The Law of Land-Ownership in Scotland

A TREATISE

ON THE

RIGHTS AND BURDENS

INCIDENT TO

THE OWNERSHIP OF LANDS

AND

OTHER HERITAGES IN SCOTLAND

BY

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ADVOCATE

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PREFACE TO THE FIRST EDITION.

THE aim of the present treatise is to fill up an admitted gap in Scotch legal literature. While many well-known works are devoted to an exposition of the rules of heritable conveyancing (that is, the transmission of heritable property *inter vivos* or *mortis causâ*, and the form of the documents employed therein), and while other approved treatises are concerned with the relation of landlord and tenant, the laws regulating the use and enjoyment of lands and other heritages by their owner in possession have, in almost every instance, to be culled directly from judicial decisions and the statute-book, or groped for in the Civil Law and in English and foreign legal systems. Accordingly, the point of view taken up in the following pages is that of a person possessing lands or other heritages in Scotland as their undoubted owner, and the questions which it has been attempted to answer are mainly these: first, What or how much does he possess under his titles? secondly, How far is he restricted in the use and enjoyment of his property by limitations conceived (*a*) in favour of the Crown or the public, or (*b*) in favour of individuals? and thirdly, What are the public burdens which he

is called upon to bear by reason of his ownership or possession? The great importance of the fact of possession in all questions of land-ownership pointed to the expediency of starting with a few chapters on that subject. So that the most convenient division of a somewhat extensive field of inquiry has appeared to be into four parts, headed respectively—

I. Possession and Ownership generally.
II. Restrictions in favour of the Crown and the Public.
III. Restrictions in favour of Individuals.
IV. Public Burdens.

A glance at the Table of Contents will show the nature of the subjects which are treated of under each of these heads.

It is only further necessary to explain the mode in which statutory enactments have been set forth. It is becoming more and more strongly the belief among lawyers on both sides of the Border that the only trustworthy, and usually the most convenient, mode of explaining statutory law is to print the Acts in full along with relative notes and a copious index. The practitioner instinctively turns away from any *résumé*, however careful, to the *ipsissima verba* of the Legislature, and only desires further to know whether and in what sense these have been subjected to judicial interpretation. Therefore, in the present work, wherever the law is wholly or mainly statutory, a very brief reference is thought sufficient in the text, and the statute is printed *ad longum* in the Appendix, with notes. Where, however, as in the Fourth Part, small fragments only of statutes require to be noticed, these or their substance have been inserted in the text.

It is my hope that the following pages may be useful, not only to the legal practitioner, but also to the owners of property in lands, houses, and other heritages, and to those generally who

are in the possession or management of heritable property in Scotland.

I have to return my warm thanks to very many of my brethren at the Bar for assistance most ungrudgingly afforded me in the preparation of this treatise; and I cannot be sufficiently grateful for the unwearied help and counsel of my friend Mr David Gillespie, Advocate, who has kindly revised the work as it passed through the press, and furnished me with many timely and valuable hints and suggestions.

June 1879.

PREFACE TO THE SECOND EDITION.

I HAVE found it impossible to curtail any part of a work which originally aimed—perhaps too successfully—at conciseness. The increase in its bulk is due—(1) to a new statute, the Entail Act of 1882; (2) to the mass of cases which have been decided in the Scotch Courts during the last four years; (3) to an ampler use of English cases; and (4) to frequent citation of cases decided in the United States Supreme Court, and, so far as included in the admirable collection known as the American Reports, in the Supreme Courts of particular States. Scotch cases are brought down to 8th November 1883; English cases to the end of 8 App. Cas., 24 Ch. D., and 11 Q.B.D.; and American cases to the end of 16 Otto, and 43 Amer. R.

The thorough revision which the work has undergone owes

much of its value to its having been shared by my friend Mr Alexander Moody Stuart, Advocate, whose sound judgment and accurate research have saved me from not a few blunders and not a little anxiety.

J. R.

10 Melville Street, Edinburgh,
December 1883.

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PART I.

POSSESSION AND OWNERSHIP GENERALLY.

CHAPTER I.

POSSESSION.

THE word Possession, both in Roman and Scotch law, has been used in a variety of different meanings. Laying aside its non-legal signification, according to which a man's possessions mean his whole estate, that which he possesses or owns, it has been employed, in the first place, for the simple having or holding a thing, so that, as matter of fact, it is under the possessor's control, with the power of excluding the interference of all others. This is more properly called detention; and the holder or detentor may be quite unconscious of the fact of detention. This condition of things is productive of no legal results. The *animus* or intention to possess is required to introduce the physical fact of detention into the domain of law. This intention of the possessor may be,—to hold entirely for another, as in the case of a mere custodier; or partly for another and partly for himself, of which the most familiar example is that of the tenant of a heritable subject; or lastly, entirely for his own behoof, in which case the detention or *corpus* may be direct, or it may be mediate—that is, by the hands of some other. In all the cases here contemplated, the object possessed has been corporeal; but by an extension of the term introduced by the Roman law, and accepted by our own, the word possession, or *quasi* possession, is used with reference to incorporeal things or real rights, such as servitudes. Out of all these uses of the term, the only one which is of importance in this place is possession (including *quasi* possession) proper—viz., the having or holding a thing within the possessor's control, with

Definition.

Detention.

Quasi possession.

Possession proper.

the intention of holding it as his own property—*cum animo rem sibi habendi.*[1]

Scotch nomenclature.

The Scotch differs from the Roman law in its nomenclature in some respects, which are mainly traceable to the peculiarities of the early Roman civil procedure. Into these differences it would be useless to enter. But reference must be made to the terms used to qualify possession by our institutional writers. They begin by copying the derivation of the word given in the 'Digest,' from *positio sedium*, denoting the settlement of colonies in their particular seats.[2] The leading division is into natural and civil: the former meaning the holding of the thing possessed corporeally; the latter signifying either the holding of the subject by the sole act of the mind, or by the hands of another who holds it in the possessor's name.[3] Stair's enumeration[4] of the different degrees of clearness of possession seems to be of no legal value, except as detailing the various modes in which possession may be proved; for the possession, however proved, is the same, and has the same legal effects. A similar remark may be made regarding the term 'symbolical 'possession' (whether the symbol be part of the thing possessed or not); regarding possession by conjunction of interest, and possession *vi aut clam aut precario*,—for all of these qualifications refer to modes of acquiring possession, not to differences in its nature.[5] The distinction between possession *bonâ fide* and *malâ fide* will be touched on below.[6] But it must be borne in mind that possession proper, as above defined, is always the same, and that any apparent difference in its effects arises from other elements with which

Natural—civil.

[1] The chief Roman texts are to be found in D. (41.2) and C. (7.32). The leading modern authority is Savigny, *Das Recht des Besitzes*, of which there is an English translation by Perry; see §§ 1-11. A later monograph is by a Belgian civilian, Molitor, *La Possession*, &c., 3d ed., 1868; see chap. I.; see also the latest, Bekker, *Das Recht des Besitzes*, 1880. The main controversies are discussed by Vangerow, *Pandekten*, §§ 198 *et seqq.* See also Hunter's *Roman Law*, p. 195 *et seq.*, in which the author differs from the above civilians as to the genesis of the Roman doctrine; the Scotch authorities *infra*; and Bayne, 32-38. A learned American jurist, O. W. Holmes, junr., argues, mainly on the history of the doctrine of bailments, that the only intention demanded by the English Common Law is the intention to exclude others. (*The Common Law*, ch. v. and vi., and esp. p. 220.)

[2] 1 pr. D. (41.2), Craig, 2.2.5; St. 2.1.9; Ersk. 2.1.20. It is more probably compounded of *pot*, the root of *potis*, *potens*, &c., and *sedes*.

[3] St. 2.1.10; Ersk. 2.1.22. The reference to 9 D. (41.2) gives no sanction to the nomenclature used by our writers. The use of the terms *naturalis* and *civilis possessio* in the Roman law was quite different. For discussions on this, a favourite *crux* of the civilians, see Savigny on Poss., §§ 5 and 6; Puchta, *Kl. civil. Schriften*, p. 239 *et seq.*; Molitor, *La Possession*, &c., §§ 4, 5, 6; Vangerow's *Pandekten*, § 199; and Hunter's *Roman Law*, p. 210, note. Bankt. 2.1.26, comes nearer the Roman terminology.

[4] St. 2.1.11-14.

[5] St. 2.1.15-16; Ersk. 2.1.23.

[6] See chap. 4.

it may happen to be combined; and that the only really important elements are the *corpus* or detention, and the *animus* or the intention, with which the subject is held.[7]

A right or a fact?

It may be right to notice here a controversy, which is, however, of no practical importance, except as contributing to give clearer notions of the part which possession ought to play in the science of law. Is possession a right or a mere fact? Whichever of these it be, there can be no question that possession gives rise to some very important rights. According to Stair, possession 'hath in it a distinct lesser right than property, though it be more '*facti* than *juris;*' and 'is a common precognite to the most of real 'rights.'[8] Erskine says more distinctly that it is made up partly of fact and partly of right—the fact being the detention, and the right the view with which the possessor holds.[9] But it seems clear that the *animus* itself is nothing more than a fact as well, and that its existence does nothing to convert that which was originally a mere physical condition—a *res facti*—into a right.[10] It is only when this condition of things is interfered with that a right of action arises out of the mere state of possession. The misuse of words which elevated possession into a right, probably arose from the early use of the term in the Roman law to denote that equitable ownership which the prætor granted to those who held and cultivated the *ager publicus*, which was in strict law inalienable, and to the property of foreigners, who could not have the Roman *dominium*.[11]

Jus possidendi. *Jura possessionis.*

It ought to be needless to remark on the distinction between the right to possess—*jus possidendi;* and the rights of the possessor, or consequent on possession—*jura possessionis.* The former is part and parcel of the benefits of ownership, and, in a wider sense, of certain other rights; the latter are rights which arise either wholly or principally from possession, and from it alone. Yet the distinction has been lost sight of.[12] Thus there have been reckoned among the advantages of possession the acquisition of property by occupation, by accession, and even by tradition—

[7] See Craig, 2.2.5-12, for the distinction between investiture and possession.

[8] St. 2.1.8.

[9] Ersk. 2.1.20.

[10] 1 § 3 D. (41.2), Craig, 2.2.5.

[11] Savigny, §§ 2.5 *et seq.*; Hunter, p. 221; Molitor, §§ 7-11. This learned author, while upholding the theory of right, is puzzled how to classify it; and proceeds partly on the assumption that every sort of possession *animo rem sibi habendi* produces rights and remedies. But this is erroneous, for the thief of moveables had in Roman law no remedy either against the real owner or any third person; 12 § 1 D. (47.2). See also Bekker, pp. 33, 340.

[12] Savigny, § 3; Molitor, §§ 2, 3; Hunter, p. 221.

the fact being, that in all these cases possession and property have a simultaneous origin, and that the former is from the first nothing more than the badge of the latter. The same thing is true, though less obviously, of the acquisition, as property not liable to restoration, of fruits *bonâ fide percepti* by one who is not the real owner of the subject which produces them. Until separation, the crop or fruits are not supposed to have any existence except as parts of the larger subject. Not till the moment of separation, gathering or reaping, does a new and separate possession begin. But it is at this very instant that the *bonâ fide possessor* acquires the fruits as owner. The leading consideration is the good faith of the possessor, the honest belief on probable grounds that he really is the owner, both of the producing subject and its produce—a belief which the equity of the Roman and Scotch, though not of the English law, justifies so far as the produce is concerned. When the *bona fides* ceases to exist, the privilege of the possessor ceases with it; and many delicate questions—chiefly decided on special circumstances—have arisen as to the exact date at which the change takes place.[13]

The *commoda possessionis.*

From a careful survey of the legal import of possession, it becomes clear that there are only two rights consequent on or inherent in the fact of possession—two *jura* or *commoda possessionis;* and that, accordingly, these alone fall within the scope of the present treatise. They correspond in a general way with the *possessio ad interdicta,* or *possessio* simply, and the *possessio ad usucapionem,* or *civilis possessio* (in the strict acceptation of the phrase), of the Roman law.[14] The rights denoted by these terms are the only rights known to the law in which the fact of possession is the only, or at least the main, element of importance. The former of the two is the right of the possessor to resist encroachment on or disturbance of his possession; and that either by taking steps to retain possession when threatened, or summarily to recover it when lost—in other words, the right to the possessory remedies. The other is the right to acquire or secure property in what did not originally belong to the possessor, by holding it undisturbed for a certain long period of time on an adequate title. This is the right to prescribe.

Right to the possessory remedies.

Right to prescribe.

Possession—exclusive.

Before bringing these preliminary remarks to a close, and proceeding to an exposition of these two rights, it is necessary to a complete understanding of the subject to remark, that it is of the essence of possession to be exclusive. This is expressed in the

[13] See *infra,* chap. 4.

[14] Savigny, § 4.

phrase that there cannot be at the same time a *possessio duorum in solidum.* The moment a thing comes into the possession of one man, it leaves that of its former possessor. This does not, however, prevent possession by more than one *pro indiviso;* nor by several persons holding each with a different *animus*—as fiar, liferenter, tenant, or custodier. The maxim and its qualifications apply equally to possession and ownership.[15]

[15] 5 § 15 D. (13.6); 3 § 5, 26 D. (41.2), cf. 15 § 4 D. (43.26); Savigny, § 11; Molitor, § 25; Warnkönig, 1.4.4.; Craig, 2.2.5.; Bankt. 2.1.27.

CHAPTER II.

A.—THE POSSESSORY REMEDIES.

In the Roman and Scotch systems.

As has just been said, the possessory remedies are directed to the protection of possession in two distinct ways—either by enabling the possessor to retain possession when threatened or disturbed, or to recover it summarily when lost. These correspond in general to the *interdicta retinendæ et recuperandæ possessionis* of the Roman law. The *interdictum adipiscendæ possessionis* owed its existence to a technicality of that system, and never was a possessory remedy.[1] It is unnecessary to enter into further detail concerning the Roman interdicts, than to refer to the texts and chief modern authorities,[2] and to present the materials requisite for a comparison with the Scotch remedies. The Roman interdict for the retention of disturbed possession of immoveable property was the *interdictum uti possidetis.*[3] Its requisites were possession; violent disturbance thereof, either by a hindrance of the possessor in the use of the subject, or by the encroacher's acting towards the subject as if he were possessor; and finally, the continuance and assertion of possession by the complainer at the date of bringing the interdict. The stated exceptions were, that possession had been obtained by the complainer either forcibly or clandestinely, or as tenant-at-will, from the other; and they could only be pleaded as between these parties, it being *jus tertii* to allege that possession had been got illegally from any third party. The purpose or object of this interdict was to obtain damages for the wrong done; to secure against further or threatened disturbance; and to fix possession pending *rei vindicatio.* Right to damages

[1] Savigny, § 35; Paul. Sent. 3.5. § 18; 3 I. (4.15); Gaius, 4.144; D. (43.3); C. (8.3); Molitor, § 57.

[2] Gaius, 4.138 *et seqq.*; I. (4.15); D. (43.1); C. (8.1); Savigny, §§ 34-42; Heffter's Civil Process, p. 393 *et seq.*; Puchta Inst. § 197; Molitor, § 54-79.

[3] Gaius, 4.149; 4 I. (4.15); D. (43.17); C. (8.6), and writers in [2].

prescribed in one year. The Roman interdicts[4] for the summary recovery of the possession of immoveables when lost were apparently[5] three, corresponding to the three exceptions just mentioned —*de vi* (or *unde vi*), *de clandestinâ possessione*, and *de precario*. For success in these it was necessary that the complainer should have had possession at the date of the alleged wrong; that the respondent himself was the wrong-doer; and that the wrong amounted to dejection—that is, loss of possession either through the respondent's personal violence or surreptitious entry, or, in the case of a *precarium*, through refusal to remove in conformity with his tenure, this being regarded as the commencement of adverse possession. The exceptions were in general the same as those which applied to the *interdictum uti possidetis*. The result of success was restitution and damages; and the remedy prescribed in one year. It is proper to keep these rules of procedure of the civil law in view; because, in some way which it is impossible now to trace, they seem to have acted as the model of the Scotch possessory remedies, though the influence of the feudal system is likewise visible.[6]

Title required in the law of Scotland.

The law of Scotland, in the case of heritable property, requires some title as the foundation for a possessory judgment against disturbance, or for summary recovery of possession; but it may be any lawful title which *ex facie* applies to the subject encroached on, and is not of the nature of a claim of debt. There is no trace to be found in the books of an interdict being granted without any title of possession being alleged.[7] Yet it is easy to imagine a case in which one who is a mere squatter, settling down on land to which he has no right whatever, should be disturbed in his possession by one equally devoid of title. He would be entitled to resist such disturbance by appeal to the ordinary tribunals and not solely by his own hand, as is shown not only by the action of ejection,[8] but by the analogous provision of the civil law, which puts the reply of tenancy-at-will into the mouth only of the complainer's own author. The rule requiring a title would, however, be justified in the case supposed, by regarding the squatting as tenancy at the will of the real owner, based on the latter's own title, and good against all but him. When his ownership ceases,

[4] 6 I. h.t.; Gaius, 4.154; D. (43.16); C. (8. 4 and 5), and Cicero, pro A. Cæcinâ, 31, 32, quoted by Savigny, § 40. See also [2], *supra*.

[5] It is doubtful whether the second interdict ever existed. Sav. § 41.

[6] St. 4.26. 13 and 15; Ersk. 4.1. 47 and 50.

[7] See Hagart *v.* Fife, 15th Nov. 1870, 9 Macph. 127; Irvine *v.* Robertson, 18th Jan. 1873, 11 Macph. 298; Stewart, Pott, & Co. *v.* Brown Bros., 15th Oct. 1878, 6 Ret. 35.

[8] *Infra*, p. 19.

so does the right of possession.[9] Thus, when a heritor transferred his right in a seat in his parish church, interdict against the acquirer's taking possession, at the instance of one who had occupied the seat by the heritor's permission, was refused.[10] So also possession for fifteen years without a title, and only on an alleged agreement with the proprietor, which was not instructed nor produced, was not sufficient for a possessory judgment.[11] But a personal title suffices;[12] or a lease,[13] even after it has been reduced, provided no removing has been obtained;[14] or the peculiar right which a heritor has in the parish churchyard or part thereof;[15] or, for a servitude, any sort of title which does not expressly exclude it.[16] It seems to have been at one time thought that servitudes, being *res incorporales*, could not be the subject of a possessory judgment;[17] but this view was expressly repudiated at a very early period.[18] A rental clothed with possession is equally available.[19] Finally, a seisin without its warrant is enough.[20] But the title must be one which on the face of it will apply to and fit in with the possession alleged, as cause and effect. Thus a general trust-disposition of all lands which might belong to the truster at his death, is not a sufficient title for obtaining interdict against encroachment on a particular subject, it being necessary to prove extrinsically that the subject had belonged to him.[21] For the same reason the title must not be inconsistent with the possessory right claimed.[22] An evasion of this rule is met

Personal.

Leasehold.

Servitude.

Must fit the possession.

[9] See *contra*, Hope, Min. Prac. 10.1, note; More's Notes to Stair, p. 148. But the rule of the old cases, to which More refers, seems to have been relaxed.

[10] M'Intosh *v.* Fraser, 8th July 1823; 2 S. 460 (N.E. 412).

[11] Neilson *v.* Vallance, 10th Dec. 1828, 7 S. 182.

[12] Glendinning *v.* Gordon, 1716, M. 9643 and 10610; Thomson *v.* Donald, 4th March 1830, 8 S. 630; Knox *v.* Brand, 26th May 1827, 5 S. 714 (right of ferry); Dickson *v.* Dickie, 18th July 1863, 1 M. 1157; cf. the rubric, with the remarks of the L.J.-C.

[13] Hume *v.* Scot, 1676, Mor. 10641; Robertson *v.* Arbuthnot, 1681, M. 10643; Hepburn *v.* Robertson, 1706, M. 10644; Young *v.* Cunningham, 22d June 1830, 8 S. 959; Anderson *v.* M'Callum, 3d Nov. 1857, 20 D. 2; Begbie & Co. *v.* Frame, 24th Nov. 1857, 20 D. 81; M'Donald *v.* Dempster, 15th Nov. 1871, 10 Macph. 94.

[14] Innes *v.* Allardyce, 14th Dec. 1822, 2 S. 93 (N.E. 85). See Innes *v.* Partridge, 28th June 1826, 4 S. 761 (N.E. 769).

[15] M'Bean *v.* Young, 22d Jan. 1859, 21 D. 314.

[16] Liston *v.* Galloway, 3d Dec. 1835, 14 S. 97, overruling Saunders *v.* Reid, 26th Feb. 1830, 8 S. 605; Carson *v.* Miller, 13th March 1863, 1 Macph. 604. Cf. Knox *v.* Brand, *supra*, [12].

[17] Grant *v.* Law, 1695, M. 10644; L. Montgomery *v.* Blair, 1694, 4 B.S. 153.

[18] Stewart *v.* Grant, 1698, M. 10644.

[19] E. Galloway *v.* Tailfer, 1627, M. 10636.

[20] M'Adam *v.* E. Galloway, 1766, M. 10654; Sheriff of Teviotdale *v.* Gledstanes, 1636, M. Sup. Vol. Durie, 82; St. 4.26.4.

[21] Mackie's Trs. *v.* Reekie, 1st Dec. 1832, 11 S. 157.

[22] Haigues *v.* Haliburton, 1705, M. 10623; Hunter *v.* Maule, 26th Jan. 1827, 5 S. 238 (N.E. 223); Lockhart *v.* Meikle, 1724, M. 10625.

by the maxim, *nemo potest sibi mutare causam possessionis*, if the possessor ascribe his possession to any but the original title, to the prejudice of his author. Nothing short of the long prescription can set up a new title covertly substituted, pending the possession.[23] Lastly, a possessory judgment cannot be obtained by the creditor in a *debitum fundi*, either as against another creditor, for between these the ordinary rules of ranking are applicable; or as against the owner, for the possession is not adverse.[24]

Not a claim debt.

So much for the title requisite for a possessory judgment. The possession must be of the same character as will be shown further on to be necessary for the positive prescription.[25] In particular, it must be open,[26] by either 'labouring the lands or drawing the 'rents,' peaceable and uninterrupted,[27] and as matter of right.[28] It is not suspended by minorities.[29] Also, in a question between the possessor and him from whom it was obtained or his authors, it must be *bonâ fide* possession.[30] Its duration appears to have been ten years at a very early period,[31] possibly in imitation of one part of the civil law of prescription; but for more than two centuries it has been seven years.[32] This period carries the possessory privilege when the party pleading it, or his predecessors, have been seven years in possession immediately before the action or other interruption, or 'at least where there hath not seven 'years intervened since he or they were in possession seven years.'[33]

Character of the possession required.

[23] Cs. Dunfermline *v.* L. Pitmedden, 1698, M. 10630; Carnegie *v.* Mags. of Montrose, 1777, M. 10611, and Possession, App. No. 1; Menzies *v.* Campbell, 1679, M. 10629. The rule does not apply to new securities for debt; Cleughton, 1749, M. 10610. See further on the maxim, chap. 3.

[24] Hope, Min. Prac. 10.1, note. Adamsons *v.* L. Balmerino, 1662, M. 10645; White *v.* Horn, 1665, M. 10646; Ly. Clerkington, 1668, do.; Hadden *v.* Moir, 1673, M. 10648; Cant *v.* Aickman, 1683, M. 10633 and 10643. As to wadsets, see Moys *v.* E. Morton, 1724, M. 10626; Innes *v.* D. Gordon, 1700, M. 10635.

[25] See *infra*, chap. 3. In addition to the cases there, see A. *v.* B., 1546, M. 10598; Cs. Dunfermline, *supra*, [23]; Irving *v.* Leadhills Mining Co., 11th March 1856, 18 D. 833; Lord Deas in Johnstone *v.* Murray, 5th March 1862, 24 D. 709. As to possession of a use which was '*res meræ facultatis*,' see Gibb *v.* Bruce, 1st Dec. 1837, 16 S. 169.

[26] Harper *v.* Armour, 1672, M. 10628; Fife Ferry Trs. *v.* Mags. of Dysart, 20th Dec. 1827, 6 S. 265.

[27] Montgomery *v.* Home, 1664, M. 10627; E. Winton *v.* Gordon, 1668, do.; and cases in M. 10631-3; St. 4.26.10.

[28] Lindsay *v.* Robertson, 13th June 1867, 5 Macph. 864; Calder *v.* Adam, 2d March 1870, 8 Macph. 645.

[29] E. Winton in [27].

[30] Cs. Dunfermline *v.* L. Pitmedden, 1698, M. 10630: Maxwell *v.* Ferguson, 1673, M. 10628; M'Kerron *v.* Gordon, 15th Feb. 1876, 3 Ret. 429, and other road cases, *infra*, chap. 19. If in other circumstances, see Ross *v.* Fisher, 28th Feb. 1833, 11 S. 467.

[31] Blackfriars *v.* Berwick, 1503, M. 10597; Hope, Min. Prac., 10.1; see Spottisw., note there.

[32] Hamilton *v.* Tenants of Overshiels, 1661, M. 10618; and see 3 B.S. 354.

[33] St. 4.26.4 and 10; Dalmahoy *v.* Horsburgh, 1628, M. Sup. Vol. Durie, p. 49; Wilson *v.* Henderson, 2d March 1855, 17 D. 534.

In the case of a possessory judgment being claimed for warrandice lands, the possession must have followed the eviction of the principal lands.[34] In deciding a possessory question, the possession prior to the seven years may be looked to in order to discover the character of the possession during the latter period, not only in regard to its being a matter of right, but in regard to its legality at the commencement.[35]

Effect of a possessory judgment.

It has been conjectured that the possessory judgment originated in the hardship which would arise from a vassal being ousted from possession by one who appeared to have a preferable right—the titles of the other, which were necessary for his defence, being in the hands of one or other of his superiors, from whom he could not recover them at short notice.[36] Whether this be so, or whether the distinction between a possessory and a declaratory or petitory action, like the larger division between summary and ordinary actions, is one which emerges the moment that law begins to be treated as a science, and may have been copied from the civil law, is of no practical importance. The effect, or, as it is usually called, the benefit, of a possessory judgment is to secure the holder thereof in his possession, until such time as his title is reduced or he is otherwise put in *malâ fide*.[37] It cannot, as a rule, be pleaded as *res judicata* in a question of right.[38] During this interval he has all the rights of a *bonâ fide* possessor.

Modes of use.

Possession of the nature herein described may be used in either of two ways—either as the foundation of a possessory action, or as a defence against the same.[39] These two cases will now be noticed in their order: first, where possession has only been threatened and requires to be secured by process of law; and, second, where it has been lost and has to be summarily restored.

1. Interdict.

(1) The active remedy appropriate for preventing any threatened or attempted disturbance of possession is (in the Inferior Courts) interdict, or (in the Bill Chamber) suspension and interdict; concerning which, in conformity with what has just been said, it has been laid down,[40] that 'to justify the interposition of the Court

[34] Forbes *v.* Innes, 1668, M. 1322 and 10647; Menzies *v.* Campbell, 1675, M. 10652.

[35] Johnstone *v.* Murray, 5th March 1862, 24 D. 709, per L. Deas; M'Kerron *v.* Gordon, 15th Feb. 1876, 3 Ret. 429. Lord Gifford differed on the latter point, holding that this was a matter for declarator.

[36] St. 4.22.14 and 4.26.3; Ersk. 4.1.50.

[37] St. 4.26.1.3; Ersk. 4.1.50; Watt *v.* Macgill, 11th March 1823, 2 S. 289 (N.E. 254); Hunter *v.* Maule, 26th Jan. 1827, 5 S. 238 (N.E. 223); Macdonald *v.* Watson, 23d Feb. 1830, 8 S. 584. It in no way excludes a declarator; Gray *v.* Watson, 1st March 1844, 6 D. 925.

[38] M'Callum *v.* Forth Iron Co., 15th March 1861, 23 D. 729.

[39] Cf. St. 4.26.4.10 (7), with 15.

[40] Per Lord Cowan in Colquhoun *v.* Paton, 17th June 1859, 21 D. 996, 1001.

'in granting an interdict, the party applying for it must show a 'legal title to the subject, of which his use and enjoyment and 'right of possession are alleged to be unlawfully interfered with; 'and further, he must show, *either* that there has been plain invasion of his property by a party having no right or title whatever 'in or to the subject or its use, *or* as against a party pleading competing title that he has had possession, in virtue of his title, for at 'least seven years prior to that attempt to innovate on it of which 'he complains, when he will be entitled to interdict *uti possidetis*.'[41] The former alternative is only one of the modes of protecting a right of property, either as an independent remedy, when the element of possession does not enter into the question, or as ancillary to a conclusion for declarator; and, properly speaking, it concerns us here only by way of illustration. The latter protects possession, and is a possessory remedy. Furthermore, in reading the cases, it is always necessary to bear in mind the distinction between interdict as a definitive possessory remedy and interim interdict granted either at the inception of a prohibitory process or at some later stage, such as the passing of the Note in the Bill Chamber. In granting or refusing interim interdict, a larger discretion is allowed to the judge in order to the attainment of substantial justice pending investigation of the facts. With this explanation, it will be useful to collect from cases of all these kinds certain rules which apply more especially to heritable property.

Nothing more need be said of the title required;[42] and the peculiarities of procedure in the Bill Chamber and Court of Session do not belong to the present discussion.[43] But it is proper to call attention to the circumstances in which interdict is granted or refused, and to its effect when granted.

Circumstances in which interdict is granted or refused.

Interdict will not be granted adversely to the admitted possession, on a mere allegation that the possession has been illegal. The proper remedy is declarator.[44] Nor in possessory questions will interdict be always granted as matter of right. It is an equitable remedy to a large extent subject to the discretion of the Court, which will be influenced by such a consideration as the greater or

[41] See Glens *v.* Bryden, 8th June 1830, 8 S. 893; Matheson *v.* Stewart, 17th May 1872, 10 Macph. 704.

[42] See also Porterfield *v.* M'Millan, 3d July 1847, 9 D. 1424.

[43] See 2 Mackay, C. of Session Practice, 210-238.

[44] Murray's Trs. *v.* Mowatt, 28th Nov. 1835, 14 S. 84; L. Lovat *v.* Fraser, 19th Dec. 1845, 8 D. 316; Porterfield *v.* M'Millan, 3d July 1847, 9 D. 1424; Dickson *v.* Lanark, &c., Road Trs., 18th Nov. 1848, 11 D. 115; Buchanan *v.* Glasgow Waterworks, 3d June 1869, 7 Macph. 853. See also E. Kinnoul *v.* Dalgleish, 21st March 1805, 4 Pat. 671, 677; Scott *v.* M'Dowall, 29th May 1857, 19 D. 769; Grierson *v.* Sandsting School Board, 21st Jan. 1882, 9 Ret. 437.

smaller loss likely to be caused by granting or refusing;[45] and whether it grants or refuses, the Court may, where that is practicable, cause an account to be kept of the income drawn from the disputed subjects[46] in order to facilitate a settlement after the rights of parties have been fixed by declarator. It is not sufficient to adduce a *primâ facie* case of right or of possession. There must be some proof or admission, at once deducible.[47] In granting interim interdict, however, this rule, like many others, is not so strictly observed.[48] It may be gathered from a series of cases[49] —in none of which, however, was the state of possession a prominent element—that, to justify interdict, there must be either an actual attempt, or at least reasonable apprehension of an intention, to invert or disturb the possession. Lord President Hope was of opinion that interdict should be granted, if the thing complained of was unlawful; 'for as none of the lieges has a right to do what 'is unlawful, none have an interest to object to be interdicted from 'doing it.'[50] But Lord Corehouse thought that 'no man is entitled 'to ask for an interdict against another, unless he has actually suf- 'fered, or has reasonable cause to apprehend the risk of suffering, 'at his hands.'[51] In this opinion he is supported by the Court in the case of *King*—with this argument added, that no one has a right to expose another to the pains of breach of interdict if the latter inadvertently goes one inch beyond his rights. Interdict, founded on ownership, is an inappropriate remedy when untimeously presented—as where the possession has been peaceably and for some length of time inverted,[52] or operations have been completed for some years without objection.[53] A stronger and more questionable case

Discretionary.

Apprehension of disturbance.

Timeous.

[45] Walker *v.* Christie, 18th Jan. 1849, 11 D. 373; Wilson *v.* Gilbert, 18th March 1863, 1 Macph. 663; L.J.-C. in Lindsay *v.* Robertson, 13th June 1867, 5 Macph. 864; Baird *v.* Monkland Iron Co., 18th July 1862, 24 D. 1418; in England, Elwes *v.* Payne, 12 Ch. D. 468.

[46] Monkland Canal *v.* Dixon, 16th May 1822, 1 S. 412 (N.E. 385); Carnegie *v.* Brand, 6th July 1826, 4 S. 802 (N.E. 809); Mackenzie *v.* Mags. of Dingwall, 11th July 1829, 7 S. 899, varied 11th July 1831, 5 W.S. 351; E. Fife *v.* Mags. of Banff, 27th Nov. 1829, 8 S. 137; Graham *v.* D. Hamilton, 30th June 1868, 6 Macph. 965; Ds. Sutherland *v.* Gilchrist, 15th Dec. 1837, 16 Sh. 237.

[47] Anderson *v.* E. Morton, 9th July 1846, 8 D. 1085; Rankin *v.* M'Lachlan, 30th Nov. 1864, 3 Macph. 128.

[48] See D. Buccleuch *v.* Brown & Co., 29th Oct. 1873, 1 Ret. 85; Adams *v.* Mags. of Glasgow, 10th June 1868, 40 Jur. 524.

[49] Moncrieff *v.* Arnott, 13th Feb. 1828, 6 S. 530; Dunn *v.* Hamilton, 11th March 1837, 15 S. 853; affd. 30th July 1838, 3 S. and M.L. 356; King *v.* Hamilton, 17th Jan. 1844, 6 D. 399; Hoyle & Co. *v.* Shaws Water Co., 21st Nov. 1854, 17 D. 83.

[50] 15 S. 872.

[51] Ibid. Hay's Trs. *v.* Young, 31st Jan. 1877, 4 Ret. 398; Steuart *v.* Stephen, 12th June 1877, 4 Ret. 873.

[52] Cf. D. Richmond *v.* E. Fife's Trs., 16th Feb. 1844, 6 D. 701; and Presb. of Dunoon *v.* Campbell, 13th June 1844, 6 D. 1262; Mags. of Kirkcaldy *v.* Greig, 18th July 1846, 8 D. 1247.

[53] Hoyle & Co. *v.* Shaws Water Co.,

was one in which it was held that a summary petition to the sheriff for an order to restore a wall to its original height, as a division-wall between the complainer's and the respondent's lands, and for interim interdict against further building, was not a competent remedy, after the wall—which was intended by the respondent to be converted into the gable of a house—had reached the height of four storeys, during a period of two months consumed by the parties in negotiating as to the terms on which the complainer should get the benefit of the gable, in case he should wish to make use of it.[54] And in an earlier case, where interdict founded on a servitude *non ædificandi* was sought, first, against proceeding further with buildings already erected, and, secondly, against building at all, the erections having been nearly completed, it was refused—the former application having been made *intempestive*, and the latter being quite incompetent.[55] But this rule does not apply to exclude interdict when the operations, complete at one time, require periodical renewal,[56] or are repeated, as distinguished from being continuous.[57] An additional power is now conferred on the Court of Session, or the Lord Ordinary on the Bills, to ordain a respondent in a Bill Chamber proceeding to reinstate the complainer in his possessory right, as against any such act done either before or after the institution of such proceeding as might have been interdicted by the Court in the exercise of its preventive jurisdiction, and that on a prayer to that effect contained in the original or in a supplementary note.[58] There may, however, still be cases in which neither interdict nor reinstatement is feasible, as where a 'blaes' heap is ignited;[59] and then an action of damages is the only remedy. Though, as will be shown presently, there are circumstances in which alterations in the state of possession may be made *vid facti*, without recourse to the Courts, the rule is, that an interdict will lie against any such high-handed proceedings.[60]

Against alterations *vid facti*.

supra,[49]; cf. Campbell *v.* Mags. of Bute, 30th June 1831, 9 S. 848; but see Farquharson *v.* Farquharson, 1741, M. 12779, 5 B.S. 688, for a case of *interdictum restitutorium*.

[54] Begg *v.* Jack, 10th Jan. 1874, 1 Ret. 366; see sequel, 3 Ret. 35, canvassed in Grahame *v.* Mags. of Kirkcaldy, 7 App. Cas. 558, 9 Ret. H.L. 92, per Lord Watson; discussed *sub voce* Begg *v.* Jack in chap. 32, *infra*.

[55] Lowson's Trs. *v.* Crammond, 16th Nov. 1864, 3 Macph. 53; see Glen *v.* Caledonian Ry., 23d May 1868, 6 Macph. 797.

[56] E. Fife *v.* Gordon, 18th June 1807, M. Appx., Salmon Fishing, No. 2.

[57] Dickson *v.* Dickie, *supra*,[12]; Hoyle & Co. *v.* Shaws Water Co., *supra*, [49].

[58] 31 & 32 Vict. c. 100, sec. 89. See, as to the Common Law, Grahame, [54].

[59] Hislop *v.* Kelvinside Estate Co., 10th Jan. 1883, 20 Sc. L.R. 298.

[60] Cameron *v.* Macdonnel, 20th Dec. 1822, 2 S. 103 (N.E. 97); M'Crone *v.* Campbell, 24th Nov. 1826, 5 S. 42 (N.E. 39); Hill *v.* Dixon, 8th Feb. 1849, 11 D. 551; Hood *v.* Miller, 10th Feb. 1855, 17 D. 411; Begbie & Co. *v.* Frame, 24th Nov. 1857, 20 D. 81.

One example will suffice. The complainer's coal-house was separated from the respondent's premises by a vennel, and had been protected for more than the possessory period against carts by a curb-stone therein, which the latter *brevi manu* removed; whereupon the complainer placed a row of stones on the site, and not projecting beyond the old line of the curb, and brought an interdict against the respondent removing the stones, as he threatened to do. The interdict was granted on the grounds that the removal of the curb-stone was unwarrantable, and that the new fence was not materially different from the old.[61] It is quite competent to bring the complaint against the actual inverter of possession, although he is acting only as agent for a disclosed principal. The latter cannot demand to be sisted as a party to the process of interdict; still less can he demand that it should be sisted to await the issue of a declarator of his right.[62] Where a case is shown setting forth a reasonable apprehension of a sudden inversion of possession, it will be in the discretion of the judge to grant interim interdict till answers be put in, recallable on cause shown in the progress of the application. Lastly, it follows, from the *quasi* criminal nature of a complaint for breach, that the application for interdict must be distinct in its terms,[63] and neither vague nor indefinite either as to the parties against whom it is sought,[64] or the acts which it seeks to prevent;[65] and the terms of the interdict will be very strictly construed.[66]

Against an agent for others.

Strictly construed.

Breach of interdict.

Breach of interdict, being a disregard of a judicial decree, infers the consequences of a contempt of Court.[67] Complaint for breach may be competently brought wherever it can be proved that the passing of the interdict had come to the knowledge of the respondent—whether formally, by service of the petition and interlocutor, or not[68]—and that there is no material change of circumstances.[69] The proceeding is not properly a criminal one, though nearly

[61] Black *v.* Dryburgh, 13th Feb. 1840, 2 D. 583.

[62] Dobbie *v.* Halbert, 7th March 1863, 1 Macph. 532.

[63] Walker *v.* Wishart, 10th Dec. 1825, 4 S. 302 (N.E. 305).

[64] Pattison *v.* Fitzgerald, 28th Nov. 1823, 2 S. 536 (N.E. 468).

[65] Cathcart *v.* Sloss, 22d Nov. 1864, 3 Macph. 76; D. Atholl *v.* Dalgleish, 28th June 1823, 2 S. 442 (N.E. 393); Forbes *v.* Smith, 19th Feb. 1824, 2 S. 721 (N.E. 602), rem. 28th June 1825, 1 W.S. 583.

[66] Hunter *v.* Ponton, 22d Dec. 1821, 1 S. 233 (221); see Dudgeon *v.* Thomson, 17th March 1876, 3 Ret. 604.

[67] Menzies *v.* Macdonald, 13th Feb. 1864, 2 Macph. 652.

[68] Robertson *v.* M'Donald, 16th Jan. 1829, 7 S. 272; Clark *v.* Stirling, 14th June 1839, 1 D. 955; Henderson *v.* Maclellan, 23d May 1874, 1 Ret. 920; cf. D. Atholl *v.* Robertson, 9th Jan. 1872, 10 Macph. 298.

[69] L. Lovat *v.* Macdonell, 4th Feb. 1868, 6 Macph. 330 (a supervenient lease of salmon-fishings from the Crown). Cf. Dudgeon *v.* Thomson, 10th July 1877, 4 Ret. H.L. 88.

approaching thereto.[70] Thus, where penal conclusions are added —such as for punishment by imprisonment, fine, or otherwise—it is absolutely necessary to obtain the concourse of the Crown.[71] Again, where a complaint for breach was sent to a jury who returned a verdict for the respondent, and an application was made for a new trial on the ground of the verdict being against evidence, it was held, that in respect of the penal conclusions, the very strongest grounds for opening up the verdict must be shown, even if (as did not need to be decided) such a proceeding was not incompetent on the analogy of 'tholing an assize,' though the analogy was not perfect, as the jury were sitting in a civil case.[72] Yet the judicial examination of the respondent, after service of the complaint and the disposal of any question of relevancy, was found to be competent, in spite of this *quasi* criminal character;[73] he is also a competent witness in the complaint;[74] and his presence in Court is not required when there is no decerniture for punishment by fine or imprisonment, nor even absolutely indispensable when only a fine is inflicted.[75] It was, however, required where imprisonment was directed as alternative to a fine and to finding security for future good behaviour.[76] The results of breach of interdict depend on the circumstances in which it took place. In every case the wrong-doer is liable in expenses; and if there has been any alteration in the *status quo*, he is compelled to restore matters to the position in which they stood before the breach—failing which, he is mulcted in damages.[77] If the breach has been innocent or inadvertent, nothing more is demanded;[78] and in that case, it would seem that the Crown's concurrence is not required.[79] But if the breach be wilful, and a direct contempt of Court, the wrong-doer may be subjected, in addition to indemnifying the

[70] Cf. Chisholm *v.* Black, 12th June 1871, 2 Coup. 49.

[71] D. Northumberland *v.* Harris, 23d Feb. 1832, 10 S. 366; Beattie *v.* Rodger, 14th Nov. 1835, 14 S. 6; and L. Gray *v.* Petrie, *infra*, [76].

[72] Mackenzie *v.* Mags. of Dingwall, 11th July 1829, 7 S. 899; affd. 11th July 1831, 5 W.S. 351; 10th July 1838, 16 S. 1305; 12th Feb. 1839, 1 D. 487.

[73] Mackay *v.* Ross, 23d Sept. 1853, 1 Irv. 288; and see Hamilton *v.* Allan, 16th Feb. 1861, 23 D. 589; Henderson *v.* Macleilan, 23d May 1874, 1 Ret. 920.

[74] 16 Vict. c. 20, sec. 3; Miller *v.* Bain, 9th July 1879, 6 Ret. 1215.

[75] Anderson *v.* Connacher, 20th Dec. 1850, 13 D. 405.

[76] L. Gray *v.* Petrie, 17th Feb. 1848, 10 D. 718; 10th March 1849, 11 D. 1021; 16th Nov. 1849, 12 D. 85; affd. 22d Feb. 1851, 13 D. (H.L.) 30, explained in last case. See Milne *v.* Davidson, 11th Dec. 1829, 8 S. 223.

[77] Anderson *v.* Connacher, *supra*, [75]; L. Blantyre *v.* Dunn, 25th Jan. 1845, 7 D. 299.

[78] Fraser's Trs. *v.* Cran, 1st Dec. 1877, 5 Ret. 290; 7th Jan. 1879, 6 Ret. 451; (the respondent, author of a nuisance, believed on reasonable grounds that the nuisance had ceased).

[79] D. Northumberland *v.* Harris, *supra*, [71].

complainer, as already indicated, to reprimand, to fine, to paying the expenses of the Crown, to furnishing security against future misconduct—and failing these, to imprisonment.[80] And it is no excuse that the respondent regarded the interdict as inept from being informally granted. The proper remedy would have been to obtain its recall.[81] The petition for penalties may be combined with an application for interdict against the party in fault, and others engaged with him in the same course of conduct.[82]

Damages for wrongous interdict.

Interdict is granted *periculo petentis*, and damages may be claimed for one wrongously obtained; but something more than that the interdict merely caused delay in the respondent's operations must be proved.[83] In the ordinary case, caution is found on the passing of the note for such damages, if it should afterwards be determined that the application for interdict had been unwarrantable; and in one case there was much speculation as to whether the fact that caution had been found did not preclude inquiry as to whether damages were due.[84] It is conceived that such could not be the result—since caution is only a ready mode of recovering a debt found justly due—and that the *quantum* of damage, as well as the fact of liability, is a matter for the Court to decide. Accordingly, the Court has so decided, and has drawn a distinction between two cases, in both of which interdict was obtained in *bonâ fide*—but, as it turned out, mistakenly in point of legal right—by finding no damages due in the first case,[85] either in name of *lucrum cessans* to the party interdicted, or of actual gain to the party who had obtained the interdict, on the ground that the latter was only acting in continuance of long possession; and in the other case, by mulcting in damages, as no such possession had existed. In respect of the *bona fides*, however, the damages were estimated only at the actual loss sustained.[86] If the respondent be substantially in the wrong, and interdict be refused or recalled on the ground only of not being the proper remedy, no damages are due.[87]

Action of molestation.

The ready and rapid remedy of suspension and interdict has

[80] L. Gray *v.* Petrie, *supra*, [76]; Borthwick *v.* Boyd, 23d Feb. 1850, 12 D. 781; E. Galloway *v.* Nixon, 24th Oct. 1877, 5 Ret. 28.

[81] Hamilton *v.* Caledonian Ry., 20th July 1847, 10 D. 41; revd. 3d August 1850, 7 Bell, 272; D. Argyll *v.* M'Arthur, 28th June 1861, 23 D. 1236.

[82] Jolly *v.* Brown, 28th May 1828, 6 S. 872.

[83] Mudie *v.* Miln, 12th June 1828, 6 S. 967. Malice and want of probable cause do not require to be averred—Kennedy *v.* Fort-William Comrs., 12th Dec. 1877, 5 Ret. 302.

[84] L. Elibank *v.* Renton, 15th Jan. 1833, 11 S. 238.

[85] Moir *v.* Hunter, 16th Nov. 1832, 11 S. 32.

[86] Miller *v.* Hunter, 23d March 1865, 3 Macph. 740.

[87] Jack *v.* Begg, Oct. 26, 1875, 3 Ret. 35.

superseded the old summons of molestation, which is, however, still competent, and still stands in our styles,[88] though of little more than antiquarian interest. It differed from the similar action on a brieve of perambulation in pleading possession as well as a title, and was 'calculated for continuing proprietors of land-'estates in the lawful possession of them till the point of right be 'determined against all who should attempt to disturb their pos-'session. It was chiefly used in questions of commonty and con-'troverted marches.' It is discussed very fully by Lord Stair, and more shortly by Erskine.[89]

2. Pleadable in defence.

(2) A possessory judgment, founded on possession for seven years, as already defined, may be pleaded in defence to a note of suspension and interdict.[90]

3. Ejection and intrusion.

(3) The possessory remedies for the recovery of possession of heritage when lost—corresponding to the *interdicta recuperandæ possessionis* of the civil law[91]—are divided into two categories; those which do not, and those which do, require a special title for the constitution of the right. Of the former sort are actions of ejection, intrusion, and succeeding in the vice; of the latter are actions for maills and duties, and for removing.[92]

Ejection is the unwarrantable entering on lands or other heritable subjects by casting out violently (*vi*), as the name implies, the then possessor, he being in corporeal possession. Intrusion is such entering *clam vel precario*[93] when the possessor holds only *animo*, but has not relinquished his possession. There is then no violence used, since there is no natural possessor.[94] The rules regarding the actions arising from these wrongs are entirely similar except in this one respect, that a warrant to enter into possession summarily, contained in a disposition, is a complete answer to an action of intrusion—since this is regarded as relinquishment, which is a matter of fact to be gathered from the circumstances of the case[95]—but not to an action of ejection, if the ejection have been resisted, since the public peace must be respected.

No title is required to be alleged by the dispossessed party in

[88] Balf. 434; Dallas, p. 283; 3 Jurid. Styles, p. 128; Hope, Min. Prac. 10.6.7 and 10; 1587, c. 42, and Mackenzie's note thereon.

[89] Stair, 1.9.28; 4.27, *tot. tit.*; Ersk. 4.1.47; Bank. 4.24.53; Kames's Hist. Law Tracts, 290; Bayne, p. 149. For the *Actio finium regundorum*, see D. (10.1); C. (3.39).

[90] See cases in note [44], p. 13.

[91] *Supra*, p. 9.

[92] St. 4.26.2; Ersk. 4.1.47; Bank. 4.24.49; Bayne, 148-9; Balf. Pract. 465.

[93] Hally *v.* Lang, 26th June 1867, 5 Macph. 951.

[94] St. 1.9.25, 4.28.1; Bank. 4.24.57; Hope, Min. Prac. 10.4.

[95] St. 1.9.25.

either action, though where it exists it is usually set forth.[96] The paramount rule is '*spoliatus ante omnia restituendus.*'[97] Yet it would seem that a title will be demanded when the ejector is able in defence to exhibit a heritable title to the subjects in question.[98] A mere squatter is regarded as possessing at the will of the lawful possessor, and on a withdrawal of the permission, is himself an intruder, liable to be dispossessed on the principle of the civil interdict *de precario.* His action is only good against third parties.[99] Claims for meliorations by the squatter are not allowed to delay his removal, but are for later settlement.[100] *Interest reipublicæ* that possession, however obtained, should not be altered without consent of parties or judicial order;[101] though rare cases may happen in which one will be justified in restoring *vid facti* a state of things which has been *vid facti* changed, provided he do so *de recenti*, and without a breach of the peace.[102] The pursuer must have been in the natural possession himself, or by his servants or tenants,—in case of ejection, at its date—in case of intrusion, shortly anterior thereto. There being no proper succession in possession, his representatives may sue without service or confirmation.[103] Though Stair, in the passages just cited, says that the action lies even if the pursuer possesses *vi aut clam*, it is not so when he has obtained possession in this way from the defender or his authors, but only as between him and a third party—following in this respect the civil law.[104]

Form of summons.

