profit: I shall make concord where discord is, to the utmost of my power: In all lineations and neighbourhoods I shall give my leal and true judgment, bot prayer or reward." On making this oath, and paying the dues of admission, the burghess receives an extract of the act of his admission under the hand of the town-clerk. [By § 2 of 23 & 24 Vict. c. 47, the magistrates and council of any royal burgh are authorised to admit any person entitled to vote in the election of any member of council of such burgh to the status of a burghess thereof, on payment of entry money, not exceeding one pound. The law of Scotland respecting the creation of burghesses was assimilated to that of England by 39 & 40 Vict. c. 12.] See *Ersk.* B. i. tit. 4, § 20; *Bank.* i. 56.

BURGH ACRES; are acres, or small patches of land, lying in the neighbourhood of royal burghs; usually feued out to, and occupied by, burghesses, or persons resident within the burgh. The statute 1695, c. 23, concerning runridge lands, excepts burgh and incorporate acres from the pro-

visions of the act. It has been held that this exception relates only to the case of royal burghs, and not to burghs of barony or others; *Douglas*, 1777, 5 Br. Sup. 581; *Bell's Princ.* § 1099. See *Runridge*.

[BURGH, PARLIAMENTARY.] Burghs which return or contribute to return members to parliament, and are not royal burghs, are generally called parliamentary burghs. See 3 & 4 Will. IV. c. 77; 4 & 5 Will. IV. c. 86, 87; 35 & 36 Vict. c. 33, §§ 32, 33. See *Bell's Princ.* § 2173.]

BURGH, ROYAL. A royal burgh is a corporate body erected by a charter from the Crown. The corporation consists of the magistrates and burgesses of the territory erected into the burgh. The magistrates are generally a provost and bailies, dean of guild, treasurer, and common council. By 1663, c. 6, the provost and bailies of royal burghs have power to value and sell ruinous houses when the proprietors refuse to rebuild or repair them; and many enactments are to be found in the acts of the Scottish Parliaments, regulating the trade in royal burghs, and defining the privileges of the magistrates and burgesses; see *Kames' Stat. Law abridged*, art. *Burgh Royal*. The magistrates may judge in petty riots; and in Edinburgh, Stirling, Perth, and some other royal burghs, they have a cumulative jurisdiction along with the sheriff in blood-wits. [But their criminal jurisdiction is now practically limited to police offences, and is regulated by the various Police Acts, and by the Summary Procedure Act of 1864. See *Moncreiff on Review in Crim. Cases*, 36; *Irons' Police Law*, 203.] The eldest magistrate of every royal burgh, has, since the Union, been named in all the commissions of the peace. The magistrates have right, with consent of the majority of the burgesses, to impose certain small taxations or duties on the inhabitants, for the use of the burgh; and they have also the power of proportioning some of the taxes imposed by Parliament. A convention, composed of commissioners from each of the royal burghs, meets annually at Edinburgh, with power to make regulations for promoting the trade and commonweal of the burghs, and to inquire how their annual revenues have been applied. [See *Convention of Royal Burghs*.] There are sixty-six royal burghs in Scotland.

The right of appointing their successors formerly belonged to the old councils, in terms of the statute 1469, c. 5, by which it was also directed, that when the new

council was chosen, the members of it, along with those of the old council, should choose all the office-bearers of the town, as aldermen, bailies, dean of guild, &c.; and that each craft should choose a person of the same craft to have a voice in the said election of office-bearers. This simple and uniform plan of election was not universally adopted; and from local influences, the setts of the burghs exhibited an almost endless variety in their details; agreeing, however, with scarcely an exception, in the principle of self-election. This diversity has now been put an end to, and the "close system," as it has been called, abolished by 3 & 4 Will. IV. c. 76, by which the election of councillors is rendered popular, and given to male residents in the burgh or its vicinity, possessing certain qualifications mentioned in the act. [The existing regulations will be found in that act, and in the Municipal Elections Amendment Acts of 1868 and 1870 (31 & 32 Vict. c. 108, and 33 & 34 Vict. c. 92). The right of electing the Town Council is conferred on all such as are qualified to vote in the election of a member of Parliament, in terms of the Reform Act of 1868, and on all those who would otherwise be sufficiently qualified, but whose premises, though within the municipal boundaries, are beyond the parliamentary boundaries, or are situated in a royal burgh not now returning a member of Parliament. See *Election Law*. Women may vote, if unmarried, or not living with their husbands; 44 & 45 Vict. c. 13. The election takes place on the first Tuesday of November in each year. For the purposes of election, any burgh may be divided into wards or districts, the arrangement of which is regulated by 31 & 32 Vict. c. 108, §§ 16, 17, as amended by 39 & 40 Vict. c. 25.] The councillors are chosen from among the electors residing, or personally carrying on business within the royalty; and where there is a body of burgesses in the burgh, each councillor, before his induction, must be entered a burgess. [He may pay the burgess dues after election, if before induction; 23 & 24 Vict. c. 47, § 2. The number of councillors is in some cases fixed by statute (3 & 4 Will. IV. c. 77; 15 & 16 Vict. c. 32; 31 & 32 Vict. c. 108, § 11); in others it depends upon the sett or usage of the burgh. One-third of the number retire annually, but there is no bar to the re-election of an outgoing councillor.] Vacancies taking place during the year by death or resignation are supplied, *ad interim*, by the remaining members of