The summons of ejection[105] sets forth the pursuer's former peaceable possession—with or without a title—and the defender's violent ejection, and forcibly intruding himself and taking posses-

[96] Dallas, p. 202; 3 Jur. Styles, p. 129; Ogilvie *v.* Restalrig, 1541, M. 14730; Montgomery *v.* Hamilton, 1548, M. 14731; Gadzeard *v.* Sheriff of Ayr, 1781, M. 14732.

[97] Cases in M. 14733 and 14737-40.

[98] Macdonald *v.* Chisholm, 16th May 1860, 22 D. 1075; see M'Callum *v.* Patrick, 21st Nov. 1868, 7 Macph. 163.

[99] Men of Selkirk *v.* Tenants of Kelso, 1541, M. 14738.

[100] Ibid., and Sinclair *v.* Sinclair, 29th Jan. 1829, 7 S. 342.

[101] Leg. Burg. c. 101 (marked c. 126) 1 Rob. I. c. 25: Rob. III. c. 15; Stair, 4.3.47; Bank. 1.10.8, 2.9.76, 4.24.57; Munro *v.* Davidson, 1808; Hume, 518. As to the brieve of novel disseisin, see Reg. Maj. 3.36; Quon. Att. c. 53; 1 Rob. I. c. 13; Co. Litt. 154.160.

[102] Macdonald *v.* Watson, 23d Feb. 1830, 8 S. 584 (removal of an obstruction to a road, on the fourth day); Glasgow, &c., Road Trs. *v.* Whyte, 10th Dec. 1825, 4 Sh. 303 (N.E. 306) and 2d Dec. 1828, 7 Sh. 115; cf. Ly. Ashburton *v.* Mackenzie, 8th July 1829, 7 Sh. 849; Graham *v.* Sharpe, 29th Nov. 1823, 2 Sh. 540 (N.E. 471); Geils *v.* Thompson, 12th Jan. 1872, 10 Macph. 327; Glasgow, &c., Road Trs. *v.* Tennant, 9th Feb. 1854, 16 D. 521. Mr Alan Fairford omits the provisoes. See Redgauntlet, chap. viii.

[103] St. 4.28.1-4; Scots *v.* E. Hume, 1663, M. 10602; but cf. Blair *v.* Matthew in Stair 1.9.26.

[104] Maxwell *v.* Fergusson, 1673, M. 10628; cf. notes [4] and [99].

[105] St. 4.28.5, 1.9.26; Dallas and Jur. Styles, *ut supra*, note [96].

sion, which he still maintains; and concludes for a finding that this was unwarrantable, and for an order instantly to flit and remove, to reinstate the pursuer, to desist from further molesting him, and to pay violent profits and other damages. The summons of intrusion differs only in setting forth the wrongous entry and masterful detention thereafter.

Caution for violent profits.

The only matter requiring explanation in these writs is the clause as to violent profits. These are penal damages instituted as a special deterrent against taking the law into one's own hands, 'for whatever is done without proper warrant or authority is by 'the law accounted violence.'[106] Caution for them must be found as a condition to lodging defences.[107] Violent profits are, by an old rule, estimated at double the amount of rent (whether that actually paid or the full value, does not appear) of houses within burghs royal and of regality, and within considerable burghs of barony.[108] In rural subjects there is no fixed rule, the safest being that given by Stair—the greatest profits that the pursuer can prove he could have made[109]—together, as has been recently laid down, with all damages which the subject may receive at the hands of the defender.[110] It seems doubtful whether deduction must be made of the expenses of cultivation.[111] These profits may be claimed either in such a summons as above or in a separate summons; but in either case no one but the actual occupier has a right to them.[112] So that if a lessor and lessee sue conjunctly, the latter only can proceed for violent profits, though the former may insist in his absence for the ordinary profits and for repossession.[113] Though ejection may be construed out of acts which have not the effect of expelling the complainer, it seems doubtful whether the constructive ejection, implied in mere intrusion, infers liability for violent profits.[114] The old mode of proof by oath *in litem* has been practically superseded by recent evidence Acts; and the action, except as to the finding of caution, proceeds like any suit for damages. Claim for the excess of the violent over the ordinary profits is prescribed in three years; for to

[106] Ersk. 2.6.54.

[107] 1594, c. 217; explained St. 4.28.8; 2 Jur. Styles, 76; see A. S. 11th July 1839, § 34, and cases in 2 Hunter, 62-3.

[108] St. 1.9.27, 2.9.44, 4.29.3; Bankt. 1.10.133.147; Ersk. *ut supra;* Weddell v. Buchan, 1611, M. 16460.

[109] St. 2.9.44; see Ersk. *ut supra;* Spottisw., p. 88; Bankt. *ut supra.*

[110] Per L. P. Inglis in Gardner *v.* Beresford's Trs., 17th July 1877, 4 Ret. 1091—a case of lease.

[111] Cf. St. 1.9.27, with 4.29.2 and 3; see ——— *v.* L. Sinclair, 1580, M. 14726.

[112] Damitston *v.* Mags. of Linlithgow, 1582, M. 16459.

[113] Steil *v.* Hay, 1666, M. 3611.

[114] L. Colliston *v.* E. Errol, 1575, M. 3605; Drumkillo *v.* Laing, 1623, M. 3609.

this effect have the general words of 1579, c. 81, been restricted by usage.[115] But minors may sue within three years of reaching majority. The defences proper to the two actions generally are—(1) That the whole subject was immediately restored in the same condition as before, and payment made of damages and expenses. Our old law introduced the limit of twenty-four hours; but it is doubtful if the Court would now be bound thereby.[116] (2) That entry was by authority of a competent judge; or (3) with consent of the pursuer or others who were in lawful possession.[117]

Sheriff-Court proceeding.

This form of remedy by summons, which is confined to the Court of Session,[118] is not the only form. A summary application by petition to the sheriff praying for the same orders and proceeding on the same grounds is the remedy usually adopted.[119]

The summons of succeeding in the vice is part of the law of landlord and tenant.[120]

Removings.

In removings, whether ordinary or summary, and in actions for maills and duties, a title is required; and the actions will or will not be possessory, according as the summons is laid on the title with seven years' possession, or on the title alone. The possessory title is necessary where the defender or his author possesses a competing title.[121] The rules of procedure and the results are precisely the same in both cases, and need not be here discussed, since the processes are not in any way distinctly possessory, but proceed as a rule on proprietary right alone.[122]

4. In defence.

(4) A possessory judgment is, finally, an answer to all these modes of recovering possession, and preserves the *bona fides* of the possessor till the issue of a declarator of right.[123]

Jurisdiction.

The sheriff and Dean of Guild have jurisdiction in possessory actions.[124] It may be anticipated that the recent extension[125] of the sheriff's jurisdiction to heritable questions below a certain value will result in a considerable diminution in the number of purely possessory cases.

[115] Stair, 1.9.26, 4.28.7; Mack. Obs. 195; Ersk. 3.7.16; cases in M. 11067-11074; M'Phadrick *v.* M'Lachlan, 1626, 1 B.S. 36.

[116] St. 4.28.7; see Sym *v.* Ambrose, 1624, M. 14743; Brown *v.* Lamb, 1630, M. 14744.

[117] St. ibid. and 1.9.26; Campbell *v.* Glenorchy, 1668, M. 10604; St. 1.9.27, and cases there.

[118] Home *v.* Home, 1586, M. 7481.

[119] Dickson *v.* Dickie, 18th July 1863, 1 Macph. 1157; see Hally *v.* Lang, *supra*, [93]. Lees' Styles, pp. 129, 217, 304.

[120] St. 1.9.27, 2.9.45; 2 Hunter, 35.

[121] St. 4.26.3.4.15.

[122] See the whole learning on Removings in 2 Hunter, 1-107; and on Maills and Duties, do., pp. 350-5.

[123] St. 4.26.10(7.)15; Bankt. 2.9.66; Ersk. 4.1.50; Hally *v.* Lang, *supra*, [93], per L. Curriehill (I.) and L. Deas.

[124] Ersk. 1.4.3 and 24; 2 Hunt. 33 and 331; Wight *v.* Wilson, 27th Nov. 1827, 6 S. 132; Thomson *v.* Donald, 4th March 1830, 8 S. 630; Gibb *v.* Bruce, 1st Dec. 1837, 16 S. 169; Johnstone *v.* Murray, 5th March 1862, 24 D. 709; cf. Lowson's Trs. *v.* Crammond, 16th Nov. 1864, 3 Macph. 53.

[125] 40 & 41 Vict. c. 50, sect. 8.

CHAPTER III.

B.—THE POSITIVE PRESCRIPTION.

THE second of the two advantages of possession is the right of prescription. Prescription in its widest application, as used in the law of Scotland, may be described as the effect which that law allows, in certain circumstances, to the lapse of time. But as applied to land rights, the element of possession, which may be said to be latent in all cases of prescription, comes prominently into the foreground. It is by virtue of this prominence that the doctrine of prescription claims treatment in this place; and if attention be here directed mainly to the part which is played by possession, this will be the more pardonable, since no part of our law has received—as indeed the intricacy of many of the questions involved fully demanded—so much elucidation, as the general rules relating to the positive prescription, not only from our great institutional writers,[1] but also in more modern times.[2] Yet it will be impossible to explain the characteristics of prescriptive possession without some exposition of the title it requires, and of the effect it produces. Definition.

Prescription in land rights is the creature of statute.[3] The Act of 1594, c. 218 (214), only touched the fringe of the subject, and, as being imperfect, was superseded[4] by the Act 1617, c. 12, which has been eulogised by Stair as 'that excellent statute 'of prescription;[5] and by Kames[6] as 'the palladium of our land 'proprietors.' As construed and extended by many generations of interpreters, this Act was found to work so satisfactorily as not to Statutory.

[1] St. 2.12, 4.35.15, 4.40.20, 4.45.17; and More's Notes, p. 265 *et seq.;* Ersk. 3.7; Bankt. 2.12; B. Pr. 605 and 2002.

[2] Napier on Prescription.

[3] For this reason, the connection of the Scotch with the civil law in this matter is of no practical importance. See St. 2.12.1-11; Napier, pp. 18-33; Gai., 2.42-61; I. (2.6); D. (41.3); C. (7.30.31.33-39); Paul. 5.2.

[4] Though not entirely in old practice. St. 2.3.19; Ersk. 2.7.25.

[5] St. 4.35.15.

[6] Eluc. p. 262.

require formal amendment till the year 1874, when the Act 37 & 38 Vict. c. 94, was passed. Whether, as Stair seems to deny,[7] and Lord Jeffrey[8] to affirm, there existed a prescription at common law, of part of which the Act of 1617 was simply declaratory, it is useless now to inquire. That the authority of the Act of 1617 was carried far beyond the narrow scope indicated by its terms, is undoubted; but whether this was done in explication of a previously existing common law, or simply by analogy to a rule of positive enactment which was found convenient, is of no practical moment.[9] In any case, the law of prescription in land rights resolves into a commentary upon these two statutes, the enacting portions of which are given in the note below.[10]

[7] St. 2.12.12; but cf. 2.3.69, and L. Adv. *v.* Sinclair, *infra*, note [45].

[8] In Crawfurd *v.* Menzies, 12th June 1849, 11 D. 1127. As to the policy of having any law of prescription, see St. 2.12.9; Ersk. 3.10.1; Bankt. 2.12.76; Napier, pp. 2-17; Kames, Eluc. p. 228 *et seq.*

[9] Kames, Equity, p. 117.

[10] The Act 1617, c. 12, after reciting the 'mischiefs'—viz., theft, corruption, loss and forgery of titles in times remote, causing the lieges great uncertainty of their heritable rights, and referring to the civil law and the laws of all nations—statutes, finds, and declares, 'that whosoever his 'Majesties lieges, their predecessors and 'authors, have brooked heretofore, or shall 'happen to brook in time comming, by 'themselves, their tenents, and others having their rights, their lands, barronies, 'annual-rents, and other heritages, by virtue of their heritable infeftments made 'to them by his Majestie or others their 'superiors and authors for the space of 'fourty years continually and together, 'following and insuing the date of their 'said infeftments, and that peaceably, 'without any lawful interruption made to 'them therein during the said space of 'fourty years, that such persons, their 'heirs and successors, shall never be 'troubled, pursued, nor inquieted in the 'heritable right and property of their 'saids lands and heritages foresaids, by 'his Majesty or others, their superiors and 'authors, their heirs and successors, nor 'by any other person pretending right to 'the same, by vertue of prior infeftments, 'publicke or private, nor upon no other 'ground, reason, or argument, competent 'of law, except for falsehood: providing 'they be able to show and produce a 'charter of the saids lands and others 'foresaids granted to them, or their predecessors, by their saids superiors and 'authors, preceding the entry of the saids 'fourty years possession, with the instrument of seasing following thereupon; or 'where there is no charter extant, that 'they show and produce instruments of 'seasing, one or moe continued and standing together for the said space of fourty 'years, either proceeding upon retours or 'upon precepts of *clare constat;* which 'rights his Majesty, with advice and consent of the estates foresaids, finds and 'declares to be good, valide, and sufficient 'rights (being claid with the said peaceable and continual possession of fourty 'years) without any lawful interruption 'as said is for brooking of the heritable 'right of the same lands, and others foresaid. And sicklike, his Majesty, with 'advice foresaid, statutes and ordains that 'all actions competent of the law, upon 'heritable bands, reversions, contracts, or 'others whatsoever, either already made 'or to be made, after the date hereof, shall 'be pursued within the space of fourty 'years after the date of the same: except 'the said reversions be incorporate within 'the body of the infeftments used and produced by the possessour of the saids lands 'for his title of the same, or registered in 'the Clerk of Register his books, in the 'which case, seeing all suspition of falsehood ceases most justly, the actions upon

So-called positive and negative prescription.

It is evident, on reading the Act 1617, c. 12, that it treats of two different sorts of cases, in which the lapse of forty years is to have a certain legal result. To the prescription described in the first clause, the term 'positive' has come to be applied.[11] That which is described in the second clause (beginning with the first occurrence of the words 'and sicklike') has, along with a similar institution in moveable rights of early date, been named 'negative 'prescription.' The former has to do solely with heritable rights, and mainly concerns us here; the latter is an extension to these rights of the older prescription of actions, introduced by 1469, c. 28, and 1474, c. 54. The element of possession is here subordinate to the idea of abandonment through neglect, or of presumed satisfaction.[12] Where the negative prescription affects the subsistence of such bonds or contracts as are, or used to be, regarded as heritable, it forms part of the law of obligations. But it has also an important function to exercise on the titles of heritable pro-

'the saids reversions, ingrossed and regis-
'trated, ought to be perpetual; excepting
'always from this present Act all actions
'of warrandize, which shall not prescribe
'from the date of the bond or infeftment
'whereupon the warrandize is sought, but
'only from the date of the distresse, which
'shall prescribe, it not being pursued
'within fourty years as said is; and sick-
'like it is declared that in the course of
'the saids fourty years prescription, the
'years of minority and less age shall
'noways be counted, but only the years
'during which the parties against whom
'the prescription is used and objected
'were majors and past xxi years of age,'
&c.

Conveyancing and Land Transfer Act, 1874, 37 & 38 Vict. c. 94, sect. 34: 'Any *ex facie* valid irredeemable title to 'an estate in land recorded in the appro-
'priate register of sasines shall be sufficient
'foundation for prescription, and posses-
'sion following on such recorded title for
'the space of twenty years continually
'and together, and that peaceably, with-
'out any lawful interruption made during
'the said space of twenty years, shall, for
'all the purposes of the Act of the Par-
'liament of Scotland, 1617, c. 12, "Anent
'"prescription of Heritable Rights," be
'equivalent to possession for forty years
'by virtue of heritable infeftments for
'which charters and instruments of sasine
'or other sufficient titles are shown and
'produced, according to the provisions of
'the said Act; and if such possession as
'aforesaid following on an *ex facie* valid
'irredeemable title recorded as aforesaid
'shall have continued for the space of
'thirty years, no deduction or allowance
'shall be made on account of the years of
'minority or less age of those against whom
'the prescription is used and objected,
'or of any period during which any person
'against whom prescription is used or ob-
'jected was under legal disability. This
'enactment shall have no application to,
'and shall not be construed so as to alter
'or affect, the existing law relating to the
'character or period of the possession, use,
'or enjoyment necessary to constitute or
'prove the existence of any servitude or
'of any public right of way or other pub-
'lic right, and shall not be pleadable to
'any effect in any action in dependence
'at the commencement of this Act, or
'which shall be commenced prior to the
'1st day of January 1879: Provided al-
'ways, that the possession for any space
'of time prior to the 1st day of January
'1879 shall not have effect for the pur-
'poses of this section unless such space
'of time immediately preceded and was
'continuous up to the said 1st day of
'January.'

[11] See Napier, p. 59, as to nomenclature.

[12] Bell, Pr. 605.

perty, and it may be convenient shortly to dispose of this before proceeding further.

Their correlation.

After considerable vacillation of opinion,[13] the true doctrine as to the relation which subsists between the so-called positive and negative prescription as affecting heritable titles was thus laid down by Lord Corehouse, as having been established by an earlier case:[14] 'There is no proposition better established than that the 'negative prescription cannot be pleaded directly against a right of 'heritable property. If it was otherwise, possession alone, without infeftment, would complete the right, contrary to the statute '1617, which requires a title as well as possession. . . . Both 'parties must produce their respective progresses, and compete 'upon them. . . . The negative prescription is of use, not in 'being objected directly against a heritable right of ownership, 'but in trying the validity of the competing progresses, and in 'getting rid of various objections which might otherwise have 'been competent. . . . For though exceptions, founded on '*ex facie* nullities—for example, that the deed is not subscribed, 'or that it is tested by only one witness—and the like, are not 'barred, yet all objections not appearing *ex facie* on the deed are 'effectually cut off by the negative prescription.'[15] This doctrine is now settled law. An example of the rule that the negative prescription is ineffectual to do away with the objection of *ex facie* nullity was given in a well-known case[16] a few years later, where there was an erasure *in essentialibus* of a deed which was a necessary part of the progress of one of the parties. There, if the negative prescription could have been pleaded, so could the positive.[17] But it is too loose to say 'that no man can plead the 'negative prescription, as affecting a heritable right, who cannot 'also plead the positive.' The correct statement of the doctrine appears to be, that the negative prescription can be pleaded by any party to whom the positive prescription, if it had run, would have afforded a good title.[18] This follows from the rule that

[13] For a learned account of which, see Napier, pp. 70-101.

[14] Paul *v.* Reid, 8th Feb. 1814, F.C.

[15] In Cubbison *v.* Hyslop, 29th Nov. 1837, 16 Sh. 112. See the same judge's op. in Macdonnell *v.* D. Gordon, 26th Feb. 1828, 6 S. 600, 611. For another statement of the same doctrine, see Sandford, Entails, p. 469.

[16] Shepherd *v.* Grant's Trs., 24th Jan. 1844, 6 D. 464, affd. 21st July 1847, 6 B. App. 153.

[17] See Macdonald *v.* Lockhart (Largie), 22d Dec. 1842, 5 D. 372; Officers of Ordnance *v.* Mags. of Edinburgh, 16th Dec. 1859, 22 D. 219, affd. 4th March 1862, 4 Macq. 447. See L. Deas, 22 D. 237, distinguishing this case from those of Paul and E. Dundonald.

[18] Per L. P. in E. Dundonald *v.* Dykes, 12th May 1836, 14 Sh. 737, 742; see Paterson *v.* Wilson, 25th Jan. 1859, 21 D. 322; Chisholm *v.* Chisholm-Batten,

there can be no right of action where there is no interest to sue; the party pleading the negative prescription must have the legal right of property, in the event of his being successful. Erskine,[19] from a mistaken idea of the import of an early decision, maintains the exact contrary to the rule just quoted; but his doctrine has been either explained away or repudiated.[20] For a similar reason, the statement of Bell,[21] that 'the negative prescription is insuf-'ficient to extinguish any right or claim of property unless there 'be an opposite right in the course of being confirmed at the 'same time,' must be controlled by the *dicta* of Lord Corehouse. No 'right of property' can be so extinguished in any circumstances; though a burden or a *jus crediti* may, even when its subject is a heritable right.[22] The importance of these rules, which distinguished between the functions of the positive and negative prescription, has been much enhanced by the clause quoted from the Conveyancing Act of 1874, by which the term of the positive prescription has been cut down by a half, and that of the negative left as it was.

The three functions of positive prescriptions.

To return to the positive prescription. It is useful in three different ways, or has been made to perform three different functions:[23] (1) to secure a progress of titles to an estate, the extent or quantity or nature of which is not in dispute, against any one alleging a better title; which may be called *protective prescription:* (2) to determine the extent or comprehension of an estate, the title to which is not questioned; which may be termed *explicative prescription:*[24] and (3) to merge a title of property (*dominium utile*) in the higher title of superiority (*dominium directum*), and thus consolidate the two by what is called *prescriptive consolidation.* The last will not demand much elucidation in the present work,[25] being merely an alternative mode of bridging over the chasm which strict feudal principles interposed between these two rights, though vested in the same individual. The other two functions of the institute are of much greater importance.

The first only contemplated by the Act of 1617.

The Act 1617, c. 12, was obviously framed with a view only

9th Dec. 1864, 3 Macph. 202, 225, per L. Deas; B. Pr. § 2018.

[19] Ersk. 3.7.8; Presbytery of Perth *v.* Town, 1728, M. 10723, affd. 1730, 1 Pat. 39.

[20] Napier, 80; and cases of Paul and Cubbison, *supra*, [14, 15].

[21] B. Pr. 2016.

[22] See cases in B. Pr. 2017, and correct his observations there by his own rule in § 2016. *E.g.*, the cases in notes (a) (b) and (h) are all examples of positive prescription. See Napier, pp. 558 and 87, note.

[23] See obs. of L. Shand in Buchanan and Geils, *v.* L. Adv., 20th July 1882, 9 Ret. 1218, 1234.

[24] As to duration of these differing, *infra*, p. 50.

[25] *Infra*, p. 58

to the first of these offices. This is plain, not only from the narrative of the mischiefs to be abated with which it sets out, but also from the remedy being directed against disturbance 'by 'any person pretending right' to the property, 'by virtue of prior 'infeftments,' and the careful setting forth of the title required. The clause is directed not to aid in the acquisition of property where absolutely no right or title before existed, but to establish or secure a title already existing in favour of one who is by the policy of the Act taken to be the real owner.[26] At the same time, the enactment could be of any real use only in one of two ways: either by giving the party, who, apart from any prescription, must have been recognised as the true proprietor, an easier task in proving his right; or by enabling a possessor to set up what, but for the Act, would have been a 'bad title.'[27] The mode in which both objects are accomplished is by protecting against all challenge a certain sort of title which has been followed by a certain amount of possession under it. All objections to any part of a progress of titles, which part does not require to be used as founding prescription, are irrelevant. The prescriptive progress, and that alone, is what the owner need look to in testing the security of his tenure. The words of the protection given in the Act of 1617, c. 12, to this favoured conjunction of title and possession, are very full and sweeping, and have been applied, as shall soon be shown, to many cases which were not properly within the purview of the Act. The operation of the statute, in its second function of explaining what an ambiguous title comprehends, is so mixed up with other matters, hereafter to be treated, such as 'part and pertinent,' salmon-fishing and other regalia, public rights, servitudes, and rights of way, that a reference can only be made here to the corresponding passages in this work.[28] It was the subject of much discussion in a recent case which was sent to a Court of seven judges on account of a doubt being raised whether, as evidence to construe an ambiguous title, the possession, though it be the best and strongest, is exclusive of all other evidence, and whether other evidence, such as a prior,

Scope enlarged by practice.

[26] Ersk. 3.7.2; Dirleton, p. 224,—not so much '*odio et negligentiâ non petentis*,' as '*favore possidentis*;' Kames, Eluc. p. 264.

[27] See L. Braxfield in Scott *v.* Stewart, 1778, Hailes, 9, where he refers to the latter function; D. Buccleuch *v.* Cunynghame, 30th Nov. 1826, 5 S. 57 (N.E. 53); H.M. Advocate *v.* Graham, 10th Dec. 1844, 7 D. 183, where see L.J.-C. and L. Moncreiff on the nature, purposes, and working of the positive prescription. The whole report is very instructive. Gordon *v.* Grant, 12th Nov. 1850, 13 D. 1; Miller *v.* Dickson, 1766, M. 10937 (title from the wrong superior).

[28] See *infra*, chaps. 11, 15-19, and 25-29.

contemporaneous, or subsequent title, might not be resorted to either to fortify or contradict the evidence arising from possession. This doubt was authoritatively set at rest; for it was held that uninterrupted and exclusive possession of lands for forty years under a charter and sasine, containing a description which could be so construed as to embrace the whole lands, though it may also be so construed as to embrace part of them only, is sufficient to exclude all inquiry, and to protect the person in possession against any one holding even an express title, prior in date, to the whole or any part of the lands.[29] The 'part' here mentioned was an ideal part or share, not, as in most cases, a physical or integral part of the subjects possessed, for the ambiguous description ran thus—'all and whole the several shares belonging 'to us of all and whole these short roods of land'—a description which was held to be patient of a construction embracing the whole subjects. Lastly, the subject of prescriptive consolidation is naturally connected with that of double titles.[30]

Title required.

The title required—the habile title, as it is called—is the same, whichever of these offices the prescription has to fulfil. In the words of L.J.-C. Moncreiff, in the last-cited case,[31] a habile title does not mean a charter 'followed by sasine which bears to convey 'the property in dispute, but one which is conceived in terms 'capable of being so construed.' When the same noble and learned judge in a subsequent passage states that possession 'does 'not in any accurate sense construe the title; its effect is to 'establish the right,' the context shows the meaning to be that the right is established by prescriptive possession, not merely as contributing to, but as conclusive of, the construction to be put on the title. But the title differs according to the sort of heritable right which is to be secured or acquired. The statute only contemplates feudal subjects—those demanding infeftment; but by analogy, other heritable rights have come to share in the benefits it conveys. Positive prescription, as applicable to these latter rights, and to such cases of peculiar title as salmon-fishing and servitudes, will be separately treated in the course of this treatise.[32] The title now to be described is that which is required for the positive prescription of corporeal property. It will only be necessary to give a very brief account of the state of the law

[29] Auld *v.* Hay, 5th March 1880, 7 Ret. 663, as summarised by L.P. Inglis, at p. 681.

[30] See *infra*, p. 58.

[31] 7 Ret. 668.

[32] See note [28]. Thus a 'right and 'privilege of one tide's fishing of salmon 'yearly' is one of the 'heritages' protected by the Act of 1617, though not easily classified—Murray *v.* Peddie, 25th May 1880, 7 Ret. 804.

require formal amendment till the year 1874, when the Act 37 & 38 Vict. c. 94, was passed. Whether, as Stair seems to deny,[7] and Lord Jeffrey[8] to affirm, there existed a prescription at common law, of part of which the Act of 1617 was simply declaratory, it is useless now to inquire. That the authority of the Act of 1617 was carried far beyond the narrow scope indicated by its terms, is undoubted; but whether this was done in explication of a previously existing common law, or simply by analogy to a rule of positive enactment which was found convenient, is of no practical moment.[9] In any case, the law of prescription in land rights resolves into a commentary upon these two statutes, the enacting portions of which are given in the note below.[10]

[7] St. 2.12.12; but cf. 2.3.69, and L. Adv. *v.* Sinclair, *infra*, note [45].

[8] In Crawfurd *v.* Menzies, 12th June 1849, 11 D. 1127. As to the policy of having any law of prescription, see St. 2.12.9; Ersk. 3.10.1; Bankt. 2.12.76; Napier, pp. 2-17; Kames, Eluc. p. 228 *et seq.*

[9] Kames, Equity, p. 117.

[10] The Act 1617, c. 12, after reciting the 'mischiefs'—viz., theft, corruption, loss and forgery of titles in times remote, causing the lieges great uncertainty of their heritable rights, and referring to the civil law and the laws of all nations—statutes, finds, and declares, 'that whosoever his 'Majesties lieges, their predecessors and 'authors, have brooked heretofore, or shall 'happen to brook in time comming, by 'themselves, their tenents, and others having their rights, their lands, barronies, 'annual-rents, and other heritages, by virtue of their heritable infeftments made 'to them by his Majestie or others their 'superiors and authors for the space of 'fourty years continually and together, 'following and insuing the date of their 'said infeftments, and that peaceably, 'without any lawful interruption made to 'them therein during the said space of 'fourty years, that such persons, their 'heirs and successors, shall never be 'troubled, pursued, nor inquieted in the 'heritable right and property of their 'saids lands and heritages foresaids, by 'his Majesty or others, their superiors and 'authors, their heirs and successors, nor 'by any other person pretending right to 'the same, by vertue of prior infeftments, 'publicke or private, nor upon no other 'ground, reason, or argument, competent 'of law, except for falsehood: providing 'they be able to show and produce a 'charter of the saids lands and others 'foresaids granted to them, or their predecessors, by their saids superiors and 'authors, preceding the entry of the saids 'fourty years possession, with the instrument of seasing following thereupon; or 'where there is no charter extant, that 'they show and produce instruments of 'seasing, one or moe continued and standing together for the said space of fourty 'years, either proceeding upon retours or 'upon precepts of *clare constat;* which 'rights his Majesty, with advice and consent of the estates foresaids, finds and 'declares to be good, valide, and sufficient 'rights (being claid with the said peaceable and continual possession of fourty 'years) without any lawful interruption 'as said is for brooking of the heritable 'right of the same lands, and others foresaid. And sicklike, his Majesty, with 'advice foresaid, statutes and ordains that 'all actions competent of the law, upon 'heritable bands, reversions, contracts, or 'others whatsoever, either already made 'or to be made, after the date hereof, shall 'be pursued within the space of fourty 'years after the date of the same: except 'the said reversions be incorporate within 'the body of the infeftments used and produced by the possessour of the saids lands 'for his title of the same, or registered in 'the Clerk of Register his books, in the 'which case, seeing all suspition of falsehood ceases most justly, the actions upon

So-called positive and negative prescription.

It is evident, on reading the Act 1617, c. 12, that it treats of two different sorts of cases, in which the lapse of forty years is to have a certain legal result. To the prescription described in the first clause, the term 'positive' has come to be applied.[11] That which is described in the second clause (beginning with the first occurrence of the words 'and sicklike') has, along with a similar institution in moveable rights of early date, been named 'negative prescription.' The former has to do solely with heritable rights, and mainly concerns us here; the latter is an extension to these rights of the older prescription of actions, introduced by 1469, c. 28, and 1474, c. 54. The element of possession is here subordinate to the idea of abandonment through neglect, or of presumed satisfaction.[12] Where the negative prescription affects the subsistence of such bonds or contracts as are, or used to be, regarded as heritable, it forms part of the law of obligations. But it has also an important function to exercise on the titles of heritable pro-

'the saids reversions, ingrossed and registrated, ought to be perpetual; excepting always from this present Act all actions of warrandize, which shall not prescribe from the date of the bond or infeftment whereupon the warrandize is sought, but only from the date of the distresse, which shall prescribe, it not being pursued within fourty years as said is; and sicklike it is declared that in the course of the saids fourty years prescription, the years of minority and less age shall noways be counted, but only the years during which the parties against whom the prescription is used and objected were majors and past xxi years of age,' &c.

Conveyancing and Land Transfer Act, 1874, 37 & 38 Vict. c. 94, sect. 34: 'Any *ex facie* valid irredeemable title to an estate in land recorded in the appropriate register of sasines shall be sufficient foundation for prescription, and possession following on such recorded title for the space of twenty years continually and together, and that peaceably, without any lawful interruption made during the said space of twenty years, shall, for all the purposes of the Act of the Parliament of Scotland, 1617, c. 12, "Anent "prescription of Heritable Rights," be equivalent to possession for forty years by virtue of heritable infeftments for which charters and instruments of sasine or other sufficient titles are shown and produced, according to the provisions of the said Act; and if such possession as aforesaid following on an *ex facie* valid irredeemable title recorded as aforesaid shall have continued for the space of thirty years, no deduction or allowance shall be made on account of the years of minority or less age of those against whom the prescription is used and objected, or of any period during which any person against whom prescription is used or objected was under legal disability. This enactment shall have no application to, and shall not be construed so as to alter or affect, the existing law relating to the character or period of the possession, use, or enjoyment necessary to constitute or prove the existence of any servitude or of any public right of way or other public right, and shall not be pleadable to any effect in any action in dependence at the commencement of this Act, or which shall be commenced prior to the 1st day of January 1879: Provided always, that the possession for any space of time prior to the 1st day of January 1879 shall not have effect for the purposes of this section unless such space of time immediately preceded and was continuous up to the said 1st day of January.'

[11] See Napier, p. 59, as to nomenclature.

[12] Bell, Pr. 605.

perty, and it may be convenient shortly to dispose of this before proceeding further.

Their correlation.

After considerable vacillation of opinion,[13] the true doctrine as to the relation which subsists between the so-called positive and negative prescription as affecting heritable titles was thus laid down by Lord Corehouse, as having been established by an earlier case:[14] 'There is no proposition better established than that the 'negative prescription cannot be pleaded directly against a right of 'heritable property. If it was otherwise, possession alone, with-'out infeftment, would complete the right, contrary to the statute '1617, which requires a title as well as possession. . . . Both 'parties must produce their respective progresses, and compete 'upon them. . . . The negative prescription is of use, not in 'being objected directly against a heritable right of ownership, 'but in trying the validity of the competing progresses, and in 'getting rid of various objections which might otherwise have 'been competent. . . . For though exceptions, founded on '*ex facie* nullities—for example, that the deed is not subscribed, 'or that it is tested by only one witness—and the like, are not 'barred, yet all objections not appearing *ex facie* on the deed are 'effectually cut off by the negative prescription.'[15] This doctrine is now settled law. An example of the rule that the negative prescription is ineffectual to do away with the objection of *ex facie* nullity was given in a well-known case[16] a few years later, where there was an erasure *in essentialibus* of a deed which was a necessary part of the progress of one of the parties. There, if the negative prescription could have been pleaded, so could the positive.[17] But it is too loose to say 'that no man can plead the 'negative prescription, as affecting a heritable right, who cannot 'also plead the positive.' The correct statement of the doctrine appears to be, that the negative prescription can be pleaded by any party to whom the positive prescription, if it had run, would have afforded a good title.[18] This follows from the rule that

[13] For a learned account of which, see Napier, pp. 70-101.

[14] Paul *v.* Reid, 8th Feb. 1814, F.C.

[15] In Cubbison *v.* Hyslop, 29th Nov. 1837, 16 Sh. 112. See the same judge's op. in Macdonnell *v.* D. Gordon, 26th Feb. 1828, 6 S. 600, 611. For another statement of the same doctrine, see Sandford, Entails, p. 469.

[16] Shepherd *v.* Grant's Trs., 24th Jan. 1844, 6 D. 464, affd. 21st July 1847, 6 B. App. 153.

[17] See Macdonald *v.* Lockhart (Largie), 22d Dec. 1842, 5 D. 372; Officers of Ordnance *v.* Mags. of Edinburgh, 16th Dec. 1859, 22 D. 219, affd. 4th March 1862, 4 Macq. 447. See L. Deas, 22 D. 237, distinguishing this case from those of Paul and E. Dundonald.

[18] Per L. P. in E. Dundonald *v.* Dykes, 12th May 1836, 14 Sh. 737, 742; see Paterson *v.* Wilson, 25th Jan. 1859, 21 D. 322; Chisholm *v.* Chisholm-Batten,

there can be no right of action where there is no interest to sue; the party pleading the negative prescription must have the legal right of property, in the event of his being successful. Erskine,[19] from a mistaken idea of the import of an early decision, maintains the exact contrary to the rule just quoted; but his doctrine has been either explained away or repudiated.[20] For a similar reason, the statement of Bell,[21] that 'the negative prescription is insuf-'ficient to extinguish any right or claim of property unless there 'be an opposite right in the course of being confirmed at the 'same time,' must be controlled by the *dicta* of Lord Corehouse. No 'right of property' can be so extinguished in any circumstances; though a burden or a *jus crediti* may, even when its subject is a heritable right.[22] The importance of these rules, which distinguished between the functions of the positive and negative prescription, has been much enhanced by the clause quoted from the Conveyancing Act of 1874, by which the term of the positive prescription has been cut down by a half, and that of the negative left as it was.

The three functions of positive prescriptions.

To return to the positive prescription. It is useful in three different ways, or has been made to perform three different functions:[23] (1) to secure a progress of titles to an estate, the extent or quantity or nature of which is not in dispute, against any one alleging a better title; which may be called *protective prescription:* (2) to determine the extent or comprehension of an estate, the title to which is not questioned; which may be termed *explicative prescription:*[24] and (3) to merge a title of property (*dominium utile*) in the higher title of superiority (*dominium directum*), and thus consolidate the two by what is called *prescriptive consolidation.* The last will not demand much elucidation in the present work,[25] being merely an alternative mode of bridging over the chasm which strict feudal principles interposed between these two rights, though vested in the same individual. The other two functions of the institute are of much greater importance.

The first only contemplated by the Act of 1617.

The Act 1617, c. 12, was obviously framed with a view only

9th Dec. 1864, 3 Macph. 202, 225, per L. Deas; B. Pr. § 2018.

[19] Ersk. 3.7.8; Presbytery of Perth *v.* Town, 1728, M. 10723, affd. 1730, 1 Pat. 39.

[20] Napier, 80; and cases of Paul and Cubbison, *supra*, [14, 15].

[21] B. Pr. 2016.

[22] See cases in B. Pr. 2017, and correct his observations there by his own rule in § 2016. *E.g.*, the cases in notes (a) (b) and (h) are all examples of positive prescription. See Napier, pp. 558 and 87, note.

[23] See obs. of L. Shand in Buchanan and Geils, *v.* L. Adv., 20th July 1882, 9 Ret. 1218, 1234.

[24] As to duration of these differing, *infra*, p. 50.

[25] *Infra*, p. 58

to the first of these offices. This is plain, not only from the narrative of the mischiefs to be abated with which it sets out, but also from the remedy being directed against disturbance 'by 'any person pretending right' to the property, 'by virtue of prior 'infeftments,' and the careful setting forth of the title required. The clause is directed not to aid in the acquisition of property where absolutely no right or title before existed, but to establish or secure a title already existing in favour of one who is by the policy of the Act taken to be the real owner.[26] At the same time, the enactment could be of any real use only in one of two ways: either by giving the party, who, apart from any prescription, must have been recognised as the true proprietor, an easier task in proving his right; or by enabling a possessor to set up what, but for the Act, would have been a 'bad title.'[27] The mode in which both objects are accomplished is by protecting against all challenge a certain sort of title which has been followed by a certain amount of possession under it. All objections to any part of a progress of titles, which part does not require to be used as founding prescription, are irrelevant. The prescriptive progress, and that alone, is what the owner need look to in testing the security of his tenure. The words of the protection given in the Act of 1617, c. 12, to this favoured conjunction of title and possession, are very full and sweeping, and have been applied, as shall soon be shown, to many cases which were not properly within the purview of the Act. The operation of the statute, in its second function of explaining what an ambiguous title comprehends, is so mixed up with other matters, hereafter to be treated, such as 'part and pertinent,' salmon-fishing and other regalia, public rights, servitudes, and rights of way, that a reference can only be made here to the corresponding passages in this work.[28] It was the subject of much discussion in a recent case which was sent to a Court of seven judges on account of a doubt being raised whether, as evidence to construe an ambiguous title, the possession, though it be the best and strongest, is exclusive of all other evidence, and whether other evidence, such as a prior,

Scope enlarged by practice.

[26] Ersk. 3.7.2; Dirleton, p. 224,—not so much '*odio et negligentiâ non petentis*,' as '*favore possidentis*;' Kames, Eluc. p. 264.

[27] See L. Braxfield in Scott *v.* Stewart, 1778, Hailes, 9, where he refers to the latter function; D. Buccleuch *v.* Cunynghame, 30th Nov. 1826, 5 S. 57 (N.E. 53); H.M. Advocate *v.* Graham, 10th Dec. 1844, 7 D. 183, where see L.J.-C. and L. Moncreiff on the nature, purposes, and working of the positive prescription. The whole report is very instructive. Gordon *v.* Grant, 12th Nov. 1850, 13 D. 1; Miller *v.* Dickson, 1766, M. 10937 (title from the wrong superior).

[28] See *infra*, chaps. 11, 15-19, and 25-29.

contemporaneous, or subsequent title, might not be resorted to either to fortify or contradict the evidence arising from possession. This doubt was authoritatively set at rest; for it was held that uninterrupted and exclusive possession of lands for forty years under a charter and sasine, containing a description which could be so construed as to embrace the whole lands, though it may also be so construed as to embrace part of them only, is sufficient to exclude all inquiry, and to protect the person in possession against any one holding even an express title, prior in date, to the whole or any part of the lands.[29] The 'part' here mentioned was an ideal part or share, not, as in most cases, a physical or integral part of the subjects possessed, for the ambiguous description ran thus—'all and whole the several shares belonging 'to us of all and whole these short roods of land'—a description which was held to be patient of a construction embracing the whole subjects. Lastly, the subject of prescriptive consolidation is naturally connected with that of double titles.[30]

Title required.

The title required—the habile title, as it is called—is the same, whichever of these offices the prescription has to fulfil. In the words of L.J.-C. Moncreiff, in the last-cited case,[31] a habile title does not mean a charter 'followed by sasine which bears to convey 'the property in dispute, but one which is conceived in terms 'capable of being so construed.' When the same noble and learned judge in a subsequent passage states that possession 'does 'not in any accurate sense construe the title; its effect is to 'establish the right,' the context shows the meaning to be that the right is established by prescriptive possession, not merely as contributing to, but as conclusive of, the construction to be put on the title. But the title differs according to the sort of heritable right which is to be secured or acquired. The statute only contemplates feudal subjects—those demanding infeftment; but by analogy, other heritable rights have come to share in the benefits it conveys. Positive prescription, as applicable to these latter rights, and to such cases of peculiar title as salmon-fishing and servitudes, will be separately treated in the course of this treatise.[32] The title now to be described is that which is required for the positive prescription of corporeal property. It will only be necessary to give a very brief account of the state of the law

[29] Auld *v.* Hay, 5th March 1880, 7 Ret. 663, as summarised by L.P. Inglis, at p. 681.

[30] See *infra*, p. 58.

[31] 7 Ret. 668.

[32] See note [28]. Thus a 'right and 'privilege of one tide's fishing of salmon 'yearly' is one of the 'heritages' protected by the Act of 1617, though not easily classified—Murray *v.* Peddie, 25th May 1880, 7 Ret. 804.

prior to 1874, and a reference to the chief authorities for the same, seeing that recent legislation on land rights, together with the section of the Act of 1874 already quoted, has wrought a change which will, in the course of a few years in most cases, make the former system rather a study for the legal antiquary than a practical subject for the practitioner.

Of heirs and of singular successors.

The alternative contained in the proviso of the Act 1617, clause 1, has been interpreted by practice as pointing out a broad distinction between the title of heirs and that of singular successors. In both cases it was absolutely necessary that the party pleading prescription should be able to connect himself with a sasine—'*nulla sasina, nulla terra;*'[33] and in both cases the prescriptive progress had to be free from any *ex facie* or patent nullity. But a singular successor, be he purchaser or be he creditor in possession, must connect himself with an infeftment proceeding on a warrant produced and *ex facie* valid,[34] such as a charter, disposition, or procuratory, except in the case of a sasine *propriis manibus*, where a precept was out of place, and in the case of an instrument of resignation and sasine in burgage subjects, because there the same deed both contained the warrant and set forth the act of taking infeftment. In the case of heirs, neither the original charter nor the warrants of renewal are required. It is sufficient that sasines bearing to follow on a retour, or on a precept of *clare constat*, be produced. This has long been settled law, though it was at one time doubted whether the retour or precept was not also necessary. In burgage subjects, the instrument of cognition and sasine combined warrant and sasine.[35]

Title accepted by Act of 1874.

The Conveyancing and Land Transfer Act of 1874, sect. 34, accepts as title for prescription in any action commenced on or after 1st January 1879, 'any *ex facie* valid irredeemable title to

[33] For exceptions, see Aytoun *v.* Mags. of Kirkcaldy, 4th June 1833, 11 S. 676; and allodial subjects, Scot. *v.* Ramsay, 15th Feb. 1827, 5 S. 367 (N.E. 340), *per* L. Glenlee.

[34] In a recent case, L. Young was of opinion that as warrant for sasine were enough (1) an *ex facie* invalid disposition, and (2) a ratification appended thereto by the disponer's apparent heir who never entered; even although the sasine bore to proceed only on the precept in the disposition. L. Craighill, with greater fidelity to the Act, took the opposite view—Glen *v.* Scales's Tr., 15th Dec. 1881, 9 Ret. 317.

[35] St. 2.12.20; Ersk. 3.7.4; cases in Bell, Pr. 2008-2012; Napier, 102-123, who holds the doubt in B. Pr. 2010, as to an extract from the register being insufficient to supply the place of a sasine, as not justified. The other doubt in the same section has never been cleared up. For further cases on title, see Graham *v.* Orr, 8th Feb. 1826, Sh. (Teinds) 96; Aytoun *v.* Mags. of Kirkcaldy, 4th June 1833, 11 Sh. 676; Wemyss *v.* E. Morton, 18th Jan. 1838, 16 Sh. 332; D. Buccleuch *v.* Mags. of Edinburgh, 7th March 1843, 5 D. 846. An unregistered sasine will not be sufficient; More's Notes, p. 278; Bankt. 2.12.10, *contra*.

'an estate in land recorded in the appropriate register of sasines.' Passing by, for the present, the word 'irredeemable,' the obvious intent of the enactment is, not to annul or supersede the old rules as to title, where the old forms of conveyances are still produced in Court, but to add a new rule applicable to the new system, according to which registration takes the place of infeftment. The title here admitted is an accurate modern equivalent for the various titles detailed in the foregoing paragraph. *Ex facie* validity was equally required by the older law, and denotes the absence of any *ex facie* nullity, which latter has been defined as that which will 'deprive the title of the character of a formal com-' plete and valid instrument.'[36] Before 6 & 7 Will. IV. c. 33, and sect. 54 of the Act of 1874 became law, any erasure *in essentialibus* of an instrument of sasine, or of the record of any deed in the register of sasines, rendered the instrument or record *ex facie* invalid,[37] and unfit to be part of a prescriptive progress, no matter how the blot came about; and this is apparently still the law, if in either case the record is not conformable to the instrument or deed, as given in for registration. In the eye of the law, the instrument in the one case, and the record which has come in its place in the other, does not exist, and there is no habile title for prescription. But if there be no such disconformity, it is provided by these Acts that no challenge on the ground of erasure shall receive effect unless such erasure shall be proved to have been made for the purpose of fraud. The defect is, in these circumstances, only latent; so that, though the right of challenge can only be exercised when the vitiated instrument or record is part of the prescriptive title, and may therefore be lost in twenty years, yet if it so happens that the party who pleads prescription has to go further back for the commencement of his prescriptive progress, he will not be safe from such challenge till forty years, the full period of negative prescription, have passed.[38] It would seem to have been the opinion of Lord Corehouse, in the sequel to the passage already quoted,[39] that forgery was in the same position as fraud, or any other latent defect; and this would

[36] Per L.J.-C. in H.M. Adv. *v.* Graham, 10th Dec. 1844, 7 D. 183, 196; see Shepherd *v.* Grant's Trs., *supra*, note [16].

[37] Innes *v.* E. Fife, 10th March 1827, 5 Sh. 559, affd. 20th June 1827, 2 W. and S. 637; Macmillan *v.* Campbell, 4th March 1831, 9 Sh. 551 (per L.O.); Hoggan *v.* Ranken, 13th Feb. 1835, 13 Sh. 461, affd. 30th July 1840, 1 Rob. App. 173; qualified in Howden *v.* Ferrier, 10th July 1835, 13 Sh. 1097. In record, Gray *v.* Hope, 1790, M. 8796; Macqueen *v.* Nairne, 23d Jan. 1823, 2 Sh. 637; 1 Bell, Convey. p. 627.

[38] See D. Buccleuch *v.* Cunynghame, 30th Nov. 1826, 5 Sh. 57, and authorities below, on *bona fides*, chap. 4.

[39] In Cubbison *v.* Hyslop, *supra*, note [15].

have been undoubted, looking to the oblivion to which every document but the prescriptive title itself is consigned by the Act of 1617, had it not been for the preamble and the exception of 'falsehood' contained therein, which has been always construed to mean 'forgery.'[40] The distinction between forgery and other fraud seems to be, that while both may be alleged equally against the prescriptive progress adduced, and while neither can shake the positive prescription by cutting down any deed not belonging thereto, forgery is not protected by the negative prescription, while other frauds are.[41] The word 'title' is not defined, either in the Act of 1874 or in its predecessor of 1868 (31 & 32 Vict. c. 101), but it is a term of the most general scope, including all deeds by virtue of which one holds or has held a legal right. It may therefore be safely taken as embracing all the documents included under the terms 'deed,' 'conveyance,' and 'instrument.' And an 'estate in land' is very widely defined. It 'shall mean any interest in land, whether in fee, life-'rent, or security, and whether beneficial or in trust, or any real 'burden on land, and shall include an estate of superiority.' The old law as to securities will be treated of presently.[42] It is not easy to see how anything 'equivalent' to the positive prescription of 1617 can apply to real burdens, properly so called, unless it be indirectly by securing the title of the debtor.

Apparency. The statute of 1874 seems to make no alteration on the old law as to the effect of possession on apparency in questions of prescription. The expression in sect. 34—'possession following 'on such recorded title'—can only be rendered intelligible by adding, 'by one who can connect himself with it,' which was all that was required under the Act of 1617.[43] No enlargement of the right of apparent heirs in this respect can be deduced from the 9th section of the same Act of 1874, which vests a personal right in heirs without service; nor any change upon the old distinction between prescription on progresses, in which charter and sasine prior to the prescriptive period are produced, and those in which only instruments proceeding on retours or precepts of *clare constat* are founded on. In the former case, there being direct evidence that the ancestor or author had himself a title, 'fit in 'its own nature for vesting the property in him,' it is of no consequence whether his successors—general or singular—possessed on

[40] D. Buccleuch, *supra*, [38]; Graham *v.* Watt, 15th July 1843, 5 D. 1368.

[41] Ersk. 3.7.12; see Napier, pp. 161 and 606.

[42] *Infra*, p. 38; for liferent, see *infra*, p. 35.

[43] Napier, p. 191; cf. Ersk. 3.7.4; Middleton *v.* E. Dunmore, 1774, M. 10944.

their own infeftment, or on personal titles, or even on apparency.[44] In the latter case, there being no such evidence, but merely 'a 'reasonable presumption' of an original title, the words of the old Act requiring 'instruments of seasing, one or more continued and '*standing together*,' are strictly interpreted as meaning that when the prescriptive possession on such a title is that of two or more successive possessors, they must each renew the infeftment, or, at least, the party pleading prescription must be himself infeft, and be able to connect with an infeftment sufficiently ancient.[45] Stair, in the passage quoted, would seem to indicate the necessity of the former of these alternatives with nothing more than an interval of apparency reasonably sufficient to allow of renewal. But it has since been decided that if there be possession on such sasines both prior and posterior to an interval of apparency—lasting in the case referred to for nearly 20 years—the interval will be counted in.[46] If the whole prescriptive period has been occupied by one heir's possession, these rules do not apply, and prescription may be pleaded by his heir apparent or by his singular successor uninfeft.[47] Further, in all cases of accession of possession[48] the Court may order a party pleading prescription, in case of doubt, to make up his title, this being the best way of proving his ability to connect himself with the progress.[49] Mr Ross[50] is in error in saying that the point does not seem to have been raised whether a disponee from an heir possessing on infeftments proceeding upon retours or precepts of *clare constat* may conjoin his possession with that of his author, where the possession of the latter has not extended to 40 years. The point had been twice determined in the affirmative in last century,[51] and this is now considered as settled law.[52]

The prescriptive title having been thus briefly discussed, the remainder of this chapter will be occupied with the requisites of prescriptive possession; in other words, with the sort of possession which is alone available for positive prescription.

Prescriptive possession—its requisites.

(1) *Possession must be cum animo domini.*—With the doubtful

1. Possession as owner.

[44] Caitcheon *v.* Ramsay, 1791, M. 10810.

[45] Caitcheon, *supra;* St. 2.12.15; L. Curriehill in L. Adv. *v.* Sinclair, 21st June 1865, 3 Macph. 981, 996.

[46] Nielson *v.* Erskine, 26th Feb. 1823, 2 S. 247 (N.E. 216).

[47] E. Argyle *v.* Macnaughton, 1671, M. 10791.

[48] See Roman Law as to accession of possession discussed in Vangerow, § 322.

[49] Crawford *v.* Durham, 20th Dec. 1822, F.C.

[50] L. C. Land Rights, p. 440.

[51] Purdie *v.* L. Torphichen, 1739, M. 10796, explained by L. Cowan in M'Neill, *infra;* Millar *v.* Dickson, 1766, M. 10937.

[52] M'Neill *v.* Macneal, 4th March 1858, 20 D. 735.

exception of leasehold rights[53] there can be no positive prescription, unless the possessor has during the whole period held the subject as owner,[54] *animo rem sibi habendi.* This is involved in the whole tenor of the first clause of the Act of 1617, whether it be regarded as a mode of acquiring or of securing property; and the extensions of its scope introduced by judicial interpretation have, as will presently be seen, respected its purpose in this matter at least. The seeming exception of prescription of predial servitudes is really none, since the servitude is regarded as being possessed as a pertinent or accessory of the dominant tenement, without which it cannot exist.[55] In public rights the proposition resolves itself into this other—that the public shall possess as in right, not by tolerance.[56] As has been already pointed out, possession as owner may be either natural or civil—by the owner's own detention, or by another's in his name.[57] The former case presents no difficulty; the latter demands closer inspection. The cases of chief practical importance are the superior's civil possession through his vassal, the fiar's through the liferenter, the landlord's through his tenant, and the debtor's through his creditor in possession. This last will naturally lead to the anomalous prescription of the creditor for his own behoof. Of course where no representation and no such connection subsist, the possession of one person cannot be pleaded for the benefit of another.[58]

Superior and vassal.

(*a*) *Superior and vassal.*—Both of these are *domini* of the subject feued out, no alteration in this respect having been made by the Conveyancing Act of 1874. There may be, accordingly, in this case, three courses of prescription running at the same time—one in favour of the superior against a competitor for the superiority, in which the vassal's possession avails to his lord; another in favour of the vassal as against a claimant to the property; and a third as between the superior and vassal themselves. Of this last, an example is to be found in a case[59] where the Crown established by the positive prescription a feu holding, which had been originally taken out by mistake, but had been possessed on by the vassal for more than forty years. No feu-

[53] See Napier, chap. v. § 1, p. 289 *et seq.*; Carlyle *v.* Baxter, 12th March 1869, 41 Sc. Jur. 342.

[54] See *supra*, p. 3.

[55] See *infra*, chap. 25.

[56] *Infra*, chaps. 19, 20, and especially Mackintosh *v.* Moir, 28th Feb. 1871, 9 Macph. 574.

[57] Ersk. 3.7.50; *supra*, p. 3.

[58] Napier, p. 175; E. Morton *v.* Stuart, 16th June 1813, 1 Dow. 91, 5 Pat. 720; Aikman *v.* D. Hamilton, 17th June 1830, 8 S. 943, var. 5th July 1832, 6 W.S. 64; L. Adv. *v.* Hall, 19th July 1873, 11 Macph. 967.

[59] D. Buccleuch *v.* Off. of State. 1768, M. 10711.

duties had been levied, but the Crown's possession was held to be proved by renewals of the holding during the prescriptive period. The principle seems to have been that the tenure was a condition essential to the vassal's right of possession, and that he could not repudiate his own title. The decision is, accordingly, quite consistent with some modern cases, in which the Court went back to the original charter to see what were the rights of the superior and vassal in respect of an alleged reservation of minerals or sporting rights, said to have dropped out of, or to have crept into, the progress. If there had been adverse possession of the minerals by the superior or vassal, as the case might be, for forty years, the case would have been different; but nothing of the sort had taken place, and the change had been made in such deeds as were proper only to renewing, not to altering, the right.[60] It follows from the vassal's possession being that of the superior, as well as from the rule that there can be no prescription in the teeth of the title on which it is founded, that the vassal cannot prescribe immunity from his obligation to pay feu-duties and casualties in all time coming, by proving that he has not paid any for forty years back. But the negative prescription enables him to get rid of liability for arrears of older date than forty years.[61]

Fiar and liferenter.

(*b*) *Fiar and liferenter.*—The liferent is here regarded less as a separate estate in land limited in duration, than as a burden or personal servitude on the fee, whose existence it acknowledges and involves in every moment of its own. The possession of the liferenter, therefore, is that of the fiar. But a distinction must be drawn. The simplest case is where the liferent arises from an *inter vivos* disposition, and the prescriptive period elapses during the disponer's own lifetime. The next simplest case is where an heir or representative, whose right to succeed is undisputed, inherits the fee, stripped of the liferent by his ancestor either *inter vivos*, or, more commonly, *mortis causâ*. In both cases the liferenter's possession supports the fee, on which itself depends, by prescribing against attack by any third party. But if, in the latter case, there be a dispute about the succession to the common author, the liferenter's possession cannot avail to eke out prescrip-

[60] Graham *v* D. Hamilton, 27th Jan. 1842, 4 D. 482; Thriepland *v.* Rutherford, 30th May 1848, 10 D. 1062 and 1079; Hutton *v.* Macfarlane, 11th Nov. 1863, 2 Macph. 79; Boyd *v.* Bruce, 20th Dec. 1872, 11 Macph. 243; cf. Mitchell *v.* York Buildings Co., 1777, 6 Pat. 795; Anderson *v.* Cadella, 27th July 1803, 4 Pat. 532; Fleeming *v.* Howden, 21st May 1868, 6 Macph. 782.

[61] St. 2.12.16; Ersk. 3.7.12; B. Pr. 609; Napier, p. 633; Stewart *v.* Fleming's Heir, 1627, M. 10749; Gairntully *v.* Coms. of St Andrews, 1638, M. 10750; Wallace *v.* Crawford's Exrs., 5th Dec. 1838, 1 D. 162.

tion in favour of either competitor, seeing that the question on whose right the liferent is a burden is the *de quo quæritur*. Only after that question has been settled are matters restored to the same position as in the simpler cases supposed, and the successful claimant may use the liferenter's possession against the world.[62] This was one of the points raised in the great case of *Shepherd* v. *Grant's Trs.*,[63] and decided in this sense by a majority of the judges who considered the matter,[64] though passed over by the House of Lords as unnecessary to its judgment. The fact that the entailed fee and the liferent were constituted in different deeds was of no moment, and the controversy arose between competing representatives of the entailer. A different result was arrived at in a case already quoted for a different purpose;[65] but there the Court may have been led astray by the fact that one of the claimants had, by the positive prescription, secured his title to a part of the deceased ancestor's property which was not liferented by the widow; and this part of the decision may, on general grounds and on authority, be gravely questioned.

Landlord and tenant.

(*c*) *Landlord and tenant.*[66]—In the ordinary case,[67] a tenant cannot plead prescription at his own hand, for, as his lease betrays him to be *non dominus*, he would thus be prescribing in the face of his title. His natural possession is, however, available to his landlord, if he be really tenant of the subject,[68] and thus in an indirect way to himself, by securing the title of his author. But there is nothing in the law of Scotland to prevent a tenant ceasing to possess as such, and commencing a course of prescription, as owner, on a habile title, adversely to his *quondam* landlord.[69]

[62] Younger *v.* Johnstons, 1665, M. 10924; question moved, but not decided in E. Dundonald *v.* Dykes, 12th May 1836, 14 S. 737. See Napier's explanation of the Otter case at p. 176. It is also reported in 2 Pat. 193, where the reversal is said to have proceeded on the question of liferent. See Lord Wood in M'Neill *v.* Macneal, note [52].

[63] 19th Jan. 1844, 6 D. 464, affd. 21st July 1847, 6 B. App. 153.

[64] L. Ivory expressly diss.

[65] Nielson *v* Erskine, *supra*, note [46].

[66] It is the more fitting to notice the relation of these parties in the matter of prescription, as Mr Hunter does not seem to have regarded it as falling within the scope of his work.

[67] Nicolson *v.* Swaney, 1804; Hume, 920. As to long leases, see Napier, p. 289 *et seq.* The Registration of Leases Act, 1857, 20 & 21 Vict. c. 26, has no express provision as to prescription; and by applying the definition in the Act of 1874 of 'estate in land' to the provision in sect. 34 of the same Act, it would seem that long leases, though recorded in the Register of Sasines, are not to be regarded as subjects of the positive prescription.

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[69] The maxim, '*nemo sibi ipse causam possessionis mutare potest*' took its rise in the early Roman law of succession (*possessio pro herede*) in a technicality, which soon disappeared. Cic. de Legg. II. 19.20; Scheurl's Inst. § 194; see Puchta's Inst., §§ 239 and 315. In Justinian's time it had come to mean just what is stated in the text as Scotch

But he cannot do so surreptitiously behind the landlord's back. Though he may make the change *in malâ fide*, he must do so openly; and the prescription, which will in the end preclude the landlord from objecting, must begin and continue for forty years with a manifest change in the relation of the parties. There are no fixed *indiciæ* of such a change. Every case depends on its own circumstances. Thus it was found, in a teind case, that possession till within the prescriptive period had been on a lease, and not on a posterior heritable right, chiefly on account of acknowledgments of the lessor's right, and an omission from a judicial sale of the lessee's estate.[70] In an earlier case,[71] possession of pasturage was ascribed to servitude prescribed as part and pertinent, rather than to an old tack, on which no rent had for forty years, if indeed at any time, been paid. In a case which went to the House of Lords, the lessee of lands obtained from his landlord—an entailed proprietor—a feu, for a feu-duty differing from the rent formerly due, and forty years had elapsed from the date of this transaction, but not from the ish of the lease. It was found that possession on the feu-right could be held to have run only from the latter date, seemingly because, though the receipts all along bore to be for feu-duty, they were not for the exact feu-duty reserved, and could not therefore be construed into an approbation of the title.[72] The latest case[73] was almost exactly similar to that of *Sinclair*, the tack of teinds being acknowledged, in a locality posterior to the date of the alleged heritable right, to be the title of possession, and also within the prescriptive period in making up Crown titles.[74] Lastly, a tenant, without any written title to a subject which he possesses precariously, can in no case acquire a prescriptive right to it.[75]

law; see esp. 19, § 1, D. (41.2), and 2, § 1, D. (41.5); or, as it is expressed in the Code Napoléon, art. 2240, 'on ne 'peut prescrire contre son titre, en ce 'sens que l'on ne peut pas se changer 'à soi-même la cause et le principe de sa 'possession.' See the whole matter discussed in Molitor, § 39; see also Ersk. 2.1.30; Napier, p. 182; and add Forbes, 2.1.1.3.3.

[70] Sinclair *v.* Sinclair, 1771, M. 10835, Lord Pitfour in Hailes, p. 378.

[71] Grant *v.* Grant, 1677, M. 10876. See converse case of a tack of salmon-fishings being held inconsistent with a *prior* prescribable title, Carnegie *v.* Mags. of Montrose, 1777, M. 10611, and Possession, App. No. 1; and the relation of the rule to possessory questions, Menzies *v.* Campbell, 1679, M. 10629. It is inapplicable to securities for debt, Cleuchton, 1749, M. 10610.

[72] D. Roxburghe *v.* Wauchope, 1732, revd. 5th March 1734, 1 Pat. 126.

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[75] Campbell *v.* D. Argyll, 19th May 1836, 14 S. 798.

Debtor, and creditor in possession.

(*d*) *Debtor, and creditor in possession.*—A creditor may be in possession of his debtor's property on a wadset, an adjudication, or on a disposition *ex facie* absolute with back-bond. In the ordinary case his natural possession is the civil possession of his debtor, and may have the effect of securing the debtor's title by means of the positive prescription against all the world; and indirectly, therefore, of securing his own. This requires no illustration. But here again, as in the preceding paragraph, the position of parties may change—the creditor may come to be regarded as possessing *quâ* owner, and the debtor be excluded by the lapse of time from exercising his power of redemption; and the change may take place in a much less obvious way than in the case of a tenant. The case of wadsetter and reverser is, in these days, of no practical importance.[76] That of a creditor possessing on an adjudication is of more moment, and has been elaborately discussed by Mr Bell,[77] since whose time little has been done to elucidate the matter. Shortly stated, the effect of prescription here is to act as an equivalent for decree of declarator of expiry of the legal[78]—mere expiry thereof without declarator being ineffectual to exclude redemption by the debtor.[79] About two points there seemed to be at first some difficulty. It being admitted that mere decree of adjudication and possession following thereon were not a sufficient foundation for prescription of the irredeemable right, was a charter of adjudication enough without infeftment?[80] An affirmative reply would be inconsistent with the whole tenor of the Act of 1617; and it may be believed, with Mr Bell,[81] that the only case in which it seems to have been so found, is explicable on some other hypothesis.[82] Whether that be the case or not, the contrary has been twice decided since by the Court of Session, in strict concord with the rest of the law of prescription.[83] The other moot point is also understood to have been set at rest. When does the prescriptive period begin to run?—at the date of

On adjudication.

[76] It is sufficient to refer to Napier, p. 124 *et seq.*, and cases there.

[77] 1 B.C. 744 (7th ed.); see Napier, p. 135 *et seq.*

[78] Ged *v.* Baker, 1740, M. 10789; Kilk. p. 418; Elch. Adjudn., No. 28, Presen. No. 22; Anderson *v.* Nasmyth, 1758, M. 10676; Caitcheon, *supra*, [44]; Ormiston *v.* Hill, 7th Feb. 1809, F.C.; and cases of Johnston *v.* Balfour, and Spence *v.* Bruce, in 1 B.C. 745, note [5]; and majority of Court in Stewart *v.* Lindsay 1 B.C. 744.

[79] Campbell *v.* Scotland and Jack, 1794, M. 321.

[80] See the modern equivalent in 37 & 38 Vict. c. 94, § 62.

[81] 1 B.C. 746, in note on Robertson *v.* D. Athole, 10th May 1815, 3 Dow. 108, 1 Ross L.C. 208.

[82] *E.g.*, there was room for a plea of consolidation of property with the superiority.

[83] Graham *v.* Orr, 8th Feb. 1826, S. (Teinds) 96; Thomson *v.* Stewart, 11th Feb. 1840, 2 D. 564.

the infeftment even if prior to the lapse of the legal, or only after the legal has expired and infeftment has taken place? On reasoning similar to that which demanded some evidence of a change intervening in the relations of parties in the foregoing paragraph, and seeing that merely getting infeft on the security operates no such change, it seems reasonable to regard the expiry of the legal as putting the creditor on a new footing, since he is only then in a position to bring a declarator. Accordingly, this date has been chosen [84] as that at which the creditor is regarded as beginning to possess as owner, and that though there is no apparent alteration in his conduct, or actual change in his *animus*;[85] and this has come to be the understanding of the profession. But the other opinion, though contrary to principle and some authority, was that of Baron Hume;[86] and one passage in Bell's 'Principles' is open to a similar interpretation—though, in other two passages,[87] he expressly adheres to the view maintained in his 'Commentaries.' A case which went to the House of Lords [88] seems at first sight inconsistent with the rule,—for in 1811 the positive prescription was found to have run on a sasine dated in 1768, proceeding on a charter of adjudication of date 1766,—but is not so in reality; for as to one of the two adjudications, the legal had elapsed long before these dates—and as to the other, no legal was possible, the decree having been obtained *contra hereditatem jacentem*, after renunciation by the heirs. The adjudication and deeds following on it do not make an *ex facie* irredeemable title; so that the curtailment of the prescriptive period introduced by the Conveyancing Act of 1874 does not apply in this case.[89]

On disposition *ex facie* absolute with back-bond.

The third example of a creditor in possession on infeftment is that of a disposition *ex facie* absolute with back-bond. Here the disposition actually divests the debtor and invests the creditor—the former having only a *jus crediti*, enabling him to demand restoration on certain conditions.[90] The second part of the Act of 1617, extending the negative prescription to heritable bonds and reversions, excepts from its scope reversions which, though not 'incorporate within the body of the infeftment,' are yet

[84] Possibly influenced by English law; see L. Ch. Eldon in Robertson *v.* D. Athole, *supra*, [81].

[85] Cases in [78], *supra*; and Bell, *loc. cit.*

[86] Napier, p. 139.

[87] §§ 831, 2012, and 2302.

[88] Lawrie *v.* Livingstone, 24th June 1816, 6 Pat. 194.

[89] Hinton *v.* Connell's Trs., 6th July 1883, 20 Sc. L. R. 731.

[90] Robertson *v.* Duff, 14th Jan. 1840, 2 D. 279; Gardyne *v.* Royal Bank, 8th March 1851, 13 D. 912, revd. 13th May 1853, 1 Macq. 358.

exception of leasehold rights[53] there can be no positive prescription, unless the possessor has during the whole period held the subject as owner,[54] *animo rem sibi habendi*. This is involved in the whole tenor of the first clause of the Act of 1617, whether it be regarded as a mode of acquiring or of securing property; and the extensions of its scope introduced by judicial interpretation have, as will presently be seen, respected its purpose in this matter at least. The seeming exception of prescription of predial servitudes is really none, since the servitude is regarded as being possessed as a pertinent or accessory of the dominant tenement, without which it cannot exist.[55] In public rights the proposition resolves itself into this other—that the public shall possess as in right, not by tolerance.[56] As has been already pointed out, possession as owner may be either natural or civil—by the owner's own detention, or by another's in his name.[57] The former case presents no difficulty; the latter demands closer inspection. The cases of chief practical importance are the superior's civil possession through his vassal, the fiar's through the liferenter, the landlord's through his tenant, and the debtor's through his creditor in possession. This last will naturally lead to the anomalous prescription of the creditor for his own behoof. Of course where no representation and no such connection subsist, the possession of one person cannot be pleaded for the benefit of another.[58]

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[75] Campbell *v.* D. Argyll, 19th May 1836, 14 S. 798.

Debtor, and creditor in possession.

(*d*) *Debtor, and creditor in possession.*—A creditor may be in possession of his debtor's property on a wadset, an adjudication, or on a disposition *ex facie* absolute with back-bond. In the ordinary case his natural possession is the civil possession of his debtor, and may have the effect of securing the debtor's title by means of the positive prescription against all the world; and indirectly, therefore, of securing his own. This requires no illustration. But here again, as in the preceding paragraph, the position of parties may change—the creditor may come to be regarded as possessing *quâ* owner, and the debtor be excluded by the lapse of time from exercising his power of redemption; and the change may take place in a much less obvious way than in the case of a tenant. The case of wadsetter and reverser is, in these days, of no practical importance.[76] That of a creditor possessing on an adjudication is of more moment, and has been elaborately discussed by Mr Bell,[77] since whose time little has been done to elucidate the matter. Shortly stated, the effect of prescription here is to act as an equivalent for decree of declarator of expiry of the legal[78]—mere expiry thereof without declarator being ineffectual to exclude redemption by the debtor.[79] About two points there seemed to be at first some difficulty. It being admitted that mere decree of adjudication and possession following thereon were not a sufficient foundation for prescription of the irredeemable right, was a charter of adjudication enough without infeftment?[80] An affirmative reply would be inconsistent with the whole tenor of the Act of 1617; and it may be believed, with Mr Bell,[81] that the only case in which it seems to have been so found, is explicable on some other hypothesis.[82] Whether that be the case or not, the contrary has been twice decided since by the Court of Session, in strict concord with the rest of the law of prescription.[83] The other moot point is also understood to have been set at rest. When does the prescriptive period begin to run?—at the date of

On adjudication.

[76] It is sufficient to refer to Napier, p. 124 *et seq.*, and cases there.

[77] 1 B.C. 744 (7th ed.); see Napier, p. 135 *et seq.*

[78] Ged *v.* Baker, 1740, M. 10789; Kilk. p. 418; Elch. Adjudn., No. 28, Presen. No. 22; Anderson *v.* Nasmyth, 1758, M. 10676; Caitcheon, *supra*, [44]; Ormiston *v.* Hill, 7th Feb. 1809, F.C.; and cases of Johnston *v.* Balfour, and Spence *v.* Bruce, in 1 B.C. 745, note [5]; and majority of Court in Stewart *v.* Lindsay 1 B.C. 744.

[79] Campbell *v.* Scotland and Jack, 1794, M. 321.

[80] See the modern equivalent in 37 & 38 Vict. c. 94, § 62.

[81] 1 B.C. 746, in note on Robertson *v.* D. Athole, 10th May 1815, 3 Dow. 108, 1 Ross L.C. 208.

[82] *E.g.*, there was room for a plea of consolidation of property with the superiority.

[83] Graham *v.* Orr, 8th Feb. 1826, S. (Teinds) 96; Thomson *v.* Stewart, 11th Feb. 1840, 2 D. 564.

the infeftment even if prior to the lapse of the legal, or only after the legal has expired and infeftment has taken place? On reasoning similar to that which demanded some evidence of a change intervening in the relations of parties in the foregoing paragraph, and seeing that merely getting infeft on the security operates no such change, it seems reasonable to regard the expiry of the legal as putting the creditor on a new footing, since he is only then in a position to bring a declarator. Accordingly, this date has been chosen [84] as that at which the creditor is regarded as beginning to possess as owner, and that though there is no apparent alteration in his conduct, or actual change in his *animus;* [85] and this has come to be the understanding of the profession. But the other opinion, though contrary to principle and some authority, was that of Baron Hume; [86] and one passage in Bell's 'Principles' is open to a similar interpretation—though, in other two passages,[87] he expressly adheres to the view maintained in his 'Commentaries.' A case which went to the House of Lords [88] seems at first sight inconsistent with the rule,—for in 1811 the positive prescription was found to have run on a sasine dated in 1768, proceeding on a charter of adjudication of date 1766,—but is not so in reality; for as to one of the two adjudications, the legal had elapsed long before these dates—and as to the other, no legal was possible, the decree having been obtained *contra hereditatem jacentem*, after renunciation by the heirs. The adjudication and deeds following on it do not make an *ex facie* irredeemable title; so that the curtailment of the prescriptive period introduced by the Conveyancing Act of 1874 does not apply in this case.[89]

On disposition *ex facie* absolute with back-bond.

The third example of a creditor in possession on infeftment is that of a disposition *ex facie* absolute with back-bond. Here the disposition actually divests the debtor and invests the creditor—the former having only a *jus crediti*, enabling him to demand restoration on certain conditions.[90] The second part of the Act of 1617, extending the negative prescription to heritable bonds and reversions, excepts from its scope reversions which, though not 'incorporate within the body of the infeftment,' are yet

[84] Possibly influenced by English law; see L. Ch. Eldon in Robertson *v.* D. Athole, *supra*, [81].

[85] Cases in [78], *supra;* and Bell, *loc. cit.*

[86] Napier, p. 139.

[87] §§ 831, 2012, and 2302.

[88] Lawrie *v.* Livingstone, 24th June 1816, 6 Pat. 194.

[89] Hinton *v.* Connell's Trs., 6th July 1883, 20 Sc. L. R. 731.

[90] Robertson *v.* Duff, 14th Jan. 1840, 2 D. 279; Gardyne *v.* Royal Bank, 8th March 1851, 13 D. 912, revd. 13th May 1853, 1 Macq. 358.

'registrated in the Clerk of Register his books.' This points to a distinction which has been given effect to in cases of wadset,[91] and which must rule also here, the circumstances being precisely similar.[92] If the back-bond has never been recorded in the register of sasines, and not appealed to or made use of for forty years, the negative prescription extinguishes it wholly.[93] If, on the contrary, it has been so recorded,[94] the negative prescription cannot run. But in both cases the positive prescription may be running in favour of the creditor in possession.[95] The recording of the back-bond can only be of importance where there is no room for positive prescription. It would probably also be held, like 'a 'judicial demand for a reconveyance,' to act as an interruption of the course of the positive prescription.[96] From all this it follows that the relative position of the parties here differs entirely from that of the adjudging creditor in possession and his debtor. The adjudger holds a title, bearing on the face of it the evidence of its being only a security; and therefore his possession may be claimed, until it is too late, by the debtor as his own civil possession.[97] Here, on the contrary, the debtor's right is not concerned in the possession at all: the creditor is full proprietor, as long as he possesses, only under a resolutive condition. Consequently, if the debtor, after recovering possession, requires, in order to eke out prescription, to include the term of his creditor's possession, he must do so, not as on his own right, but in the same way as any singular successor benefits by his author's possession.[98]

Beneficiary and trustee.

(*e*) *Beneficiary and trustee.*—No relation of civil and natural possession subsists in this case, any more than in that of a disposition with back-bond. The trustee in possession of the legal estate is in questions of title subject to the same rules, and open to the same rights and privileges, as other proprietors. The beneficiary has no direct concern with the positive prescription.[99]

2. Possession must be on and consistent with title.

(2) *On and consistent with the title.*—These two requisites, though distinct, are so intimately connected with each other, as to be fitly

[91] See Napier, pp. 128-133.

[92] 1 B.C. 714-724; Duff, Feud. Conv., p. 295.

[93] Munro *v.* Munro, 19th May 1812, F.C.; Chambers *v.* Law, 6th June 1823, 2 S. 366 (N.E. 326).

[94] As to the other effects thereof, see authorities in [92], and 2 Bell's Lect., p. 1164.

[95] Cases in [93], and Scott *v.* Stewart, 1779, M. 13519; 2 Hailes, 730, 5 B.S. 542, 588; contrary to Ersk. 3.7.10, *ad fin.*

[96] See note [92].

[97] Ersk. 3.7.5.; Ly. Burgy *v.* Strachan, 1667, M. 1305.

[98] See Murray *v.* M'Lellan, 1713, M. 10934.

[99] Baird *v.* Mags. of Dundee, 5th Feb. 1862, 24 D. 447, alt. 3d March 1863, 1 M. (H.L.) 6. As to the effect of the negative prescription on trusts, see 2 M'Laren on Wills, 386 and 573.

taken together. They explain much of what has been said in the immediately preceding pages, but they are mainly to be traced in that class of prescription which we have called the explicative;[100] and illustrations will accordingly be found in other parts of this work under the heads of Part and Pertinent, Salmon-fishings, and so forth. In the present place it is, however, proper to adduce examples which either do not properly fall under other heads, or else set forth the rules with more than usual distinctness. Thus, in a declarator of property which was sent to a jury, the issue had to put possession 'in virtue of the pursuer's titles in process,' something more than mere possession being required for the positive prescription.[101] Where a grass glebe lay in the middle of a barony whose owner possessed it for more than the prescriptive period, under an agreement by the presbytery to grant a feu, he was found to be precluded from ascribing his possession to the barony title, and thus securing his right by prescription.[102] Where an old decree gave to one party the ownership in a moor, and to the other a servitude over it, no possession by the latter, consistent with his servitude right, could be used to operate prescription of the ownership:[103] for that purpose there must be something which could in no way be ascribed to the lower right. The same argument has been repeatedly used in foreshore cases.[104] In one of these, the principle was given effect to under somewhat peculiar circumstances. The feuars of a seaboard village, who were fishermen, objected to a fellow-feuar encroaching, by buildings, on the foreshore, alleging that, by immemorial usage, they, as adjoining feuars, had erected thereon poles for drying their nets, and drawn up their boats, and had thereby acquired a servitude entitling them to continue so doing. But these averments were held not to justify an issue of servitude, seeing that the acts of possession they alleged were all ascribable to the lower statutory right bestowed on fishermen by 29 Geo. II. cap. 23.[105] The latest decision is one by which the point now under discussion was

Ascribable to the title founded on.

[100] But see Sinclair *v.* Sinclair, 29th Jan. 1829, 7 S. 342.

[101] Christison *v.* Hope, 18th Nov. 1847, 10 D. 119; Nicol. *v.* L. Adv., 10th Jan. 1869, 11 Macph. 966.

[102] Scot *v.* Ramsay, 15th Feb. 1827, 5 S. 367 (N.E. 340).

[103] E. Fife's Trs. *v.* Cumming, 25th Jan. 1831, 9 S. 336; see Macdonald *v.* Macdonald, 1797, affd. 22d June 1801, 4 Pat. 237.

[104] Agnew *v.* L. Adv., 21st Jan. 1873, 11 Macph. 309, 332, where L. Neaves quotes Morton *v.* Covingtree, 1760, M. 13528, an illustration of how the objection is overcome; L. Adv. *v.* Maclean, 23d May 1866, 38 Sc. Jur., 584.

[105] Cameron *v.* Ainslie (Fort William Ca.), 21st Jan. 1848, 10 D. 446; see Hoyle *v.* M'Cann, 10th Dec. 1858, 21 D. 96. Now repealed, 31 & 32 Vict. c. 45, s. 71. See in contrast to the former case De La Warr *v.* Miles, 17 Ch. D. 535.

brought out very clearly in the judgment of the House of Lords.[106] It was there decided not to be sufficient, in founding on a conveyance (of a barony) with part and pertinent as prescriptive title to lands not expressly mentioned therein, to show that the proprietor and his predecessors had possessed the subjects claimed, *along with* the subjects mentioned in the title, for forty years. It had to be shown that they were possessed *as* part and pertinent. The circumstances which were held, not separately, but when taken together, to disprove the latter view, were briefly these: discontiguity from the principal subjects; the admitted fact that the subjects claimed had been from an early period a royal palace, and no part of the barony; that the titles of the barony carefully enumerated the lands originally embraced within it, and omitted the palace; and that the palace itself was used as a boundary in some of the titles, and was therefore not overlooked by inadvertence. These may serve as illustrations of the rule that possession must be had on, and be ascribable to, the title produced.

And not inconsistent with the title.

It must, moreover, be not inconsistent with this title. Referring to the cases of derivative possession already discussed,[107] as examples of the application of this rule to protective prescription, it will suffice to notice here one or two instances of its application to cases of explicative prescription, in addition to other illustrations thereof, which will be adduced under the head of Part and Pertinent.[108] A proprietor of land bounded 'on the south by 'the river Tay' feued out part, bounding it by a 'sea-wall which 'divides these said subjects from the sea-beach,' and in the precept reserving to the granter 'full liberty of quarrying on the beach 'and shore still belonging to me.' Forty years' possession of the feu on a subsequent progress which omitted the reservation, but otherwise substantially agreed with the original feu-right, was held incapable of founding prescription in the feuar of property in the beach, as being inconsistent with his title.[109] Again, a piece of ground was disponed to be held by the disponee *pro indiviso* with the granter, as the site of a staircase to be erected at their common expense. It was held that such a title could not found by prescription an exclusive right of use as access, since it was *res meræ facultatis* to the other whether he used it or not, and no one can prescribe against his title.[110] And lastly, it was thought

[106] L. Adv. *v.* Hunt (Dunfermline Palace), 31st Jan. 1865, 3 Macph, 426, rev. 11th Feb. 1867, 5 Macph. (H.L.) 1.

[107] See *supra*, pp. 34-40.

[108] *Infra*, chap. 11.

[109] Kerr *v.* Dickson, 28th Nov. 1840, 3 D. 154, affd. 18th July 1842, 1 B. App. 499.

[110] Leck *v.* Chalmers, 3d Feb. 1859, 21 D. 408.

extremely doubtful whether a conveyance of lands 'cum piscationibus ostreorum . . . in mari dict. terris adjacen,' could by prescriptive possession be interpreted to include oyster-fishing 'opposite 'adjoining lands.'[111]

(3) *Sufficient and adequate to indicate the right claimed.*—This statement is intended to include a number of requisites nearly allied to each other, but taking different aspects, according to the nature of the right in dispute. The possession of visible corporeal subjects, such as lands and houses, scarcely admits of doubt as to its import. But there may be ambiguity in the case of minerals and of incorporeal rights, such as servitudes, salmon-fishings, and public privileges; and it is in respect to these that the above rule is of great importance. 3. Possession must be sufficient and adequate to indicate the right claimed.

(*a*) *The possession must be legal;* or, in other words, it must be not inconsistent with a public law—such as, in salmon-fishing, the old law regarding the Saturday's slop,[112] the rules regulating cruives,[113] and those directed against fixed engines.[114] But this means only that prescription cannot be pleaded as setting up a right to continue the illegal possession. That possession may, however, be the strongest possible assertion of a right capable of lawful use, and therefore be so far available for prescription.[115] Consistent with public law.

(*b*) *Tantum prescriptum quantum possessum.*[116]—The possession must be commensurate with the right claimed; or, conversely, the right acquired is limited to and measured by the amount of possession had during the prescriptive period. Were it otherwise, prescription would be of no avail, either in protecting titles or interpreting them. The rule is well illustrated, as applied to the negative prescription, in a case where a grant of customs payable by those who crossed a river between two points had been enforced at one crossing, but for forty years not at another; and it was held that the right to levy being divisible, the latter part was lost, Commensurate with the right.

[111] Maitland *v.* M'Clelland, 21st Dec. 1860, 23 D. 216; see E. Zetland *v.* Tennant's Trs., 26th Feb. 1873, 11 Macph. 469.

[112] Fraser *v.* D. Gordon, 1765, M. 14293.

[113] Cases in M. 14286-14297; Halkerton *v.* Scott is not reported on appeal, but is referred to in a later stage; V. Arbuthnot *v.* Scott, 1797, n. r., revd. 25th May 1802, 4 Pat. 337; also Johnstone *v.* Stotts, 1800, n. r., affd. with var. 18th Feb. 1802, 4 Pat. 274; 1802, affd. with var. 2d May 1806, 5 Pat. 119; Colquhoun *v.* Mags. of Dumbarton, 1794, M. 12827, rem. 1801, 4 Pat. 221; Mackenzie *v.* Reuton, 12th June 1840, 2 D. 1078.

[114] E. Fife *v.* Gordon, 1807, M. Salmon-Fishing, App. No. 2; Fraser *v.* Duff, 13th Nov. 1829, 8 S. 14, affd. 23d Feb. 1831, 5 W.S. 57; Ramsay *v.* D. Roxburghe, 9th Feb. 1848, 10 D. 661, affd. 3d Aug. 1850, 7 B. App. 248; D. Richmond, *v.* E. Seafield, 16th Feb. 1870, 8 Macph. 530.

[115] L. Adv. *v.* L. Lovat (Beauly), 27th Feb. 1880, 7 Ret. H.L. 122, 134, 145, 153.

[116] Ersk. 2.9.4.; B. Pr. 993.

not being kept up by the former.[117] A verdict having established a right of salmon-fishing and its accessories—the right of mooring boats and drawing nets—there was some difference of opinion on the bench as to whether these were rights of property or of servitude, but none on the point that they should be restricted to parts of the bank which had been in use to be so employed.[118] In a Tweed case, one of the points decided was, that an immemorial custom of opposite salmon-fishing proprietors casting the net right across the river by alternate shots, could never give either of them a right to rod-fishing across the *medium filum*.[119] In a similar way an adjudication, with charter and infeftment, was found not to be kept up, as to the whole lands adjudged, by possession of part only, the debtor having for the prescriptive period possessed the rest on his own titles.[120] The technical doctrine of union in a barony has been differently construed in two cases, which it seems impossible to reconcile. In the earlier of the two, the lands of P. were, along with others, erected into a barony '*cum communi* '*pasturâ*'; and the servitude had been exercised in connection with the other lands, but not for forty years back in connection with P. In a division of the commonty, it was held that the owners of P. had a right to share, their right having been kept up by the possession had on behalf of the rest of the barony.[121] In the other case, this decision does not seem to have been referred to; and it was found that, though right to salmon-fishings is acquired by possessing them for forty years on a barony title, yet if there have been no possession in a part of the barony discontiguous from other parts in which there has been possession, the maxim *tantum prescriptum quantum possessum* applies, and there is no prescription as to the former. The ground of judgment was, that the opposite result would have been a perversion of the rule that possession of part of a barony is equivalent to possession of the whole, for that rule only applies to subjects which can be proved to belong to the barony in some other way than by possession.[122] The same reasoning would apply to *Cheap's* case, for there too the clause (of pasturage) was quite general. As to the element of discontiguity, one of the chief merits of a barony title is to overleap the limits of space. The more modern rule is to be preferred, on the ground of being better in accord with the prin-

Barony.

[117] Mags. of Linlithgow *v.* Mitchell, 21st June 1822, 1 S. 515 (N.E. 476); cf. Cheap, *infra*, [121].

[118] Berry *v.* Wilson, 1st Dec. 1841, 4 D. 139.

[119] Milne *v.* Smith, 23d Nov. 1850, 13 D. 112.

[120] Clarke *v.* E. Home, 1746, M. 10662, revd. 1753, 1 Pat. 533.

[121] Cheap *v.* Ferguson, 1785, M. 14520.

[122] L. Adv. *v.* Cathcart (Carleton), 19th May 1871, 9 Macph. 744.

ciples of this department of the law. Accordingly it was fully recognised, both by the Court of Session and by the House of Lords, in an extremely narrow case, in which there was held to be sufficient possession of salmon-fishing in a river and its tributaries, taken as a *unum quid*, in so far as they ran through or *ex adverso* of the lands of a barony; though the possession, except over the last four miles of the river after it had passed a considerable fall, was meagre and profitless, being merely by incidental watching, occasional fishing, and suppression of poaching on the only occasion on which it was known to have been attempted, and though the baron had a separate express right to salmon-fishings over the really profitable part of the river.[123] But the maxim under discussion must not be too strictly interpreted. Erskine[124] is justified in maintaining that 'a servitude by prescription may be sometimes justly extended beyond former 'usage;' though, as is pointed out by Lord Ivory in his note to the passage, he goes too far in applying the extension to raising the height of a damhead.[125] To be justifiable, the so-called extensions must be not properly extensions at all, but such use or development of use as may be fairly held to be involved in the possession proved. Thus a public road, which has been used from time immemorial for all purposes required by the public, though only for the passage of horses, cattle, and foot-passengers, may, on the introduction of carts and carriages into the district, be used as a public road for the latter, provided that, without engineering operations, it is capable of being so used from one end to the other.[126] In salmon-fishing, changes in a river may necessitate alterations in the stations used. Yet the Court does not require prescriptive possession of fishing from each of these, but rather satisfies itself as to the question whether there has been exclusive possession for the requisite period of the right of fishing within the area which embraces them all.[127] And if possession of salmon-fishings has been had on all parts of a sea-coast *ex adverso* of a proprietor's lands, where it could be conveniently exercised, this

Liberal construction of the rule.

[123] L. Adv. *v.* L. Lovat, *supra*, [115], esp. 7 Ret. H.L. pp. 129, 145, 151, 165.

[124] 2.9.4.

[125] Erskine is unsupported by one of the cases he quotes, for there no increase was made to the burden—L. Gairlton *v.* Stevenson, 1677, M. 14535; and the other case transgresses the rule (*infra*, chap. 25), that the burden on the servient must not be increased merely for the greater profit of the dominant tenement—Bruce *v.* Dalrymple, 1741; Elch. *v.* Servitude, No. 2.

[126] Forbes *v.* Forbes, 20th Feb. 1829, F.C., and 7 S. 441; Mackenzie *v.* Bankes, 19th June 1868, 6 Macph. 936; cf. a similar American case, Parks *v.* Bishop, 18 Amer. R. 519, and see the English authorities cited in Finch *v.* G. W. Ry., 5 Exch. D. 254.

[127] E. Zetland *v.* Tennant's Trs., 26th Feb. 1873, 11 Macph. 469.

carries the right for every part of the coast.[128] A similar rule is applicable to prescriptive possession of parts of the foreshore of a barony,[129] and is thus described by Lord Blackburn:[130] 'All that 'tends to prove possession, as owners, of parts of the tract, tends 'to prove ownership of the whole tract, provided there is such a 'common character of locality as would raise a reasonable infer- 'ence that if the barons possessed one part as owners they pos- 'sessed the whole, the weight depending on the nature of the 'tract, what kind of possession could be had of it, and what the 'kind of possession proved was. And the weight of the aggregate 'of many such pieces of evidence taken together is very much 'greater than the sum of the weight of each such piece of evidence 'taken separately.'

Clear, unequivocal, and exclusive.

(c) *Clear, unequivocal, and exclusive.*—To a full understanding of these requisites is necessary some knowledge of the peculiarities of the rights connected with salmon-fishings,[131] public privileges,[132] and the foreshore;[133] and the passages of this treatise to which reference only can here be made are noted below.[134]

4. *Longi temporis.*

(4) *Longi temporis.*—Perhaps proceeding on the lapse of time which, in exceptional cases, the *prescriptio longissimi temporis* of the Roman law demanded,[135] and the analogy of the earlier Acts treating of the negative prescription of actions,[136] the term of prescription required in both parts of the Act 1617, c. 12, was forty years.[137] This still continues to be the period of the nega-

[128] M'Douall *v.* L. Adv. (Logan), 16th April 1875, 2 Ret. (H.L.) 49; L. Chan.'s op., p. 58, revg. C.S. 13th June 1873, 11 Macph. 688. Probably the same would be true of a river, though the point did not arise purely in the Beauly case, [115].

[129] L. Adv. *v.* L. Blantyre, 19th June 1879, 6 Ret. H.L. 72, 80.

[130] Ibid., p. 85. There and in the Beauly case, 7 Ret. H.L. 122, 175, his lordship refers to the English case, Jones *v.* Williams, 2 M. and W. 331.

[131] See *infra*, chap. 18.

[132] See *infra*, chaps. 19, 20.

[133] See *infra*, chap. 15. As to minerals, see cases of continuous possession, *infra*, p. 50.

[134] As to a right of superiority, see E. Fife's Trs. *v.* Sinclair, 29th Nov. 1849, 12 D. 223.

[135] The usual period of the *pr. longissimi temp.* was thirty years. (See the expression in the preamble of the Act of 1617, 'after the expiry of thirty or forty 'years'; its reference to the civil law; and A.S., 16th Dec. 1615.) It differed from the Scotch analogue in requiring *bona fides* in its inception, but no *titulus*, according to the prevailing opinion of civilians —Vangerow, § 325. It was an adaptation to property of the (negative) prescription of actions. The chief application of the exceptional period of forty years was to Church property, by Nov. 111, altering 23 C. (1.2), which had stretched the period in that case to 100 years—Puchta, §§ 208 and 240; see St. 2.12.3.

[136] 1469, c. 28; 1474, c. 54.

[137] The same had been the case with its forerunner, 1594, c. 218. According to Mr Bell, Pr. 932, the term of prescription in udal lands is thirty years; but this must be more akin to negative than to

tive prescription. But by the 34th section of the Act of 1874, already so often referred to,[138] possession for twenty years on the title required therein is enacted to be 'equivalent,' for all the purposes of the Act of 1617, to possession for forty years, by virtue of the titles required in the last-mentioned Act—in other words, is to be sufficient for the positive prescription. The purposes of the Act of 1617 have been held to mean these as interpreted by the decisions of the Court, and, consequently, to extend to its explicative as well as to its original protective function,[139] as explained on a former page.[140] Provision is made for the case of minorities.[141] The old law is left standing as to adjudications,[142] servitudes, public rights of way, and other public rights. The clause is not to be pleadable in any action commenced prior to 1st January 1879, 'provided always that the possession for any space of time 'prior to 1st January 1879 shall not have effect for the purposes 'of this section, unless such space of time immediately preceded 'and was continuous up to the said first day of January.' This proviso has been added for the purpose of maintaining the validity of such interruptions as were made before that date, and as would have been effectual against the forty years' prescription; and it is believed that it was chiefly in the view of the Legislature to protect in this way the Crown's right to fishings and the foreshore.[143] It is obvious that this change in the law makes it even more important than formerly to distinguish clearly between the effects of the positive and of the negative prescription on heritable property; and curious results may be figured as likely to arise.

De momento in momentum.

Prescription runs *de momento in momentum*, whether positive or negative, counting in not only *tempus utile*, but *tempus continuum*,[144] and allowing interruption to be made down to the very last day of the period required. The term of the positive prescription begins to run, according to the express enactment of the Act of 1617, at 'the date of their saids infeftments'—that is, not sooner than the date of the furthest back sasine founded on. The modern equivalent for this is the date of registration in the Register of Sasines, as determined by the Minute-Book.[145] Pre-

positive prescription, as no charter is possible. There seems to be no authority for his dictum in the Sess. Pap. to the case he quotes.

[138] See it printed, p. 25, note.

[139] Buchanan and Geils *v.* L. Adv., 20th July 1882, 9 Ret. 1218.

[140] *Supra*, p. 27.

[141] *Infra*, p. 25.

[142] Hinton *v.* Connell's Trs., 6 July 1883, 20 Sc. L. R. 731.

[143] Mowbray on the Act of 1874, p. 95.

[144] Ersk. 3.7.30. This was the rule in R.L. as to all prescriptions beyond one year—Puchta, § 208. *T. utile* defined, 1. D. (44.3).

[145] 1617, c. 16; 1693, cc. 13 and 14; 31 & 32 Vict. c. 64, s. 15.

scription ceases to run as soon as any effectual interruption has been made.[146] The combination of the *ex facie* valid title and possession for so long a period as forty years does away with the necessity—which was retained even in the latest Roman law[147]—for proving otherwise that the possession was begun or continued *in bonâ fide*. In other words, the possessor may know from the beginning, and during every moment of his possession, that the property came to him or his predecessor from one who was not himself owner, and had no right to dispose of it.[148] Mackenzie's and Stair's opinion to this effect is followed by Erskine, on the ground that the length of possession infers *bona fides*, and by Napier.[149] Bell's[150] opinion must be either disregarded, or read as really enforcing the necessity for a *justus titulus*. The reduction of the prescriptive period to a moiety makes no alteration in this respect.

Bona fides not required.

As an alternative to possession for forty years, is frequently put to a jury 'possession for time immemorial.' Without having the technical significance and important effects which it bears in English law, the term is nevertheless useful. Thus, it may be necessary to go further back than forty years from the date of the action, either for the purpose of imputing possession to a title habile to found prescription, which later titles have ceased to be,[151] or in search of a period of possession which has been uninterrupted.[152] In the case of *Cuthbertson*, members of the public succeeded in 1851 in proving a right of way as existing before 1827, when interruption took place; and it was laid down by the Court, with the approval of the House of Lords, that if the evidence did not go back quite forty years before 1827, but so far as it went and for time immemorial showed one state of matters, as existing, without any indication of change, the jury was bound to presume prescriptive possession corresponding.[153] This is a relaxation of the hard and fast rule of time, on account of the

Possession for time immemorial.

[146] *Infra*, p. 51.

[147] *Supra*, note [135]. Begun—not necessarily continued—*in bonâ fide*, c. un. C. (7.31). Both required in the Canon Law, c. ult. X. de præscript.

[148] Cf. def. of *bona fides* in 109 D. (50.16).

[149] Mack. 3.7.5; St. 2.12, §§ 6.11.19; Ersk. 3.7.15; Napier, p. 51.

[150] Bell. Pr. 2004, 2008.

[151] L. Adv. *v.* Sinclair, 14th June 1865, 3 Macph. 981, affd. 7th June 1867, 5 Macph. H.L. 97; L. Adv. *v.* M'Culloch, 20th Oct. 1874, 2 Ret. 27.

[152] Cuthbertson *v.* Young, 20th Dec. 1851, 14 D. 300; other stages in 12 D. 521, 13 D. 1308, 14 D. 375 and 465; and 1 Macq. 455; Borthwick *v.* Kirkland, 1677, Mor. Sup. vol. p. 66; L. Eldon in Rodgers *v.* Harvie, 3 W.S. 251, 259; Mags. of Elgin *v.* Robertson, 17th Jan. 1862, 24 D. 301, where a change was not only indicated, but held proved.