the council, and the persons so elected by the councillors retire at the succeeding election. [The supplying of vacancies in the event of an election being found invalid is provided for by 16 Vict. c. 26. An election cannot be challenged after one month; see *Drew*, 14 Nov. 1854, 17 D. 51.] Upon the third lawful day after the election, the councillors meet and choose [from their number] by a plurality of voices, a provost, bailies, treasurer, and other office-bearers, as existing in the council by the sett or usage of the burgh. [The election is a statutory duty, and the court will ordain its performance if neglected; *Herron*, 22 Jan. 1880, 7 R. 497. The provost and treasurer always remain in office for three years, even though in ordinary rotation they should have retired from the council; 3 & 4 Will. IV. c. 76, § 24; c. 77, § 22.] The rights of the guildry, trades, &c., to elect their own dean of guild, &c., are still preserved; but they are now no longer recognised as official or constituent members of the council, their functions being performed by a member of council, elected by the majority of the councillors. In Aberdeen, Dundee, and Perth, however, the dean of guild, and in Edinburgh and Glasgow, the convener of trades and the dean of guild, are *ex officio* members of council; and the electors in all the above-named burghs choose such a number of councillors as, together with the officers, makes up the full number of the council. No magistrate or councillor can be town-clerk. A magistrate is not responsible for the debts of the burgh, or the acts of his predecessors, otherwise than as a citizen or burgess. The existing council in all burghs royal must every year make up, on or before 15th October, a state of their affairs, to be kept in the town-clerk's or treasurer's office. [The exclusive privilege of trading in burghs was abolished by 9 & 10 Vict. c. 17.] See *Stair*, B. iv. tit. 47, § 19; *More's Notes*, clxxi.; [*Ersk.* B. i. tit. 3, § 7; tit. 4, § 20;] *Bell's Princ.* § 2161; *Kames' Stat. Law Abridg.* h. t.; *Hunter's Landlord and Tenant*, i. 146; *Ross's Lect.* i. 90, 390; [*Guthrie Smith on Damages*, 91; *Marwick on Municipal Elections*; *Irons' Police Law*, 171.]

BURGH OF BARONY and BURGH OF REGALITY. A burgh of barony, or a burgh of regality, is a corporation analogous to a royal burgh, consisting of the inhabitants of a determined track of ground within the barony [or the regality], erected by the King, and subjected to the govern-

ment of the magistrates. The right of electing magistrates is vested by the charter of erection sometimes in the baron or the lord of regality, [as superior of the barony or regality], and sometimes in the inhabitants themselves; and whatever jurisdiction belongs to the magistrates, the superior's jurisdiction is cumulative with it. See *Ersk.* B. i. tit. 4, § 30; [*Bell's Princ.* § 2174.]

BURGLARY; is an English law term, signifying the breaking and entering the dwelling-house of another in the night-time with the intention to commit theft or any other felony, whether the felony be completed or not. See *Tomlins' Dict.*; *Hume*, i. 102. See *Housebreaking.* *Stouthreif.*

BURLAW, Byrlaw. Burlaw laws are made and determined by consent of neighbours, chosen by common consent in the byrlaw courts. Hence byrlaw-men or birley-men, a species of rustic judges for determining disputes in their neighbourhood. This seems to have been a very ancient institution. *Skene, h. t.* [See *Bye-Laws.*]

BURSARY; is the name given to an endowment or exhibition in a Scotch university, for the support of a student. *Ersk.* B. i. tit. 5, § 12; *Jurid. Styles*, ii. 61, 633; [*Martin*, 5 Dec. 1885, 13 R. 274.]