[153] The same in Nicolson *v.* Bightie, 1662, M. 11291.

necessities of the case. In *Sinclair's* case—relating to salmon-fishing—Lord Curriehill (I.) explained very fully the inferences which the law draws from immemorial possession. It is presumed to go backwards so as to connect with the titles of a more remote date; and besides being an element of prescription, it serves as an interpreter of the written title. His lordship further argued, from Stair,[154] that these effects flowed from it before the Act of 1617. In a case two years earlier, a majority of the Second Division had expressed grave doubts as to the application of the statutory positive prescription to public rights of way, and preferred to regard prescription in such cases as merely 'that presumption 'which arises from immemorial possession, for which forty years is 'taken as being in general a sufficient equivalent.' Lord Benholme differed, and knew of no forty years' prescription except under the statute.[155] It is probably impossible, at this time of day, to determine whether the statute was merely declaratory of an older law of prescription, and regulative of a part thereof—or whether, being a new institute, it was extended to cases not expressly provided for; and it matters little, for exactly the same sort of possession is required under both theories.[156]

Shorter periods.

It has been frequently attempted to secure, in a shorter period than forty years, the benefits which are associated with the positive and with the negative prescription. Whatever has been the fate of these attempts in the latter case, they may be said to have entirely failed, in modern times at least, in the former. The plea of acquiescence, taciturnity, homologation, or *mora*, for a shorter period—for it is variously named—was indeed, at the beginning of the century, admitted as sufficient to transfer a right of property;[157] but the cases referred to have not been followed,[158] and have indeed been expressly repudiated.[159] The doctrine of *dedication* of public rights will fall more properly within another

[154] St. 2.3.69, 3 Macph. 994.

[155] Davidson *v.* E. Fife, 5th June 1863, 1 Macph. 874.

[156] The latter seems preferable. St. 2.12.9 & 12 (quoted with approval by L. Blackburn in Dalton *v.* Angus, 6 App. Cas. 818), expressly denies a common-law prescription. All our prescriptions are statutory. The case of Glenorchy *v.* Campbell, in 1610, says nothing about possession, and has been explained otherwise; and one would expect greater flexibility in the period under the other theory; see Neilson *v.* Sheriff of Galloway, 1623, M. 10880; and L. Jeffrey's dictum, cited *supra*, p. 24.

[157] Aytoun *v.* Douglas, 1800, and Aytoun *v.* Melville, 1801, M. Property, App., Nos. 5 and 6.

[158] Buchanan *v.* Carmichael, 25th Nov. 1823, 2 S. 526 (N.E. 460); Johnston *v.* Scott, 26th Feb. 1834, 12 S. 492; Cowan *v.* L. Kinnaird, 15th Dec. 1865, 4 Macph. 236; D. Buccleuch *v.* Cowan, 23d Feb. 1866, 4 Macph. 475; see Stirling *v.* Haldane, 26th Nov. 1829, 8 S. 131; Br. Pr. 945; and L. Chanc. in Wark *v.* Bargaddie Coal Co., 3 Macq. 479.

[159] L. Melville *v.* Douglas's Trs., 12th Dec. 1828; 7 S. 186, 8 S. 841.

chapter.[160] And it is only necessary to mention and reject, as was done by Lord Justice-Clerk Inglis, the distinction drawn by Lord Benholme between extending the scope of a title, which required forty years' possession, and explaining it, which might be accomplished by less.[161] The distinction was recently revived by Lord Lee, acting as Lord Ordinary;[162] but the opinions of all the judges of the First Division, in reviewing his judgment, proceeded on the assumption that possession for the full prescriptive period was required in all cases.

5. Possession must be continuous and uninterrupted.

(5) *Continuous and uninterrupted.*—By the express words of the Act of 1617, possessors, in order to prescribe, must hold 'peaceably, without any lawful interruption made to them therein 'during the said space of fourty years;' and by the 34th section of the Conveyancing Act of 1874, there must be possession for 'twenty years continually and together, and that peaceably, with-'out any lawful interruption made during the said space of twenty 'years,' which is merely an amplification of the earlier enactment. This element is so much part and parcel of prescription that it does not require to be put expressly in issue. 'Forty years' pos-

Continuous.

'session implies *without interruption.*'[163] As viewed positively, and in respect of the acts of the prescriber, the possession required of him is said to be continuous; as viewed negatively, in respect of the acts of his opponent, it must be uninterrupted. The former aspect of the rule was at one time well illustrated by the law of patronage, which required at least two successive presentations to satisfy the requirement,[164] and may still be seen in cases of reservations of minerals in feus. Thus, a vassal who had held his lands under reservation of the coal in favour of his immediate superior, having, on the latter's attainder, obtained under the Clan Act a Crown charter free of the reservation, and having for forty years possessed the surface, and wrought the coal at one part of the estate twice at an interval of thirty years, and at another place only once, was held not to have proved prescriptive possession of the coal, as against a party who had acquired the

[160] *Infra*, chaps. 19, 20; and see L. Neaves in M'Donald *v.* Dempster, 15th Nov. 1871, 10 Macph. 94.

[161] Fraser *v.* Grant, 16th Mar. 1866, 4 Macph. 596. See also op. of Lord Mure in L. Adv. *v.* Blantyre, reported in 6 Ret. H.L. 82.

[162] In Buchanan and Geils *v.* L. Adv., 20th July 1882, 9 Ret. 1218, 1226.

[163] *Per* L. Moncreiff in Mackenzie *v.* Davidson, 27th Feb. 1841, 3 D. 646.

[164] See whole law reviewed in Macdonell *v.* D. Gordon, 26th Feb. 1828, 6 S. 600; King's Adv. *v.* Dundas, 18th May 1830, 8 S. 755, affd. 1st Oct. 1831, 5 W.S. 723; abolished 37 & 38 Vict. c. 82.

forfeited estate as it had stood in the rebel's person.[165] For possession of the surface was not enough in such a case to prescribe the mineral at one time reserved out of the feu, and the meagre working of the coal was not continuous enough or explicit enough for an assertion of right. A striking contrast to this sort of possession is to be found in a case where the holder of a reservation of coal had never wrought it under the lands in question, but had done so under other lands belonging to the same barony; while it was proved that the owner of the lands (who had a clause giving him coals and coalheughs) had wrought it at a very remote period, had resumed working beyond the prescriptive period, keeping it up for eleven years, and since that time had made several trials for coal. The latter prevailed. It was not sufficient for him, in a question with a holder of such a reservation, to point to his possession of the surface, though that is the import of one of the reports.[166] The rule, however, must not be taken too strictly, since the working of one of several mineral fields, all contained in the same charter, and feued under one reddendo, will be sufficient for the whole.[167] Prescription is then the 'badge,' not the measure, of the right, and to work more or less is *res mercæ facultatis.*

Uninterrupted.

Regarded from the opposite point of view, the rule is more fruitful. Interruption is defined as any 'step taken by the owner 'of a right or debt against the possessor or debtor for preserving 'it from prescription,'[168] and may be either judicial or extra-judicial. The former may either stop at citation or proceed further. Citation, to be useful as an interruption, must be on a summons under the Signet, containing all the grounds and warrants on which it proceeds, and, in order to be good against singular successors, recorded in the Register of Interruptions—now absorbed in the General Register of Sasines[169]—within sixty days of the execution.[170] This last must, for all purposes, be 'by messengers-'at-arms, against the defenders personally, or at their dwelling-

Judicial interruption.

[165] Forbes *v.* Livingstone, 31st Jan. 1822, 1 S. 282 (N.E. 263), rem. 29th June 1825, 1 W.S. 657; C.S. 29th Nov. 1827, 6 S. 167, the view of the majority of the whole Court; cf. Mitchell *v.* York Buildings Co., 1776, affd. 1777, 6 Pat. 795; Anderson *v.* Cadells, 1801, affd. 27th July 1803, 4 Pat. 532.

[166] Ly. Crawfurd *v.* Bethune, 10th July 1821, 1 S. 111 (N.E. 110); Ly. Crawfurd *v.* Durham, 20th Dec. 1822, F.C., and 2 S. (N.E.) 97, 2d June 1826, 4 S. 665 (N.E. 670).

[167] Bell, Pr. 2006.

[168] Ersk. 3.7.38. The whole subject is better treated with reference to the negative prescription, and has been fully discussed by Erskine, 3.7.30-47; Bankt. 2.12.50; Bell, Pr. 615-23, 2007; Nap. chap. viii. p. 656 *et seq.* Hence the brevity of the text.

[169] 31 & 32 Vict. c. 64, sect. 15.

[170] 1696, c. 19. A bill is no longer required. 13 & 14 Vict. c. 36, sect. 18.

'places, and at the parish churches in the time of divine service 'or immediately after, and,' edictally, 'upon three score days.'[171] The church publication must be at the most patent door,[172] and is unnecessary if the citation have been personal.[173] And citations for the purpose of interruption must 'be renewed every 'seven years; otherwayes to prescrive, except the parties be 'minors, in which case this Act is not to be extended against 'them during the years of their minority.'[174] If, on the other hand, the case is called in Court, the necessity for these formalities—publication, registration, and renewal—ceases, and the interruption endures for forty years.[175]

Extra-judicial.

Extra-judicial interruption may be either civil, by notarial instrument—or natural, by actual dispossession. To the former,[176] the same rule is applied as to citations—that, to be valid against purchasers and singular successors, the instruments of interruption must be recorded. Otherwise the interruption is only effectual 'as to the heritor and possessor of the ground.'[177] It is more important to observe what has been and has not been considered sufficient for *natural* interruption. This, of course, depends on the nature of the right which is in course of prescription. Thus, in salmon-fishing in a river, the simultaneous possession of two parties, who each claim the whole, may really be quite consistent, and not adverse—each having only a part of the entire fishery.[178] In a case where a servitude of pasturage was claimed on a charter '*cum communi pasturâ*' generally and forty years' possession, it was held that any interruption was sufficient to show that the heritor did not consent, as by turning off the other's cattle yearly and stopping his casting of peats, though these measures had failed effectually to stop the use. It was not necessary in such a case to resort to a summons, or to prove complete interruption for a whole year.[179] On the other hand,

[171] 1669, c. 10.

[172] 1685, c. 15.

[173] St. 4.35.15.

[174] 1669, c. 10, explained Ersk. 3.7.43. See ibid. § 40, for the effect of objections to citations, &c., and add, as cases of real rights, Heriot's Hosp. *v.* Hepburn, 1695, M. 10786; Edington *v.* Home, 1672, M. 11292.

[175] Ersk. 3.7.43; B. Pr. 2007; Nap. p. 662, and cases there; Wallace *v.* E. Eglinton, 7th July 1830, 8 S. 1018 (a decl. of non-entry); Mackenzie *v.* Robertson, 22d May 1827, 5 S. 694 (N.E. 648), (reduction of decl. of expiry of the legal).

[176] Called also interruption *vid facti*, using this term in a restricted sense, 1696, c. 19; Ersk. 3.7.40, meaning interruption for the set purpose of stopping prescription.

[177] 1696, c. 19.

[178] Brown *v.* Mags. of Kirkcudbright, 1678, M. 10844.

[179] Nicolson *v.* Bightie, 1662, M. 11291; converse case, Munro *v.* Mackenzie, 1760, M. 14533. Cavers *v.* Turnbull, 1629, M. 10874, is very general.

where prescription was necessary to prove a right of thirlage over certain lands which had been in the habit of grinding their corn at the claimant's mill, it was held, in an early case, that there could be no interruption by abstraction of single parcels of corn, however large and however frequently, but only by abstraction of the whole crop of a year.[180] Nor was it sufficient interruption for the defenders in another case to go to other mills occasionally, since ordinarily they went to the pursuer's mill, and, above all, paid insucken multures.[181] Of public rights of way, it is sufficient here to say that the possession had by the lieges must be peaceable and uninterrupted,[182] or at least that attempted interruptions had never been effectual to prevent the public use of the road.[183] In fact, the successful resistance of the public to such attempts is often the best proof that the road is a public one, since they exclude the theory of tolerance. In the case of *Rodgers*, Lord Chancellor Eldon laid down the law applicable to another position of matters: 'If the right be once established by clear and distinct 'evidence of enjoyment, it can be defeated only by distinct evi-'dence of interruptions acquiesced in.'[184] So that the law deducible from general considerations, as well as from decided cases, may be stated as follows: Actual dispossession is required for all these natural interruptions. Where the *onus* lies upon the possessor of proving his right by prescription, interruption may consist of such acts or omissions of his own as show that he had not been possessing under the right he now claims, or by such acts of his opponent as prove the maintenance of adverse right. If the *onus* lies the other way, the converse is true, and the interruptions must be acquiesced in; and this will, as a rule, be provable only by a new course of contrary prescription.

(6) *Must the possession be adverse?*—This question has been answered differently in different parts of the doctrine of prescription. In order to make the query and the replies made to it more intelligible, it will be necessary to examine shortly,—first, the nature of adverse possession, and the arguments for its necessity; next, the authority in certain cases to the contrary; and, lastly, the way in which these two views have been 6. Adverse?

[180] Henderson *v.* Arnot, 1677, M. 10867.

[181] Keithick Mill *v.* Feuars, 1665, M. 11292.

[182] Mags. of Elgin *v.* Robertson, 17th Jan. 1862, 24 D. 301, 788; sequel in Jenkins *v.* Robertson, 2 Macph. 1162, 5 Macph. H.L. 27, 6 Macph. 951, 7 Macph. 739.

[183] Rodgers *v.* Harvie, 13th January 1826, 4 Mur. 25, 10th July 1827, 5 S. 917 (N.E. 851), affd. 8th July 1828, 3 W.S. 251.

[184] 3 W.S. 260. This is consistent with a case of aqueduct, Borthwick *v.* Kirkland, 1677, in Mor. Sup. Stair, p. 66.

both adopted by the law. It is undoubted that possession, in order to be prescriptive, must always be adverse, in the sense that it must not be held derivatively (as has been shown in a previous section), or, in questions with the public, by the mere permission or tolerance of the true owner.[185] But a rule of quite a different kind is here contemplated. That the possession must be adverse, is said to be involved in the purpose of the Act of 1617, as set forth in the preamble—'to cut off all occasion of pleas;' as well as in the first enactment, protecting against any one troubling, pursuing, or inquieting the prescriber; and in the third, concerning minorities. It is alleged to be still more clearly indicated in the clause about interruptions, which has just been considered. The supposed rule may be variously stated. Thus, possession, in order to be prescriptive, must at any and every moment be capable of being lawfully interrupted. Or, such possession must be, at every moment of its course, *adverse* to a lawful right.[186] Or there must always be some one at every point of the prescriptive period who is in a position lawfully to oust the possessor, and who is culpably negligent of his own interests in not doing so. The last proposition is the same as saying, more technically, that the party against whom prescription is running must at every moment of the period be *valens agere cum effectu*, taking that phrase in its widest sense. The reason given for the rule is this: Prescription is important as adding security to rights; it would be absurd to talk of adding security to rights which need none. Prescription is not required to tinker good titles, but bad. For the other view, it is argued that none of these requirements are to be found in that part of the statute of 1617 which applies to the positive prescription. The purpose of the Act was simply to render a certain description of title inviolable against all extrinsic objections to which it might be alleged to be liable in respect of irregularities in the prior steps of the progress. This is clear from the preamble, and from the first clause, and is not controverted by that part of the latter which relates to interruptions. There is no necessity for a *verus dominus*, with a lawful right at any moment of the prescriptive period to turn out the possessor; in other words, no need for the doctrine of *non valens*. The matter was very strongly put by Lord Kames:[187] 'If a man cannot acquire by the positive prescription, 'unless there be a person existing who can object to it, the neces-

[185] Baird *v.* Fortune, 25th May 1859, 21 D. 848, revd. 25th April 1861, 4 Macq. 127.

[186] Lord Chanc. Cottenham in Neilson *v.* Cochrane's Reps. 1 Rob. Ap. 82, 93.

[187] Millar *v.* Dickson, 1766, M. 10937, 10944; see also his Elucid. p. 266; Equity, 2, 117.

'sary consequence is, that 400 years instead of forty may not be 'sufficient to secure a family in the possession of their estate.' The first view is that which is maintained as to all parts of the law of positive prescription by Mr Napier in his learned commentaries, and by Mr Bell,[188] and is that which is recognised—though with expressions of jealousy and regret—in the law of double titles. The latter theory is that which is authoritatively laid down, in the case of *M'Neill* v. *Macneal*,[189] by a unanimous judgment of the Second Division, as will presently be explained. The only exception there pointed at is that of prescription on double titles, already mentioned. It is indifferent which view is adopted in the case of an attempted recovery by a proprietor, through whose lands a road once public runs, of its full and absolute use and possession; for the public can never be incapable of maintaining its rights. But in all other cases it must now be held as settled law that the exception of *non valentia agendi*, or legal incapacity to sue,[190] on the part of him against whom prescription is pleaded, cannot be objected in a case coming under the first clause of the Act of 1617. In this is to be observed one more instance in which the negative prescription differs from its younger brother. All the observations about *non valens* to be found in the institutional writers are now to be read as applying only to the former.[191] Keeping these preliminary observations in view, it will now be convenient to go into some further detail in the following order: (*a*) the rule that *non valentia agendi* at common law cannot be objected against the positive prescription; (*b*) the exception of double titles; and (*c*) the statutory reply of minority.

Reply of *non valentia*, as a rule, inapplicable to positive prescription.

(*a*) *The reply of* non valens *inapplicable.*[192]—It would be needless to enter into a discussion of the general principles and the authorities which were supposed to warrant the introduction of this common-law reply to the positive prescription, without any express enactment in the statute, and it will be sufficient to refer to the text-books in which they are collected.[193] But it will be convenient to note the texts and cases whose authority to the contrary has been followed in the recent decision already mentioned.[194]

Lord Stair[195] shows, by the reason he gives for the exception,

[188] Nap. pp. 198, 201, and chap. iv. *passim*, 443 *et seq.*, 528 *et seq.*; B. Pr. 2023.

[189] 4th March 1858, 20 D. 735, esp. in Lord Wood's opinion, 742, 748.

[190] Ersk. 3.7.37.

[191] 20 D. 744; St. 2.12.27; Ersk. 3.7.37.

[192] See note [188], *supra*. Liferent, there mentioned by Bell, has been discussed *supra*, p. 35.

[193] Ibid.

[194] M'Neill *v.* Macneal, *supra*, [189].

[195] 2.12.27.

that he is referring to the negative prescription, first introduced in Acts of the fifteenth century,[196] which proceeded on 'the not 'following the right.' The context of the passage in Erskine[197] points to the same conclusion. But both authors had the positive prescription in view, for both of them cite a case in which the exception was undoubtedly applied thereto,[198] there having been forfeiture and restoration *ex justitiâ*. But this case has been animadverted on as being of a peculiar character, chiefly in respect of the almost sovereign power of the unscrupulous Duke; and it is the only distinct authority in favour of the view here controverted. A case followed close on the heels of this, in which the inapplicability of the exception to the positive prescription was fully recognised;[199] and the same was held, without reference to the last decision, in the *Otter* case.[200] The incapacity to sue in all these cases was personal, depending on forfeiture of the alleged owner. But the law was further illustrated by two cases nearly a century apart, whose circumstances were so nearly identical that it will be sufficient to note the more recent of the two—the case of *M'Neill*, already cited.[201] By a marriage-contract lands were destined to the heirs-male of the marriage—whom failing, to the nearest lawful heirs-male of the husband. The husband was succeeded by his son, who again was succeeded by his son, who served in special to his father, not as heir-male of provision, but simply as his heir-male, and got infeft thereon in 1788. He died in 1818, having executed an entail in favour of an illegitimate son, who was infeft thereon in the same year, and possessed till his right was challenged in 1854 by the lawful heir under the destination in the marriage-contract. Two other points which have been already noticed[202] were determined; and from the state of the pleadings, it was assumed that the entailer's service was faulty. Yet it was held that the possessor's title had been fortified against any such attack on extrinsic grounds by the positive prescription. His own possession was not of sufficient length, and had therefore to be eked out by that of the entailer, who was, however, the undoubted heir of provision under the marriage-contract, which he was assumed to have passed by. His possession was adverse to no one's right. If the alleged

[196] St. 2.12.12. 1469, c. 28, and 1474, c. 54.

[197] 3.7.37.

[198] E. Lauderdale *v.* V. Oxenford, 1666, M. 27; D. Lauderdale *v.* E. Tweeddale, 1678, M. 11193.

[199] Innes *v.* Innes, 1695, M. 11212. Therefore correct Bell, Pr. 2023. See 20 D. 745.

[200] Wilson *v.* Campbell, 1765, 5 B.S. 543.915.930; revd., but only on the question about a liferent, 1777, 2 Pat. 193.

[201] Millar *v.* Dickson, 1766, M. 10937; and M'Neill *v.* Macneal, 4th March 1858; 20 D. 735.

[202] *Supra*, pp. 33, 36.

defect in his service had been made subject of action against him, the suit would have been dismissed for want of interest, and he would simply have served anew. No adversity of title set in till 1818: till then the pursuer was *non valens agere*. The Lord Ordinary and the Second Division were, in spite of this circumstance, unanimous in sustaining the exclusive title of positive prescription, after a careful survey of the authorities just quoted, and a subtle discrimination of the case in hand from the ordinary case of double titles. In the latter, there exist two titles, the validity of which is not disputed; in the former, the possessor's title was challenged as bad, and prescription was held to exclude any investigation into the force of the attack.

But only in double titles.

(*b*) *The exceptional case of double titles.*—The foregoing paragraph has led far enough for the scope of this work, and a minute examination of the law of double titles would lead still further, into the intricacies of Scotch conveyancing. It will be sufficient, in order to a complete view of the positive prescription, to give in a few sentences the gist of the *catena rerum judicatarum*, which illustrates the learning and acumen of the Scotch bench in this department of the law. The rule of *non valens*, rejected elsewhere, is here predominant, and is the key to an understanding of all the decisions. These, so far as concerned with prescription, all turn on questions of disputed succession; since, so long as one who has two different rights to a piece of property lives, he is regarded as using both for the greater security of his own possession. But as soon as there arises, not attack from without, but dissension within, among his heirs and successors, actual or prospective, as to which title shall govern his succession, prescription steps in. The rules, so far as developed by judicial decision, are these: Where a party having right to lands under two titles, one limited and the other absolute, completes his title under the latter, and possesses upon it for forty years, the former, though the preferable and governing title, is extinguished by prescription. In other words, the unlimited title is set up by the positive prescription, out of reach of challenge by the heir of entail—the reason being, that any one of the substitutes might have stopped the possession on the absolute title, by calling upon the possessor to make up titles under the limited investiture.[203] But if a possessor, holding

[203] M'Dougal *v.* M'Dougal (Mackerston), 1739, M. 10947; Elch. Prescription, No. 20, 5 B.S. 674, 3 Ross, L.C.L.R. 510; Bruce *v.* Bruce-Carstairs, 1770, M. 10805, 1 Hailes, 378, affd. 1772, 2 Pat. 258 (a case of consolidation), and other cases in B. Pr. 2020, (*d*); also Paterson *v.* Purves, 10th March 1823, 1 S. App. 401; Vere *v.* Hope, 12th Feb. 1828, 6 S. 517,—in both of which a reference to the entail was disregarded as narrative only.

the same titles as in the foregoing supposition, does not complete his title on either, but possesses on apparency for forty years, the limited title is not extinguished, but remains the governing title, being the *lex feudi*—the only title under which it was lawful, and under which it must therefore have been the presumed intention of the heir, to possess. There was no positive prescription in favour of the unlimited title for want of sasine, and no negative prescription of the limited title, no neglect of it having been proved.[204] If both titles are unlimited, but they contain different destinations, one being the last investiture and the other a personal title, and the party having right by both neglects the latter and completes his title under the other, the personal remains the governing title, because no prescription is possible.[205] So long as both titles were vested in the same person, there was *non valentia*, for 'no one can prescribe against himself.'[206] There, service to or renewal of an old investiture is not intended and is not adapted to sopite another destination; and possession is presumed to be on both titles, and to be keeping both alive.[207] It has been frequently regretted[208] that this rule should have been adopted—instead of its being held that the fact of making up titles on one of two investitures shall denote a renunciation of the other title for all purposes of succession, though still available as securing the possessor against challenge of the party's own right. Being subversive of the salutary law of prescription, the rule will not be extended further than the Courts have already gone. But though no choice of title is gathered from mere renewals by service or *clare constat*, with prescriptive possession, where both rights are absolute, this selection is clearly enough shown, either by the possessor executing a new conveyance of the lands,[209] or by his obtaining a new investiture.[210]

Prescriptive consolidation.

On the other hand, the rule which denies the relevancy of a

[204] Welch-Maxwell, 21st June 1808, M. Prescription, App. No. 8, 3 Ross, L.C.L.R. 522, affd. 29th July 1814, 6 Pat. 65; Lumsdaine *v.* Balfour, 13th June 1811, F.C., affd. 14th March 1816, 6 Pat. 150; cf. D. Hamilton's Trs. *v.* D. Hamilton, 18th May 1824, 3 S. 24 (N.E. 17), with D. Hamilton *v.* Westenra, 14th Nov. 1827, 6 S. 44.

[205] Smith and Bogle *v.* Gray, 1752, M. 10803, 5 B.S. 790, 2 Ross, L.C.L.R. 577; Durham *v.* Durham, 24th Nov. 1802, M. 11220, affd. 5 Pat. 482; Zuille *v.* Morrison, 4th March 1813, F.C.; Ogilvy *v.* Erskine, 26th May 1837, 15 S. 1027.

[206] L. Kilkerran in Mackerston Ca., *supra*, [203].

[207] Interlocutor in Smith and Bogle, [205].

[208] See L. Monboddo in the last case, 5 B.S. 790, and all the judges in the cases of Zuille and Ogilvy, [205], and Lord Wood in M'Neill *v.* Macneal, [189].

[209] Edgar *v.* Maxwell, 1736, M. 3090, 4325; Elch. *v.* Service and Confirmation, No. 6, affd. 1742, 1 Pat. 334.

[210] Molle *v.* Riddell, 13th Dec. 1811, F. C., affd. 19th June 1816, 6 Pat. 168; Zuille *v.* Morrison, [205].

plea of *non valentia* against the positive prescription receives abundant illustration from the doctrine of the consolidation of property with superiority. It has long been held that prescriptive possession of a mid-superiority or of the *dominium utile* of an estate, on an infeftment in the superiority by one who held a title to both, has the same effect as if consolidation had been effected by resignation *ad remanentiam*, or by the minute which is now allowed as an alternative thereto.[211] This prescriptive consolidation may take place whether the base right has been made up or not,[212] and may have the result of bringing a fee-simple property under the fetters of an entailed superiority.[213] No *jus crediti* in any one, to oppose the consolidation during the course of prescription, is required;[214] and both titles may be unlimited. If both descend in the same line, there is no difficulty. If, on the other hand, the destination is different, Lord Gillies, in the case of *Lord Elibank*, and Lord Mackenzie in that of *Wilson*, were of opinion, though doubtfully, that the cases of double title showed it to be 'dangerous to hold that the mere possession of a party 'who is himself heir under both should be held intended to operate 'a change in the dominant destination of the estate.' It has, however, been the well-marked tendency of the Court not to extend the authority of these cases of double title, which were all questions between co-ordinate destinations, while here the superiority is regarded as a higher right than that of property; and has, moreover, in the cases already cited, even when entailed, absorbed the latter though fee-simple. It may therefore be anticipated that the destination of the superiority will govern.

(c) *The statutory exception—Minority.*—This objection or reply is to be found in both of the statutes which treat of the positive prescription. In the Act of 1617, it is enacted that 'the years 'of minority and lesse age shall no ways be counted, but only the 'years during the which the parties against whom the prescription 'is used and objected were majors and past twenty-one years of Minority.

[211] 37 & 38 Vict. c. 94, § 6, and Sched. C.

[212] Bruce *v.* Bruce-Carstairs, *supra*, [203].

[213] L. Elibank *v.* Campbell, 21st Nov. 1833, 12 S. 74; Bontine *v.* Graham, 2d March 1837, 15 S. 711, affd. 6th Aug. 1840, 1 Rob. App. 347; Dalrymple *v.* E. Stair, 10th March 1841, 3 D. 837.

[214] Napier *contradicente*, p. 229 *et seq.*, in accordance with his theory of the pos. prescription; but demonstrated by Walker *v.* Grieve, 27th Feb. 1827, 5 S. 469 (N.E. 442); Lds. Moncreiff and Gillies in Elibank, [213]; Harvie *v.* Hamilton, 29th Jan. 1822, F.C. (correct the rubric by the report); Wilson *v.* Pollok, 29th Nov. 1839, 2 D. 159. The cases of Ms. Clydesdale *v.* E. Dundonald, 1726, M. 1262, affd. Robertson's App., 564, and Bald *v.* Buchanan, 1786, M. 15084, were given against prescription for reasons different from this.

'age.' And the Act of 1874,[215] after reducing the period of positive prescription to twenty years, provides that if the possession required by the Act 'shall have continued for the space of 'thirty years, no deduction or allowance shall be made on account 'of the years of minority or less age of those against whom the 'prescription is used and objected.' The later Act, therefore, leaves the former law as to deducting minorities in full force till 1st January 1879; but in no case brought into Court after that date can the years of minority, added to the ordinary prescriptive period, stretch beyond thirty years, except in questions relating to servitudes or public rights.

Rationale.

The exception of minority was probably drawn from the Roman law;[216] but a strong feeling of its equity has introduced it into the systems of law of most civilised communities.[217] The pupil or minor is not himself, as a rule, capable of judging of his legal rights; and it may well be that his guardians may neglect what does not concern them personally and may involve inconvenient litigation. The hard and fast rule provides for all such cases, and applies even where there is no such negligence. The exception comes in at the end of that part of the Act of 1617 which extends the negative prescription to heritable rights. Upon this fact, and general considerations of expediency, Lord Kames[218] argued that it did not apply to the positive prescription; but the authority and practice are all the other way.[219] In the best known modern systems of law other states of total or partial disability—such as coverture, insanity, and absence beyond the seas—are associated with minority. But the argument from the express mention of the last, that it was intended by the Legislature to exclude the others, has, as already shown, prevailed, in the interests of security of title.

Whose minority?

The only minority which acts as a suspension of the positive prescription is that of the party who, during the period sought to

[215] 37 & 38 Vict. c. 94, sect. 34; *supra*, p. 25.

[216] It is still a moot question whether minorities were discounted from the *longi temporis possessio*. Most civilians affirm this; but many deny. The debate turns on the simple point whether 5 C. (2.41) extends beyond the negative prescription of actions. The older usucapion suffered no such exception; and it is not expressly introduced in l. un. C. (7.31). If the latter party is right, and if the point were still open, much might be said for Kames's opinion, *infra*, [218]. There seems no authority for Napier's distinction between pupilarity and minority, p. 476. See the authorities in Vangerow, § 317.5.

[217] 3 & 4 Will. IV. c. 27, sects. 16 and 17; Code Nap. 2252; Preuss. Landrecht. 1.9. 535. The L. Ch. in Baird *v.* Fortune, *infra*, [232], shows wherein the English and Scotch institutes differ.

[218] Kames, Eluc. p. 268.

[219] St. 2.12.18; Ersk. 3.7.35; B. Pr. 2022; Blair *v.* Kerseland, 1754, M. 11156, 5 B.S. 825, and cases now to be cited.

be counted off, was the *verus dominus*—lawfully in right of the property, and with a vested non-contingent right to compete for the possession of it.[220] Hence the rule does not apply to children's hospitals;[221] nor to several minor beneficiaries in the same trust;[222] nor, it may be argued, though an opposite opinion has been expressed in the same case,[223] even if there be only one beneficiary. For the same reason, by an early decision,[224] much canvassed but never really disturbed, it was decided that where an entailed estate is possessed on a fee-simple investiture, the running of prescription upon that investiture is not suspended by the minority of any heir-substitute, either immediate or remote, unless the right of succession has actually devolved upon him.[225] He must have a right, not contingent but present, to claim possession.[226] The same reasoning appears in a case uncomplicated by an entail,[227] where the running of prescription on a charter of adjudication and sasine was found not to be suspended by the minority of one child, since he had never been vested by delivery to or for him of an existing disposition; nor by that of another child, because the right did not at the time stand in him. In a question between an entailed superior and his alleged vassal, who maintained his having obtained by prescription an indefeasible Crown title, it seems to have been thought by the Court so clear that the minority of a substitute could not be deducted, that the point was not adverted to in their lordships' opinions.[228] This rule is in strict consistency with that which obtains in the negative prescription, that the minorities of those only who are in right to challenge can be deducted.[229] A right of way case is useful as showing that whether the securing of

[220] St., Ersk., and B. Pr., *ut supra.*

[221] Cases in M. 11149.

[222] Maclellan *v.* Menzies, 1756, M. 11160.

[223] Bailie *v.* Menzies, 1756, 5 B.S. 847 and *per* L. Lee in Black *v.* Mason, *infra*, 231.

[224] M'Dougal *v.* M'Dougal (Mackerston), 1739, 203.

[225] In Ayton *v.* Monypenny, 1756, M. 10956, revd. 1757, 1 Pat. 649, the reversal was put on the Mackerston case.

[226] Gordon *v.* Gordon, 1784, M. 10968; Auchindachy's Cred. *v.* Grant, 1792, M. 10971, affd. 1794, 3 Pat. 317; see 3 Ross, L.C.L.R. 474. The Bargany case—Fullarton *v.* Hamilton—was eventually decided on a different point, and makes no change—1796, M. 11171, rem. 1797, 3 Pat. 631; further in 4 Pat. 175 (1801); (see the opinions of the judges in these early stages of the case, in 1 W.S. Appx.); 1 Sh. App. 265 (1822), 1 W.S. 410 (1825); see Nap. p. 494.

[227] Ross *v.* Mackenzie, 1776, n.r. affd. 1776, 3 Pat. 676.

[228] D. Buccleuch *v.* Cunynghame, 30th Nov. 1826, 5 S. 57 (N.E. 53); and see Maule *v.* Maule, 4th March 1829, F.C., and 7 S. 527, and Appx.; and Campbell *v.* D. Argyll, 19th May 1836, 14 S. 798.

[229] Sinclair *v.* Campbell's Trs., 3d March 1835, 13 S. 594, rem. 2 S. and M'L. 103; sequel, 9th March 1837, 15 S. 770; 10th March 1841, 3 D. 871.

public rights by forty years' possession be founded on the common law, or on an extension of the Act of 1617, minorities will be discounted; but that if an alleged public road runs through the land of several proprietors, each of these, with any replies he may make, must be dealt with separately,—not, on the one hand, as a community which could have no less-age; nor, on the other, by reckoning up all the minorities together.[230] In a later right of way case it appeared that the lands through which the alleged road ran were destined to a person in liferent for his liferent use only, and to the heirs of his body in fee. These were two daughters, both minors at his death. The youngest did not attain majority till eleven years thereafter. It was held, in entire accordance with the earlier cases, that the public had to prove fifty-one years' user and no more, since till the father's death there was no vesting, no possibility of ascertaining who would be his heirs. Till then he, as fiduciary fiar, was entitled and bound to protect the estate.[231] In the last case in which the reply of minority was adverted to in the House of Lords, the Lord Chancellor (Campbell), on appeal, deprecated what he regarded as an 'attempt to lessen the protection given to minors by the law of 'Scotland,' to be found in an observation by Lord Deas, in delivering the judgment of the Court of Session, that 'it was true there 'was a minority during part of the time; but the sellers knew 'what they had sold, and the heir's interests were doubtless 'attended to by those acting for him, just as if he had been 'major.'[232] On the case coming back to the Court of Session to apply judgment,[233] Lord Deas remarked that his opinion could not bear that construction, since the long prescription was confessedly out of the case—adverse possession not having extended to the prescriptive period; that his judgment was founded on usage for a long period of years, as construing a clause of pertinents; and that though usage during a minority might be entitled to less weight than the rest of the period, it was not to be deducted as a blank. The question whether the period of gestation may go to swell the period of deduction, has been decided in the affirmative,[234] has been re-opened,[235] and has little more than a curious interest.

[230] Craufurd *v.* Menzies, 12th June 1849, 11 D. 1127.

[231] Black *v.* Mason, 18th Feb. 1881, 8 Ret. 497.

[232] Baird *v.* Fortune, 25th May 1859, 21 D. 848, revd. 25th April 1861, 4 Macq. 127, 138.

[233] 13th June 1861, 23 D. 1080.

[234] Campbell *v.* Wilson, 1765, 5 B.S. 917; More's Notes, p. 267; B. Pr. 625; Shaw on Obl. p. 285. Campbell's case was reversed on the question of liferent, 1770, 2 Pat. 193.

[235] Nap. pp. 526 and 628.

'The positive prescription is effectual against the Crown by the ex- Crown, &c.
'press words of the Act. With regard to the Church, communities,
'and hospitals, there is no exception to the rule of the Act.'[236]

The vicennial prescription of retours, introduced by the Act 1617, c. 13,[237] is so intimately related to the positive prescription introduced by the immediately preceding statute, that, though not founded on possession, it cannot be overlooked here. The first-mentioned Act purports to be merely declaratory of the meaning of an earlier statute, 1494, c. 57, but in reality makes an important alteration in the law. The early statute was wide enough in its terms to apply to all reductions of retours, whether brought against the members of the inquest or against the party served, and provided a prescription of three years. The Act of 1617 leaves this state of the law intact as to summonses of error brought against the inquest, but extends the period of prescription to twenty years as between rival heirs. Vicennial prescription of retours.

The statute only refers to retours under the obsolete form of inquest by a jury; but it is equally applicable to the new form, first introduced in 1847, and now regulated by the Consolidation Act of 1868.[238] It has no concern with precepts of *clare constat* from the superior. The opinion of so eminent a conveyancer as Lord Balgray,[239] that the vicennial prescription secures the ten- Scope of the Act.

[236] B. Pr. 2025, and authorities there. Add Mack. Inst. 3.7.17; Bankt. 2.12.9; Steuart (on Dirleton, p. 224), excepts the annexed property of the Crown.

[237] 1617, c. 13, after referring to the Act 1494, c. 57, as ordaining 'that all 'summonds of errour or inordinate pro-'cesse be pursued within the space of 'three years after the determination of 'the inquest or service, the party being 'of lawful age and within the realm,' and declaring that this only referred to prosecutions against the jury, 'and no ways 'to hurt or prejudge the righteous heir 'and nearest of kin who by the law of 'God and man was to succeed in the right 'of blood and succession to their predeces-'sors, and to their lands and heritages '*jure sanguinis*,' proceeds to enact, 'That 'the said Act of Parliament shall no ways 'hurt nor prejudge the nearest of kin to 'seek reduction of the saids retours and 'service to be past and exped in time com-'ing, and that within the space of twenty 'years immediately following the date of 'the saids retours and services; and if 'the saids summonds of reduction be not 'intented, executed, and pursued before 'the expiring of the saids twenty years, 'that the said action of reduction of the 'said retour and service shall prescrive in 'the selfe, and no party be heard there-'after to pursue the same reduction.' The Act closes with provisions now obsolete. See Ersk. 3.7.19; St. 3.5.45; Bankt. 3.5.92 *et seq.*; B. Pr. 2024; Nap. p. 857. For the relation of the prescription to the maxim of Scotch as of Roman law, '*Jura sanguinis nullo jure civili* '*dirimi possunt*,' 8 D. (50.17), see Mack. Inst. iii. 7.7; Ersk. 3.7.12; and Ersk. Pr. 3.7.17; Bankt. 2.12.13 and 3.5.94. The common law only applies where no one has served.

[238] 10 & 11 Vict. c. 47; 31 & 32 Vict. c. 116, sects. 27-58. See *infra*, p. 67, as to the enactment of 1874.

[239] In Wallace *v.* E. Eglinton, 26th Feb. 1835, 13 S. 564, 568.

tative title made up by means of an adjudication on a trust-bond, is worthy of the greatest respect, but can hardly be said to outweigh contrary considerations. The silence of the Act itself may not be decisive; for this sort of title, though founded on 1540, c. 106, was not known to history till the middle of the seventeenth century:[240] but if it is to come under the purview of the prescription statute by analogy, the resemblance to an ordinary service must be strict. Now the chief merit of the old service, as of the new, is that it was granted only *causâ cognitâ;* while there is no security that an adjudication, though a judicial proceeding, shall be *in foro.* The prescription secures not only special, but also general services.[241] It applies to heirs of provision as well as of line;[242] and to each of these, both among themselves and against each other.[243]

Relation to the positive prescription.

The Act introducing the positive prescription, and the statute at present under discussion, from their juxtaposition and similarity of subject, have been always regarded as part of one design, and many difficulties have arisen in tracing the correlation and scope of the two. Lord President Hope[244] once admitted that he never could reconcile the vicennial prescription of retours with the long prescription; and in *Neilson's* case eight judges concurred in hinting at legislation being required to redd the marches between the statutes. What relation does the vicennial bear to the positive prescription on a sasine proceeding on a retour? The effect of the latter has been sufficiently discussed. The function of the vicennial prescription has been variously, but quite consistently, stated as follows. Lord Fullerton, delivering the judgment of the First Division in 1852,[245] observed—'The object 'of the statute seems to us [to be] to secure the service from all 'challenge on the ground of error, from whatever source that 'error, *quâ* error, arose.' In *Neilson's* case,[246] the leading opinion in the Court of Session states the view of the Legislature thus: 'When the difficulty of establishing propinquity is considered, 'which in most cases depends on human testimony, it does seem 'highly expedient and just to limit the period within which a 'service can be set aside and the party of new called upon to

[240] A.S. 28th Feb. 1662; 1695, c. 24; Ersk. 3.8.85; Sandf. Her. Suc. ii. 9.

[241] Bankt. 3.5.97; Neilson *v.* Cochrane's Reps., 17th Jan. 1837, 15 S. 365, affd. 19th March 1840, 1 Rob. 82, esp. L. Chan. Cottenham at p. 95.

[242] Implied in Bargany Ca., *infra,* [254]. Decided in Campbell *v.* Campbell, 26th Jan. 1848, 10 D. 461.

[243] Mack. Obs. 350 and Appx.; Younger *v.* Johnston, 1665, M. 10924.

[244] In Wallace *v.* E. Eglinton, *supra,* [239].

[245] Shedden *v.* Patrick, 11th March 1852, 14 D. 721, 727.

[246] 15 S. 369.

'undertake a probation,'—or, as another judge put it, 'to prove his 'propinquity in blood to the deceased,' when that is impeached.[247] More distinctly still, Lord Chancellor Cottenham in the same case[248] said: 'Chapter 13th provides for something distinct from 'that which has been provided for in chapter 12. In chapter '12 the words are, "that they (that is, the parties in posses- '" sion) show and produce instruments of seisin one or more, con- '" tinued and standing together for the space of forty years, either '" proceeding upon retours or upon precepts of *clare constat*," which 'the statute declares shall be a good title against all persons 'whatever. There must therefore, under this statute, be not 'only a possession of forty years, but a possession with an osten- 'sible ground of title; there must be that which would in this 'country be called an adverse possession—that is, a possession 'hostile to the party claiming the right to the same, having its 'origin in a title hostile to the right of the party claiming,—and 'this will make a title against all the world. The provisions of 'the 13th chapter seem to me to be quite consistent with that 'title being good against all the world. By the 13th chapter 'it is only provided that the party served heir shall not be dis- 'turbed in his rights as heir after twenty years, by any action 'brought by another person claiming only to be heir. But the 'heir may be disturbed by any person who comes in with a 'stronger title than that of mere heirship. It is quite consistent 'that those two parties, as between themselves, may be precluded 'from disputing as to their title after twenty years have elapsed, 'and yet that another party should not by means of possession 'adversely acquire a title against all the world till the expiration 'of forty years. The statute in chapter 13 only provides that '*quoad* the heirship, the service and retour by one party *quâ* heir 'shall not be disputed by another party who merely comes in '*quâ* heir.' This seems the same thing as saying that the service, so protected, becomes *res judicata*[249] as against all rival heirs, and nothing more. It is implied, in all that has just been quoted, that the statute will bar any claim to make out which it would be necessary to reduce a service on the ground of propinquity, and that it would apply to a purchaser, simulate or *in bonâ fide*, from a rival heir himself so excluded.

[247] *Per* L. Moncreiff, 15 S. 371. Therefore it cannot be objected to the heir himself bringing reduction of his own retour on minority and lesion—Gray *v.* Fotheringham, 1700, M. 10987; nor be pleaded in case of inaccuracy in service of the true heir—Drummond *v.* Drummond, 1793, M. 6936.

[248] 1 Rob. App. 93.

[249] L. Meadowbank in Bargany case, 1 W.S. Appx. ii. p. 7.

Possession not required.

The near relationship of the two statutes has given rise to subsidiary questions. Thus, does the vicennial prescription so far resemble the positive as to require possession to follow on the retour? The affirmative was held in one case, which is followed by More;[250] and Lord Medwyn, in *Neilson's* case,[251] said—'The 'two Acts I look upon as parts of the same law, and I conceive 'the retours mentioned in the second Act are retours of the kind 'mentioned in the first as forming part of a title of possession.' But this does not seem to be law.[252] If by possession is meant possession on a feudal title, following upon the protected retour, the necessity for this is denied by Lord Cottenham, on the authority of Bankton.[253] But he added, 'It might be matter for 'serious consideration how far a party should be entitled to make 'an unfair use of the statute—that is to say, where some unjust 'advantage by concealment or otherwise may have been taken of 'the true heir;' showing thereby, like Lord Medwyn, his distrust of 'latent general services.' The vicennial prescription is, therefore, less of the nature of the positive than of the negative, which proceeds on presumed abandonment of claim.

Does it protect an invalid service?

Again, is a service *ex facie* invalid protected by the vicennial prescription? In the last *Bargany* case,[254] twelve judges, relying on the analogy of the positive prescription, answered this query in the negative; and nothing was said on the subject by Lord Eldon in the House of Lords. The leading opinion of the consulted judges laid down 'that the vicennial prescription could 'not run upon the retour, because it bore on the face of the 'retour itself that the party who was served heir was not and 'could not be the heir of the person who died last vested in 'the right.' This dictum has been followed by all subsequent writers.[255] But if the real nature of the vicennial is more akin to the negative than to the positive prescription, the analogy fails, and the retour is protected against 'challenge on the ground 'of error, from whatever source that error, *quâ* error, arose,'[256] by the neglect and presumed abandonment of twenty years. Whether a fraudulently obtained retour would be also protected, has never

[250] Elgin Wrights *v.* Hutcheson, 1794; Bell's Fol. Ca. 7; More's Notes, p. 271.

[251] 15 S. 371.

[252] B. Pr. 2024; Bankt. 3.5.97.

[253] 1 Rob. App. 96.

[254] Fullarton *v.* Hamilton, 12th Feb. 1824, 2 S. 698 (N.E. 585), affd. 20th June 1825, 1 W.S. 410. The opinions of the C.S. judges are in the last report, and the passages referred to are to be found at pp. 427, 478, and 496. See Campbell *v.* Campbell (Boquhan), 10th July 1868, 6 Macph. 1035.

[255] B. Pr. 2024; More's Notes, p. 271; Nap. p. 864.

[256] Shedden *v.* Patrick, *supra*, [245], *loc. cit.*; see Neilson, *supra*, [241].

been decided, and was left an open question in the immediate sequel to the passage quoted from the case of *Shedden*, and in the recent case of *Rocca*.[257] The same analogy seems to impugn the other doctrine on this subject laid down by the majority of the Scotch judges, in the passages already quoted from the *Bargany* case, that the benefit of the vicennial prescription is personal to the party served, and does not pass to his heir.[258] The proper criterion pointed at by the statute is, whether the party alleging himself to be the true heir has or has not to reduce a prescribed retour in order to make his claim good. If he has, he is met by the Act, which is quite general in excluding all reductions; if not, his path is clear. Accordingly, the benefit of the statute has been allowed to singular successors in two more recent cases.[259]

Is it personal to the party served?

The date from which the prescription begins to run is 'the 'date of the retours or services'—now[260] that of the sheriff's decree of service. It is suspended by minorities;[261] partly, perhaps, because the term is a long one—partly from reading the preamble, referring to the Act 1494, c. 57, into the enacting part of the statute. The only sort of interruption admitted by the Act itself is 'by summons of reduction, intented, executed, and 'pursued before the expiring of the saids twenty years.' In *Neilson's* case the service had been obtained in 1809, and reduction brought in 1833; and it was held to be no interruption that the pursuer had purchased a brieve in 1811, and that other parties had litigated for the property in the character of donators of the Crown as *ultimus heres*. But in an old case, something less than action of reduction was admitted as an interruption —namely, an apprising by a creditor proceeding upon a charge against the true heir to enter, and possession by the creditor thereon.[262]

Currency of the period.

The vicennial prescription has been adapted to the new rule of the vesting of inheritance, introduced by the Conveyancing Act of 1874, by the 13th section of that Act; which requires, however, possession on infeftment on the part of the heir succeeding after the date of the Act—the date of the infeftment being deemed, in the absence of evidence to the contrary, to be the date of his entering into possession. There is no deduction of minority, as in the corresponding section regulating the positive prescription.

Conveyancing Act, 1874.

[257] Shedden *v.* Patrick, *supra*; Rocca *v.* Catto's Trs., 2d Nov. 1876, 4 Ret. 70.

[258] Sandf. Her. Suc. ii. 42; Nap. p. 865.

[259] Neilson *v.* Cochrane, *supra*, [241]; Rocca *v.* Catto's Trs. *supra*, [257]; see Mack. Obs. on the Act cited, [243].

[260] 31 & 32 Vict. c. 116, sect. 33.

[261] Gray *v.* Fotheringham, *supra*, [247].

[262] Lamb *v.* Anderson, 1673, M. 10984; Bankt. 3.5.95; and Younger *v.* Johnstons, 1665, M. 10924.

CHAPTER IV.

BONÂ FIDE POSSESSION.

THE rules now to be discussed agree with the possessory remedies and prescription, in serving to mitigate the operation of the strict law of property, and may therefore be conveniently allowed a place here. The rights peculiar to possession in the honest belief of right of ownership, are two—certain rights to the fruits of the subject possessed, and certain claims founded on meliorations made thereon.

A.—BONÂ FIDE PERCEPTION AND CONSUMPTION.

Rationale.

It has been already observed [1] that the effects, ascribable to such possession of land, upon the ownership of the fruits or products of the subject, form not so much a department of the law of possession, as one of the modes of acquiring property in moveables, and that in this process the *bona fides* is the main element. Viewed closely, the rules in regard to this matter are found to be applications of the principle that property in moveables is presumed from possession. This presumption may be overcome in various ways; among others, by proof of *mala fides* in the possessor. It will be shown presently that *bona fides* has no influence on the property of the fruits till these are severed from the principal subject, and have in that way become separate entities. They are then regarded as never having been, in their character of independent subjects, the property of the true owner of the land; but, on the contrary, as belonging to the person who, being in possession of the principal subject for the time being, also possesses its fruits as soon as they come to have an independent existence in the eye of the law. Bad faith in the possessor is an effectual bar to any such pretension on his part. It would, perhaps, be more correct to speak of the

[1] *Supra*, p. 5.

present matter as the effect of *mala fides*, in causing the restoration of the subject possessed *cum omni causâ*, than as the effect of *bonâ fide* possession of a subject upon the ownership of its fruits. Lord Stair accordingly, with that legal intuition which so often makes him the most trustworthy of guides, first treats of this subject, but not at much length, in his chapter on Restitution.[2] He and his successors then proceed to state the law upon the other view —not inconsistent when properly understood. In following their lead, as most convenient for exposition, it will be well to keep in mind the more strictly logical road by which the same goal may be reached.[3] It follows that the rule of law now to be considered only arises where a person has been in possession of a heritable subject upon an apparently good but invalid title, and has been evicted, and is called to account for the fruits, rent, or annual value—not where two separate interests arise under a single title, the validity of which is not challenged.[4]

The rule of law to be now examined is thus expressed—*Bonæ fidei possessor facit fructus consumptos suos.*[5] But this is not an accurate statement of either the Roman[6] or Scotch law. What is required in order to correct it will appear shortly. Having already sufficiently examined the nature of possession, the first topic to be here discussed is the good faith on which the whole institute depends. What is it? and how does it come to an end? Maxim.

Erskine's definition of a *bonâ fide possessor* is founded on the Roman law.[7] He 'is one who, though he be not truly proprietor 'of the subject which he possesses, yet believes himself proprietor 'upon probable grounds and with a good conscience.' 'A *malâ fide* '*posesssor* possesses a subject not his own, and knows at the same Title.

[2] St. 1.7.10-12; cf. 2.1.23-24.

[3] See Kames, Equity, ii. 137-152.

[4] The view of L.P. Inglis and L. Rutherfurd Clark in Huntly's Trs. *v.* Hallyburton's Trs., 5th Nov. 1880, 8 Ret. 50; *contra*, L. Mure and L. Shand. For cases of *bonâ fide* encroachment on property, see p. 121.

[5] St. 2.1.23.

[6] As both St. 1.7.12, and Ersk. 2.1.25, are vague, if not incorrect, in stating the Roman law, it may be well to give the latest results shortly in a note. There is still some controversy on the subject, but a very large majority of civilians agree on the following points: 1. The *bonæ fidei possessor* acquires at their separation full property in all fruits, and is only obliged, *officio judicis*, by a personal obligation, when the principal subject is vindicated from him, to deliver over the *fructus exstantes* to the successful pursuer—25, 28 D. (22.1). 2. Mere separation is enough to produce this ownership, perception or ingathering not being required—13 D. (7.4), 25, § 1 D. (22.1), 48 D. (41.1). 3. He is freed from this obligation to restore by consumption—4 C. (9.32), 40 fin. D. (41.1). 4. Consumption includes specification and alienation. 5. There is no difference made between industrial and natural fruits. Last passage and 35 I. (2.1), cf. 45 D. (22.1); Vangerow, i. p. 616; Puchta, ii. § 242; Pagenstecher, ii. 101 *et seq.*; Pothier, Propriété, §§ 334-342; Code Nap. 549-50; Preuss. Landrecht. 1.7.10.

[7] 109 D. (50.16).

'time—or, which comes to the same account, may upon the smallest 'reflection know—that he is not the rightful owner.'[8] It will be obvious that, in the case of heritable property at least, this involves also the necessity for some title sufficient on the face of it for the transference of the right. The subject must have been obtained neither violently nor clandestinely nor by fraud.[9] The title may be a disposition,[10] adjudication,[11] or other *justus titulus*, 'colourable, 'though perhaps null in itself, upon informalities requisite in law, 'or upon inhibition, interdiction, or want of power in the granter;[12] 'yet when, by a common or known law, the title is void materi-'ally—in this case the possessor is not esteemed to possess *bonâ* '*fide*.'[13] The distinction so stated is not easily observed in practice; and it is often difficult to say what shall be considered a title sufficient to found *bonâ fide* possession, and what not. Thus, where part of the feu-duty in a charter was twenty-four bolls of bear, 'to be measured by the common prick-mete of this 'nation,' viz.—the Linlithgow boll—it was held that this was to be the rule for the future; but the excess rendered for two centuries under a higher district standard could not be demanded back, having been received *in bonâ fide*.[14] It would have been different if there had been disconformity to a statute.[15] In both of these cases, though decided differently, there was something due to the possessors under the title. But *bona fides* alone is not enough. A piece of ground, part of which had been feued out, was sold under articles of roup, which excepted the parts feued, and it was held that the purchasers, not having acquired right to the superiority of the ground feued, were liable in repetition of the feu-duties, though they had with perfect honesty drawn them for twenty years.[16] A very similar decision was pronounced in a case where a purchaser obtained payment of the rent of a crop to which he was not entitled. There was found to be no room for the plea of *bona fides*, and he was ordered to restore with interest.[17]

Justus titulus, quid?

[8] Ersk. 2.1.25; St. 2.1.24.

[9] Ersk. 2.1.27.

[10] Muire *v.* Ahannay, 1624, M. 3638, 8373; Guthrie *v.* Sornbeg, 1664, M. 861; Nelson *v.* Gordon, 26th June 1874, 1 Ret. 1093.

[11] Lamb *v.* Hepburn, 1614, M. 95, and other cases in St. 2.1.24.

[12] Seaton *v.* Seaton, M. 1753, and other cases ibid.; Kinminity *v.* Sutherland, 1751, M. 1727; Grant *v.* Dundas, 1765, M. 1760, doubted by More, Notes, 50.

[13] St. 2.1.24, *ad fin.*; case of Grant there, M. 1743; and E. Winton *v.* Cs. Winton, 1666, M. 9047; cf. Ly. Cardross *v.* Hamilton, 1711, M. 1747; Ly. Forbes *v* L. Forbes, 1765, 2 Pat. 84.

[14] Leslie *v.* E. Moray, 2d Feb. 1827, 5 S. 284 (N.E. 264).

[15] Mags. of Dunbar *v.* Kelly, 26th Nov. 1829, 8 S. 128.

[16] Moir *v.* Glen, 15th June 1831, 9 S. 744.

[17] Sinclair *v.* Sinclair, 1st Dec. 1847, 10 D. 190; see Macpherson *v.* Tytler, 19th Jan. 1850, 12 D. 486.

Possession against one's title is just as exclusive of the plea as possession without a title. Therefore, where an heir of entail to two estates, which he was precluded by the destinations from holding together, while possessing one of them as owner, first held the other as administrator-in-law for his son, and then made up titles to it in his own name and drew the rents for his own behoof, it was found that he must account for the whole proceeds of the latter estate, and that the plea of *bonâ fide* perception and consumption was barred by his having possessed directly in the teeth of the entails. It was not even necessary for this purpose that the titles last made up should be reduced.[18] The connection of a *justus titulus* and *bona fides* may be further illustrated by a recent case, where the question was as to the right of a widow of an heir of entail to the shootings over her locality lands, and as to whether those unlet had to be computed in judging of the excess of her right over the limit allowed by the entail. Both questions were, after much ligitation, determined in the affirmative; and it was then decided that the widow was protected against a claim for the arrears of excess by the maxim now under consideration.[19] Lord Neaves[20] said: 'It is a most important branch of our law, upon 'which the happiness of families and the safety of fortunes very 'often depend, that, although at a distance of time lands may be 'evicted so that the title to draw the rents may be cut down, so 'far as the right of property is concerned, the title to receive and 'spend the rents that are current is fixed in the possessor by pos-'session alone. . . . I think the plea of *bonâ fide* perception and 'consumption is solely a defence. It is not the foundation of an 'action, but it has been well described as being a shield and not a 'sword.' Lord Cowan[21] thus summed up the law applicable to the case: 'I consider that all the elements necessary to support 'that defence [*bonâ fide* perception and consumption] exist in this 'case in the strongest degree. In the first place, as regards title, 'there is the deed of locality granted by the last proprietor of the 'estate, *ex facie* valid and unchallengeable, and to no extent in 'excess of the powers of the granter, according to the rental of the 'estate, viewed irrespective of these questions as to the value of 'shootings raised by the pursuer, and which required so much 'litigation to have recognised and practically applied. And in the 'second place, the possession of the defender under that title it is

Relation thereof to *bona fides*.

[18] Bontine *v.* Graham, 20th Dec. 1838, 1 D. 286; cf. Hume *v.* Ly. Hadingtoun, 1635, M. 1739; and Johnston *v.* Johnston, 20th July 1875, 2 Ret. 986—a case of approbate and reprobate, or election.

[19] Menzies *v.* Menzies, 3d July 1863, 1 Macph. 1025.

[20] 1 Macph. 1036.

[21] Ibid. p. 1035.

'impossible for me to view otherwise than as having been had 'and enjoyed by her *in optima fide*.' And Lord Ardmillan thus states the law, entirely in accordance with our text-writers:[22] 'The plea is one of equity, and the law recognises it to the effect 'of qualifying the strict rule which imposes the obligation to 'restore: there is no room for the plea if the title to the subject 'possessed is complete, for it arises only when surrender and 'restitution are due. But when possession has been on a title 'apparently good, and believed to be good, that is held to be a 'possession *in bonâ fide;* and the fruits of the subject during such '*bonâ fide* possession are permitted, in consequence of the *bona* '*fides*, to remain with the possessor.' The decision just quoted recalls an earlier case of widow's locality, the judgment in which seems open to the gravest doubt.[23] The plea was there taken with reference to rents from quarries in the locality lands, received from the sub-factor under a judicial factor appointed by the Court pending another litigation. The locality specified the lands and the rental of each portion thereof, but said nothing about the quarries. The plea was allowed by a majority of three to two, chiefly on the ground that the widow had been misled by the sub-factor, but against these weighty considerations,—that the life-rent was by constitution, not by reservation; that the proprietor himself was not there to protect his own interests; and that, in enumerative titles, the rule holds, '*Expressio unius, exclusio* '*alterius*.'[24]

Bona fides never existent.

To test the existence and duration of the state of mind called good faith has puzzled casuists and Courts of Equity from time immemorial. No rule can be laid down except that each case must depend on its own circumstances.[25] These may point strongly to *bona fides* never having existed, there having been a *conscientia rei alienæ* from the very inception of the possession.[26] Judicial intimation of the blot is then not required; private knowledge is

[22] 1 Macph. 1032; St. and Ersk. *ut supra*, [2], [8], [9]; Bankt. 1.8.12 and 2.1.10.; Kames, Eq. ii. 137 *et seq.*; Bayne, 32.

[23] D. Roxburghe *v.* Ds.-Dow. of Roxburghe, 17th Feb. 1815, F.C.

[24] See the sequel, D. Roxburghe *v.* Swinton, 2d March 1824, 2 Sh. App. 18. For older cases, see Blair *v.* Scott, 1752, M. 1720; Reid *v.* Maxwell, 1708, M. 1744; cf. Ly. Borthwick *v.* Ker, 1636, M. 1748, with Keith *v.* Simson, 1637, M. 5933. For a 'colourable title' in Teinds, see L. Adv. *v.* Drysdale, 24th Feb. 1872, 10 Macph. 499, affd. 24th April 1874, 1 Ret. H.L. 27; Haldane *v.* Ogilvy, 8th Nov. 1871, 10 Macph. 62. Does the plea apply in favour of the Crown?—E. Cawdor *v.* L. Adv., 2d March 1878, 5 Ret. 710.

[25] More's statement, Notes, p. 50, is to be preferred to Ersk. 2.1.29, who throws the presumed cesser of good faith too far back for the course of modern case-law, as stated in the text.

[26] Bankt. 1.8.13.

enough. But along with such knowledge, there must be something further excluding the notion of good faith—such as that the possession had been counter to some plain rule of law.[27] And it has been repeatedly held to be a strong presumption against *bona fides*, that the principal subject has been acquired by the possessor gratuitously.[28]

Cesser of *bona fides*.

On the other hand, it may be established that the possession had at one time been *in bonâ fide;* and the question, at what moment that ceased and the *conscientia rei alienæ* set in, has been very differently answered, according to the circumstance of each case. The change cannot be effected otherwise than in the course of a judicial proceeding. The *dictum* of Erskine to the contrary must be read as applying to possession *ab initio in malâ fide*, that being the case in the decision he quotes.[29] In exceptional cases, where the possessor is met by a right which requires no extrinsic proof, but carries on the face of it the untenable nature of his possession, his *bona fides* is held to cease with citation, or litis-contestation.[30] But this can be only in an action to which he is, or may make himself, a party, since he may shut his ears to any other warning;[31] except, indeed, in the case of a purchaser from the possessor *pendente processu*, who is then treated as if he had been from the beginning a party to the action.[32] Another point in a lawsuit was fixed upon in an early case—the date at which the untenability of the defender's position was made clear by the production of a register.[33] But as a rule, *bona fides* is founded on some grounds which it is only reasonable to defend at law; and then it is only brought to an end by the judgment of a competent Court.[34] This may be—for the circumstances vary greatly—the

[27] Smyth *v.* Oliphant, 1748, M. 1717; cf. case of Stirling on same page; Clyne *v.* Clyne's Trs., 14th Dec. 1839, 2 D. 243; Whyte *v.* Ballantine, 20th Jan. 1825, 3 S. 451 (N.E. 315); Justice *v.* Ross, 21st Nov. 1829, 8 S. 108; cf. Lang *v.* Mags. of Dumbarton, 29th June 1813, F.C., where there was no possession. Contrast on this matter Kibbles *v.* M'Donald, 16th Feb. 1832, 10 Sh. 341, with Yellowlees *v.* Alexander, 17th March 1882, 9 Ret. 765.

[28] Wolmet's Children *v.* Douglas, 1662, M. 1730; Cockburn *v.* Robertson, 1697, M. 1732; Nisbet *v.* Cairns, 12th March 1864, 2 Macph. 863; see Gray *v.* Watson, 1672, M. 1754.

[29] Ersk. 2.1.28; Wolmet's Children *v.* Douglas, [28]; see St. 2.1.24.

[30] Winton *v.* Winton, 1666, M. 9047; Hunter *v.* L. Sanquhar, 1610, M. 1753; Seaton *v.* Seaton, 1617, ibid.; L. Balcarres *v.* Ardross, 1735, M. 1760; D. Atholl *v.* Dalgliesh, 20th June 1822, 1 S. 511 (N.E. 472).

[31] Douglas *v.* Wedderburn, 1664, M. 7748; Buchanan's Cred. *v.* Anderson, 1744, M. 1735; M'Tavish *v.* M'Lauchlan, 1748, M. 1736; Gray *v.* Watson, [28]. Grant *v.* Dundas, 1765, M. 1760, is inconsistent with these cases and with reason; see More, Notes, p. 50.

[32] Gracie *v.* E. Stair's Trs., 5th Feb. 1831, 9 S. 393; cf. Stirling *v.* Dunn, 14th Jan. 1831, 9 S. 276.

[33] Fumartoun *v.* Lutefoot, 1675, M. 1755.

[34] Kinminity *v.* Sutherland, 1751, M.

judgment of the Lord Ordinary against the possessor;[35] or, if the case is one of such importance as naturally to go into the Inner House, the date of their lordships' decision, if not reversed elsewhere.[36] In a large number of cases, *mala fides* was found to be induced only by a judgment of the House of Lords. In some of these there was a reversal of the Court of Session's judgment held by the possessor.[37] In a very special case, *bona fides* was found to have ceased at the date when a successful appeal to the House of Lords was taken against a judgment of the Court of Session, seeing that in the interval judgments contrary to that of the Scotch Court had been pronounced in similar cases, and especially under the same deed.[38] But in some other cases there were held to be peculiarities sufficient to warrant the defence of *bona fides* down to the judgment of the House of Lords in affirmance. This was the result where the Appellate Court based its decision on different grounds from those taken by the Court below, and thus indicated at once the difficulty of the cases, and no opinion of the accuracy of the reasoning of the Court in Scotland;[39] where there was not only great difficulty in coming to a decision, but the whole controversy between the parties was brought up by a cross appeal;[40] or even where there was acknowledged hardship, and so much perplexity, that the whole Court below had been equally divided.[41] It is therefore sufficiently clear, that the existence or

1727; Mags. of Selkirk *v.* Clapperton, 13th Nov. 1830, 9 S. 9.

[35] Smith and Beaton Prs., 6th Feb. 1810, F.C.; D. Roxburghe *v.* Wauchope, 13th June 1822, F.C., affd. 9th March 1825, 1 W.S. 41.

[36] Laurie *v.* Spalding, 1769, M. 1764. More, Notes, p. 50, wrongly calls this the first judgment. Henderson, 14th Dec. 1815, F.C.

[37] Elliot *v.* Pott, 30th May 1882, 1 S. 445 (N.E. 413), affd. 10th May 1824, 2 Sh. App. 181. The Queensberry Leases—D. Buccleuch *v.* Hyslop, 13th Nov. 1822, 2 S. 6 (N.E. 5), affd. 10th March 1824, 2 S. App. 43; E. Wemyss *v.* D. Queensberry's Trs., 14th Jan. 1823, 2 S. 107 (N.E. 101), affd. 2 S. App. 70; Agnew *v.* E. Stair, 19th May 1826, 4 S. 604 (N.E. 612), var. 22d July 1828, 3 W.S. 286; Brisbane's Trs. *v.* Lead, 26th Nov. 1828, 7 S. 65; Carnegy *v.* Scott, 4th Dec. 1827, 6 S. 206, affd. 9th Dec. 1830, 4 W.S. 431; see 1 S. App. 114. See the result of these cases stated in Houldsworth *v.* Brand's Trs., 8th Jan. 1876, 3 Ret. 304. There is a statement of the English law of mesne profits after ejectment in the L. Chan.'s speech, 4 W.S. 438. For animadversions on the singular results of our law, see 2 S. App. 89, and 3 W.S. 319.

[38] Stirling *v.* Dunn, 14th Jan. 1831, 9 S. 276.

[39] Turner *v.* Turner in H.L., 1st July 1813, 1 Dow 423 — in C.S., 3d March 1820, F.C.; Cleghorn *v.* Eliott in H.L., 2d May 1828, 3 W.S. 60—in C.S., 10th June 1842, 4 D. 1389.

[40] Cleghorn *v.* Eliott, *supra*,[39]; and Menzies *v.* Menzies in H.L., 29th July 1861, 23 D. (H.L.) 16—in C.S., 3d July 1863, 1 Macph. 1025.

[41] Moir *v.* Mudie in H.L., 1st March 1824, affd. without costs, 2 Sh. App. 9—in C.S., 16th June 1826, 4 S. 725 (N.E. 731). For cases on leases other than those cited, see 2 Hunt. 526 *et seq.* (4th ed.); and for rents pending appeal, Bowman *v.* Henderson, 1805, M. v. *Bona et mala fides*, No. 4.

absence of *bona fides* is a question of fact depending on a multiplicity of circumstances, and amenable to no rule of law. Along with *mala fides* begins the liability for violent profits, the nature of which has been already explained.[42]

Acquisition of ownership in fruits.

It now remains to discuss the rest of the maxim—*facit fructus consumptos suos.* It has been briefly indicated that this is not a full statement of the Roman law at any period of its history;[43] much less is it so of the Scotch law, which is even more favourable than the system it copies to the possessor of a subject in good faith, It is more nearly expressed by substituting for '*fructus* ' *consumpti*,' *fructus percepti*, fruits ingathered; for 'it is universally ' agreed that, by our customs, perception of the fruits is by itself ' sufficient for acquiring their property—so that if the fruits have ' been "*percepti*" by the possessor, he may retain them as his own, ' though they should be still extant.'[44] It is not necessary that they should be consumed—including, in that term, alienated or immixed beyond recognition. But what the Roman law admitted in deference to strict theory, though taking back with one hand what it gave with the other, the Scotch law gives effect to in practice—viz., that the property in the fruits passed to the *bonâ fide* possessor of the principal subject by their mere separation.[45] No act of ingathering is required on his part. By separation the fruits cease to be part of the subject which produced them, and become independent things. If the principal subject be heritable, they themselves are moveable, and subject to an entirely different set of legal rules; one of which is, that possession presumes property; and another, that possession *corpore et animo* of the principal subject is kept up as to its fruits *solo animo*, even when severed, until they are removed by the act of another.[46] The true contrary to *fructus percepti*, as understood by the Scotch law, is *fructus pendentes.*

Fruits natural, industrial,

No distinction is made between fruits natural, industrial, and civil.[47] When Lord Stair says that 'industrial and artificial profits, ' in so far as such arise from the haver and not from the thing, fall ' not under restitution, if once separate,' he draws a distinction which is unknown in practice, and would be unworkable; and he

[42] *Supra*, p. 20. In Yellowlees *v.* Alexander, *supra*, [27], the demand was for the annual value as set out in the Valuation Rolls applicable to each year of the possession.

[43] *Supra*, p. 69, note.

[44] Ersk. 2.1.25.

[45] D. Roxburghe *v.* Wauchope, 1825, 1 W.S. 41, 58.

[46] In the Roman law it was different with the usufructuary and tenant-farmer, for they had no proper possession of the fruits before they themselves ingathered them; cf. 35.36. I. (2.1).

[47] Ersk. 2.1.26.

introduces the principle of fairly rewarding labour into an institute founded upon a totally different theory.[48] It is true that as to one sort of industrial fruits—growing crops raised from seed—and as to that alone, the rule is *messis sementem sequitur*; so that if the seed have been sown during *bonâ fide* possession, the crop goes to the sower as its representative, though in the interval *mala fides* has supervened.[49] But then there is no distinction between what is the produce of nature and what of industry. The crop is regarded as something manufactured out of the seed, and following its fortunes. From a comparison of what has just been said with the common law applicable to the rights of heir and executor on the death of an owner of heritable property, or of the fiar and the representatives of a deceased liferenter, it will appear that the two proceed on the same fact—the character of each subject, as moveable or heritable, at the date of the death, or at the commencement of *mala fides*—and follow the same lines in making the distinction.[50] So far, therefore, as the common law leads, it will be safe to eke out the scanty authority on the present topic with the more prolific literature of liferent and succession. With regard to corporeal fruits, industrial or otherwise, it is only necessary to say that artificial hay of the first crop is moveable, and that it is doubtful whether the same is not true of the second crop, it having been found lately to be an industrial crop as between landlord and tenant, but in older cases heritable as between heir and executor.[51] Growing trees are always heritable —unless, perhaps, in nursery gardens.[52]

and civil.

The rents of a subject not actually occupied by the *bonâ fide* possessor are its *civil* fruits. Arrears of rent which are due and not paid are regarded as moveable, being separated by becoming due from the subject producing them, and vested in the proprietor or possessor independently.[53] If the rent be payable at the legal terms, or its payment be conventionally postponed, the common-law rule is to ascertain to what period of possession the payment next due effeirs; and if that period has been completed by the possessor in unimpaired good faith, he will be entitled to payment from the tenant as *fructus percepti*.[54] If the rents are forehand

[48] He was probably misled by the use of the words '*pro culturâ et curâ*' in 35 I. (2.1), or by 45 D. (22.1), which was not a case of *b. f.* possession. The law is clearly laid down in 48 pr. D. (41.1).

[49] Ersk. 2.1.26.

[50] St. 2.1.2; Ersk. 2.2.4; 2 B.C. 2. See under Fiar and Liferenter, *infra*, chap. 35.

[51] Cases in 2 B.C. 2, note 5; and Gordon *v.* Gordon, 1806, Hume, 188.

[52] Ibid., and Begbie *v.* Boyd, 15th Dec. 1837, 16 S. 232.

[53] 2 B.C. 8; B. Pr. 1047 *et seq.*, 1499 *et seq.*, and cases there; and see *infra*, on the rights of liferenters, chap. 35.

[54] Ibid.

or anticipated, they vest in the possessor by his surviving the term of payment, even though they be for possession not yet completed.[55]

A question of much practical importance arises here on the two Apportionment Acts.[56] These will be more properly examined at length elsewhere; and it is only necessary to premise here that their purpose is to vest all rents and other periodical payments in the nature of income, as if they accrued from day to day, like interest on money lent; so that, if one entitled to these payments dies between terms, his personal representatives shall have right to a proportion of the same, payable at the term next after his death, corresponding to the period he survived. The earlier Act confined this alteration in the law to the case of the termination of limited rights; the Act of 1870 extends it to all cases where apportionment is possible. Now, although the former Act, from its style, was plainly drawn with special reference to England, and though it could not have contemplated for that country any *bonâ fide* perception of rents (that being unknown to the law), it may still be argued that, by the Act as applied in Scotland, the case is provided for. The 'determination' of the interest of the *bonâ fide* possessor by the entrance of bad faith, is just as total as that which is caused by the death of a liferenter or entailed proprietor; and the Act of 1834 speaks of this determination occurring by death, 'or by any other means whatsoever,' and goes on to benefit, not only the executors of the person whose right is terminated, but that person himself, plainly proceeding on his survivance. But if any doubt remained as to the application of the earlier Act to such a case, it seems removed by the perfect generality of the second section of the Act of 1870—the only exceptions being 'annual sums made payable in policies of insurance,' which had also been excepted in the Act of 1834,[57] and express contrary disposition by statute or otherwise.[58]

Apportionment Acts.

[55] Ibid.

[56] 4 & 5 Will. IV. c. 22. sect. 2; and 33 & 34 Vict. c. 35; see *infra*, liferent, chap. 35.

[57] Act 1870, sect. 6; Act 1834, sect. 3.

[58] Latta *v.* Ecclesiastical Commissioners, 30th Nov. 1877, 5 Ret. 266. For the rights of a *bonâ fide* purchaser of goods from one not the true owner, see 1 B.C. 261, and English cases in note; see also M'Nair *v.* L. Cathcart, 1802, M. 12832; Hamilton *v.* Chancellor, 13th Nov. 1833, 12 S. 22; Nisbet *v.* Cairns, 12th March 1864, 2 Macph. 863; Macgowan *v.* Robb, 29th March 1864, 2 Macph. 943 (*mala fides*); Agnew *v.* E. Stair, 19th May 1826, 4 S. 604 (N.E. 612). For the rules applicable to accounting for rents in case of one possessing on an informal adjudication, see Smith *v.* Flowerdew, 28th June 1853, 16 D. 55.

B.—Recompense for Meliorations.

Rationale.

The other benefit accruing to one in possession as owner, but not really owner, from the fact that he possesses *in bonâ fide*, is his right to recompense for meliorations or improvements made by him on the subject during his holding. This right rests on a totally different principle from that which determines the property of the fruits. It is obviously fair and equitable that he who has possessed a piece of property in the honest belief that it was his own, and has at his own expense, and on that footing, enhanced the value of the subject, should not be compelled to give it up to the true owner, who in the meanwhile has been ignoring or neglecting his rights, without some remuneration for the improvements. It is also only fair that the true owner should not be compelled to pay to the meliorator more than the improvements are worth to himself on entry. The case is quite different from other instances of meliorations. When these are made by a lessee during his term, the claim for recompense is unfavourably regarded, since they are presumed to have been made by the tenant for his own convenience; and the lease, statute, and the common law of fixtures form the only test of the relative position of the parties. There the contract is the norm; here no contract can have existed. Improvements made by an heir of entail in possession are provided for by statute. Those made by a liferenter are open, on the one hand, to the same observation as those made by a lessee—that they were made in contemplation of the temporary nature of his tenure, and solely for his own benefit—and on the other hand, to the contention that the fiar is usually known, present in his own person or by an agent, cognisant of what is being done to the property, and armed with the right to interfere in certain cases. Silence on his part may sometimes be as significant as express obligation of an acknowledgment of liability to recompense the liferenter's representatives. According as one of these or suchlike views overbalances the other, and according to the nature of the improvements themselves, will be the result of such a claim.[59] Here an opposite set of considerations comes into play. On the one part, the *bonâ fide* possessor

[59] As to meliorations by husband to wife's property, Reedie *v.* Yeaman, 1875, 12 Sc. L.R. 625; by mother on son's property, Paterson *v.* Greig, 18th July 1862, 24 D. 1370; by a mere *negotiorum gestor*, Fernie *v.* Robertson, 19th Jan. 1871, 9 Macph. 437; by a bankruptcy trustee, Buchanan *v.* Stewart, 10th Nov. 1874, 2 Ret. 78; and by a creditor holding a disposition *ex facie* absolute, Nelson *v.* Gordon, 26th June 1874, 1 Ret. 1093.

makes outlays on the property in the confidence that his tenure is a permanent one, and they are consequently lavished with no niggard hand. On the other, nothing in the way of implied consent can be pleaded against the true owner, who may be wholly ignorant or excusably diffident of his legal right. There being no contract, the equitable rule is here applied, '*Nemo* '*debet locupletari aliená jacturâ*,'—thus paraphrased by Stair:[60] 'Whatsoever turneth to the behoof of any (*in rem versum*) makes 'him liable for recompense, though without any engagement of 'his own;' and by Pothier, 'That rule of equity which per-'mits not that any one shall enrich himself at the expense of 'another.'[61] The rule is taken from the Roman law, which abounds with regulations for the guidance of the judge in all conceivable cases. It is more in accordance with the genius of the Scotch jurisprudence, while adopting the general doctrine, to leave each case to be decided on its special circumstances. At the same time, the views of the Roman jurists are instructive, more especially when, as in the present instance, the Scotch law is meagre. They are accordingly shortly stated below.[62]

[60] St. 1.8.6.7; Ersk. 1.7.33 and 3.1.11; otherwise *n. d. ex alieno damno lucrari;* in Cic. de Off. 3.5, '*ut non liceat sui com-*'*modi causâ nocere alteri;*' and '*detra-*'*here de altero sui commodi causâ;*' Kames, Equity, i. 140-168, discusses the whole doctrine; see also ii. 146 *et seq.;* B. Pr. 538; Bayne, 32.

[61] Pothier, Propriété, § 346, p. 228.

[62] Two cases are excluded. No recompense can in any case be demanded by a thief or violent possessor—1 C. (8.51); nor any for outlay directly connected with the rearing and ingathering of the fruits; it must be expended on the subject itself —46 D. (22.1), 1 C. (7.51). With reference to this last, the *malâ fide* possessor has a right to recompense for *impensæ necessariæ*—outlay necessary for the upkeep of the subject—and for sums paid by him in extinguishing burdens on being pressed by the creditors. He is liable for deterioration or destruction through his dole or *culpa*, but not for that which is accidental; and, as already pointed out, for fruits consumed, ingathered, or which ought to have been ingathered (*fr. percipiendi*)—5.22 C. (3.32). The law, 38 D. (5.3) which misled Cujace, Obs. x. c. 1, and Stair, i. 8.6, and seems to go further than this, is to be confined to the case of *hereditatis petitio*, the possessor defending which is regarded as *negotiorum gestor*. The *bonâ fide* possessor, besides not being liable for anything which happened to the subject during the subsistence of his good faith, and besides his right to the fruits (*supra*), and to *imp. necessariæ*, has a claim to recompense for *impensæ utiles* —*i.e.*, such as add to the selling value of the property without being required for its preservation, and that by way of a claim in the process of *Rei vindicatio*—5 C. (3.32), 30 I. (2.1); but only in so far as the value at the date of the action was actually enhanced, and provided the estimated enhancement do not exceed the sum laid out. The amount is largely in the discretion of the judge. Neither class of possessors has a claim for *imp. voluptuariæ* —such as do not raise the market value of the subject. There is a right to retain possession—48 D. (41.1), 14 § 1, 29 pr. D. (10.3), by exception to the *Rei vindicatio*, until these counter-claims are settled. See on the whole subject—Pothier, Propriété, §§ 343-353; Pagenstecher, ii. 170 *et seq.*, Vangerow, i. p. 654 *et seq.;* Weiske's Lexicon, xiii. p. 101 *et seq.;* Puchta, § 171; Arndts' Pandekten, § 168. See

Restitution by *malâ fide* possessor.

The position of the *bonâ fide* possessor with reference to recompense for ameliorations, according to the law of Scotland, will be best illustrated by contrast with that of the *malâ fide* possessor. The rules applicable to the nature and subsistence of *bona fides*, as detailed in the preceding part of this chapter, apply equally here.[63] In one case the rights and liabilities of a *malâ fide* possessor were the subject of very careful examination. The pursuer had, in the absence abroad of the defender, who was proprietor of a piece of vacant land, entered into possession, on the footing apparently of holding a bill of the defender's, and the title-deeds impledged, in security thereof, by parties who had no right to pledge them. A purchaser from the pursuer, for £25, erected a house on the ground at a cost of more than £200, both of which sums had to be returned, and the subject, as improved, thrown back on the pursuer's hands, as he was not in a position to give the purchaser a title. The defender, on returning home, obtained decree for delivery of the titles, and decree of removing against the pursuer, who now sued for recompense for the ameliorations, as having been made *in bonâ fide*. The defence was laid on *mala fides* as a bar against claim for recompense, and was unanimously sustained.[64] The bad faith was held to be clearly proved, and Lord Stair's dictum[65] that 'even he who *malâ fide* buildeth upon 'another man's ground, or repaireth unnecessarily his house, is 'not presumed to do it *animo donandi*, but hath recompense by 'the owner *in quantum lucratus*,' was expressly repudiated by the help of Erskine.[66] There must be hardship somewhere, and it is better to throw it on the usurping possessor than on the innocent owner. That a *malâ fide* disburser had not a claim in equity for recompense was held to be the true drift of the Roman law, and to have been the principle assumed in discussing all claims founded on *bonâ fide* ameliorations. It will be remembered that the *malâ fide* possessor has to restore all the fruits. It was here laid down that he has no claim for what the Roman jurists called *impensæ utiles*. Has he, as in Roman law, a claim to be recompensed for outlays necessary for the preservation of the subject? Some

Code Nap. 1381, 1635; Preuss. Landrecht. i. 7.204-217; and authorities quoted in Barbour, *infra*, [64].

[63] But see Wilson *v.* Dundas, 1695, 4 B.S. 236, where recompense was given in absence of a *justus titulus*. See case of *bona fides* induced by the agent of the owner—Duff, Ross, & Co. *v.* Kippen, 1871, 4 Sc. L.R. 299.

[64] Barbour *v.* Halliday, 3d July 1840, 2 D. 1279; see also D. Hamilton *v.* Johnston, 4th Feb. 1877, 14 Sc. L.R. 298.

[65] St. i. 8.6. For the meaning of the Roman text quoted, see note [62]. For circumstances proving *mala fides*, see Sess. Papers to Ritchie *v.* Robertson, 7th June 1832, 10 S. 621.

[66] Ersk. 3.1.11; in Bankt. 1.9.42, there is only a statement of the Roman law; B. Pr. 538.

parts of the opinions of the judges are general enough to deny any such claim; but the conclusions of the action, and the careful note of the Lord Ordinary, confine these opinions strictly to the matter in hand: and it may be anticipated, should the question arise, that the Roman jurisprudence would be followed, and indemnification given for necessary outlays. These differ from the other matters now under discussion,—from the fruits, as coming directly out of the possessor's pocket, and not having any necessary connection with the produce of the subject; and from meliorations, as being that which the true owner would have had to execute himself, and the neglect of which would be both ruinous to the subject, and in many cases contrary to the law. These distinctions point to the justice and equity of the Roman rule.

York Buildings Co. v. Mackenzie stated,

A celebrated case,[67] decided in last century by the House of Lords, is worthy of examination as having been referred to the category of *bonâ fide* possession by a very high authority;[68] while its circumstances, and the tenor of the final judgment, both point to a different view. Mackenzie, who was common agent in the ranking and sale of the bankrupt estate of the York Buildings Company, purchased for his own behoof part thereof at a judicial auction confirmed by decree of the Court; and, having paid the price and got infeft, remained for eleven years in undisturbed possession, and expended large sums in buildings and other improvements. The House of Lords, in the first appeal, reduced his right, and ordered him 'to refund to the pursuer all the rents 'and profits which he had received out of the estate in question, 'and an adequate consideration for the enjoyment of such part 'thereof as he occupied himself; but without prejudice to the 'title of the defender to reclaim all such sums of money as he 'had paid for the original price thereof, and also for the permanent improvement of the same, with the interest thereof to be 'computed from the time when the same were advanced, and paid 'according to such rates as the Court of Session should appoint.' There then followed directions saving the rights of *bonâ fide* lessees and others, ordering an accounting and reconveyance of the estates on payment of what might be found due to the defender, and remitting to the Court below.[69] On the case reaching the same House by a second appeal, on the question of accounting,

[67] York Buildings Co. *v.* Mackenzie, 1793, M. 13367, revd. 1795, 3 Pat. 378, and 1797, 3 Pat. 579.

[68] *Per* L. Brougham in Blaikie Bros. *v.* Aberdeen Ry., in H.L., 20th July 1853, 1 Macq. 461.

[69] This detailed judgment was drawn up by Lord Thurlow (or by his *famulus*), and approved by Lord Chan. Loughborough.

the judgment of the Court of Session was affirmed, which found Mackenzie entitled to claim the expense of making up his titles to the estate; of enclosing and making plantations and a shrubbery adjacent to the mansion-house; of building a mansion-house and offices and another house on the estate; but not of boring and sinking for coal, since that did not seem to have been for the benefit of the property; and not entitled to a factor's fee for receiving the rents and managing the estate. He was taken as having each year's rent on hand at Martinmas,[70] and as liable for interest from that date in each year; and he was found not liable for the pursuer's expenses in the reduction. The principle on which the improvements were allowed was, that they were of a permanent kind, and proper for the estate; and as to the *quantum* to be allowed, the expense of making them was taken in preference to going into a proof of whether they 'would weigh more [or less] 'in the sale of the estate than the expense.'

and examined.

In examining this important case,[71] it will appear significant that though the plea of *bona fides* was raised in the arguments for both parties, not a word is said of it in the opinion of the Lord Chancellor as the ground of his judgment, unless it be in the matter last mentioned. On the one hand, Mackenzie was in the honest belief that the sale made by himself in a fiduciary capacity to himself as an individual was unchallengeable, and that he was the true owner; and it was the opinion of a majority of the Court of Session that he was so. On the other hand, he was both vendor and purchaser, and it would have been of the worst example to allow the element of personal profit, possibly adverse to the beneficiary, to creep into the relation—one *uberrimæ fidei*—between him and the beneficiary. The possessor was, accordingly, treated neither as a *bonâ fide* possessor, since he had to return the value of the fruits—nor as a *malâ fide* possessor, seeing that he had a claim for meliorations. The judgment, as framed and explained, was in fact a well-devised attempt to restore things to their original position before the invalid sale, so far as that was possible in the altered circumstances. Though the case is of no direct authority in the present matter, the principles of accounting will be found very instructive.[72]

Douglas v. *Douglas's Trs.*

A modern case[73] presented some features of difference from that which has just been examined, but was decided on the same

[70] This arbitrary rule was not approved by the L. Chan., but was acquiesced in.

[71] See obs. in note to Blaikie Bros.[68].

[72] Mackenzie's case was followed in Jeffrey *v.* Aiken, 16th June 1826, 4. S. 722 (N.E. 728), (meliorations reserved); Gillies *v.* Maclachlan's Reps., 11th Feb. 1846, 8 D. 487 (credit given).

[73] Douglas *v.* Douglas's Trs., 20th July 1864, 2 Macph. 1379.

principles. A trustee, in the *bonâ fide* belief that he was entitled to alter the directions of the truster, purchased with the trust-funds (taking the title in his own name in fee-simple) a landed estate of a different description from that directed by the trust-deed to be purchased and entailed on the trustee himself and a series of heirs. The trustee laid out a large sum of his own in meliorations. After his death the heir of entail under the trust was found entitled to the option either to demand a reconveyance on giving credit in the accounting for the original price and sums shown to have been expended on improvements, or to obtain payment of this price with interest, after making allowance for the trustee's liferent use thereof—that option being well established in all cases of investment of trust funds in violation of the trust.[74] Here the fruits or rents were not returned, since the trustee was entitled to the possession in any view, and the only doubt was as to the absolute nature of his right.

Rights of *bonâ fide* possessor to recompense.

Coming now to the recompense due to *bonâ fide* possessors in the simpler case, which involves no fiduciary relations, his first right in time is that of retaining possession till his claim has been ascertained and paid.[75] But this is only in security. His good faith has ceased, and he is liable to all the consequences of *malâ fide* possession, and to account accordingly. From this position he may free himself by obtaining the appointment of a judicial factor.[76] There is no *jus retentionis* where no title can be shown; the *bonâ fide* possessor must remove at once.[77]

De in rem verso.

The claim for recompense is limited to the actual improvement, as at the date of settlement, consequent upon operations performed on the property during the *bonâ fide* possession.[78] In other words, the true owner, in vindicating his property, is liable to account only *in quantum lucratus est*, to the extent to which he has been enriched; the claim against him is only *de in rem verso*.[79] On the one hand, he cannot demand that the rents or fruits acquired by the possessor should be by him imputed to the payment of the principal of any burden upon the property, but only to defraying the interest.[80] On the other hand, he is not liable

[74] *Per* L.J.-C. 2 Macph. 1385.

[75] Binning *v.* Brotherstones, 1676, M. 13401; York Buildings Co. *v.* Mackenzie, *supra*, [66] (1st appeal).

[76] York Buildings Co., [67] (2d appeal).

[77] Beattie *v.* L. Napier, 27th May 1831, 9 S. 639.

[78] See a case in which the claim was of the nature of an action of repetition, the *bonâ fide* possessor having, under a mistaken view of his rights, purchased the subject over again at a value enhanced by his meliorations.—Yellowlees *v.* Alexander, 17th March 1882, 9 Ret. 765.

[79] St. i. 8.6-7; Ersk. 3.1.11; Bankt. 1.8.15; B. Pr. 538; Kames, Eq. i. 140 *et seq.*; Binning *v.* Brotherstones, *supra*, [75]; Rutherford *v.* Rankine, 1782, M. 13422.

[80] Gordon *v.* Maitland, 1757, M. 1727; Cleghorn *v.* Eliott, 10th June 1842, 4 D.

for the whole sums actually expended on improvements, unless it be proved that these remain, at the date of valuation, of the full value of the expenditure.[81] If the case should occur that, on account of rise of wages or other reasons, the worth of the meliorations to the estate is greater than the sum originally expended, it is probable that this sum would be taken as the maximum of recompense, as in the Roman law.[82] The exact amount will be ascertained by valuation; and where the subjects have been all along let, the safest guide will be the actual rise in rent.[83] But both in this case and in that of natural possession, it will usually be necessary, in view of the (till recently) constant rise of heritable property in some if not all parts of the country, to distinguish between the increase which is directly referable to the improvements, and that which is due to the so-called 'natural 'increment of value.' Recompense is due only for the former.[84] The meliorations must be of a permanent kind,[85] such as are not exhausted within a short period, and such as enhance the saleable value of the subject.[86] The ordinary outlay against tear and wear founds no claim, since it is set against the rents or annual profit of occupancy.[87] The application of these rules will be for the equitable consideration of the Court, according to the circumstances of each case.[88]

Damnum fatale.

Though there is no authority on the matter, it would seem to follow, from the principles already discussed, and from the Roman jurisprudence, that the rules, as between fiar and liferenter,[89] in the case of destruction of the subject possessed—as a house destroyed by fire—are equally applicable to the present subject. If the *bonâ fide* possessor, or those for whom he is responsible, have been in fault, the true owner will have a right to indemnification. If not, and the destruction has been *damno fatali*—by pure accident—as the possessor is nowise bound to rebuild, so he is not liable to make good the loss. If, in the latter case, he never-

1389; see Bowie *v.* Corbet, 1679, and Trail *v.* Moodie, 1728, M. 13405-7; 2 Kames, Eq. 147.

[81] See remarks on cases of York Bgs. Co. and Douglas, *supra*, pp. 81, 82.

[82] *Supra*, [62].

[83] See Jack *v.* Pollock, 1665, M. 13412.

[84] Douglas *v.* Douglas's Trs., *supra*, [73].

[85] York Buildings Co., *supra*, [67], for examples; Mags. of Selkirk *v.* Clapperton, 13th Nov. 1830, 9 S. 9.

[86] *Impensæ utiles*, not *voluptuariæ*, as these misleading terms are construed in the Corpus, *supra*, [62].

[87] Binning *v.* Brotherstones, *supra*, [75]. In this respect the Scotch seems more equitable than the Roman law.

[88] As to meliorations on subjects liferented, see Halkett *v.* Watt, 1672, M. 13412; and Laird *v.* Fenwick, 1807, M. App. Liferenter, No. 3.

[89] See *infra*, chap. 35. See 2 Hunter, p. 246. The statement in the text seems consistent with the rule '*res perit suo* '*domino*,' as construed by the House of Lords in Bayne *v.* Walker, 3d July 1815, 3 Dow, 233.

theless repairs or rebuilds the tenement, he is entitled to claim recompense for melioration, just as if there never had been in his possession anything more than the mishap left behind it. If, however, he has been insured, he will be liable for the money paid him with interest; or if it has been laid out in rebuilding or repairing, his claim for recompense will be diminished to the same amount. It has never been decided that he will be liable for accidents, if uninsured, even where insurance is matter of the most ordinary prudence.

CHAPTER V.

OWNERSHIP IN GENERAL.

Some definitions.

PROPERTY, in the legal sense of the word—ownership or *dominium*—as first introduced into Europe by the Roman jurisprudence, has been variously defined. It is nowhere formally defined by the Roman writers or legislators; and their descriptions of the institute are very meagre. The nearest approaches to a definition are passages in which property in slaves is called an 'unimpaired power' over them;[1] and that is said to be mine of which it could not be said that any part belonged to any other person.[2] Blackstone[3] describes property similarly as 'that sole and despotic dominion 'which one man claims and exercises over the external things of 'the world, in total exclusion of the right of any other individual 'in the universe.' The most philosophical codes of modern nations are not much more satisfactory. The Code Napoléon[4] calls it 'the 'right to enjoy and dispose of things in the most absolute way, 'provided no use is made of them which is forbidden by law or 'regulation.' And the Prussian Landrecht[5] lays it down that 'the 'proprietor is one who is entitled, himself or through a third 'party, to dispose at his will of the substance of a thing, to the 'exclusion of others.' Coming nearer home, Lord Stair is at once more pithy and more accurate, where he says that 'a right real 'is a power of disposal of things in their substance, fruits, or use,' meaning thereby, as he has premised, dominion.[6] And Mr Erskine, in his corresponding passage, defines property as 'the right of using 'and disposing of a subject as our own, except in so far as we are 'restrained by law or paction.'[7]

Rei vindicatio.

These quotations may serve as fair statements of the view taken

[1] '*Illibata potestas*,' 2 D. (1.6).
[2] 25 pr. D. (50.16).
[3] 2 Bl. Com., p. 1 (Kerr's ed.
[4] Art. 544.
[5] I. 8.1.
[6] St. 2.1.1.; see Skene *sub voce* 'Feodum'; Craig. 1.9.9; Bankt. 2.1.6.
[7] 2.1.1.

of the nature of property in the systems of law from which they are culled. But the insufficiency of one and all can hardly be disguised. Some of the explanations are no definitions at all; others go hopelessly wrong. It will clear matters greatly to trace them all back to the root from which they together sprang. That root was the action of *Rei vindicatio*—a form of process anterior to, or at least contemporaneous with, the earliest legal notion of property in Europe. It was brought by one claiming a corporeal subject against its possessor,[8] and thus marked the epoch at which property was legally separable from possession. But the claim was put, not upon an obligation lying on the possessor to surrender the subject, but on a plea which would have been equally good against the whole world.[9] The vindication—thence termed an *actio in rem*—was thus opposed to the condiction, the action to enforce an obligation against one determinate person, thence called an *actio in personam*.[10] The corresponding terms, applicable to the rights sued on, are *jus in re* and *jus ad rem*—the former a Roman phrase, the latter one invented by the civilians. It might have been supposed that the former would have been used by the Roman experts (as by Lord Stair) as applicable to and inclusive of property, the highest right of all. But a true instinct forbade such a use; and as matter of fact, the phrase in the *Corpus juris civilis* only appears as referring to subordinate *jura in re aliená*, such as servitudes and pledge. The reason will appear presently.

Austin's definitions.

It would be needless to pile up references to the various authors who have laboured to elucidate a matter which at first sight seems so simple. But one word must be said of the elaborate exposition presented to his students by that learned pedant in definitions, Mr Austin.[11] He accurately defines real rights (*jura in rem*, as he prefers, though without authority in the Roman law, to term them) as 'rights residing in persons, and available against other 'persons generally,' or '*facultas personæ competens sine respectu ad* '*certam personam*,' and includes in these the right of a father in his child, and of a guardian in his ward, as well as of a master in his slave.[12] He then says that ownership or property is a species

[8] This origin still appears in the def. of Grotius—'*d. est facultas quâ quis rem* '*non possidens eam jure consequi potest.*'

[9] '*Hanc ego rem ex jure Quiritium* '*meam esse aio.*'—Gai. 4. 16.

[10] 25 pr. D. (44.7); St. and Ersk. *supra*, 1 B.C. 298.

[11] Jurisprudence (1st ed.), ii. 33, 35, 477, 480; iii. 158, 163: and authorities cited in the first passage. Add Pufendorf de j. nat. et gen. 4.4.1, who points out that the thing itself suffers no change in its qualities—there being only in dispute a relation towards other persons in respect of the thing.

[12] My revered teacher, Von Vangerow, discovered, in the relation of a freeman, a freedman, and a slave, to his own person, quiritarian ownership, bonitarian ownership, and the entire absence of ownership!

of *jus in rem*, and defines it as 'the right to use or deal with some 'given subject in a manner or to an extent which, though it is 'not unlimited, is indefinite;' or in another place, 'any right *in* 'rem (especially over a thing) indefinite in point of user.' Property, then, is a right. Is it so?

Examined.