BURYING-PLACE. The right to a burying-place in a parish churchyard is a right of a peculiar description, which, in the ordinary case, is attached as part and pertinent of the lands of the several heritors in the parish. But there is no proper right in the *solum* of the churchyard vested in the heritor using it as a family burying-place, entitling him to exclude the management and control of the whole heritors of the parish, to whom the entire churchyard belongs, in the same sense in which the area of the parish church belongs to them. This general rule, however, even in rural parishes, is liable to exceptions; and in burghs the same sort of property in a burying-place, which is admitted as to church seats, seems to be recognised; although the extent of the right of alienation does not appear to be distinctly ascertained. In Edinburgh, the right to special burying-places in the churchyards is recognised, and the right transferred by conveyances, which are recorded in the town-council or kirk-session records; and there can be no doubt that, where the magistrates of a town have acquired a piece of ground, whether adjacent to the churchyard or elsewhere, and have inclosed and laid it out as a burying-ground, the feu of a special allotment in this inclosure may be

acquired, inherited, or transferred, as a burial-place, according to the ordinary rules of law, and always consistently with this special use of the subject. [Lair-holders in a private cemetery have no right of property in their lairs, but only a right, depending on contract, to use them in perpetuity for sepulture, with a corresponding obligation on the proprietors of the cemetery to dedicate it exclusively to that purpose; *Cunningham*, 23 June 1871, 9 Macph. 869. The act 18 & 19 Vict. c. 68 (amended by 19 & 20 Vict. c. 103, § 69; 20 & 21 Vict. c. 42; 29 & 30 Vict. c. 50; 44 & 45 Vict. c. 27; 49 & 50 Vict. c. 21), provides for the formation of new burial-grounds, and their management by parochial boards. The same act also gives power to Her Majesty, on the representation of a Secretary of State, to restrain the opening of new burial-grounds, and to order the discontinuance of burials in specified places (§ 5). See *Bain*, 6 Nov. 1884, 12 R. 62.] See *Ersk.* B. i. tit. 5, § 13; B. ii. tit. 1, § 8; *Bell's Princ.* § 836; [*Dunlop's Par. Law*, 72; *Duncan's Par. Eccl. Law*, 231; *Black's Par. Eccl. Law*, 65; *Rankine on Land-Ownership*, 163, 656.] See *Churchyard*.

BUTCHERS. By 1703, c. 7, butchers are prohibited from possessing, on lease or otherwise, either directly or indirectly, more than one acre for the purpose of grazing cattle, &c. The object of this act seems to have been to prevent monopolies; but there is no evidence of its ever having been enforced. *Hunter's Landlord and Tenant*, i. 197.

BUYING OF PLEAS. By 1594, c. 216, it is not lawful for members of the College of Justice, or for any inferior judges, their deputies, clerks, or "advocates," directly or indirectly, by themselves, or others for their behoof, to buy any lands, teinds, rowms or possessions (extended by judicial construction to all

debateable rights, whether heritable or moveable), which are or have been in dependence and remain undecided. The penalty is loss of office, place, and privilege. The object appears to have been to prevent parties connected with the court from purchasing depending suits, and using their influence in the court in promoting their success: and hence it seems to be held that the purchaser of the plea must be a practitioner in the court before which it depends, otherwise he will not be affected by the statute. Although the act does not mention procurators before inferior courts, Mackenzie holds that the word "advocates" before these courts extends to procurators. *Mackenzie's Obs.* 289; *Stair*, B. i. tit. 10, § 8; tit. 14, § 2; tit. 17, § 14; *Kames' Equity*, 235; [*Bell's Princ.* § 36; *Menzies' Conv.* 52; *M. Bell's Conv.* i. 161.] See *Pactum de quota litis*.

BYE-LAWS; [rules made by some authority (subordinate to the legislature) for the regulation, administration, or management of a certain district, property, undertaking, &c., and binding on all persons who come within their scope; *Sweet's Law Dict.* Thus, an act of Parliament incorporating a railway company gives it power to make bye-laws for the regulation of its line, subject to the sanction of the Board of Trade.] Every corporation lawfully erected has power to make bye-laws or private statutes for the government of the corporation, which are binding on themselves, unless contrary to the laws of the land, or to the terms of their charter. [See *Brice on Ultra Vires*, 7; *Slattery*, 13 App. Ca. 446. Blount, in his *Law Dict.*, holds that the word *bye-law* is the same as the old *birlaw* or *burlaw*; see *Burlaw*. It is derived from *bylag* (Swedish) or *bylov* (Danish): *by*, a village, and *lag* or *lov*, law. *Skeat's Etymol. Dict.* See *Lumly on Bye-laws*.]

C

[**CABS.** See *Hackney-Coachmen*.]

CADROW; erroneously printed in the act 1434, c. 41, for *Cadzow* or *Hamilton*. *Skene, h. t.*

CALENDAR. The statute altering the calendar, and introducing what was called the *new style*, is 24 Geo. II. c. 23, which enacted, that from and after 31st December 1751, 1st January, and not 25th March, shall be reckoned the first day of the year;

as also, that the day after 2d September 1752 should be reckoned 14th September. The statute provides for all the other changes connected with the alteration in the calendar. A calendar month consists of thirty or thirty-one days, except February, which has twenty-eight, and in leap years twenty-nine days. See *Swint. Abridg. h. t.*; [*Wharton's Lex.*]

[**CALL.** The capital of a joint stock