As a test of the accuracy of the Roman nomenclature, let it be inquired what it is that distinguishes *dominium* from the rights strictly called *jura in re*. The answer is at once suggested by Mr Austin's own definition,—that the former is indefinite in user; the latter, such as a predial servitude, well defined. In other words, the uses which flow out of ownership cannot be exhausted by enumeration. The owner cannot be said to have the right of usufruct in his own property.[13] Such *jura in re* diminish not the property, but its use; and when they cease to exist, the gap they made is at once, and *ipso facto*, filled up.[14] Now it is of the essence of a right that it shall be certain or ascertainable; and it matters nothing in this respect whether it is maintainable against all the world or only against a single individual. The pursuer in a *Rei vindicatio* did not allege against the possessor a right to seize upon, carry off, use, enjoy the fruits of, or alienate the subject.[15] These would have been definite claims. He only pleaded that the thing was his; and in doing so, he maintained what included all these rights, and yet was something quite different in its own nature—for these rights could only come to have existence as such by coming into the person of one who was not the proprietor. And to whatever extent these subordinate rights may be given off, the ownership or property remains one and indivisible.[16] It follows that ownership is neither a right nor a bundle of rights.

Definition – a relation.

Ownership or property may be defined as a legal relation subsisting between a person and a thing, whence flows to the former the right to use and dispose of the latter indefinitely, so far as he is not restrained by law or paction.[17] In this statement these propositions are involved: The relation must be one recognised by law: the thief has therefore no ownership in the thing stolen. The

[13] 5 pr. D. (7.6); 26 D. (8.2); 45 pr. D. (50.17).

[14] Called by civilians the *elasticity* of ownership. Pagenstecher, p. 7; 4 I. (2.4); 3 pr. D. (3.33); 3 § 1, D. (7.2); Gaius, 2.30; Paul, Rec. Sent. 3.6.28, in Huschke, p. 387. Remark the verbs in these passages.

[15] Mr Austin may have been unconsciously misled by the English practice of ejectment, whereby a question of property is determined by a possessory action.

[16] As to common property, see chap. 30.

[17] Vangerow, § 295. Besides the authorities already quoted, see Gesterding, p. 2; Pagenstecher, p. 3; Puchta, § 231; Warnkönig, § 202; Arndts, § 130. And see David Hume's 40th Essay—on the Passions (note).

relation postulates a person—and involves much of the law of persons,—and a thing, which must be a subject capable of appropriation. The right to use and dispose of the thing is usually summed up—but, as above pointed out, without any attempt at exhaustiveness—as the *jus utendi, fruendi, et abutendi;* the right of use, enjoyment of the fruits and of definitive use—including, in the latter phrase, right to destroy, to convert, to burden, and to alienate. It is further involved in the definition that the relation is exclusive of the interference of every other party, and absolute with reference to the thing itself. But this eminent control, though indefinite as are the capacities of mankind, is limited in certain well-defined ways by general law, and may be restricted by the provision of man. The greater part of this work will be concerned with the rule of exclusive and absolute use, and the limitations of both kinds which it suffers in practice.

The subjects of ownership.

The 'things' which are alone to be treated of in the following pages, include all such heritable subjects as do not lie in obligation, and they are chiefly corporeal, though such anomalous rights as those relating to harbours and salmon-fishing may seem to form an exception. The point of view taken up with regard to them is that of a person holding, on titles admittedly valid, the relation of proprietor towards them. And the leading question will be, How far does that relation admit of his going in dealing with the subjects of his ownership?

Things incapable of ownership.

From this point of view the only requisite in the nature of the things themselves is that they should be capable of appropriation—patient of absolute and exclusive use by an individual. The only subjects of which this cannot be properly predicated are what the Romans called '*communia omnium*'—things the property of which belongs to no person, but the use to all.[18] The only way in which these become the subject of legal treatment is when an attempt is made to restrict this common use. Such subjects are the light, air,[19] and running water.[20] The sea and its shores, which were considered common by the Romans, claim attention elsewhere.[21] All other things, whether *res publicæ, res universitatis, res sacræ, religiosæ,* or *sanctæ,* are the property of some one, though it may be under trust for certain purposes. If they are vested in no one else, they 'are by our feudal plan deemed *regalia,* or rights belonging to

[18] I. (2.1); 2 D. (1.8); Cr. 1.15.1; St. and Ersk. 2.1.5. Not 'common property'—Glück. Com. 2.460. Called also public—112 D. (50.16), 3 pr. D. (43.8).

[19] Their use will come more conveniently under the head of Servitudes, chap. 26.

[20] *Infra,* chap. 29.

[21] *Infra,* chap. 15.

'the Crown.'[22] The way in which these public and other rights affect the private proprietor will constantly recur in the sequel.

Subject to what has just been said, the rule is, that the owner of land holds the property of everything within his boundaries *a cœlo usque ad centrum;* or, as Craig has it, *inter cœlum et inferos*[23]—of everything above, on, and beneath the ground. The immediately succeeding chapters will illustrate this rule under the head of Boundaries, Accession, Fixtures, Part and Pertinent, Game, Minerals, and other minor rights.

[22] Cr. 1.15 and 16, *tot. tit.*, 2.8.14; St. 2.1.5; Ersk. 2.1.6 *et seq.*; Bank. 1.3.20; B. Pr. 638 *et seq.*

[23] Cr. 2.8.17; St. 2.3.60; Ersk. 2.6.1; B. Pr. 940.

CHAPTER VI.

BOUNDARIES.

Boundaries generally.

It is beyond the scope of this work to assist the conveyancer, when drawing a charter or a disposition, in framing descriptions of lands and heritages, whether that be done by express words or by reference; it is more the aim of this chapter to enable the proprietor or his agent to discover what and how much he owns under his titles. The description he finds there may be that of a bounding charter, wholly or partially,[1] and may proceed either by reference to a specified prior possession, or by a detail of the physical limits, or by measurement, or by any or all of these combined. Or, on the other hand, the subjects may be described by some general name, more often a string of uncouthly-spelt names, not defined in any of these ways. In case of dispute about the comprehension of titles of the latter sort, the only criterion is possession, the consideration of which will fall most suitably under the head of Part and Pertinent. The present chapter will be concerned more particularly with bounding charters.

Bounding charters.

The peculiarity of a bounding charter is, that no amount of possession under it of a corporeal subject beyond the limits can enable the possessor to vindicate the ownership thereof. He owns so much as his charter gives him: to acquire in that way property in anything beyond would be to fly in the face of his title.[2]

[1] Girdwood *v.* Patersons, 3d June 1873, 11 Macph. 647.

[2] St. 2.3.26; Ersk. 2.6.3; B. Pr. 738; Young *v.* Carmichael, 1671, M. 9636; Thomson *v.* Grieve, 1688, 2 B.S. 118; Wilson *v.* Dundas, 1695, 4 B.S. 236; Suttie *v.* Gordon, 26th May 1837, 15 S. 1037 (complicated by a lease); Ross *v.* Milne, Cruden, & Co., 16th Feb. 1843, 5 D. 648; St Monance *v.* Mackie, 5th March 1845, 7 D. 582; Stewart *v.* Greenock Harbour Trs., 12th Jan. 1866, 4 Macph. 283. But see Watt *v.* Paterson, 10th Nov. 1813, 2 Dow, 25; referred to in Gordon *v.* Grant, *infra*, [3]. Reid *v.* M'Coll, 25th Oct. 1879, 7 Ret. 84, is open to these observations: that a boundary by the lands of A does not, so far as that boundary extends, infer a bounding title; that the existing march-stones were not

For this purpose, any specification of a limit is good so far as it goes; as, for instance, that the subject is within a parish named.[3] But the contrary is true of such 'concomitant privileges' as naturally accompany the ownership of lands, such as servitudes, even although there be no clause of parts and pertinents;[4] and incorporeal rights, such as salmon-fishings.[5]

Ambiguous boundaries.

Where a bounding charter is so precise and intelligible in its terms as to enable the Court, without further inquiry, to fix the boundaries, no proof of possession will be allowed;[6] or if a proof has been led, it will be disregarded.[7] But as in the interpretation of all other documents, so here—if the limits given are ambiguous and unintelligible without extrinsic evidence, a proof will be necessary, in which prescriptive possession by the grantee, or acquiescence by the grantor, will be important elements. Thus, where 'pier,' a word of vague extent, was part of a boundary, proof of the meaning intended to be put on it was allowed, and one part of the evidence admitted was an advertisement (required by the Burghs Act of 1822), which was referred to in the articles of roup and the disposition.[8]

Demonstrative and taxative measurements.

Where the subject is described, both by its physical meiths and bounds, and by a specified possession or measurements, grave discrepancies may appear. The rule is, that the physical boundaries must govern, if they are clearly set forth; and that the particulars added are merely demonstrative or illustrative, not taxative of the extent.[9] Thus, infeftment in a mill with four acres of land, on which there had been immemorial possession of six or seven acres, was held to be a good defence against a removing from the surplus lands.[10] The rule was put very strongly by Lord

mentioned in the titles; and that the only relevant question in the case was as to the proof of the defender's prescriptive possession.

[3] Hepburn *v.* D. Gordon, 25th Nov. 1823, 2 S. 525 (N.E. 459); Gordon *v.* Grant, 12th Nov. 1850, 13 D. 1.

[4] Liston *v.* Galloway, 3d Dec. 1835, 14 S. 97, and 2 Bell, Ill. 129; Beaumont *v.* L. Glenlyon, 11th July 1843, 5 D. 1337, esp. L. Ordinary's note; see Borthwick *v.* L. Borthwick, 1668, M. 9632; Brand *v.* Charteris, 18th Dec. 1841, 4 D. 292.

[5] E. Zetland *v.* Tennent's Trs., 26th Feb. 1873, 11 Macph. 469; cf. E. Dalhousie *v.* M'Inroy, 3d March 1865, 3 Macph. 1168.

[6] Darroch *v.* Ranken, 9th Dec. 1841, 4 D. 219.

[7] Gibson *v.* Bonnington Sugar Co., 20th Jan. 1869, 7 Macph. 394. See the cases of peculiar boundaries, *infra*, p. 94.

[8] Davidson *v.* Mags. of Anstruther-Easter, 25th Nov. 1843, 7 D. 342.

[9] Borthwick *v.* Strang, 1799, Hume, 513. In a Canadian case the Privy Council Committee held, with obvious justice, that if the words indicating boundaries are equally susceptible of two interpretations, that one is to be taken which comes nearest giving effect to the measurements—Herrick, *v.* Sixby, L.R. 1 P.C. 436.

[10] Douglas *v.* Lyne, 1630, M. 2262; cf. Hannay *v.* Creds. of Bargaly, 1785, M. 13334; Gray *v.* Hamilton, 1801, M. App. Sale, No 2; Brown *v.* Kyd, 1 Dec. 1813, Hume, 700. 'Merkland' does not im-

Justice-Clerk Boyle, in a case where both march-stones and measurements were given: 'I can find no authority for holding that a 'bounding charter is to have reference to the quantity of measure-'ment. Stair, Erskine, and Bankton all describe bounding char-'ters in words exclusive of measurement.'[11] This does not mean that measurements fail for all purposes to make the title a bounding one; though the decision is an authority for Mr Duff's opinion that measurements pure and simple are no bar to the accession of additional space by prescriptive possession.[12] The question as to the effect in that way of measurements standing alone is, however, not likely to arise. But in many cases the measurements have been held to be taxative, and thus to dominate over the physical description or general name. This may be the result of the use of words plainly taxative;[13] or by making the feu-duty depend on the extent—as so much per acre, the measurement being given.[14] Perhaps even exact lineal measurements of length and breadth may be decisive where an estimate of the area would not.[15] It may therefore be held that Mr Bell is supported neither by authority nor by principle when he says, that 'when the subject 'is, by name or otherwise, clearly pointed out, a superadded 'measurement is generally held as taxative.'[16] This is the exception rather than the rule. But it is different where a reference, enumerative of the lands as possessed by certain tenants, is appended to a general name of subjects, the physical limits of which are not specified. The reference is then held to be taxative,[17] unless the possession is decisive to the contrary.[18] Again, a definite physical boundary may have to give way to other considerations besides a taxative measurement. A curious instance of this occurred early in the century. A party had right by succession to two contiguous estates, by separate titles holding of different superiors. Prior to his succession, 300 acres had been added to one of these by being separated from the other by a dyke. The first was sold, one of the boundaries being this dyke; and then the other to a different purchaser, as described in the old titles, without any reference to the curtailment. In a question

Identification by possession,

and by holding.

port a bounding charter—Spence *v.* E. Zetland, 25th Jan. 1839, 1 D. 415.

[11] Ure *v.* Anderson, 26th Feb. 1834, 12 S. 494; Fleming *v.* Baird, 12th June 1841, 3 D. 1015; L. Moncreiff in Off. of State *v.* Smith, 11th March 1846, 8 D. 711, 721.

[12] Duff, Feud. Conv. § 47.

[13] Ibid.

[14] Hepburn *v.* Campbell, 1781, M. 14168; cf. Harley *v.* Campbell, 16th Jan. 1822, 1 S. 238 (N.E. 226), where boundary and measurement combined to repel an application for diminution of feu-duty.

[15] See L.P. in Hunter *v.* L. Adv., 25th June 1869, 7 Macph. 899, 906.

[16] B. Pr. 738.

[17] Murray *v.* Oliphant, 1634, M. 2262.

[18] Gardner *v.* Scott, 6th Dec. 1839, 2 D. 185, revd. 3d March 1843, 2 B. App. 129.

between the two purchasers, it was held that the latter had the feudal title to the 300 acres. There had been no express annexation thereof to the first piece of land, and the second purchaser got all of the second subject that the grantee had from his superior.[19]

Plans.

A plan docketed and referred to in the title 'is fully as good 'as any words describing the line of boundary.'[20] The same rules apply to it as to other bounding titles; and it will depend on the circumstances of each case whether the plan shall prevail over other descriptions,[21] or be held as superseded.[22] So much for the rules applicable to boundaries generally. The old actions of perambulation and molestation have been already noticed.[23] Peculiarities in the rules respecting certain sorts of boundaries now deserve attention.

Special boundaries.

March-stones.

In early times in Scotland the only mode of indicating boundaries was by march-stones, solemnly set up by the parties and known to the neighbourhood. The care which was taken to preserve oral evidence of their authenticity is shown by the practice recorded by Stair, that 'boys used sometimes to be laid down upon 'them and sharply whipped, whereby they will be able to remember and be good witnesses as to these marches when they are 'very old, that impression on their fancy lasting long.'[24] Pending a dispute about boundaries, neither party is entitled to set up march-stones along what he conceives to be the line of march, and the Court will interdict him without inquiring into the accuracy of the line.[25] Those stones only are entitled to the name of march-stones, which have been set up under judicial authority, or by consent of parties, either express or implied.[26] March-fences were in fact unknown prior to the statute of 1661,

[19] Livingstone *v.* Clark, 31st May 1821, 1 S. 44 (N.E. 48); cf. Lang *v.* Mags. of Dumbarton, 29th June 1813, F.C. (personal bar).

[20] L.P. in North British Ry. *v.* Mags. of Hawick, 19th Dec. 1862, 1 Macph. 200.

[21] Glassell *v.* E. Wemyss, 22d March 1806, 5 Pat. 104. In N.B. Ry. *v.* Moon's Trs., 8th Feb. 1879, 6 Ret. 640, a plan coinciding with measurements outweighed a descriptive boundary.

[22] Paterson *v.* Carnegie, 27th May 1851, 13 D. 997. For observations on the value as evidence of the Ordnance Survey plans and measurements, see Gibson *v.* Bonnington Sugar Co., *supra*, [7]; and Strang *v.* Steuart, *infra*, [27]; and as to plans generally as evidence, Place *v.* E. Breadalbane, 17th July 1874, 1 Ret. 1202.

[23] *Supra*, p. 18. As to the *actio finium regundorum*, old as the XII. Tables, see 6 I. (4.17); D. (10.1); C. (3.39); Vangerow, § 658; Puchta, § 234. It seems to have been the model of our Act, 1661, c. 41; see also Balf. Pract. 434; Ersk. 4.1.48.

[24] St. 4.43.7. The same custom still prevails in Russia. See Wallace on Russia.

[25] Stewart *v.* Sangster, 20th June 1849, 11 D. 1176.

[26] See the law of acquiescence, *infra*, chap. 24., and Turner *v.* Baker, 27 Amer. R. 226. In our law nothing short of possession for the prescriptive period would protect an encroachment.

to be noticed in a later chapter.[27] In many parts of the Highlands this is still the case; and the stones are still useful in disputes about boundaries in other parts of the country. When there is no evidence as to the course of a boundary-line between two known march-stones, and there are no natural features on the ground to guide, the rule is to draw the line straight.[28] The natural features of stream, hill-top, or watershed are often decisive in cases of conflicting evidence of possession—in mountainous districts[29] especially, where trespass is easy.[30]

Natural features.

There will be a further opportunity[31] of discussing the rules of law affecting property in the shore of the sea or of a navigable river. It is only necessary in this place to explain the meaning of the terms usually to be found in titles. It seems to be decided that, in questions between subject superior and vassal, a boundary by the sea,[32] or by the sea-beach,[33] or by the sea-shore,[34] or by a navigable river,[35] means the same thing, and gives property in the foreshore, subject to certain public rights, down to the ebb-mark of ordinary tides.[36] There is much doubt, however, whether the 'sea-flood' and 'flood-mark' are equivalents, and whether they or either of them are to be construed as having the same meaning as the terms already mentioned. In none of the cases cited was the Crown a party, and all of them were overlaid with specialties. In the leading case, it was found by the Court of Appeal that the owner of an 'enclosed' yard within burgh, bounded on one side by the 'sea-flood,' could not gain land by natural accession or artificial works from the sea; but the decision seems to have turned on the word 'enclosed,' and on some possession seawards on the part of the burgh.[37] In the next case, the burgage title bore in the disposition a boundary 'by the sea,' and in the sasine,

Sea, sea-beach, sea-flood, flood-mark, river, &c.

[27] *Per* L.P. Inglis in Strang *v.* Steuart, 31st March 1864, 2 Macph. 1015, 1031, affd. 15th Feb. 1866, 4 Macph. H.L. 5; chap. 32.

[28] Ewing *v.* Lennox, 22d Jan. 1828, 6 S. 417.

[29] Whitson *v.* Ramsay, 14th April 1813, 5 Pat. 664.

[30] Fraser *v.* Chisholm, 27th July 1814, 2 Dow, 561; Lumsden *v.* Gordon, 21st June 1870, 42 Sc. Jur. 530.

[31] *Infra*, chap. 15.

[32] Mags. of Culross *v.* E. Dundonald, 1769, M. 12810; Campbell *v.* Brown, 18th Nov. 1813, F.C.; Boucher *v.* Crawford, 30th Nov. 1814, F.C.; see 2 Bell, Ill. 2.

[33] Cameron *v.* Ainslie, 21st Jan. 1848, 10 D. 446; see Kerr *v.* Dickson, 28th Nov. 1840, 3 D. 154, affd. 1 E. App. 499.

[34] Mags. of Culross *v.* Geddes, 24th Nov. 1809, Hume, 554; Boucher, *supra*, [32]; see Off. of State *v.* Smith, 11th March 1846, 8 D. 711, 715, 721, 724, affd. 13th July 1849, 6 B. App. 487.

[35] Todd *v.* Clyde Trs., 23d Jan. 1840, 2 D. 357, affd. 8th June 1841, 2 Robin. 333; Berry, *infra*, [40].

[36] St. 2.1.5; Ersk. 2.6.17; B. Pr. 641 *et seq.*

[37] Smart *v.* Mags. of Dundee, 1797, 3 Pat. 606, 8 Brown, Ca. in Parl. 119; Laird *v.* Mags. of Dundee, 1788, n.r.

'by the sea-flood:' the possession, such as it was, appeared to be in favour of the disponee; and the contention for the burgh was, that the 'sea' meant the sea-flood at ordinary tides—a view which had been already repudiated in the first *Culross* case.[38] It was found that the disponee had right to the sea-ware.[39] Some years later, a case arose in which a proprietor whose lands were bounded on the north by the 'water of Tay' (there a navigable river), had feued out part, bounding it by the 'flood-mark'; and part of that, again, had been sub-feued, with boundary by the 'sea-flood.' The sub-feuar enclosed part of the foreshore *ex adverso* of his feu. In a declarator at the instance of the first party, it was found that he had retained the right of property in the shore within high-water mark riverwards of ordinary spring-tides, the 'flood-mark' being a boundary which excluded the shore from the vassal's conveyance.[40] The 'flood-mark' and 'sea-flood' seem to have been regarded as identical, and *Smart's* case was taken as settling the general question of the construction of such a boundary. The chief specialties in *Berry's* case were,—that, though not in form, yet in substance the defenders were the real pursuers, since they were the aggressors, seeking to innovate on the state of possession; and that the pursuer had a right of harbour within his bounds. But the first of these peculiarities does not seem to have been founded on at all; and the second is noticed only by the Lord Ordinary. They were, however, used to explain the case of *Berry* in another Tay case.[41] There the owner of lands lying alongside of, but not expressly bounded by, a navigable river, feued out parts thereof, consisting of a certain number of acres, of so many yards in breadth from east to west, but without mentioning the length from north to south, and bounded 'on the 'south by the sea-flood.' The measurements were not regarded as taxative towards the river; and it was held by a majority of the First Division (Lord Deas dissenting), that in the absence of any decided possession, either by superior or feuars, the former must be taken to have conveyed away all his own right seawards, in a question with his feuars, in which the Crown did not interpose; and that therefore he had no right, as against them, to land reclaimed by alluvion *ex adverso* of the feus, and below the original high-water mark. All the judges were of opinion that it made no difference whether the superior's title was one of barony or ordi-

[38] *Supra*, note [32].

[39] Leven *v.* Mags. of Burntisland, 27th May 1812; Hume, 555; see L. Medwyn in 3 D. 212.

[40] Berry *v.* Holden, 10th Dec. 1840, 3 D. 205.

[41] Hunter *v.* L. Adv., 25th June 1869, 7 Macph. 899.

nary Crown charter. The Lord President and Lord Ardmillan relied solely on the effect in law of the feuar's titles as divesting the superior of all right of property seawards, in absence of any express reservation; and touched upon a third distinction between *Berry's* case and the case on hand—that Berry had an express seaboard boundary, while Hunter had not. Whether it would have made any difference in the result if he had, was not decided. Lord Kinloch, however, went so far as to say that the 'sea-flood' as a boundary, was just the same as the 'sea' or the 'sea-shore'; while Lord Deas was unable to distinguish the case from *Berry's*, which he himself had pleaded when at the bar, and still considered to have been rightly decided. It may be gathered, therefore, that this later case proceeded on the *ratio* that the superior gave out the land as bounded by the 'sea-flood,' in the belief that he had nothing more to give, and that he must be held to his own construction of his title; and that a conveyance by a subject must be construed *in dubio* in favour of the grantee, while the reverse is true of a grant from the Crown. With much submission to the opinion of Lord Kinloch, it would be a strong proposition to lay down, especially considering the silence or dissent of his colleagues, and the contrary result of the cases of *Smart* and *Berry*, that 'sea-flood' meant the same thing as 'sea'—especially as his lordship seems to have been puzzled to know what to say of the term 'flood-mark.' The law, as it at present stands, may be taken to be, that 'sea-flood' and 'flood-mark,' as boundaries, are equivalent, and mean high-water mark of ordinary tides.[42]

Boundaries laterally of seaboard and riverain properties.

Where conterminous properties on the sea-shore or on a navigable river, whose boundary at the present or at a former high-water mark is known, each include the foreshore *ex adverso*, various schemes have been submitted to the Court for determining the line of march between the two across the foreshore. The rule which has been adopted is—from an imaginary line drawn by the Court and representing the general coast or river line between two points chosen by the Court at its discretion, to drop a perpendicular on the known boundary.[43] In the case of an estuary, the general direction thereof is got from the *medium filum* at low water—not of the fresh-water current alone, but of the whole space then covered with water.[44] This plan rejects equally the determination of this

[42] St. 2.1.5; Ersk. 2.6.17. See further, chap. 15.

[43] Campbell *v.* Brown, 18th Nov. 1813, F.C.; first scheme approved in M'Taggart *v.* M'Douall, 1st March 1867, 5 Macph. 534; and Laird *v.* Reid, 14th March 1871, 9 Macph. 699, and 18th July 1871, 9 Macph. 1009. The same in England. Crook *v.* Corp. of Seaford, L.R. 6 Ch. 551.

[44] Laird's case, 2d report.

boundary, by producing the landward march-line where it reaches high-water mark. Mr Kyle's plan, actually adopted in *Campbell's* case, of drawing a straight line between the two extremities at high water of the ground belonging to each of the adjoining proprietors, bisecting the angle thereby formed at the march-stone, and producing the bisecting line seawards. And lastly, Mr Sang's plan, of an equitable adjustment proportional to the extent of seaboard of a large number of neighbouring proprietors, whether called into Court or not.[45] If one of two neighbours has appropriated, by prescriptive possession or otherwise, a greater width of foreshore than he would have been entitled to under these rules, and has thus encroached on that which lay *ex adverso* of the other, the *datum* point on which the perpendiculars are dropped, in determining the march between them still further seawards, is not fixed by the extremity of the encroachment, but by the march at the original high-water mark.[46]

'By' a wall, &c.

When a piece of ground is said to be bounded 'by' a physical object, such as a wall or ditch, no part of the boundary is conveyed.[47] One exception to this rule has been already found in the

'By' a river.

case of the sea-shore. Another occurs where the march is formed 'by' a river above high-water mark. In this case the *medium filum* of the stream is taken to be the boundary.[48] 'Enclosed by' may mean something different from 'bounded by,' and may in-

'By' a road, &c.

clude the fence in the subject conveyed.[49] A boundary 'by' a highway seems to be in a different position from a river-side march, and to exclude every part of the road from the conveyance,[50] though this rule dates from a time when it was believed that the *solum* of a highway was necessarily the Crown's. 'The 'highway intervening' equally reserves the road.[51] Yet where road or river is as matter of fact, though not expressly by conveyance, the separation between two properties, the presumption is

[45] Laird's case, 1st report.

[46] Ibid.

[47] Smyth *v.* Allan, 1813, 5 Pat. 669.

[48] Wishart *v.* Wyllie, 1853, 1 Macq. 389; M'Intyre's Trs. *v.* Cupar-Fife, 24th May 1867, 5 Macph. 780; Gibson *v.* Bonnington Sugar Co., 20th Jan. 1869, 7 Macph. 394; Morris *v.* Bicket, 20th May 1864, 2 Macph. 1082, affd. 13th July 1866, 4 Macph. H.L. 44; see esp. p. 50.

[49] Wilson *v.* Laing, 14th June 1844, 7 D. 113.

[50] Ewing *v.* York, 19th Dec. 1857, 20 D. 351; but see the observations of the L. Chan. in Wishart *v.* Wylie, 1 Macq. 389, 390. The rule has certainly not been understood by conveyancers, and unexpected results sometimes follow. It is repudiated in America. See Oxton *v.* Groves, 28 Amer. R. 75; Kneeland *v.* Van Valkenburgh, 32 ibid. 719; Low *v.* Tibbetts, 39 ibid. 303.

[51] Mags. of Culross *v.* Geddes, 24th Nov. 1809, Hume, 554; Mags. of St Monance *v.* Mackie, 5th March 1845, 7 D. 582.

that the middle line of each is the boundary.[52] A boundary 'by a 'street' is exclusive of the street itself, and the proprietor of the feu can only build up to the line separating the feu from the pavement. Even if he had cellars under the pavement, no part of the street would be held to belong to him.[53] Every boundary must be read with due reference to the nature of the subject. Thus the 'south bank of a canal' was held to mean the exterior line of the towing-path, not the edge of the water.[54] A 'loch' is held to denote the ordinary and natural dimensions or extent of water when affected neither by floods nor drought nor artificial change. The medium between the highest and lowest points reached by the water in winter and summer in the last forty years was rejected.[55]

Fences.

A great deal of legislation in early times, and considerable litigation throughout the whole of Scotch legal history, have been concerned with fences on marches and elsewhere; but a better opportunity will appear of discussing the whole subject in a later chapter.[56]

[52] See *infra*, chap. 29; Doe d. Pring. *v.* Pearsey, 7 B. and C. 304; Smith *v.* Howden, 14 C.B.N.S. 398.

[53] D. Buccleuch *v.* Mags. of Edinburgh, 27th May 1864, 2 Macph. 1114, 17th Feb. 1865, 3 Macph. 528.

[54] Fleming *v.* Baird, 12th June 1841, 3 D. 1015.

[55] Baird *v.* Robertson, 20th June 1839, 1 D. 1051; and Graham *v.* Boswell, 14th Nov. 1835, 1 D. 1053 (note).

[56] *Infra*, chap. 32.

CHAPTER VII.

ACCESSION.

In narrow sense.

THE term 'accession' may be used to denote any mode of acquiring property in accordance with the rule '*accessorium sequitur* '*principale*'—such as property in fruits, the young of animals, or buildings.[1] It is here, however, employed in a narrower sense, to indicate the addition of land to land from natural causes. The other accessories of land-ownership will follow in subsequent chapters.

Alluvion and avulsion.

The distinction—a very practical one—between accession by alluvion and accession by avulsion is copied from the Roman law.[2] The former is defined by Erskine[3] as 'the insensible addition which grounds lying on the banks of a river receive by what the water washes gradually from other ground;' to which may be added the land left exposed by the gradual retreat of the sea.[4] Avulsion, on the other hand, is the violent tearing away by river or sea of a part of the ground of one proprietor and the depositing of it in a shape capable of identification on the bank or shore of another's land.[5] In the former case, the owner of the land to which the addition has been made obtains the ownership of the increment, on account of its being indistinguishable from his original property; in the latter case he does not, for the

[1] Cr. 2.8.2; St. 2.1.34; Ersk. 2.1.14; B. Pr. 934 *et seq.*; Bankt. 2.1.10.

[2] The *incrementum latens* caused by alluvion went at once to the owner of the neighbouring land—Gai. 2.70; 20 I. (2.1); 7 § 1 D. (41.1); the increment caused by avulsion did not, until the trees carried away took root in the said land—cf. 21 I. (2.1), with 7 § 2 D. (41.1), which come to the same thing, though differently worded. This change did not apply to *agri limitati* of the old law—16. D. *h.t.*; Gesterding, § 26; Pagenstecher, 2, 128.

[3] 2.1.14; St. 2.1.35.

[4] B. Pr. 935. Actual contiguity to the river or sea is necessary; the interposition of however narrow a strip being fatal to the claim—Saulet *v.* Shepherd, 4 Wallace, U.S. Supreme Court, Rep. 502. See case of *alluvio* at a right angle in a river, Batchelder *v.* Keniston, 12 Am. R. 143.

[5] B. Pr. 936.

opposite reason. In the case of the sea retreating, the proprietor can only profit if his lands are expressly, or as matter of fact, bounded by the sea, flood-mark, or such other term as is not inconsistent with following a fluctuating boundary.[6] There has been no decision concerning avulsion, but it would follow that the proprietor of the land torn away will have a right to the minerals beneath it,[7] and to enter and carry off from the surface whatever he can identify as his; and there is no indication of his being barred of this remedy by the inrooting of trees, as in the Roman law, nor by the short prescription of modern codes.[8] The English agrees with the Scotch law in regard to these natural changes.[9]

Alvei mutatio.

The same principles apply to cases where the change takes the shape of a shifting of the bed of a stream laterally from natural causes. If the alteration be gradual, the general doctrine of alluvion is further justified by the acquiescence of the landowner who loses by it; for he might lawfully have so embanked the stream as to guard himself from injury.[10] On the other hand, if the change has been caused by a sudden flood—by avulsion—no alteration is made on ownership;[11] nor has a temporary inundation any such result.[12]

Insula nata.

The last natural change of surface which requires to be noticed is the appearance of an island in a river, which may happen by the stream working for itself a new channel while still retaining the old, or by sand and earth being brought down and arrested by some peculiarities in the bed.[13] The general rule is, that the island belongs to the owner of the *alveus;* in the case of a navigable river, the Crown; in the case of a private river, the proprietor through whose land it flows. If the river be the march between the landowners, and each has the property of the bed *ad*

[6] See cases in last chapter, and esp. cf. Kerr *v.* Dickson, 28th Nov. 1840, 3 D. 154, affd. 1 B. App. 499, with Hunter *v.* L. Adv., 25th June 1869, 7 Macph. 899.

[7] L. Mackenzie in Mags. of Edinburgh *v.* Scot, 10th June 1836, 14 S. 922, 933.

[8] Prussian L.R. 1.9.223; Austrian G.B. § 412; Code Nap. 559. Fournel, *s. v.* Alluvion, attérissement.

[9] Bract. 2.2.2; Hale, de Jure Maris, chaps. i. iv. vi.; 2 Bl. Com. 262; Callis, 51; Woolrych, p. 34; King *v.* L. Yarborough, 3 B. and C. 91, affd. 1 Dow. N.S. 176.

[10] Ms. Tweeddale *v.* Kerr, 14th May 1822, 1 S. 397 (N.E. 373). In England it does not, by bringing the stream in contact with a neighbouring property, dock the exclusive right of fishing which the lord of the manor *through* which it formerly flowed possessed—Foster *v.* Wright, 4 C.P.D. 438.

[11] The distinction appears in the actual case stated in 38 D. (41.1); see also 7 § 5 D. *h. t.*, 23 I. (2.1).

[12] 7 §§ 6 and 30 D. *h. t.;* 23 D. (7.4); 24 I. (2.1); Gesterding, § 28; Pagenstecher, ii. 134. On the English law, see Mayor of Carlisle *v.* Graham, L.R. 4 Ex. 361.

[13] 30 § 2 D. (41.1).

medium filum, the ownership of the island will also be determined by its position relative to that line,[14] in a question between opposite riverain proprietors; and by the same rule as has been already given, of dropping perpendiculars from the general direction of the river to the march-stones, as between upper and lower conterminous owners. This is the case when the change has been imperceptible in its progress, though not in its result. If sudden and yet permanent, the phenomenon presented is just that of an '*alvei mutatio*' by avulsion. It thus appears that the distinction set forth at starting runs through all these cases, and that no difference is occasioned in legal result by the fact that alluvion and avulsion proper involve an actual removal of soil from one place to another; while a river may change its bed or an island be formed without any such removal. The *alveus* of a private river is regarded simply as the continuation of the dry land. The consequence of an opposite theory in the Roman law was, that an island arising in such a river remained the property of him whose property was nearest it *ex adverso*, when it first appeared, however much it might extend both up and down and across the stream.[15] This does not appear to be the law of Scotland, which looks to the ownership of the part of the *alveus* covered by the island. The increment will be for the benefit of the riparian owners according to that test, and no one will be allowed to follow a shifting bank when it escapes from his bounds. The island is regarded as part of the bed, not of the bank, so long as it remains an island, or at least till the *alveus* on one side ceases to be substantially a channel of the river—a date which will depend on the circumstances of each case.[16] In a river in which the sea ebbs and flows, the *medium filum* is ascertained at low water.[17]

Artificial changes.

The cases just referred to have all been examples of a purely natural change in the surface of the ground. But it may happen that the forces of nature have been set in motion, or directed in a certain way, by some artificial structure. If the *opus manufactum* has been made on the land of a third party or lawfully on the land of the party who seeks to gain by the accession—as by sea-walls or embankments in navigable rivers—the same doctrines seem to apply as if the process of change had been natural from

[14] Pools *v.* Dirom, 9th July 1823, 2 S. 466 (N.E. 416); Hale, *supra*, [9]; Callis, 44; 3 Kent, Com. 428.

[15] 56 pr. D. (41.1).

[16] Wedderburn *v.* Paterson, 22d March 1864, 2 Macph. 902; E. Zetland *v.* Glovers of Perth, 31st Jan. 1868, 6 Macph. 292, affd. 11th July 1870, 8 Macph. H.L. 144—salmon-fishing in a navigable river; Branham *v.* Turnpike Co., 27 Amer. R. 789.

[17] Ibid. St Clair County *v.* Lovingstone, 23 Wallace, U.S. Rep. 46.

the beginning.[18] But if the artificial operation be unlawful, or beyond the landowner's right, he will not be entitled to profit by his own wrongous act or any of its consequences.[19]

[18] Smart *v.* Mags. of Dundee, 1797, 3 Pat. 606; 8 Br. P.C. 119; Todd *v.* Clyde Trs., 23d Jan. 1840, 2 D. 357, affd. 2 Rob. 333; Att.-Gen. *v.* Chambers, 4 De. G. and J. 68, 70; St Clair County *v.* Lovingstone, *supra*, [17].

[19] See Menzies *v.* Breadalbane, 4th July 1826, 4 S.783, rev. 4th July 1828, 3 W.S. 235; Morris *v.* Bicket, 20th May 1864, 2 Macph. 1082, affd. 13th July 1866, 4 Macph. H.L. 44: and see the distinction pointed out by L. Tenterden in Rex *v.* Trafford, 1 B. and Ad. 880.

CHAPTER VIII.

FIXTURES.

Introductory. THE rule which gives to the owner of a part of the earth's surface the property of everything within the area—above it to the zenith, and beneath it to the centre of the earth, as defined by the direction of the plumb-line produced indefinitely in both directions—is wide enough to include all objects which happen to be placed within the bounds, no matter for how short a time or transient a purpose. As matter of law, the presumption is to that effect, but it is controlled in various ways. The case of wild animals will occupy another chapter. At present an attempt is to be made to expound the doctrine of fixtures—one of the least satisfactory parts of our jurisprudence in common with that of many other countries. The exposition will be relieved from entering on the most important branch of the subject—the rules as between landlord and tenant—by Mr Hunter's elaborate chapter;[1] but it will be compelled to pursue with diffidence the course of English authorities,[2] on account of the comparative paucity of Scotch decisions on the subject. The law of both countries seems to be identical in principle:[3] cases decided in the one realm are cited as of authority or as of weight in the treatises and Courts of the other; and both systems attempt to soften down, and conform to the necessities of modern times, a salutary rule, which is common to all enlightened systems of law.

The rule is, '*Inædificatum* (*plantatum, satum*) *solo solo cedit.*'[4]

[1] Vol. i. chap. xii.

[2] Acknowledgment must be made of valuable assistance derived from 2 Smith's Leading Cases—*voce* Elwes *v.* Maw, and Horn *v.* Baker; from Amos and Ferard; Brown; and especially Grady on Fixtures.

[3] See L. Brougham in Fisher *v.* Dixon, 4 B. App. 353; and L. Chelmsford in Brand's Trs. *v.* Brand's Trs., 3 Ret. H.L. 23.

[4] The brocard is not to be found in the Corpus, but is a gloss on the passage in 7 § 10 D. (41.1), '*Omne quod inædificatur solo cedit.*' For equivalent expressions, see 28 D. *eod. tit.*; 2 C. (3.32). The subject is treated by the civilians under that head of industrial accession which is termed adjunction. Besides the commentators thereon quoted by Mr Hunter, i. p. 297, see Gesterding, § 31; Puchta, 2. p. 695; Pagenstecher, 2. p. 145; Vangerow, § 329;

When a moveable subject has been infixed in, or annexed to, an immoveable, it becomes part of the latter, and belongs to its owner —not, as it has been well put, on the ground of his activity in the annexation, but of the necessary absorption of the property of the accessory into the property of the principal.[5] The rule is said to be traceable in the English Year-books to a remote period, and it has been recognised in the whole course of Scotch law.[6] One relaxation on the strict rule has been discussed already as the doctrine of *bonâ fide* perception; and the rules as to fixtures are also to be regarded as exceptions to the stringency of the maxim, which have been gradually extending in scope. *Inædificatum solo solo cedit.*

The word 'fixture' has come to have two different meanings: one, its natural and obvious sense—viz., anything which is infixed into or annexed to an immoveable, that is, directly or indirectly to the soil; and the other, a technical sense—viz., a moveable which has been annexed to the soil, but may be removed in certain circumstances at the will of the person who annexed it, or of his personal representative[7]—a curious perversion of the term, whereby fixture denotes removeability. It seems best to adhere to the first and more obvious meaning. 'Fixture.'

The law of fixtures may be best elucidated by distinguishing and enumerating the parties between whom questions as to their removeability may arise. The statement of Lord Ellenborough, C.J., in *Elwes* v. *Maw*,[8] the leading English case, has been recognised as authoritative in both countries: 'Questions respecting 'the right to what are ordinarily called fixtures, principally arise 'between three classes of persons: First, between different descriptions of representatives of the same owner of the inheritance—viz., between his *heir* and *executor*. In this first case—*i.e.*, 'as between heir and executor—the rule obtains with the most 'vigour in favour of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel anything 'which has been affixed thereto. Secondly, between the executors of tenant for life or in tail, and the remainder-man or re- Parties to questions as to fixtures.

Gaius, ii. 73-75. But the rules of Roman law are chiefly concerned with the *bonâ fide possessor*, and do not afford much assistance in the present subject.

[5] Puchta, *loc. cit.* Yet there may be cases where the heritable is the accessory of the moveable subject, and does not change the character of the latter—Case of Short's Observatory, 1 B.C. 787; and *dicta* in Tod's Trs. *v.* Finlay, 30th Jan. 1872, 10 Macph. 422.

[6] Cr. 1.9.7, 2.8.3; St. 2.1.40; Mack. 2.1.6; Bankt. 2.1.18; Ersk. 2.1.15, 2.2.4; 1 B.C., 7th ed. 786; B. Pr. 937, 1473; More's Notes, 143-5; Wallace, 109 *et seq.*

[7] Hallen *v.* Runder, 1 C. M. and R. 266; Sheen *v.* Rickie, 5 M. and W. 175; Amos and Ferard, p. 2; Brown, p. 2; Grady, p. 2; 2 Smith's L.C.—*s. voce* Elwes *v.* Maw, *passim.*

[8] 1802, 3 East. 38.

'versioner, in which case the right to fixtures is considered more 'favourably for executors than in the preceding case between heir 'and executor. The third case—and that in which the greatest 'latitude and indulgence have always been allowed in favour of 'the claim to having any particular articles considered as per-'sonal chattels, as against the claimant in respect of freehold or 'inheritance—is the case between landlord and tenant.'

Heir and executor.

As has been already remarked, the last case lies without the scope of the present work. Other cases, such as questions between vendor and purchaser, between heritable and ordinary creditors, and as to the form of diligence, will be found to be regulated by substantially the same rules as obtain between heir and executor.[9] In now proceeding to examine the law as between these last, it will be borne in mind that anything which is decided to be moveable in their case will, *a fortiori*, be removeable in the other cases; but that it does not follow, from the fact that a thing is regarded as heritable as between them, that it goes to the party who is owner of the soil in all cases. The cases between landlord and tenant are of use here, for the converse reason, when they have resulted in favour of the landlord, for the claim of an heir would then be *a fortiori*.

Annexation and its purpose.

All questions, as to whether things in themselves moveable do or do not become heritable in certain circumstances, resolve themselves into these two: (1) Has there been annexation; and if so, to what extent? and (2) what was the purpose of the annexation?[10] It is impossible entirely to dissociate these two points of view in going over the decided cases, but an attempt will be made to gather together those in which the one element or the other is most prominent.

Severance.

I. THE PHYSICAL FACT OF ANNEXATION.—As a rule, if there be no annexation at the date of the ancestor's death, either from never having taken place at all,[11] or from having been severed, the things are not fixtures, and go to the executor. Thus trees,

[9] Climie *v.* Wood, L.R. 4 Ex. 328; Mather *v.* Fraser, 2 K. and J. 536.

[10] Hellawell *v.* Eastwood, 6 Ex. 312; Parsons *v.* Hind, 14 W.R. 860, per Blackburn J.

[11] Culling *v.* Tuffnal, Buller, N.P. 34 (barn on pattens or blocks of timber)—explained in Elwes *v.* Maw, 3 East. 38, 55; Horn *v.* Baker, 9 East. 215 (reputed ownership of vats); Rex *v.* Otley, 1 B. and Ad. 161 (windmill resting on, but not fixed in a brick foundation); Wiltshear *v.* Cottrell, 1 E. and B. 74 (granary supported by staddles); cf. cases of Fisher *v.* Dixon, [12], D'Eyncourt, [30]; and also Brand's Trs. *v.* Brand's Trs., 2d Feb. 1878, 5 Ret. 607, where pit-engines for pumping and winding were found heritable, though not mechanically fixed; as also underground railways laid similarly to those in ordinary use on the surface.

so long as they remain such by growing in the soil, are heritable; but as soon as they are cut down, they become moveable.[12] Stones quarried and minerals dug also become moveable by separation.[13]

Tests of annexation.—(1) Annexation of a moveable may take place in an indefinite number of ways, as by its being let into the earth, or being cemented or otherwise permanently united to some erection previously attached to the ground;[14] and every case must be determined according to its own circumstances. But certain considerations have been frequently given effect to. Thus, if injury would necessarily be caused to the article or to the estate by the act of removal, the fixture will remain with the heir. This applies to glass windows, fixed benches, doors on their hinges,[15] and suchlike. The question here to be answered is, 'Whether the article can 'easily be removed *integré salvé et commodé*, or not, without injury 'to itself or the fabric of the building.'[16] An example of injury to the article itself is to be found in a Scotch case, where large leaden vessels, though not fastened to the building in any way but by their own weight, were regarded as heritable, in a question of security, since they would have required to be taken to pieces or melted down in order to be removed.[17] But this cannot be taken as a safe criterion in all cases; 'for that might occur with 'chattels with respect to which there is no question—as, for in-'stance, poster-beds.'[18] The distinction between the two cases is, that to have attempted to restore the same leaden vessels would have been hopeless; while the pieces of a poster-bed, when put together again, would make up the self-same article as that which was removed. This element of removeability *salvâ rei substantiâ* will be found to run through all the cases in which the decision has turned mainly on physical conditions; and it is that which is put first by the old commentator Heineccius.[19] It is not re-

(1) Injury through severance.

[12] St. 2.1.2; Ersk. 2.2.4, 2 B.C., 7th ed. 2; Stewart *v.* Stewart's Exrs. 1761, M. 5436; Paul *v.* Cuthbertson, 3d July 1840, 2 D. 1286; Anderson *v.* Ford, 16th July 1844, 6 D. 1315; Burns *v.* Fleming, 7th Dec. 1880, 8 Ret. 226 (growing shrubs and turf; probably also, even as between landlord and tenant, gravel strewn).

[13] Bruce *v.* Erskine, 1707, M. 14092.

[14] Grady, p. 16; Buckland *v.* Butterfield, 2 Brod. and B. 54.

[15] Cooke's Ca. Moore, 177. See L. Mansfield in Lawton *v.* Lawton, 3 Atk. 14, and note to next case; Dudley *v.* Warde, 1 Amb. 113; Davis *v.* Jones, 2 B. and Ald. 165; Avery *v.* Cheslyn, 3 A. and E. 75 (tenant's case).

[16] *Per* Parke B. in Hellawell *v.* Eastwood, 6 Exch. 295, 312 (distraint).

[17] Niven *v.* Pitcairn, 6th March 1823, 2 S. 270 (N.E. 240).

[18] Hellawell *v.* Eastwood, *supra*, [16].

[19] Quoted by L. Cockburn in Fisher *v.* Dixon, 6th Mar. 1843, 5 D. 775, 793, aff'd. 26th June 1845, 4 B. App. 286—'*quæ vel* '*salvæ moveri nequeunt vel usûs perpetui* '*causâ junguntur immobilibus aut ho-*'*rum usui destinantur;*' Inst. § 199; St. 2.1.2; Ersk. 2.1.15 and 4.2.4; L. J.-C. Moncreiff in Dowall *v.* Miln, 11th July 1874, 1 Ret. 1180.

quisite for the character of irremoveableness that much force would be necessary to disannex the article.[20]

(2) Special advantage to the estate.

(2) Another test of annexation is to see whether there be or be not some special advantage accruing to the estate from the annexation. This point has been divided into two by the Lord Justice-Clerk Moncreiff, in a lucid epitome of the law of fixtures which he delivered in a recent case[21]—viz., (*a*) whether the article is essential or material to the enjoyment of the fruits or the use of the heritable subject;[22] or (*b*) if there be a special adaptation in the construction of the article itself to the uses and improvement of the heritable property to which it is attached, which it would not possess if placed elsewhere.

(*a*) Material to its use. Salt-pans case.

(*a*) The first of these questions may be illustrated by the *dicta* of Lord Mansfield in the well-known salt-pans case.[23] The executors of a defunct demanded delivery of these pans from the tenant of the heir. The pans were made of hammered iron riveted together, and were placed in the works by the testator in his lifetime; they were brought there in pieces, and might be so removed; they were not joined to the walls, but fixed by mortar to a brick floor, and had furnaces under them, and might be removed without injuring the building, but the salt-works would be of no use without them. Lord Mansfield observed: 'The 'salt-spring is a valuable inheritance, but no profit arises from it 'unless there is a salt-work, which consists of a building, &c., for 'the purpose of containing the pans, &c., which are fixed to the 'ground. The inheritance cannot be enjoyed without them. They 'are accessories necessary to the enjoyment and use of the prin-'cipal. The owner erected them for the benefit of the inher-'itance; he could never mean to give them to the executor, and 'put him to the expense of taking them away without any advan-'tage to him, who could only have the old materials or a contri-'bution from the heir in lieu of them. But the heir gains £8 'per week by them. On the reason of the thing, therefore, and 'the intention of the testator, they must go to the heir.'[24] It will be seen that this class of subjects differs, on the one hand, from the leaden chambers in *Niven's* case, in being removeable without injury either to themselves or to the fabric that contains

[20] Wilde *v.* Watters, 16 C.B. 637. Nothing is absolutely fixed and immoveable—see L. Cockburn in 5 D. 795.

[21] Dowall *v.* Miln, *supra*, [19].

[22] Lawton *v.* Lawton, *supra*, [15]; Dudley *v.* Warde, *supra*, [15]; Lawton *v.* Salmon, [23].

[23] Lawton's Exrs. *v.* Salmon, 1 Hy. Bl. 259, note.

[24] The pans were not considered as instruments of a trade, but as necessary for enjoying the inheritance—*per* L. Ellenborough in Elwes *v.* Maw, 3 East. 54; see L. Lyndhurst in Trappes *v.* Harter, 2 Cr. and M. 153.

them; and on the other, from the poster-bed class, as being essential to the enjoyment of the heritage. It comes between the two, and follows the fortunes of the former.[25]

Fisher v. *Dixon.*

The present point is illustrated further by the elaborate opinions delivered in the Court of Session and in the House of Lords in the leading Scotch case between heir and executor, *Fisher* v. *Dixon.*[26] The principal question arose as to certain machinery erected by a deceased mine-owner on his own land and for his own workings; how much of it, if any, was to fall under legitim (which was held to be the same as any other executory fund in this respect);[27] and what was to go to the heir. The Court of Session pronounced, and the House of Lords affirmed, a judgment which minutely distinguished between what was heritable and what was moveable, and which went on the principle thus enunciated by Lord Cockburn, with the approval of the Court of last resort: 'I conceive that' the clear rule of our law 'not 'only assigns to the heir the larger and the fixed machines, but 'such smaller articles as, though not physically attached to these 'greater machines, or capable from their use of being so, *form* '*parts of the general apparatus,* provided they be so fitted and 'constructed as to belong specially to this particular machinery, 'and not to be equally suited to any other.' The deceased had been tenant of another mine, and had erected similar machinery in connection therewith before his death, which occurred during the course of the lease. The Court of Session distinguished this case from the other, and, in favour of trade, by a majority found this machinery to be moveable. The same case, of a mineral tenant's estate requiring to be divided into heritable and moveable *quoad* succession, recurred thirty years later,[28] when it was pointed out by the Lord Chancellor that this had been a minor and little canvassed point in *Fisher's* case, that the finding had really proceeded on an admission by the heir, and that the machinery had been actually removed by arrangement. It was here held by the House of Lords that the fact that the deceased's right was only leasehold made no difference, and that the leading rule in *Fisher* v. *Dixon* must govern in both cases. That rule was thus stated in the Lord Ordinary's Interlocutor, which, after being recalled by the Second Division, was restored by the

[25] Stockwell *v.* Campbell, 12 Amer. R. 393.

[26] 19th Dec. 1843, 5 D. 775, affd. 26th June 1845, 4 B. App. 286, 12 Cl. and Fin. 312.

[27] 4 B. App. 351.

[28] Brand's Trs. *v.* Brand's Trs., 19th Dec. 1874, 2 Ret. 258, revd. 16th March 1876, 3 Ret. H.L. 16; sequel, 5. Ret. 607; followed in Stiven *v.* Cowan, 8th March 1878, 15 Sc. L.R. 422.

House of Lords: 'The machinery and plant, and those parts 'thereof, are heritable. . . . . which were attached either 'directly, or indirectly by being joined to what is attached, to 'the ground, for use in connection with the working and carry-'ing away of the minerals, though they have been fixed only in 'such a manner as to be capable of being removed either in 'their entire state or after being taken to pieces without mate-'rial injury, including those loose articles which, though not 'physically attached to the fixed machinery and plant, are yet 'necessary for the working thereof, provided they be constructed 'and fitted so as to form parts of the particular machinery, and 'not to be equally capable of being applied in their existing 'state to other machinery of the kind.'[29]

(*b*) Special adaptation to the estate.

(*b*) The second element mentioned by Lord Moncreiff—special adaptation to the heritable subject to which the moveable is annexed—is well illustrated by a judgment of Lord Romilly, in a case[30] where the question was, what subjects were carried by the will of the liferenter of an estate on which he had built and furnished a mansion-house, his intention being to include in his devise every article he could dispose of. This was regarded as the same question as if the testator himself had attempted to remove the furnishings during his life. The following articles were chiefly discussed: Tapestries hung on wood stretchers attached by screws or nails to blocks or plugs of wood inserted in a brick wall, were treated as part of the wall itself, just as wall-paper, silk, panels, or frescoes would have been. A painting similarly fastened to the wall had the same fate, though both it and the tapestries might have been easily and without damage removed. 'The question is not whether the thing itself is easily 'removeable, but whether it is essentially a part of the building 'itself from which it is proposed to remove it, as in the familiar 'instance of the grinding-stone of a flour-mill.'[31] This did not apply to a chimney-glass, an ornamental frame, and a painting, all secured to the flush face of the wall with nails and screws.[32]

[29] This follows the rubric in 5 D. 775, and 'may be assumed correctly to describe 'the character of fixed machinery'—*per* L. Chan. 3 Ret. H.L. 18. Pierce *v.* George, 11 Amer. R. 310; Green *v.* Phillips, 21 ibid. 323; Ottumwa Woollen Mill Co. *v.* Hawley, 24 ibid. 719. M'Connell *v.* Blood, 25 ibid. 12. The point decided by the L.O. in Hyslop's Trs. *v.* Hyslop, 18th Jan. 1811, F.C., has been questioned (Arkwright *v.* Billinge, 3d Dec. 1819, F.C.), and must be deemed bad law.

[30] D'Eyncourt *v.* Gregory, L.R. 3 Eq. 382, 36 L.J. Ch. 107.

[31] Wystow's Ca. in Place *v.* Fagg, 4 M. and R. 280 n.

[32] Contrast as to mirrors, M'Keage *v.* Hanover Fire Ins. Co., 37 Amer. R. 471, with Ward *v.* Kilpatrick, 37 ibid. 472.

But the principle thus enunciated obtained still stronger illustration from the treatment vouchsafed to certain kneeling figures in the staircase placed on pedestals, and by a few screws attached thereto, but evidently not expressly made for the pedestals, and easily removeable; and to sculptured marble vases in the hall, resting and secured on pedestals simply by their own great weight. These were found to be irremovable, as being 'strictly 'and properly part of the architectural design for the hall and 'staircase itself, and put in there as such, as distinguished from 'mere ornaments to be afterwards added.' The distinction was admitted to be but thin, depending on the special circumstances of each case. In a case of the heir and executor of an unlimited proprietor, the heir's right would be of course even stronger than that of the remainder-man in the decision just quoted; but much caution will be required in carrying out a principle which, while commending itself to the student of law, will often prove barren of result to the practitioner.[33]

II.—The Effect of Intention.—While an attempt has been made down to the present point to fix the attention mainly on the physical phenomena which would present themselves naturally to a third party ignorant of the history of the annexation, it has been obviously impossible to keep clear of the element of intention.[34] There are, however, many other cases in which the intention of the person who made the annexation (that is, not so much his intention to remove or not to remove the article at some future time, as his intention with regard to its use on being annexed)[35] has come out more clearly and been given effect to expressly. Three classes of cases may be distinguished: (1) actual annexation; (2) constructive annexation; (3) destination.

(1) *Intention in cases of actual annexation.*—This element is thus explained by Lord (then Justice) Blackburn,[36] in very nearly the same words as Baron Parke:[37] 'Under the second 'point the question is, whether the chattel is annexed *perpetui* '*usus causâ*, for the improvement of the freehold, or whether 'the annexation is merely for the sake of the better enjoyment of 'the chattel. The second point is of almost as great importance (1) In cases of actual annexation.

Are gasaliers fixtures?—Sewell *v.* Angerstein, 18 L.T.N.S. 300; Jarechi *v.* Philharmonic Soc. 21 Amer. R. 78.

[33] What of wooden steps on a garden terrace, as in Burns *v.* Fleming, *supra*,[12]?

[34] See Lawton *v.* Lawton,[15]; Lawton *v.* Salmon,[23]; Fisher *v.* Dixon,[26].

[35] State Savings Bank *v.* Kircheval, 27 Amer. R. 310; cf. Meig. 1 Amer. R. 372.

[36] In Parsons *v.* Hind, 14 W.R. 860.

[37] In Hellawell *v.* Eastwood, 6 Exch. 295, 312.

'as the first point—viz., the degree of fastening.' The same idea has been otherwise expressed as an intention that the article should 'be incorporated with the soil;'[38] or 'to improve the 'premises;'[39] or 'to separate it permanently and irrevocably 'from the personal estate;'[40] or 'for the purpose of improving the 'inheritance [the fee], and not for any temporary purpose;'[41] and not merely fixed 'to secure steadiness.'[42] These quotations might be multiplied indefinitely; but enough have been adduced to show that the real subject of inquiry into the matter of intention is whether the article can be presumed to have been intended to be separable by the person who annexed it.

Of other than trade fixtures.

There are, however, two sets of cases which demand special notice, and in which the element of intention is prominent. 1. The first is that class of cases in which meliorations are made for mere ornament and convenience, or for domestic use. Here precisely the same rules apply between heir and executor, and between a fiar and the liferenter's representatives. In both instances, the general rules as to the nature of the annexation and the effects of removal, which have been explained, are applicable in the fullest sense.[43] The old case of *Cave* v. *Cave* puts the law very concisely. It was a suit concerning certain pictures and mirrors; and the finding was, that 'although these were, generally 'speaking, part of the personal estate, yet, if put up instead of 'wainscot, or where otherwise wainscot would have been put up, 'they shall go to the heir. The house ought not to come to the 'heir maimed and disfigured.' The Murthly Castle case, in which the parties were satisfied with the decision of the Sheriff-substitute and Sheriff of Perthshire, carries out this principle into details which would occupy more space than can be afforded here, and may be consulted with advantage.

Of trade fixtures.

2. There is a marked distinction, on the other hand, between

[38] Lancaster *v.* Eve, 5 C.B.N.S. 717, 728, *per* Williams J.

[39] Reg. *v.* Lee, 14 W.R. 311.

[40] Martin *v.* Roe, 7 E. and B. 237, 248, *per* L. Campbell.

[41] Walmsley *v.* Milne, 7 C.B.N.S. 115, 131, 138; and *dicta* in Tod's Trs. *v.* Finlay, 30th Jan. 1872, 10 Macph. 422.

[42] Hellawell *v.* Eastwood, [37]; Longbottom *v.* Berry, L.R. 5 Q.B. 123, 138; cf. Climie *v.* Wood, L.R. 3, Ex. 257, L.R. 4, Ex. 328; and see Fisher *v.* Dixon, [26], and Dowall *v.* Miln, [19]; and Holland *v.* Hodgson, L.R. 7 C.P. 328, esp. p. 337, for explanation of what in such cases is a 'temporary purpose.'

[43] As between heir and executor—Cave *v.* Cave, 2 Vern. 508; Harvey *v.* Harvey, 2 Stra. 1141; Colgrave *v.* Dios Santos, 2 B. and C. 76: but see Squier *v.* Mayer, 2 Freem. 249; and Beck *v.* Rebow, 1 P. Wms. 94—early cases which have been doubted. In Scotland—Murthly Castle case, reported in Brown on Fixtures, App. A., between an heir of entail and his predecessor's disponee and executor. It is an intermediate case. As regards fiar and liferenter's reps. — D'Eyncourt *v.* Gregory.[30] And see rights of liferenter, *infra*, chap. 35.

the rights of heir and executor, and of a fiar and the liferenter's representatives, to trade fixtures. As between heir and executor, the first point to be authoritatively settled was, that the distinction, said to have been set up in the unreported Cider-mill case,[44] and there alone, between fixtures erected for enjoying the profits of the land, and fixtures erected for the carrying on of a trade in which the land was only indirectly serviceable, was not law.[45] The reason is well brought out in a case of mortgage,[46] which, as we shall see, is in the same position as a case of heir and executor: 'According to the old rule of law, if that which would 'otherwise have been a chattel had been affixed to the soil, 'whether by nail, screw, or otherwise, it passed along with the 'soil to which it had been so fixed. In the relation of landlord 'and tenant, but in that relation alone, the rule of law was re-'laxed for the encouragement of trade, it being easily perceived 'that it would be injurious to trade if a tenant were told that he 'must contrive to conduct his trade with property which must 'not be affixed in any way to the soil, or he would at once be held 'to have made a present of it to his landlord; and accordingly, 'as between landlord and tenant, questions of some difficulty have 'arisen whether, in particular instances, chattels pass with the 'freehold of the land. But here—and it was the case also, as 'Lord Cottenham observed, in *Fisher* v. *Dixon*—no such question 'can arise. Here the same parties were owners, both of the fee 'and of the chattel in question. In the exercise of their own 'discretion as to the disposition of the property, they fixed certain 'articles to the soil, and no question of encouragement to trade 'can arise. Here therefore, and in all other cases where the 'owner of the chattel is also the owner of the fee, the Court can 'at once dismiss from its consideration the entire class of cases 'in which the rule of law has been relaxed in favour of trade— 'all such cases presuming the existence of landlord and tenant.' In conformity with the law as so laid down, the element of encouragement to trade was found to be excluded as between the heir and the executor, not only of a fee-simple proprietor, but also of a mineral tenant who had erected machinery, and had died pending the lease.[47]

As between heir and executor.

[44] *Per* Comyns, C.B., at Worcester assizes, quoted in Lawton *v.* Lawton, 3 Atk. 14, approved by L. Hardwicke there, and in Dudley *v.* Warde, 1 Amb. 114; by L. Ellenborough in Elwes *v.* Maw, 3 East. 54; and L. Kenyon in Dean *v.* Allalley, 3 Esp. N.P. 11.

[45] Fisher *v.* Dixon in House of Lords, *supra*, [26], see esp. L. Brougham and L. Cottenham, 4 B. App. 352, 359.

[46] *Per* L. Hatherley, then Wood V.C., in Mather *v.* Fraser, 2 Kay and J. 536, 548.

[47] Brand's Trs. v. Brand's Trs., 19th Dec. 1874, 2 Ret. 258, revd. 16th March

As between fiar and liferenter's representatives.

There seems to be no Scotch case regarding trade fixtures erected by a liferenter during his term, and remaining affixed to the principal subject at his death. In England, however, a series of cases[48] seems to bring the right of his representatives against the fiar very close to that of the tenant or his representatives against the landlord, and to indicate that Lord Hatherley is too strict in confining the relaxation as to trade fixtures to the latter class. The object in both cases is the 'public convenience, 'being an encouragement to lay out money in improving the 'estate, which the tenant would not otherwise be disposed to 'do.'[49] This matter has been already referred to,[50] and will recur in the sequel.[51] It is enough to remark here that the analogy between the two classes is not precise, since the duration of the term is in the one case certain, in the other uncertain; and it is, accordingly, undoubted law that the tenant's representatives have a stronger claim than those of the liferenter, in whose case it is probable that the nature of the fixture will be of more consequence than in the other. It is an easy but an unsatisfactory conclusion, that each case will depend on its own circumstances. The rule with regard to the tenant's removing the trade fixtures during his term does not of course apply.[52]

Rules applicable in other relations.

The distinction between heritable and moveable is of great importance in many other relations besides those noticed; but a solution of the questions which arise between heir and executor will in general be equally applicable to these.[53] In some cases the rules already laid down will be of use in interpreting the express words of a contract; in others, in fixing the presumed meaning of general agreements. The chief cases are: 1. *Seller and purchaser.* Here the rules given in the preceding sections as applicable between heir and executor, apply in full force. Everything goes with the land, *sub silentio*, which the heir would have had a right to as against the executor of the vendor.[54] A recent

Seller and purchaser.

1876, 3 Ret. H.L. 16. Here the pure question of heritable or moveable arose under an agreement. As to the effect of custom, see Trappes *v.* Harter, 2 C. and M. 153, *per* L. Lyndhurst, criticised by Crowder J. in Walmsley *v.* Milne, *supra*, [41]; and see Cullwick *v.* Swindell, *infra*, [59].

[48] Lawton *v.* Lawton, 3 Atk. 12; Dudley *v.* Warde, 1 Amb. 113, two decisions by L. Hardwicke, approved by L. Mansfield in Lawton *v.* Salmon, 1 Hy. Bl. 260; and not disputed in Penton *v.* Robart, 2 East. 88, and Elwes *v.* Maw, 3 East. 54.

[49] L. Mansfield in Lawton *v.* Salmon, *supra*, [48].

[50] *Supra*, p. 78.

[51] *Infra*, chap. 35. As to entailed proprietors, see chap. 34.

[52] 1 Hunter, L. and T., p. 324.

[53] St. 2.1.2. *et seq.*; Ersk. 2.2. *tot. tit.*; B. Pr. 1470; 2 B.C. 1 *et seq.*

[54] Cases in Am. and F. p. 214 *et seq.*; Brown, § 187 *et seq.*; Grady, p. 146; see esp. Hutchinson *v.* Kay, 23 Beav. 413, which also establishes the next proposition.

Scotch case illustrates this remark in much detail. A dwelling-house and its grounds were sold, subject to certain express exceptions and additions which did not aid the decision of the case. After reports by a man of skill, it was held that the purchaser was entitled to certain kitchen-garden stuffs planted for use in the course of the season, to a smoke-jack, and to tile-hearths laid on the original hearth-stones, bedded and jointed with cement, and enclosed with iron borders, which were soldered into the hearth; but not to potted plants, though sunk into the earth, nor to grates, gas-brackets, a hot-plate, or a mirror occupying the place of a window-shutter, nor to stone lions and fire-clay vases, fastened into parapets by stucco or cement to prevent their being blown over and not as part of the design.[55] 2. *Heritable and general creditors;* or heritable creditors in opposition to the debtor or his trustee in bankruptcy. The same rule obtains.[56] Of two Scotch cases falling within this class, one has been already adverted to.[57] The Court, in deciding it, put the true *ratio decidendi* of an earlier case, which was very favourable to the heritable creditor, on the special terms of the security, on an assignation to a fire policy, and on the possession.[58] The favour extended to the tenant in question with his landlord, as to the removing of trade fixtures, is refused to personal as against heritable creditors. The law is thus laid down in England: 'In the case of annexation by the 'freeholder of machinery and other fixtures, the things so annexed 'will pass to the mortgagee with the freehold; and this applies 'equally to articles which, as between landlord and tenant, would 'be considered as trade fixtures, as to any other articles which are 'really in the nature of fixtures.'[59] This is the case whether the annexation has been made before or after the date of the heritable security.[60] The same principles will guide the Court in construing clauses which expressly mention fixtures,[61] and will exclude the fixtures from the security, if that was clearly the intention of the parties.[62] It will thus be seen that the uniform course of decision in England sets at rest the doubt expressed by Mr Bell,[63]

Heritable and other creditors.

[55] Nisbet *v.* Mitchell-Innes, 20th Feb. 1880, 7 Ret. 575.

[56] Climie *v.* Wood, [42]; Mather *v.* Fraser, [46]. See form of remit to man of skill for the purpose of bringing out the criteria, M'Donald *v.* Cameron, 15th Nov. 1882, 10 Ret. 172.

[57] Niven *v.* Pitcairn, [17].

[58] Arkwright *v.* Billinge, 3d Dec. 1819, F.C.

[59] Longbottom *v.* Berry, [42], and cases there cited—viz., Mather, [46]; Walmsley, [41]; Climie, [42]; and Cullwick *v.* Swindell, L.R. 3, Eq. 249. These cases were followed in Holland *v.* Hodgson, [43].

[60] Cullwick *v.* Swindell, [59].

[61] Haley *v.* Hammersley, 7 Jur. N.S. 765.

[62] Waterfall *v.* Penistone, 6 E. and B. 876—commented on in Cullwick *v.* Swindell, [59].

[63] 1 B.C. 786 *et seq.* In a question

Diligence.

whether the same rules should not be applied here, as between landlord and tenant. 3. *Diligence.* The determination of what is subject to adjudication and inhibition, and what to poinding and arrestment, depends on precisely the same rules as obtain between heir and executor. There are, however, certain restrictions on the scope of poinding which do not belong to this work.[64]

Custom of district.

In many of the English cases already cited, and in others of which no mention has been made, the custom of the district in which the annexation was made, has been admitted as an element for the consideration of the Court, either if there be no contract to construe, or if its words require construction; but never to alter the meaning of the words of a deed.[65] It seems very doubtful whether custom should be admissible in such cases as questions between heir and executor, or between fiar and liferenter's representatives, between whom there is no privity of contract; for custom—where provable at all—is useful only to spell out what may be taken to have been the intention of parties in entering into an agreement, the whole terms of which have not been expressed. It will, however, be quite in its place in determining questions between landlord and tenant,[66] or vendor and purchaser, and in construing a heritable security, but the averment must set forth not merely a locally usual misunderstanding of the law, but a custom excepting certain articles from a known rule of law.[67]

(2) Constructive annexation.

(2) *Constructive annexation.*—Things in their own nature moveable, and never affixed to a heritable subject (and therefore not, properly speaking, fixtures), may be so intimately connected with a particular heritable subject as to be regarded as themselves heritable, in questions not only of succession but of contract and diligence. An example of such constructive annexation has been already pointed out in the cases of *Fisher* v. *Dixon*, and of *Brand's Trustees*,[68] where loose articles necessary for the working of the machinery went to the heir. One of the illustrations used in *Fisher's* case was the cover of a well. In another case, loose

inter socios, the bell of a factory was in the Court of Session regarded as a fixture; in the House of Lords the point was not adverted to—Barr *v.* M'Ilwham, 1 S. 124 (N.E. 122, correct the note), revd. 19th May 1826, 2 W.S. 153.

[64] 1503, c. 98; Ersk. 3.6.28; L. Adv. *v.* Forgan, 20th Feb. 1811, F.C. Appx. No. 1. As to what goes to swell the value in the Valuation Roll, see *infra*, chap. 13. Add an abnormal case, valuable for the opinions of the Law Peers, Wake *v.* Hall, 8 App. Cas. 195.

[65] Culling *v.* Tuffnell, Buller's N.P. 34, (noticed by L. Ellenborough in Elwes *v.* Maw, [8]); Lawton *v.* Lawton, [48]; Trappes *v.* Harter, [24]; Davis *v.* Jones, [15]; Rufford *v.* Bishop, 5 Russ. 346; per L. Hatherley, then Wood V.C., in Boyd *v.* Shorrock, L.R. 5, Eq. 80.

[66] 1. Hunter, 323.

[67] Nisbet *v.* Mitchell-Innes, *supra*, [55].

[68] *Supra*, [26], [28].

rolls in a rolling-mill actually fitted in, and duplicates which had been fitted in, were regarded as fixtures; while rolls destined to be so used, 'but which required something more to be done to 'them before they were fitted,' were deemed moveable.[69] More familiar examples are the keys of doors in buildings;[70] the title-deeds of an estate;[71] and a millstone, though temporarily disannexed.

(3) *Things heritable by destination.*—Unlike the other sorts of annexation, destination can only change the legal nature of a thing *quoad* succession, not as to the form of diligence;[72] for a creditor is not bound to know anything of the 'accidental 'characters' thus impressed upon it. Thus doors, windows, and other articles waiting to be fixed into a house which was in course of erection at the owner's death, were found to be heritable.[73] Right to manure, of which Mr Bell speaks doubtingly in both of his treatises, will probably follow the English and American rule,—that, if in heap, it goes to the executor; if laid out, to the heir.[74] Heirship moveables have disappeared from the law;[75] but by express destination, a moveable may still be declared heritable, as by being entailed.[76] It has been decided by Lord Shand, on grounds which seem indisputable,[77] that an entail of moveables, making them heirlooms, is not binding, even *inter heredes*, so as to prevent their going elsewhere within the family than with the lands—though an old case and some more modern *dicta* seem to tend in an opposite direction,[78] and though, in an earlier stage of the same case as was then before his lord- (3) By destination.

[69] *Per* Giffard L.J. in *Ex p.* Astbury L.R. 4, Ch. 630; Patton *v.* Moore, 37 Amer. R. 789.

[70] Liford's Ca., Co. Rep. Part. 11. p. 50; Place *v.* Fagg, 4 M. and R. 277.

[71] Ross's Lect. 2.381; Bell on Titles, 67. They cannot be pledged—Christie *v.* Ruxton, 27th June 1862, 24 D. 1182. On Agent's Hypothec—see Begg on Law Agents, chap. 15.

[72] Correct 1 B.C. 3, by B. Pr. 1475, citing Forbes *v.* Drummond, 1772, 5 B.S. 583, which, however, does not decide the point.

[73] Johnston *v.* Dobie, 1783, M. 5443; Gordon *v.* Gordon, 1806, Hume, 188. The same as to expense of finishing, as planned, a building begun by deceased, and not merely what was exigible for portion then completed or under actual contracts—Robson *v.* Denny, 2d Feb. 1861, 23 D. 429; Malloch *v.* M'Lean, 29th Jan. 1867, 5 Macph. 335; Holt *v.* Holt, 2 Vern. 322; Cooper *v.* Jarman, L.R. 3 Eq. 98. Erskine's distinction, 2.2.14, taken from the Roman law, has not been accepted; see Ivory's note, [30], and 2 B.C. 2.

[74] 2 B.C. 3, B. Pr. 1475; Lees *v.* Wilson, 1808, Hume, 191; Carver *v.* Piece, Styles's Rep. 66, per Roll. J.; see Higgon *v.* Mortimer, 6 C. and P. 616 (tenant).

[75] 31 & 32 Vict. c. 101, sect. 160.

[76] Veitch *v.* Young, M. Service and Confirmation, App. No. 4; Baillie *v.* Grant, 21st May 1859, 21 D. 838.

[77] Kinnear *v.* Kinnear, 17th Feb. 1876, 4 Ret. 705.

[78] E. Leven *v.* Montgomery, 1683, M. 3217; Maule *v.* Maule, 2d Dec. 1817, F.C.; 4th March 1829, 7 S. Appx. p. 6.

ship, the Court refused to disregard the directions of a truster to include certain valuables under a projected entail of his lands.[79] In any event, an entail of moveables will have no effect on creditors and *bonâ fide* purchasers;[80] for the statute does not apply to such subjects, nor does the Register of Entails lay any *nexus* on them.

List of articles adjudicated on.

Having thus treated of fixtures generally, of their fate in certain special relations of parties, and of articles which, without being fixtures, are treated, wholly or partially, as if they were, it might be convenient to add a list of what have been decided to be fixtures and what moveables, were it not that the Scotch lawyer has such a list in the most recent edition of Bell's Commentaries,[81] and that such a catalogue must necessarily be misleading, since every case must depend on its own circumstances. It is much safer to trust to the general doctrines just laid down, than to a supposed precedent, which may be found to halt in some material particular.[82]

[79] Kinnear *v.* Kinnear's Trs., 5th June 1875, 2 Ret. 765; 2 B.C. 2. See Ms. Bute *v.* Ly. Bute's Trs., 3d Dec. 1880, 8 Ret. 191, and *infra*, chap. 34.

[80] Sandf. on Entails, p. 252. 'Heir-'looms' bulk largely in English case law, but in such a way as to be useless to the Scotch lawyer.

[81] I. p. 789 *et seq.*, taken from Chitty on Contracts, 8th ed., p. 336 *et seq.*

[82] For peculiarities as to crops, see *supra*, p. 76.

CHAPTER IX.

EXCLUSIVE USE, TRESPASS, AND GAME.

Exclusive use.

As has been already observed, it is of the nature of property to be exclusive. As put by Sir Ilay Campbell,[1] 'No man can claim 'a road or passage through another man's property, even for the 'purpose of going to church, without a servitude, far less for 'amusement of any kind, however necessary for health. He 'cannot, without the proprietor's leave, insist to range through 'his grounds in quest of hidden treasure and precious stones, &c., 'though these last are said to be *res nullius quæ cedunt occupanti.* 'So soon as property is established, every man becomes entitled 'to the exclusive right of exercising it *nisi lex, vel conventio, vel* 'testatoris voluntas obsistat.' Examples of all these sorts of restriction will appear in their proper places. Attention will be directed here,—first, to this right of exclusive enjoyment generally; next, to the law of trespass, in the narrowest sense of the word; and lastly, to the laws relating to game.

Examples of encroachment.

It is involved in the exclusive nature of ownership that a proprietor is entitled to resist any encroachment made within his boundaries by his neighbour in building, planting, mining, or in any other way. Instances of such encroachments have occurred in cases of jutting cornices,[2] of a wall overhanging an adjacent owner's march-line,[3] of beams or joists being inserted in his proper gable,[4] of eavesdrop falling within his ground in the absence of any servitude,[5] of an overhanging tree,[6] and of a mine driven within his property.[7] He is equally entitled to prevent his

[1] In E. of Breadalbane *v.* Livingstone, 1790, M. 4999, affd. 1791, 3 Pat. 221. Notes printed from L. P. Campbell's Sess. Pa.

[2] Miln *v.* Mudie, 12th June 1828, 6 S. 967; Hazle *v.* Turner, 22d May 1840, 2 D. 886.

[3] M'Intosh *v.* Scott & Co., 1st Feb. 1859, 21 D. 363; see Sanderson *v.* Geddes, 17th July 1874, 1 Ret. 1198, 9 Ret. H.L. 92.

[4] *Infra*, chap. 32.

[5] *Infra*, chap. 29, Part I. *ad fin.*

[6] Halkerston *v.* Wedderburn, 1781, M. 10495; see *infra*, chap. 32.

[7] *E.g.*, Durham *v.* Hood, 3d Feb. 1871,

neighbour from making use of a water-pipe which he himself had erected near his boundary for the sole use of his own tenement,[8] or from laying gas-pipes or other conduit-pipes in his soil, unless authorised by Act of Parliament.[9] The question of right to set up a sign-board or paint a sign on a tenement which does not belong in any way, or at least solely, to the party claiming the right, has been adjudicated on in many decisions, which settle, first, that no such right exists at common law where the claimant is owner of a tenement situated in a close, and the spot on which he asserts his right to fix or paint the sign is on the front wall of the tenement at the mouth of the close and facing the street;[10] secondly, that a party in that position has a right to make use of this front tenement by setting up his sign on the wall of the close itself, this being regarded as accessory to his right of ish and entry thereby;[11] and lastly, that neither of two proprietors, upper and lower, can put up his sign on a line of stone-belting which serves to indicate externally the boundary between their premises.[12] It may be well to add, so as not to have to return to the subject of business signs, that it is scarcely conceivable that the right of erecting these could in any case be gathered from acquiescence on the part of the servient owner, having regard to their inexpensive nature, and the ease with which they may be removed or obliterated;[13] that it is extremely doubtful whether such a right to exhibit a business sign *in alieno* may be constituted as a predial servitude; and that, consequently, it would be unsafe to trust to anything short of constitution by express infeftment.[14] It is true that in a recent case the owner of a shop was held to be entitled to retain a sign-board which extended beyond the middle of the joists between his shop and

Business signs.

9 Macph. 474; cf. Wilsons *v.* Waddell, 8th Jan. 1876, 3 Ret. 288, affd. 1st Dec. 1876, 4 Ret. H.L. 29; Ramsay *v.* Blair, 22d Oct. 1875, 3 Ret. 25, affd. 22d May 1876, 3 Ret. H.L. 41; Firmstone *v.* Wheeley, 2 D. and L. 203; Livingstone *v.* Rawyards Coal Co., 20th May 1879, 6 Ret. 922, affd. 13th Feb. 1880, 7 Ret. H.L. 1, 5 App. Cas. 25, and English Cases there cited.

[8] Hazle *v.* Turner, *supra*, [2].

[9] Galbreath *v.* Armour, 11th July 1845, 4 B. App. 374; B. Pr. 942.

[10] Thomson *v.* Crombie, 1776, M. 13182; Monro *v.* Davidson, 1808, Hume, 518; Lowrie *v.* Drysdale, 13th May 1812, F.C.; see Murdoch *v.* Dunbar, 1783, M. 13184 (cannot be removed *brevi manu*); and Thomas *v.* Keating & Co., 18th July 1855, 17 D. 1133; see Francis *v.* Hayward, 22 Ch. D. 177.

[11] Walker's Trs. *v.* Learmonth & Co., 17th Nov. 1824, 3 S. 288 (N.E. 202). The principle of the case will apply to the erection of a sign-board, provided the use of the close for passage is not materially impeded.

[12] Murray *v.* Mackenzie, 1812, Hume, 520.

[13] Buchanan *v.* Carmichael, 25th Nov. 1823, 2 S. 526 (N.E. 460). See as to acquiescence generally, *infra*, chaps. 24, 25.

[14] Alexander *v.* Butchart, 24th Nov. 1875, 3 Ret. 156.

the floor above, and was affixed to a cornice which finished off the shop front, on the ground of possession for more than forty years during several ownership; but the reasons given for the decision do not appear to bring the case within any known doctrine of the law of property. There were none of the usual data for inferring acquiescence rather than mere tolerance; there was no room for claiming exclusive ownership in the cornice so far as it encroached: the right maintained was not one of the known servitudes; it could not be described as a legalised nuisance; and it bore no resemblance to the well-established rights of common interest in flatted houses. It is not, therefore, surprising that the judges of the Second Division, while reaching the above conclusion, were not at one in their grounds of judgment.[15] Other cases of encroachment will appear in discussing rights of water.[16]

Proof of actual damage unnecessary.

In these, as in all other cases of encroachment by one landowner on the premises of his neighbour, it is not required of the latter to show any patrimonial loss, present or anticipated. The invasion of his exclusive right of enjoyment is in itself an *injuria*, which he is entitled to get rid of without proving any actual damage.[17]

Measure of damages.

Where loss has actually been caused, many curious questions have arisen as to the measure of damages. The American Courts have frequently been confronted with such questions where timber has been cut *in alieno*, and removed.[18] Similar cases are not likely to present themselves in the old country. But the results of the more occult fact of encroachment beyond boundary in mining are of universal interest. An equitable distinction is drawn (similar to that between the claims of a *bonâ fide* and of a *malâ fide* possessor to *impensæ utiles* in the Roman law[19]) between encroachment which has taken place inadvertently[20] under *bonâ fide* belief of title,[21] fairly and honestly,[22] or by mere mistake,[23] and

[15] M'Arly *v.* French, 8th Feb. 1883, 20 S.L.R. 371. The English law of prescription is more flexible, Moody *v.* Steggles, 12 Ch. D. 261.

[16] *Infra*, chap. 29.

[17] Miln *v.* Mudie, and Hazle *v.* Turner, *supra*, note [2]; cf. Bannatyne *v.* Cranston, 1624, M. 12769; Hamilton *v.* Edington & Co., 1793, M. 12824; Burgess *v.* Brown, 1790, Hume, 504; L. Blackburn in Ewing *v.* Colquhoun's Trs., 30th July 1877, 4 Ret. H.L. 116, 126.

[18] Foote *v.* Merrill, 20 Amer. R. 151; Railway Co. *v.* Hutchins, 30 ibid. 629; Tilden *v.* Johnson, 36 ibid. 769; Strubbee *v.* Cincinnati Ry. Co., 39 ibid. 251; and see Murphy *v.* S. C. and P. R. Co., 39 ibid. 175.

[19] *Supra*, p. 79 note.

[20] Hilton *v.* Woods, L.R. 4 Eq. 432.

[21] Jegon *v.* Vivian, L.R. 6 Ch. 742; Ashton *v.* Stock, 6 Ch. D. 719.

[22] Wood *v.* Morewood, 3 Q. B. 440, note.

[23] United Merthyr Coal Co., L.R. 15 Eq. 46 (the measure being what the true owner would have had to pay for severance and bringing to bank).

that which has taken place through fraud,[24] or [gross] negligence,[25] or wilfully,[26] or in a wholly unauthorised and unlawful way,[27] or furtively and in bad faith.[28] In the former case, the whole expenses, both of severance in the mine and of bringing the mineral to bank, are allowed to the encroacher as a deduction from the value as at the pit-mouth; in the latter case, only the expense of bringing to bank.[29] This rule, though originally springing out of a peculiarity of English process, is justified in the eyes of a Scotch lawyer by the fact that the severance only adds to the value of the mineral, while the raising is absolutely necessary to its use in its severed state. The first part of the rule is just a mode of discovering the fair value at the same rate as if the mine had been purchased, so far as encroached on, at the fair market value of the district while the minerals were yet part of the soil.[30] But this is not the only mode, and it is sometimes possible to proceed more directly. Thus, in an action at the instance of the proprietor of a feu, extending to about an acre and a half, the coal under which was not, as was the case in the adjoining feus all round it, reserved to the superior, against the lessees of the superior's mineral field for damages for working out the coal under the feu, there being admittedly a common error, and entire *bona fides* on both sides, it was held that the measure of damage was to be determined, not, on the one hand, by the profit accruing to the encroacher, subject to actual working costs; nor, on the other hand, by the impracticability of working to profit separately the coal under so small a subject; but proportionally by the rate paid by the lessees to the superior as royalty for the surrounding coal-field.[31] In all cases, surface damage, if it has been incurred, will be included,[32] but apparently not any claim for way-leave over the roads or wastes made in working in the land encroached on.[33]

Trespass—how here meant.

The word 'trespass' was unknown in our early law, and was introduced from England, where it was used in a very wide sense

[24] Ecclesiastical Comrs. *v.* N.E. Ry., 4 Ch. D. 845.

[25] Martin *v.* Porter, 5 M. and W. 352.

[26] Llynvi Co. *v.* Brogden, L.R. 11 Eq. 188.

[27] Livingstone *v.* Rawyards Co., *supra*,[7].

[28] Ibid., *supra*, [7].

[29] See the cases collected in Trotter *v.* Maclean, 13 Ch. D. 574; Justice Fry's *dicta* therein were approved in Joicey *v.* Dickinson, 45 L.T.N.S. 643. The American decisions agree—Barton Coal Co. *v.* Cox, 17 Amer. R. 525; Illinois R.R. Co. *v.* Ogle, 25 ibid. 342; Waters *v.* Stevenson, 29 ibid. 293; M'Lean County Coal Co. *v.* Lennon, 33 ibid. 64; Franklin Coal Co. *v.* M'Millan, 33 ibid. 280.

[30] Jegon *v.* Vivian, *supra*, [21]; and L. Blackburn in Livingstone *v.* Rawyards Co., *supra*, [7].

[31] Livingstone *v.* Rawyards Co., *supra*,[7].

[32] Ibid., and see chap. 28, *infra*.

[33] Livingstone *v.* Rawyards Co., *supra*,[7], *per* L.O. Craighill, and Lds. Hatherley and Blackburn.

to denote all the wrongs to which the common-law remedy, which went by the same name, was applicable. In Scotland it is popularly, and it may be here conveniently, used to denote any temporary intrusion, or entering or being upon the lands or heritages of another without his permission. If the trespass be more than transient, it becomes either encroachment or that ejection or intrusion which has already been discussed—the element of ousting the owner from possession being then more prominent. The trespass may be that of a human being, or of tame or domesticated animals. The latter case will be treated more conveniently under the head of Fences.

When excluded.

Except in the exercise of a public duty, or of some public franchise or private right, no one is entitled without the permission of the proprietor to enter his land or house,[34] on foot, on horseback, or in a vehicle,[35] or his private loch or river by swimming or in a boat. It is of no consequence whether the land be enclosed or not.[36] But it is of public concern that the rule requiring such permission should be relaxed in certain exceptional cases,—as for the purpose of extinguishing a fire, in the tenement entered or in another; for preventing a crime or pursuing a criminal;[37] in order to escape from some pressing danger or apprehended peril; or in defence of the possession of one's goods or bestial taken by the landowner, or recently straying on his land.[38] Farmers in a pastoral district are justified in trespassing in pursuit of foxes, if their destruction is necessary for the protection of sheep and other animals liable to become their prey, more especially if such be the custom of the district.[39]

Remedies.

As the law of Scotland never recognised the infliction of imprisonment for debt, so it knows of no penalty for a simple act of trespass; but in the same way that a debtor was imprisoned, as a rebel, for allowing himself to be put to the horn, the trespasser may be severely dealt with, as in contempt of Court. He may indeed jeer at the time-honoured placard, which threatens him

[34] In England, 'break his close.'

[35] *Infra*, pp. 128 *et seqq.*, and chaps. 19, 25, 26, for game cases, cases of public right of way, and servitudes: as also Watson *v.* E. Errol, 1763, M. 4991; Ms. Tweeddale *v.* Dalrymple, 1778, M. 4992, 5 B.S. 475; and E. Breadalbane, *supra*, [1]; Baird *v.* Thomson, 19th Jan. 1825, 3 S. 448 (N.E. 313); Paul *v.* Summerhayes, 4 Q. B.D. 9.

[36] Cases in last note.

[37] B. Pr. 957; see 31 & 32 Vict. c. 123, sect. 27; 33 & 34 Vict. c. 57, sect. 10; and Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, sect. 446, in aid of wrecked vessels.

[38] English cases in Addison on Torts, p. 349.

[39] Colquhoun *v.* Buchanan, 1785, M. 4997. The same in English law, provided the good of the public, not the party's own amusement, was the governing motive—*per* L. Ellenborough in case cited in Christian's Game Laws, p. 114.

with rigorous prosecution, as *brutum fulmen*. But the proprietor or possessor of the land or building entered has the right to turn him off, ordering him to quit the land in a given or in any direction. In case of refusal to obey, the use of violence will be equally unjustifiable, and will equally found a claim for damages, whether the intrusion be founded on an alleged public right of way or servitude; or, on the other hand, be an impudent trespass not justified by any claim of right.[40] The opposite would be the rule if an intending trespasser was checked in the act of making his entry on the land; or if a trespass actually committed is accompanied with violence to the interrupter, or such threats or demonstrations thereof as reasonably to alarm the latter for his own safety. These last elements, added to the special sacredness in the eye of the law of a dwelling-house, and of property contained in it, explain how it is that violence may lawfully be used to a housebreaker, and even homicide may in certain circumstances be justifiable.[41] If the trespass be accompanied with destruction of property—such as woods, fences, and the like—the common law of malicious mischief is comprehensive enough to reach, and adequate to punish, such offences, without calling for the assistance of a series of old statutes which are practically in abeyance.[42] If the act be the breaking down of a fence recently erected across the only access to the house of the accused person, the proper remedy is a civil action, not a criminal complaint.[43] Even the owner is liable to penalties if he defaces an ancient monument which he has put under the protection of the Act passed in that behalf.[44]

Vi et facti.

Housebreaking.

Malicious mischief.

Ancient monuments.

Interdict.

But in cases of simple trespass the only remedy at law is the purely civil preventive process of interdict.[45] When there is an allegation of public or servitude right, application for interdict may in reality be the formal method of determining the state of posses-

[40] See E. Eglintoun *v.* Campbell, M'Laurin's C. T., p. 505; and *infra*, p. 137.

[41] Hume on Crimes, i. 220-1, 247; Alison, i. 104; Macdonald, pp. 151, 164, and case of Lane, Bell's Notes, 77; see case of stealing chickens by night, Marks *v.* Borum, 25 Amer. R. 764.

[42] M'Kay *v.* Patrick, 25th Oct. 1882, 20 S.L.R. 23 (30 days imprisonment for malicious mischief to trees); Hume, i. 222; Alison, i. 448; Macdonald, 133. The series of Scots Acts begins with 1424, c. 33, and ends with 1698, c. 16. The only subsisting British Acts are—1 Geo. I. st. 2, c. 48, amended by 6 Geo. I. c. 16. Certain later statutes—6 Geo. III. cc. 36 & 48, 9 Geo. III. c. 41, 13 Geo. III. c. 33—are repealed. The cases are to be found in the following pages of Morrison—10478-9, 10484, 10492, 10497, and Planting and Enclosing, App. 1 and 2; and see Tait, Hutchison, Barclay, *sub vocc.*

[43] Black *v.* Laing, 29th Oct. 1879, 7 Ret. (Just.) 1.

[44] 45 & 46 Vict. c. 73, sects. 6-8.

[45] Cases of Watson, Ms. Tweeddale, and Baird, *supra*, [35].

sion pending the issue of a declarator. If there be no such pretension, the trespasser is definitely put in peril of the penalties of contempt of court in case of any future trespass, as has already been explained.[46] But, as also already pointed out,[47] even in his case decree will not go out unless the complainer can prove a reasonable apprehension of a repetition of the same or similar intrusion.[48] Even an undoubted trespass will not warrant a decree of interdict if in the special circumstances of the case the act was done *in optimâ fide*, and with no thought of offending the landowner;[49] or done by the permission of the occupier, and without any pretension to set up a right of passage available against the owner.[50] Even if the application be granted, and a technical contempt of Court be thereafter proved, the Court will look to the whole circumstances in passing its *quasi* criminal sentence. It is competent for the proprietor to join with a tenant on his land in an application for interdict against trespassing on his estate generally, and in particular on the farm occupied by the tenant; and in the same petition to ask for penalties for breach of prior interdicts against one of the same parties, though some of these interdicts were obtained by the tenant, others by the proprietor, if they have a joint interest, and the acts of trespass were part of a system.[51]

Spring-guns and other dangerous implements.

Various 'blind and indiscriminating'[52] means have been invented and used at different times to add to the ordinary terrors of the law the dread of injury to the person of the trespasser, or to straying animals. The regulation of these extraordinary safeguards has in Scotland been left to the operation of the common law; and the humanity of her landowners is attested by the fact that in only one case does a member of the public seem to have suffered from their use. It was there found that laying a spring-gun to shoot trespassers was indictable as murder if death ensued, though there was no design against any particular person.[53] In England the growth of humanitarian ideas produced a statute which may fairly be taken as embodying the state of the law in Scotland at the present day.[54] By it, 'whoever shall set or place or 'cause to be set or placed, or shall knowingly and wilfully contrive 'any spring-gun, man-trap, or other engine calculated to destroy

[46] *Supra*, p. 16.
[47] *Supra*, p. 14.
[48] Hay's Trs. *v.* Young, 31st Jan. 1877, 4 Ret. 398.
[49] Ibid.
[50] Steuart *v.* Stephen, 12th June 1877, 4 Ret. 873.
[51] Jolly *v.* Brown, 28th May 1828, 6 S. 872.
[52] B. Pr. 961.
[53] Craw, 1827, Syme, 188, 210, Shaw (Just.), 194.
[54] 7 & 8 Geo. IV. c. 18; re-enacted, 24 & 25 Vict. c. 100, sect. 31.

'human life or inflict grievous bodily harm, with the intent that 'the same, or whereby the same, may destroy or inflict grievous 'bodily harm on a trespasser or other person coming in contact 'therewith, shall be guilty of a misdemeanour;' but the setting of any gin or trap, such as is usually set with intent to destroy vermin, is not to be thereby rendered illegal; nor the setting of a spring-gun, man-trap, or other engine in a dwelling-house for the protection thereof in the night-time.[55] The distinction between the protection of a dwelling and of other premises is pointed out by Mr Bell,[56] and is consistent with what has just been said of housebreaking. For the same reason, one is entitled to keep a ferocious dog for the protection of his house, though not of his garden or orchard, and to turn it loose at night so long as it does not disturb the neighbours by barking;[57] but not to place it where it might attack a person innocently coming to the place for a lawful purpose during the day-time, or dangerously near a path, even though only a private one;[58] and a notice to 'beware of the dog' will not protect the owner, if it was not in point of fact read.[59] The protection of straying animals is not put on the same footing in England as that of human beings, and is not statutory. Thus the master of a dog injured by coming against a dog-spear set in a wood for the purpose of destroying dogs trespassing has no remedy, though the dog strayed 'by reason of his own natural instinct' and against its owner's will.[60] But an action of damages lies against one who causes the destruction of dogs or other domestic animals by setting traps with strongly-scented meats, though only for the purpose of killing vermin; for according to Lord Ellenborough, 'every man must be 'taken to contemplate the probable consequences of the act he 'does.'[61] The prudent landholder can hardly fail to see that he himself and his dependants incur greater risks from such engines

[55] Ilott *v.* Wilkes, 3 B. and Ald. 304; Bird *v.* Holbrook, 4. Bing. 628.

[56] B. Pr. 961.

[57] Ibid., and Brock *v.* Copeland, 1 Esp. 203.

[58] *Per* Tindal C.J. in Sarch *v.* Blackburn, 4 C. and P. 300; M. and M. 506; Curtis *v.* Mills, 5 C. and P. 489; Addison on Torts p. 113 (5th ed.)

[59] Case of Sarch in [58]. As to liability for the acts of ferocious dogs at large—see 26 & 27 Vict. c. 100, following on Fleeming *v.* Orr, 5th March 1853, 15 D. 486, revd. 3d April 1855, 2 Macq. 14; also Renwick *v.* Von Rotberg, 2d July 1875, 2 Ret. 855; Act 34 & 35 Vict. c. 56 (Dogs Act, 1871); Henderson *v* M'Kenzie, 18th March 1876, 3 Ret. 623; Cowan *v.* Dalziels, 23d Nov. 1877, 5 Ret. 241; Burton *v.* Moorhead, 1st July 1881, 8 Ret. 892; Wood on Nuisance, p. 870.

[60] Jordin *v.* Crump, 8 M. and W. 782; see Deane *v.* Clayton, 7 Taunt. 489.

[61] Townsend *v.* Wathen, 9 East. 276, 280—see Brent *v.* Kimball, 14 Amer. R. 35, and a quaintly American judgment in the case of a mink, Aldrich *v.* Wright, 16 Amer. R. 339.

than all the rest of the world; and as a matter of practice he trusts wholly to safeguards of a less unreasoning kind.

Reparation for damage done.

Along with, or without, an application for interdict, damages may be sued for, provided some actual injury to the landowner's premises, as by breaking down fences or treading down growing crops, can be alleged or proved.[62] In England, an action of damages lies for the mere trespass, as by walking over grass; for every encroachment on the exclusive nature of the owner's right is regarded as an injury to the land. In such a case the owner would be entitled to a verdict, though only for nominal damages.[63] In Scotland, special damage must be shown; and this the pursuer, in the case figured, would fail to prove. Expenses will in the ordinary case be found due by the trespasser, if interdict be obtained, either on his admission or on proof; and, in order to fix liability in this respect alone, it may be necessary to go to probation.[64]

Expenses.

Statutory trespass.

Such is the common law of Scotland with regard to trespass. The protection of property has been further secured by the infliction of penalties in two different sets of cases: (1) In the circumstances contemplated by the Trespass (Scotland) Act, 1865;[65] and (2) in those provided for in the game statutes. Of these in their order.

Trespass Act of 1865.

The Trespass Act of 1865 was passed for the purpose chiefly of preventing strolling tinkers, gipsies, and others, from squatting without permission on private property or private roads. Highways had been protected by earlier statutes.[66] The third section enacts that 'every person who lodges in any premises,[67] or 'occupies or encamps on any land, being private property, without 'the consent and permission of the owner or legal occupier of 'such premises or land, and every person who encamps or lights 'a fire on or near any private road or enclosed or cultivated land, 'or in or near any plantation, without the consent and permission 'of the owner or legal occupier of such road, land, or plantation, 'or on or near any turnpike road, statute labour road, or other 'highway, shall be guilty of an offence punishable as hereinafter 'provided.' Section 4 provides for the apprehension and speedy trial of the offender, and visits a first offence with a penalty not

[62] Watson, [35]; Colquhoun, [39].

[63] Holt C.J. in Ashby *v.* White, 2 Ld. Raym. p. 955; Embrey *v.* Owen, 20 L.J. Exch. 212; Bonomi *v.* Backhouse, E.B. and E. 657, 9 H.L. 503.

[64] Menzies *v.* Macdonald, 1878, 8 Sc.L.R. 81.

[65] 28 & 29 Vict. c. 56.

[66] 1 & 2 Will. IV. c. 43, sect. 96 (12); 8 & 9 Vict. c. 41, sect. 26 (12). The former is scheduled in 41 & 42 Vict. c. 51. See Appx. 12, *infra*.

[67] *I.e.*, 'any house, barn, stable, shed, 'loft, granary, outhouse, garden, stack-'yard, court, close, or enclosed place.'

'human life or inflict grievous bodily harm, with the intent that 'the same, or whereby the same, may destroy or inflict grievous 'bodily harm on a trespasser or other person coming in contact 'therewith, shall be guilty of a misdemeanour;' but the setting of any gin or trap, such as is usually set with intent to destroy vermin, is not to be thereby rendered illegal; nor the setting of a spring-gun, man-trap, or other engine in a dwelling-house for the protection thereof in the night-time.[55] The distinction between the protection of a dwelling and of other premises is pointed out by Mr Bell,[56] and is consistent with what has just been said of housebreaking. For the same reason, one is entitled to keep a ferocious dog for the protection of his house, though not of his garden or orchard, and to turn it loose at night so long as it does not disturb the neighbours by barking;[57] but not to place it where it might attack a person innocently coming to the place for a lawful purpose during the day-time, or dangerously near a path, even though only a private one;[58] and a notice to 'beware of the dog' will not protect the owner, if it was not in point of fact read.[59] The protection of straying animals is not put on the same footing in England as that of human beings, and is not statutory. Thus the master of a dog injured by coming against a dog-spear set in a wood for the purpose of destroying dogs trespassing has no remedy, though the dog strayed 'by reason of his own natural instinct' and against its owner's will.[60] But an action of damages lies against one who causes the destruction of dogs or other domestic animals by setting traps with strongly-scented meats, though only for the purpose of killing vermin; for according to Lord Ellenborough, 'every man must be 'taken to contemplate the probable consequences of the act he 'does.'[61] The prudent landholder can hardly fail to see that he himself and his dependants incur greater risks from such engines

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[65] 28 & 29 Vict. c. 56.

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[67] *I.e.*, 'any house, barn, stable, shed, 'loft, granary, outhouse, garden, stack-'yard, court, close, or enclosed place.'

exceeding twenty shillings, or imprisonment not exceeding fourteen days; and a second or any subsequent offence with a fine of not more than forty shillings, or imprisonment for not more than twenty-one days. By the 5th section private prosecution and all proceedings commenced later than within one month after the offence, are prohibited. It is believed that this Act has been found very useful in putting a stop to much petty pilfering and wanton destruction of woods and fences in country districts.

Game laws—how far here considered.

The whole subject of the Game laws is one of much interest and some complexity; and it may be well to state at the outset what part of it falls within the present treatise. The policy of the law does not concern the lawyer so much as the legislator or economist. The relations as to game between landlord and tenant are set forth with sufficient detail by Mr Hunter.[68] The ancient history of the pursuit of wild animals in Scotland has been traced by many competent hands, and only claims mention here when illustrating the present state of the law. And lastly, the point of view now to be assumed is that, not of the public or of the consumer, but of the landowner.

Tame animals.

The word 'game' denotes a division of the class of wild as distinguished from tame animals. The distinction is important in the law of ownership. Animals *mansuetæ naturæ*, naturally tame or tamed by man; and such animals, *feræ naturæ*, as are so enclosed as to have lost their natural liberty, or such as retain (and so long as they retain) the habit of returning home after straying afield,—are in the fullest sense the property of him who has brought them under his power. Examples of these are dogs or cats; deer in a park, rabbits in a warren, or fish in a pond; bees and pigeons.[69] The appropriation of such creatures by any other than their true owner is theft, and has been declared such by old statutes in cases where there might have been room for doubt.[70] In only one case is there any peculiarity in the connection between the ownership of these creatures and property

[68] Hunter, i. p. 318, and add the Ground Game Act, 43 & 44 Vict. c. 47, commented on in Brown *v.* Thomson, 20th July 1882, 9 Ret. 1183, and Fraser *v.* Lawson, 21st Dec. 1882, 20 S.L.R. 281; also Irvine, Game Laws, pp. 36, 125.

[69] In Roman law, Gai. 2.67-8; 12-16 I. (2.1): 5 D. (41.1), is very minute in its distinctions: Cr. 2.8.13; St. 2.1.33; Ersk. 2.1.10; B. Pr. 1290. The English law of parks, free warrens, and other franchised places, is stated in 2 Burn's Justice, p. 744.

[70] 1 Hume on Crimes, 82, and Acts there cited, 1474, c. 60; 1535, c. 13; 1555, c. 58; 1579, c. 84; 1587, c. 59. See L. Adv. *v.* Huie, 10th Sept. 1842, 1 Broun, 383 (fish caught in a net); Wilson *v.* Dykes, 2d Feb. 1872, 2 Coup. 183 (dead pheasant picked up on a public road—case decided on insufficiency of the charge). It is not poaching, Macdonald *v.* Maclean, 28th Feb. 1879, 6 Ret. (Just.) 14 (dead wild deer).

in land. Tame pigeons[71] are stolen when taken feloniously from their dove-cote.[72] Breaking dove-cotes was of old severely punished.[73] It is, moreover, unlawful to kill pigeons when out of the cote; and there is no limit to the distance from home at which this is the case.[74] The breeding of tame pigeons, originally introduced by the clergy, and fostered by Parliament, threatened, in the hands of persons whose property was insufficient to provide these birds with food, to be oppressive to neighbours, who had no means of protecting themselves except by scaring away the depredators;[75] till, by a statute[76] still in observance, it was enacted that no person should be at liberty to build a dove-cote, unless he had lands and teinds pertaining to him, extending in yearly rent to ten chalders victual,[77] within two miles of the same; and such a person might build only one dove-cote within these bounds. In interpreting this enactment, it has been decided that a dove-cote legally erected does not require to be demolished on passing into the hands of one who has not the requisite qualification,[78] but that, if ruinous, it cannot be rebuilt; that the close of the statute does not prohibit the erection of a pigeon-house for every ten chalders, so long as the limit in distance is kept;[79] and that an illegal cote is sufficiently rendered innocuous by building up the head, so that the birds may not enter, demolition not being necessary.[80] No limit is prescribed to the size of the dove-cote, nor to the number of its inhabitants; but there are indications that the Court was in the habit of regulating these matters, since otherwise the Act might be reduced to a nullity. Pigeons.

Right to wild animals is more closely connected with right to land. The law of fishing may be reserved to be included in the law relating to salmon and waters. Wild animals, other than fish, are regarded by the law of Scotland as either protected by certain statutes in a greater or less degree, or as unprotected in any way except by the ordinary operation of the rights of land-ownership. The wild animals which belong to the latter class Wild animals.

[71] Cr. 2.8.23; St. 2.3.78; Bankt. 2.3.167; Ersk. 2.6.7; B. Pr. 975.

[72] 1474, c. 60.

[73] 1579, c. 84.

[74] 1567, c. 16; 1597, c. 270; Eiston *v.* Longlands, 18th May 1832, 5 Deas and And. 285, per L. Balgray correcting Bankt. 2.3.167, who had retracted his opinion that shooting pigeons was legal; Murray *v.* Turnbull, 1797, M. 7628. See this case for the jurisdiction. In England the same by 2 Geo. III. c. 29; repealed 7 & 8 Geo. IV. c. 27, sect. 1; new provision, 7 & 8 Geo. IV. c. 29, sect. 33.

[75] Eiston, *supra*, [74].

[76] 1617, c. 19.

[77] 16 bolls of 1½ cwt. each = a chalder, value, £15-£16.

[78] Kinloch *v.* Wilson, 1731, M. 3601.

[79] Brodie *v.* Gordon, 1752, M. 3602; and App. *v.* Dovecot, No. 1.

[80] Durie *v.* Burntisland, 1682, M. 3601.

Game.

are chiefly vermin. The expression 'game[81] laws' may, though not very aptly, be used in a wide sense to denote any regulations which go to restrict the natural right of every man to appropriate by *occupatio* or capture that which does not belong to any other. For the Scotch—differing herein from the English[82]—law regards a wild animal as a *res nullius*, which becomes the property of its captor, however illegal the capture may be.[83] Of these restrictive regulations, some apply to the whole class of animals whose capture is not left open to all; others only to some members of that class; and certain of the latter are termed 'game' in the narrower sense, simply from having been favoured by the protection of certain of the older statutes. These and the later statutory restrictions are very various, and apply differently to different animals.

'Incident of 'landed pro- 'perty.'

I. *Qualification.*—The evils of trespass, the benefits arising from the exercise of field-sports, and other public considerations combined, while leaving untouched the law as to the right of property in individual animals, to set up the rule that 'the right of killing 'game, considered as a real right, is an incident of landed pro- 'perty.'[84] It is true that Balfour, quoting old authorities, says that it is 'leesome to all men to chase hares, foxes, and other wild beasts 'being without forests, warrens, parks, or wards.'[85] But these animals were regarded as vermin, and the rules of the Roman law were allowed to prevail outside enclosures and franchises. The common law of Scotland, on the contrary, is, that all men have right and privilege of the game on their own estates and property, exclusively of all others,[86] except as to such animals as fall among the regalia—*i.e.*, salmon and swans.[87] This right may be im-

Landed qualification.

[81] The sense in which the word 'game' in its narrow meaning is used in various statutes will be expounded under each of these. The subject of the remainder of this chapter is admirably and fully discussed in Mr Irvine's work on the Game Laws, 3d ed. 1883.

[82] The theory in England is, that a title to property created merely by occupation necessarily implies that the act of occupation is not of a wrongful nature; and capture by a trespasser does not create a title of property in him, but converts that which before was a qualified or special right of property, in the person of the owner of the land where the capture took place, into absolute property in him. See Blades *v.* Higgs, 11 Clark, H.L. 621, 631. *per* L. Chan. We shall see that forfeiture by special statute brings the two systems very close together in practice.

[83] St. 2.1.33; Ersk. 2.1.10; B. Pr. 1288; Scott *v.* Everitt, 18th Jan. 1853, 15 D. 288.

[84] *Per* L. Corehouse in Pollock, Gilmour, & Co. *v.* Harvey, 5th June 1828, 6 S. 913; Birkbeck *v.* Ross, 22d Dec. 1865, 4 Macph. 272, *per* L. Barcaple.

[85] Balf. Pract. p. 642; Quon. Att. c. 29; Mod. ten. Cur. c. 27 (should be c. 52).

[86] Kelly *v.* Smith, 1780, M. 4995; Cr. 2.8.13; St. 2.3.76; Bankt. 2.1.7; 2.3.167; Ersk. 2.6.6; B. Pr. 949, 953, 1224, 1226.

[87] St. 2.3.60; Ersk. 2.6.15; Bankt. 4.17.15; not deer—D. Athole *v.* Macinroy, 28th Feb. 1862, 24 D. 673.

parted to others absolutely or in lease, or may be reserved in disposing of the land.[88] But, inconvenience having arisen from every small landowner having this exclusive personal privilege, a landed qualification, which still subsists,[89] was introduced in these words: 'That no man hunt or haulk at any time hereafter, who hath not 'a plough of land in heritage, under the pain of one hundred 'pounds' (Scots).[90] The penalty is to be paid, one half to the Crown, the other to the informer, and is now made capable of modification.[91] 'The term "hunting" is a generic word, compre-'hending every mode of finding and following game[92] with dogs, 'and is used in that comprehensive sense in other Acts of the 'Parliament of Scotland, particularly the Act 1707, c. 13. It 'therefore comprehends shooting with fowling-pieces, as now prac-'tised in the kingdom; and no person can now kill game with dogs 'and fowling-pieces who has not a plough-gate of land in heri-'tage.'[93] Probably shooting without dogs will follow the same rule; but snaring hares does not come within it.[94] But 'by the con-'stant usage of Scotland a qualified person may grant permission to 'shoot over his own lands to a person who is not himself quali-'fied,'[95] whether he be his servant or not. This permission may be either occasional or by lease. Right of fowling or otherwise killing game may also be granted permanently in a feu-right—in which case it must be exercised in a sportsmanlike manner, personally, or by a gamekeeper, or by duly qualified friends, whether tenants of the lands to which the privilege is attached or not;

[88] For the interpretation put on special clauses of conveyance or reservation, see E. Aboyne *v.* Innes, 22d June 1813, F.C., affd. 6 Pat. 444; Carnegie *v.* L. Kintore, 15th Dec. 1829, 8 S. 251, and Do. *v.* Mactier, 2d July 1836, 14 S. 1079.

[89] Trotter *v.* MacEwan, 8th July 1809, F.C.

[90] 1621, c. 31. Its predecessor, 1600, c. 23, and its successor, 1685, c. 20, are both in desuetude. Kelly, [86], and Trotter, [89].

[91] The rule in Barclay, Dig. *voce* Game, on the analogy of Whatman *v.* Ogilvy, 3d June 1854, 1 Irv. 483; (see opinions there, in Cooper *v.* Campbell, 1805, M. App. *voce* Planting and Enclosing, No. 1); altered, 44 & 45 Vict. c. 33, sect. 6.

[92] It is not easy to say what are the proper subjects of the 'hunting and halk-'ing' of Act 1621. A collation of the older statutes seems to point at these—deer of all sorts, hares, grouse, black game, partridges, ptarmigan, and perhaps capercailzie and pheasants (only mentioned in 1594, c. 214). Plovers are associated with partridges—1427, c. 108; 1457, c. 84; with grouse, 1551, c. 12; but doubt as to their being game was expressed in Philip *v.* E. Rosslyn, 1833, 5 Sc. Jur. 433. Rabbits are not game—Moncrieff *v.* Arnott 13th Feb. 1828, 6 S. 530; North *v.* Cumming, 2d Dec. 1864, 3 Macph. 173; Inglis *v.* Moir's Tutors, 7th Dec. 1871, 10 Macph. 204; Gosling *v.* Brown, 9th March 1878, 5 Ret. 755.

[93] *Per cur.* in Trotter *v.* MacEwan, *supra*, [89]; E. Hopetoun *v.* Wight, 17th Jan. 1810, F.C.

[94] E. Cassillis *v.* Sloan, 8th Feb. 1826, Sh. (Just.) 146.

[95] Trotter *v.* MacEwan, *supra*, [89]; B. Pr. 950. It is not a *separatum tenementum*, like salmon-fishing, but a privilege incident to holding land, and transmissible.

but it is not a servitude, and cannot, therefore, be set up merely by prescription, on no express grant, or on a grant contained in the *tenendas* only.[96] The normal extent of a plough or ploughgate of land is 104 acres; but there is so much doubt thereanent, and there is apparently such diversity in different parts of the country, that the Court would not read the statute with much strictness in this respect.[97] The word 'heritage' is held to mean a feudal right of property, and will thus include liferent, and limited or unlimited fee;[98] but it is exclusive of a leasehold right, however prolonged.[99] The cases in which it was settled that right to game is not included, except *per expressum*, in the conveyance of a predial servitude, however extensive, were not laid upon the statute.[100] The heritage must be in Scotland,[101] as this must have been the original meaning of a purely Scotch statute. There seems to be no good reason why this landed qualification, which is used only as a weapon against sporting farmers and poachers, should not share the fate of its English congeners which were abolished in 1831.[102]

Extended, 1773.

It appears, from this exposition of the Act, that it was intended to prevent capture of game in certain ways, even by the owner of the land on which the game happens to be, if he be not provided with the statutory qualification. But it is purely prohibitory, and does not enable any one who has the qualification to hunt or shoot over the lands of another without his permission. It makes no relaxation in the law of trespass,[103] either on enclosed or unenclosed grounds. The necessity for a qualification is further extended to the case of 'every person whatsoever who shall 'have in his or her custody, or carry at any time of the year, 'upon any pretence whatsoever, any hares, partridges, pheasants, 'moor-fowl, ptarmigans, heath-fowl, snipes, or quails, without the 'leave or order of a person qualified to kill game in Scotland.'[104]

[96] E. Aboyne *v.* Innes, [88]; E. Aboyne *v.* Farquharson, 16th Nov. 1814, F.C., affd. 6 Pat. 380.

[97] The best account is to be found in Innes, Scotch Legal Antiquities, p. 241 *et seq.* Ploughgate = 4 husbandland, each of which = 2 oxgates, each of 13 acres Scots. See also Irvine, note to p. 53, and authorities there. There is no decision on the point.

[98] A *con-dominus* cannot lease out the shooting without the consent of the other proprietors; but he can himself shoot, and permit friends to do so gratuitously—Campbell *v.* Campbell, 24th Jan. 1809, F.C.

[99] E. Hopetoun *v.* Wight, *supra*, [93], and, in note thereto, Ms. Tweeddale *v.* Somner, 18th June 1808; see Welwood *v.* Husband, 11th Feb. 1874, 1 Ret. 507.

[100] Forbes *v.* Anderson, 1st Feb. 1809, F.C. (pasturage and feal and divot over a forest); E. Aboyne *v.* Farquharson, 5th Dec. 1809 n.r.; 16th Nov. 1814, F.C. aff. 6 Pat. 380 (right exhaustive of the *jus superficiei*).

[101] *Per* L.O. in case in 1810, cited by Ness, p. 40.

[102] 1 & 2 Will. IV. c. 32, sect. 1.

[103] Doubt in Ersk. 2.6.6, cleared by Watson *v.* E. Errol, 1763, M. 4991; and other cases, *supra*, [35].

[104] 13 Geo. III. c. 54, sect. 3. The

The penalty for the first offence is a fine of twenty shillings or six weeks' imprisonment; for every subsequent offence, forty shillings or three months' imprisonment. There is here no provision for the forfeiture of the game. It has accordingly been held that seizure of the game by the procurator-fiscal, even for the purpose of proving the offence, was illegal. Opinion was expressly reserved as to whether, on the restoration of the game to the offender, he could be fined for the renewed possession.[105] It would seem to follow from the Scotch, as distinguished from the English, theory, of the effect of capture of a wild animal, that it would have been equally illegal for the owner of the land on which the game was taken to have seized it.

Poaching Acts.

II. *Poaching Acts.*—The statutes next to be examined are those which are directed against what is popularly called 'poaching'—a term which has, however, only recently become known to the law.[106]

1707, c. 13.

One of the last Acts passed by the Scotch Parliament subjected common fowlers hunting without a subscribed warrant from the landowner to a penalty of £20 Scots, besides forfeiture of their dogs, guns, and nets; and prohibited any fowler, or any other person whatever, from coming 'within any heritor's ground, without leave 'asked and given by the heritor, with setting-dogs and nets for kill-'ing fowls by nets.'[107] But this Act, though still in observance,[108] was found to be defective in many particulars, and has been substantially superseded in practice by a series of Acts passed in the present century, in which a marked distinction is drawn between offences committed by night and by day. It was found by experience that trespass in pursuit of game by night was usually accompanied with an amount, or show, of violence, which the day trespasser seldom resorted to. Something of the same distinction was found to subsist between the two offences as between robbery and theft.

Night Poaching Act, 1828.

Accordingly, in 1828 was passed 'An Act for the more effec-'tual prevention of persons going armed by night for the de-

procedure under the Act is given in sections 8-14. It may take the form of a civil suit—E. Cassilis *v.* Sloan, 8th Feb. 1826, Sh. (Just.) 146. The findings and evidence must be recorded in writing—Christie *v.* Adamson, 1st Oct. 1853, 1 Irv. 293. Either prosecutor or accused may appeal—Gray *v.* Bonnar, 23d Jan. 1816, 19 F.C. Appx. 1. The section is still in observance in Roxburghshire; see case of defective *locus* and Lord Young's remarks on the vagueness of the section, in Downs *v.* Stevenson, 28th Feb. 1883, 9 Ret. (Just.) 11.

[105] Scott *v.* Everitt, 18th Jan. 1853, 15 D. 288.

[106] Only in the title and preamble of 25 & 26 Vict. c. 114.

[107] 1707, c. 13.

[108] P.F. of Edinburgh *v.* Wilson, 27th June 1787, F.C.; and Boyd's Justice, 312. A rule as to close time in the Act is superseded by the Act of 1773, *infra*, p. 138.

'struction of game,'[109] proceeding on the preamble that the practice of going out by night for the purpose of destroying game had very much increased of late years, and had in very many instances led to the commission of murder, and of other grievous offences. It enacted (sect. 1) that 'if any person shall after the passing of 'this Act, by night, unlawfully take or destroy any game or rab-'bits in any land open or enclosed, or shall by night unlawfully 'enter or be in any land, whether open or enclosed, with any 'gun, net, engine, or other instrument for the purpose of taking 'or destroying game,' he shall be liable in certain penalties; and provisions are made for his apprehension, for violent resistance thereto, and for conviction (sects. 2-8). If any persons, to the number of three or more together, shall by night unlawfully enter or be in any land, whether open or enclosed, for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, crossbow, firearms, bludgeon, or any other offensive weapon, each and every of such persons shall be guilty of a misdemeanour, and be liable in certain severe penalties (sect. 9). Night commences, for the purposes of the Act, at the expiration of the first hour after sunset, and concludes at the beginning of the last hour before sunrise (sect. 12); and the word 'game' is 'to include hares, pheasants, partridges, grouse, heath 'or moor game, black game, and bustards' (sect. 13).

Amended, 1844.

It was found that the provisions of this Act were evaded through the destruction, by armed persons at night, of game or rabbits on public and other roads, and at the outlets therefrom to adjoining lands; and it was accordingly enacted, in 1844,[110] that all the pains, punishments, and forfeitures imposed by the last Act upon persons by night unlawfully taking or destroying any game or rabbits in any land, open or enclosed, should be applicable to, and imposed upon, any person by night unlawfully taking or destroying any game or rabbits on any public road, highway, or path, or at the openings, or outlets, or gates from any such land into any such public road, highway, or path, in the like manner as upon any such land, open or enclosed.[111]

Day Trespass Act, 1832.

Four years after the date of what is generally called the Night Poaching Act, a statute[112] applicable to Scotland alone was passed, for the purpose of repressing trespasses by day on property by persons unlawfully engaged in the pursuit of game, which trespasses

[109] 9 Geo. IV. c. 69—a British Act; Appx. No. 1.

[110] 7 & 8 Vict. c. 29.

[111] These Acts are of so much importance to the landowner, that they are given *in extenso* in the Appendix, Nos. 1 and 3, with a note of the points decided in England and Scotland.

[112] 2 & 3 Will. IV. c. 68—'Day Tres-'pass Act,' 1832.

had become frequent in various parts of Scotland, and had in many cases been attended by acts of violence and intimidation. It enacts that if any person whatsoever shall commit any trespass by entering or being, in the day-time, upon any land without leave of the proprietor, in search or pursuit of game, or of deer, roe, woodcocks, snipes, quails, landrails, wild ducks, or conies, he shall be liable in a fine not exceeding £2 and the costs of the conviction; and if any person having his face blackened, coloured, or otherwise disfigured for the purpose of disguise, or if any persons to the number of five or more together shall commit any such trespass, each shall be liable in a fine not exceeding £5 and the expenses (sect. 1). Day-time is to commence at the beginning of the last hour before sunrise, and to conclude at the expiration of the first hour after sunset (sect. 3.) The Act is not to apply to any person hunting or coursing with hounds or greyhounds, and being in fresh pursuit of any deer, hare, or fox already started upon any other land on which such person was entitled to hunt or course (sect. 4). The game taken must be given up on demand to the person who has the right of killing game on the land, to the occupier of the land, or to any gamekeeper or servant of either of them; failing which, it is liable to seizure (sect. 5). Assaults committed by such a trespasser are punishable with a heavier fine, over and above what he has incurred for trespassing, and to imprisonment in default of payment (sect. 6). Anxious provisions are made for arrest, proof, conviction, application of penalties, and appeals (sects. 2, 7-15, 17). The relation of the Act to trespass at common law is regulated by sect. 16, which enacts 'that nothing in this Act contained shall pre-
'vent any person from proceeding by way of civil action to recover
'damages in respect of any trespass upon his land, whether com-
'mitted in pursuit of game or otherwise, save and except that
'where any proceeding shall have been instituted under the pro-
'visions of this Act against any person for or in respect of any
'trespass, no action at law shall be maintainable for the same
'trespass by any person at whose instance, or with whose con-
'currence or consent, such proceedings shall have been instituted,
'but that such proceedings shall in such case be a bar to any
'such action, and may be given in evidence to this purpose and
'effect.' [113]

The last statute which here requires to be noticed is the Act for the prevention of poaching passed in 1862,[114] by which it is made lawful for any constable or peace-officer, in any highway, Prevention of Poaching Act, 1862.

[113] See Appx. No. 2 for the Act and cases. [114] 25 & 26 Vict. c.114 (British statute).

street, or public place, to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of gun, or nets, or engines used for the killing or taking of game, and also to stop and search any cart or other conveyance in or upon which such constable or peace-officer shall have good cause to suspect that any such game, or any such article or thing, is being carried by any such person. Penalties and forfeitures are imposed, if such person shall have obtained such game, so discovered, by unlawfully going on any land in search or pursuit of game, or shall have used any such article or thing for unlawfully killing or taking game, or shall have been accessory thereto (sect. 2). Game in this Act includes one or more hares, pheasants, partridges, eggs of pheasants and partridges, woodcocks, snipes, rabbits, grouse, black or moor game, and eggs of grouse, black or moor game (sect. 1).[115]

What constitutes trespass under these Acts?

Before leaving the subject of trespass in search or pursuit of game, two general points, which may be more conveniently adverted to here than in the notes appended to the statutes, must be noticed. (1) The question, What is sufficient to constitute such trespass? has given rise to much discussion both in England and in Scotland. The English authorities must, no doubt, be used with caution, in view of the difference between the two systems of law in regard to property in wild animals; but there is less danger where, as in the present matter, the questions arise as to the interpretation of similar statutes. Thus, there must be a bodily entering or being on the land upon which the trespass is alleged to have taken place,[116] though that is not required for what is termed a civil trespass.[117] Two cases of shooting near a march were very similar in their circumstances, but different in event. A person, being on his own land, fired at and killed a pheasant which was standing on his neighbour's land, and immediately thereafter went across the boundary and picked it up. This was held to be trespass in pursuit of game, the whole transaction being one continuous act.[118] On the other hand, where a person, being on his own land, shot in flight a pheasant,

[115] See Appx. No. 5. for this Act and cases.

[116] Reg. *v.* Pratt, 24 L.J.M.C. 113, on 1 & 2 Will. IV. c. 32, sect. 30, which is similar to 2 & 3 Will. IV. c. 68, sect. 1; Mayhew *v.* Wardley, 14 C.B.N.S. 550.

[117] Pickering *v.* Rudd, 4 Campb. 219; Keeble *v.* Hickeringill, 11 East. 574, note.

[118] Osbond *v.* Meadows, 31 L.J.M.C. 238.

which had risen from the same, after it had crossed the fence, it was found not to be trespass in search of game for him to go across to pick up the dead bird, on the ground that the statute [119] did not refer to dead game.[120] The case of *Osbond* was held to be distinguishable, and that of *Pratt* was followed to the effect of holding that the mere shooting across the fence was not trespass in the sense of the Act. It follows that trespass will be committed by pursuing across the boundary game plainly only wounded, though shot on the sportsman's own side of the march; and it will be for the judge to decide whether there was or was not reasonable cause for believing that the shot had been fatal.[121] It was in one case held by a narrow majority that there can be no such thing as constructive trespass under the Poaching Acts, as by acting in concert with a trespasser in pursuit of game, and preventing the game from escaping by running up and down a public road.[122] But it seems impossible to reconcile this case with a later and undoubtedly sound decision, that the same statute—the Day Trespass Act—was contravened by persons who, while remaining on a highroad, sent dogs into the adjoining fields in search or pursuit of game. The circumstance that one of these persons—it was uncertain which—entered a field to pick up a hare thus killed, was not founded on in giving judgment.[123]

Has the landowner other remedies?

(2) The question has arisen whether, apart from the civil action of damages, and the penalties imposed by the Game Acts, the landowner has any other remedies against poaching. The answer must be, that he has not. The case of spring-guns and similar instruments has been referred to. The implements used in poaching, and the game taken, cannot be seized unless a statute so provides.[124] It may be inferred, from the illegality of killing dogs which have been prowling about a flock of sheep, that it would be equally unjustifiable to shoot a dog found poaching.[125] Nor is violence to the poacher's person permissible at common law.[126]

[119] 1 & 2 Will. IV. c. 32; similar to the Day Trespass Act.

[120] Kenyon v. Hart, 34 L.J.M.C. 87.

[121] See Donald *v.* Boddan, 1828, Syme, 303.

[122] Colquhoun *v.* Liddell, 16th Nov. 1876, 4 Ret. (Just.) 3.

[123] Stoddart *v.* Stevenson, 8th June, 1880, 7 Ret. (Just.) 11.

[124] Gregory *v.* Wemyss, 1752, M. 1989; Scott *v.* Everitt, 18th Jan. 1853, 15 D. 288 (Act 1773).

[125] Grant *v.* Barclay, 8th Jan. 1830, 5 Mur. 130; cf. Grahame *v.* Mackenzie, 1810, Hume, Dec. p. 641; but see 1597, c. 270.

[126] E. Eglintoun *v.* Campbell, 1770, M'Laurin's C. T., p. 505—see English opinions there. L. Adv. *v.* Kennedy, 3d Dec. 1838, 2 Swinton, 213 (a landed proprietor convicted, and sentenced to eight months' imprisonment, for wounding by shooting two poachers on his land). Grahame *v.* Mackenzie, [125] (threats by trespasser). And see Bell *v.* Shand, 1870, 7 Sc. L.R. 267.

street, or public place, to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of gun, or nets, or engines used for the killing or taking of game, and also to stop and search any cart or other conveyance in or upon which such constable or peace-officer shall have good cause to suspect that any such game, or any such article or thing, is being carried by any such person. Penalties and forfeitures are imposed, if such person shall have obtained such game, so discovered, by unlawfully going on any land in search or pursuit of game, or shall have used any such article or thing for unlawfully killing or taking game, or shall have been accessory thereto (sect. 2). Game in this Act includes one or more hares, pheasants, partridges, eggs of pheasants and partridges, woodcocks, snipes, rabbits, grouse, black or moor game, and eggs of grouse, black or moor game (sect. 1).[115]

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[126] E. Eglintoun *v.* Campbell, 1770, M'Laurin's C. T., p. 505—see English opinions there. L. Adv. *v.* Kennedy, 3d Dec. 1838, 2 Swinton, 213 (a landed proprietor convicted, and sentenced to eight months' imprisonment, for wounding by shooting two poachers on his land). Grahame *v.* Mackenzie, [125] (threats by trespasser). And see Bell *v.* Shand, 1870, 7 Sc. L.R. 267.

Close time.

III. *Close time.*—From the earliest recorded time, the law of Scotland has contained regulations against the killing of certain wild animals during certain seasons, variable[127] or fixed.[128] The rules applicable to the former are now in desuetude; and those which provide a fixed close time are superseded by the Act 13 Geo. III. c. 54, which enacts that every person who shall wilfully take, kill, destroy, carry, sell, bag, or have in his or her possession, or use any muir-fowl or tarmagan between 10th December and 12th August, or any heath-fowl between 10th December and 20th August, or any partridge between 1st February and 1st September, or any pheasant between 1st February and 1st October, shall for every bird so taken, &c., forfeit and pay £5 sterling, and, in case of not paying the sum decreed within ten days after conviction by a final sentence, shall suffer imprisonment for two months for each £5 sterling thereof (sect. 1). This does not extend to any pheasant or partridge kept in any mew or breeding-place, if taken in season (sect. 2); nor to possession, on the same condition, by dealers for ten days after the expiration of the season.[129] It is a question whether this relaxation applies to the possession or sale by a dealer of live birds.[130] Prosecutions under the Act of 1773 may be brought before the sheriff[131] of the county where the offence has been committed or where the defender has been found, by the fiscal or any private informer or complainer (sect. 8),[132] who gets one half of the penalties; the other half going to the poor of the parish, or towards repairing its roads (sect. 10). Provisions are made for recovery of the penalties (sect. 9), and for appeal to the Circuit Court (sects. 11-13). Prosecutions must be commenced[133] within six months after the offence (sect. 14). The penalties prescribed could not formerly be modified by the Bench, but oppression was

[127] Deer and hares during snow—Rob. iii. c. 10; 1474, c. 60; 1621, c. 32. Hunting, &c., on growing corn, 1555, c. 51.

[128] 1427, c. 108—beginning of Lentron to August for certain fowls; 1555, c. 51, partridge-taking begins at Michaelmas; 1707, c. 13, muir-fowl—1st March to 20th June;—partridges, 1st March to 20th Aug. incl.

[129] 1 & 2 Will. IV. c. 32, sect. 4; applied to Scotland by 23 & 24 Vict. c. 90, sect. 13. The section of the former Act goes on to extend the privilege of possession, &c., to forty days after said expiration in favour of others than dealers; but Scotland only shares the benefits of the Act so far as regards dealers. Probably the Scotch Courts would take the same period as a fair limit to an equitable relaxation of the strict provisions of the statute of 1773. See the old case of Simpson *v.* Unwin, 3 B. and Ad. 134.

[130] Loombe *v.* Baily, 30 L.J.M.C. 31; Porritt *v.* Baker, 10 Ex. 759; see Burn's Justice, 2, 769.

[131] 40 & 41 Vict. c. 28.

[132] Gray *v.* Bonnar, 23d Jan. 1816, 19 F.C., Appx. No. 1; Brown *v.* Hunter, 10th Dec. 1842, 1 Broun, 458.

[133] Meaning of 'commenced,' in Note to Night Poaching Act, sect. 4, in Appx. No. 1.

avoided by the prosecutor restricting his claim, if necessary, in the matter of the number of birds; and now the sheriff has full powers of modification.[134]

Wild Birds Protection Acts.

An excellent specimen of piecemeal legislation is to be found in a series of Acts passed for the protection of certain sea-birds, wild birds, and wild-fowl in the years 1869, 1872, and 1876.[135] These Acts were difficult of construction and collation, extremely arbitrary in their scope, and insufficient for their purpose. They were therefore repealed, and a more sweeping measure passed in 1880, which again required amendment in the following year.[136] These subsisting statutes are to be known as the Wild Birds Protection Acts, 1880 and 1881, and are directed towards the protection of all wild birds of the United Kingdom during the breeding season. The leading enactment provides that 'any 'person who, between the first day of March and the first day 'of August in any year after the passing of this Act, shall know-'ingly and wilfully shoot or attempt to shoot, or shall use any 'boat for the purpose of shooting, or causing to be shot, *any* wild 'bird, or shall use any lime, trap, snare, net, or other instrument 'for the purpose of taking any wild bird, or shall expose or offer 'for sale, or shall have in his control or possession after the fif-'teenth day of March, any wild bird recently killed or taken, shall, 'on conviction of any such offence . . . before the sheriff [in-'cluding steward and sheriff-substitute and steward-substitute, 'Act 1880, sect. 2] in Scotland, in the case of any wild bird 'which is included in the schedule hereunto annexed,[137] forfeit 'and pay for every such bird in respect of which an offence has 'been committed, a sum not exceeding £1, and in the case 'of any other wild birds, shall for a first offence be reprimanded 'and discharged on payment of costs, and for every subsequent 'offence forfeit and pay for every such wild bird in respect of

[134] Whatman *v.* Ogilvie, 3d June 1854, 1 Irv. 483; 44 & 45 Vict. c. 33, sect. 6.

[135] 32 & 33 Vict. c. 17; 35 & 36 Vict. c. 78; 39 & 40 Vict. c. 29.

[136] 43 & 44 Vict. c. 35; 44 & 45 Vict. c. 51.

[137] *Viz.*, American quail, auk, avocet, bee-eater, bittern, bonxie, colin, Cornish chough, coulterneb, cuckoo, curlew, diver, dotterel, dunbird, dunlin, eider-duck, fern-owl, fulmar, gannet, goatsucker, godwit, goldfinch, grebe, greenshank, guillemot, gull (except black-backed gull), hoopoe, kingfisher, kittiwake, lapwing, lark (added by Act 1881, sect. 2), loon, mallard, marrot, merganser, murre, night-hawk, nightjar, nightingale, oriole, owl, oxbird, oyster-catcher, peewit, petrel, phalarope, plover, plover's-page, pochard, puffin, purre, razor-bill, redshank, reeve or ruff, roller, sanderling, sandpiper, scout, sea-lark, sea-mew, sea-parrot, sea-swallow, shearwater, shelldrake, shoveller, skua, smew, snipe, solan goose, spoonbill, stint, stone-curlew, stone-hatch, summer-snipe, tarrock, teal, tern, thick-knee, tystey, whaup, whimbrel, widgeon, wild-duck, willock, woodcock, woodpecker. Some of these names seem to be duplicates.

'which an offence is committed, a sum of money not exceeding 'five shillings, in addition to the costs. . . . This section shall 'not apply to the owner or occupier of any land, or to any person 'authorised by the owner or occupier of any land, killing or 'taking any wild bird on such land not included in the schedule 'hereto annexed' (Act 1880, sect. 3). Refusal by any one found offending to give his real Christian name, surname, and place of abode, or his giving an untrue name or place of abode to *any* person, infers liability to an additional fine not exceeding ten shillings (sect. 4). An offence committed on the sea-coast or at sea, beyond the ordinary jurisdiction of a sheriff, is held to have been committed in any county abutting on such sea-coast or adjoining such sea; and if it has been committed on any waters forming the boundary between two counties, it may be prosecuted before the sheriff of either (sect. 6). A Secretary of State may, on application by Quarter-Sessions, extend or vary the close time by order to be published in the 'London Gazette' (sect. 8), or from time to time exempt any county, or part or parts thereof, as to all or any wild birds, by similar order from the operation of the Act; and St Kilda is excluded by the statute itself (sect. 9). It is a sufficient answer to the charge of exposing or offering for sale, or having the control or possession of any wild bird recently killed, to show either '(1) that the killing of any such wild birds, 'if in a place to which the said Act extends, was lawful at the 'time when and by the person by whom it was killed; or (2), 'that the wild bird was killed in some place to which the said 'Act does not extend, and the fact that the wild bird was im-'ported from some place to which the said Act does not extend, 'shall, until the contrary is proved, be evidence that the bird was killed in some place to which the Act does not extend.' (Act 1881, sect. 1).[138]

Game and gun licences.

IV. The law as to game licences and gun licences is entirely statutory,[139] and will be best expounded in the shape of notes to the Acts now in force, printed, so far as within the scope of this treatise, in the Appendix.

Cumulative.

Referring now to the whole of these regulations, it will be seen that no one of them interferes with the operation of any other. It followed that, until recently, unless there were some inconsistency in the conditions of the Acts, as between the night and the day

[138] This amendment of the principal Act arose mainly out of a hard case, Taylor *v.* Rogers, 50 L.J.M.C. 132. See on the older Acts Whitehead *v.* Smithers, 2 C.P.D. 553.

[139] Game Licences Act, 23 & 24 Vict. c. 90; Gun Licences Act, 33 & 34 Vict. c. 57. Appx. Nos. 4 and 6.

statutes, the same state of facts might infer liability in several penalties cumulatively—for instance, in those of the Act of 1621, of one or more of the Trespass Acts, of the Close Time Act, and of the Excise statutes. The killer of a protected wild bird during the breeding season may still be obnoxious to the penalties of the Protection Acts, and also to those of the Gun Act. Thus, in England, the same fact was found to entail the penalties both of the Close Time and of the Certificate statutes;[140] and in Scotland, an acquittal under the Poaching Prevention Act of 1862 was no defence to a charge under the Act 13 Geo. III. c. 54, sect. 3.[141] This cumulation of penalties still subsists, but is greatly curtailed in its operation by a recent statute, which excludes it with reference to the 'Game Acts' *inter se*—that is, with reference to all the Acts mentioned above as still in observance treating of game properly so called.[142]

Muirburn.

The Act 13 Geo. III. c. 54, already referred to in connection with the landed qualification and close time, has clauses regulating muirburn; and in doing so supersedes a number of old statutes, which agreed in prohibiting the burning of moors from the end of March till all the corn was shorn.[143] Section 4 provides that every person who shall make muirburn or set fire to any heath or muir in Scotland from 11th April to 1st November in any year, shall forfeit and pay 40s. for the first, £5 for the second, and £10 for the third or any subsequent offence—or in default, be imprisoned for six weeks, two months, and three months respectively. The tenant, possessor, or occupier of the ground on which such muirburn shall be made or discovered shall be deemed guilty, unless he shall prove that the fire was communicated from some neighbouring ground, or was raised on his ground by some other person not in his service or family (sect. 5). A proprietor of high and wet muirlands, having them in his own occupation, may burn the heath between 11th and 25th April; and when such lands are let, he or his commissioner or factor may, by writing under his or their hands, authorise the tenants to do the same (sect. 6), the written authority being recorded in the Sheriff Court books previous to the burning, on payment of the ordinary fees (sect. 7). The provisions of the Act for prosecution and appeal

[140] Saunders *v.* Baldy, 13 L.T.N.S. 322.

[141] Galloway *v.* Somerville, 5th Oct. 1863, 4 Irv. 444.

[142] 40 & 41 Vict. c. 38, s. 11. The statutes scheduled are 1587, c. 43; 1621, c. 31; 1707, c. 91; 13 Geo. III. c. 54; 39 Geo. III. c. 54 (partridge close time of last Act revived), and the Acts printed in the Appx. 1-5.

[143] Stat. Rob. III. c. 11; 1424, c. 20; 1477, c. 75; 1493, c. 48; 1535, c. 11; 1685, c. 20; 6 Geo. III. c. 32; cf. the English Act, 4 & 5 Will. III. c. 23.

have been already referred to.[144] The first-cited section is held to apply not merely to ground on which heath or heather grows, but to all moors or uplands, whatever may grow thereon, and though covered only with rank grass. The only practical test furnished by the Court is, that it shall be a place which moor-game frequent for breeding. The muirburn contemplated is the burning of the land of this description, and of what it bears.[145] Muirburning is a lawful act, and the proprietor of the lands where it takes place is not liable for injury caused by the extension of the fire to adjoining lands, unless *culpa* on his part is proved. He is bound 'to exercise the care and diligence which a prudent man would 'observe in his own affairs, and which a prudent and conscientious 'man will observe as to the interests of his neighbours.'[146] The amount of care necessary to be exercised will vary with the dryness of the season, and the consequent danger, greater or less, of incomplete extinction.[147] The phraseology of the 5th section seems to imply that the occupier is liable in the penalties of the Act, though the fire was lighted by a servant or member of his family without or against his orders. There would be no liability for damage to neighbouring property in such a case.[148] The burning is directly for the benefit of the stock-holder, the restrictions for the benefit of the sportsman; but practice shows that muirburn, judiciously performed, is equally beneficial to both.

Forests.

No instance has survived to modern times of a royal forest retained in the hands of the Crown, nor, it is believed, of a right of free forestry being exercised over land which does not belong in property to the forester; but many cases remain of a right of forestry being held on Crown titles along with the ownership of the land. Such a grant gives no right beyond the bounds of the forest. Deer are not, and never were, *inter regalia*,[149] and may be destroyed by any qualified person on his own land or by another with his authority, as in the case of other game. The forester has no right to interdict a neighbour from killing deer on his own

[144] *Supra*, p. 133.

[145] *Per* maj., esp. L.J.-C. and L. Mackenzie in Rodger *v.* Gibson, 12th March 1842, 1 Broun, 78, and authorities there.

[146] *Per* L. Neaves in Mackintosh *v.* Mackintosh, 15th July 1864, 2 Macph. 1357, 1862, where the proof was held to show want of due care in watching.

[147] There may be complete extinction, though for five or six months after the fire steam rises from the heated ground after every shower.

[148] Linwood *v.* Hathorn, 14th May 1817, F.C., affd. 19th March 1821, 1 Sh. App. 20; see Keith *v.* Keir, 10th June 1812, F.C. Baird *v.* Hamilton, 4th July 1826, 4 S. 790 (N.E. 796).

[149] L. Stair's dubious *dictum* to the contrary was repudiated in D. Athole *v.* Macinroy, 28th Feb. 1862, 24 D. 673, and authorities there, which are chiefly significant by silence.

land, or to trespass on his neighbour's land, either for the purpose of killing or of driving back strayed deer [150]—unless, indeed, he be co-proprietor thereof, and the deer so straying were doing harm to the land as pasturage, in which case he may drive them back.[151] Within the forest the most considerable right of the keeper was to one-third of the value of cattle escheated for straying into it, the remaining two-thirds going to the Crown; [152] but no case of the exercise of the right is known, since the time when the Court of Session made the grievance caused along miles of march in Highland districts the text of a representation to the Crown—which proved successful—not to grant any new forests.[153]

[150] Ibid.

[151] Robertson *v.* D. Athole, 22d May 1810, F.C., affd. 1st Dec. 1814, F.C., App. See as to killing in time of snow—1594, c. 214; 1685, c. 20.

[152] 1535, c. 12; see 1592, c. 130.

[153] Ms. Athol *v.* Faskellie, 1680 M. 4653.

CHAPTER X.

MINES, MINERALS, AND QUARRIES.

Subject stated.

IT will appear, in the progress of this work, that the rules regarding the enjoyment of all substances lying beneath the soil are very similar to those which apply to the use of the soil itself, and of that which it supports. Examples taken from recorded disputes concerning mines will be found to illustrate subjects so diverse as compulsory sale, the law of neighbourhood and nuisance, of servitudes, of water-courses, and of limited estates; and no attempt will here be made to anticipate what must be discussed in its proper context. But there fall to be noticed in this place one or two points of specialty in the law of minerals—considered as subjects of property, and not as articles of trade or in connection with leases.

Mines, royal and base.

I. In all the realms which arose out of the ruins of the Roman empire in western Europe, and from the earliest period at which we find any note of the working of minerals, a distinction is traceable between mines royal and mines base. Mines royal were presumed to have been reserved to the Crown in giving out the land, and were wrought usually, but not invariably, by the landowner or his lessees, on special permit of the sovereign, and for a lordship which usually amounted to one-tenth of the produce. Mines base were given out with the land as *partes soli*, expressly or by implication, and the landowner had full control over the working. Whether this was the common law in Scotland prior to the fifteenth century, depends on the construction to be put on the earliest statute of mines, 1424, c. 12,[1] which enacts that 'gif onie 'mine of gold or silver be founden in onie lordis landes of the 'realme, and it may be prooved that three halfe-pennies of silver[2] 'may be fined out of the pound of leade, the Lords of Parliament 'consentis that sik mine be the kingis, as is usual of other realmes.'

1424, c. 12.

[1] Temp. James I. of Scotland.

[2] = about 2 shillings and 5 pence Scots money of Ruddiman's time. Pref. to Dipl. Scot., p. 82; Cochran-Patrick's Early Records of Mining, lix.

The peculiarity of the expression 'consentis'—which is found in no other enactment of this Parliament—and the reference to the customary law of other countries, seem to indicate that this statute is merely declaratory of the common law of the land. But a high authority has called this 'the original Act of Annexation of Mines,' and has held that the Crown right seems to rest entirely on statute.[3] Be that as it may, the statute was practically an acknowledgment that all other minerals, except those mentioned, were not *inter regalia*. Accordingly, it was early settled that the base metals and minerals pass without express mention in a charter, whether granted by the Crown or by a subject, of the lands under which they lie.[4] Thus, an infeftment in lands with part and pertinent, without any mention of minerals, was held to be a

[3] L.O. Curriehill in E. Breadalbane *v.* Jamieson, 16th June 1875, 2 Ret. 826, 829. The customs of other countries of the West, at that date, may be traced to the recognition in the later Roman empire of the fisc's property in all minerals whatever. The classical jurists know nothing of mining, but much of treasure (*infra*, chap. 14). The distinction between gold or silver mines and other mines was enforced by the emperors—cf. 1.2.5 with 3 C. (11.6). In Germany, where mines were very early wrought, Barbarossa and his successors asserted the Crown rights, which had been till then only vaguely claimed, the usual royalty being one-tenth reserved from all minerals, with the exception in some places of coal and iron. James I. of Scotland, in obtaining the Act of 1424, doubtless imitated afar off Charles VI. of France, who again followed the example of the earlier German emperors in vindicating the Crown's radical right to minerals, and to a royalty on permission to mine. The old law of England is thus stated by the judges in the 'great case of Mines,'—Plowden, pp. 310, 336-7: 'If the ore or mine in the soil of 'a subject be of copper, tin, lead, or iron, 'in which there is no gold or silver, 'in this case the proprietor of the soil 'shall have the ore or mine, and not the 'Crown by prerogative. A mine royal, 'whether of base metal containing gold 'or silver, or of pure gold and silver only, 'may by grant of the king be severed from 'the Crown and granted to another; for 'it is not an incident inseparable to 'the Crown, but may be severed from 'it by apt and precise words.' This great case decided that even where the gold or silver in a mine of base metal in the land of a subject was of less value than the base metal, the mine was a mine royal. In the early law of all these countries the right of the Crown to permit persons to search for any mineral in the lands of another against his will, and under certain conditions to win the mineral, is asserted, and is part of the present law of France, Germany, and part of the United States. On a comparison of the legal systems of the best known civilised countries, it will appear that the law of Scotland leaves the largest control over his minerals in the hands of the landowner; for in England, though royal mines (as defined in the case cited) in which there is copper, tin, iron, and lead, cannot (by 1 W. and M. c. 30, and 5 W. and M. c. 6, and 55 Geo. III. c. 134) be any longer claimed by the Crown, but only a right of pre-emption at certain rates, royal mines of other minerals—if such exist—may still be claimed. See the chapters, of which this note is a short abstract, in Rogers on Mines, 2d ed., ii. iii. iv. and vi.

[4] Cr. 2.8.17; St. 2.3.74; Bankt. 2.3. 109; Ersk. 2.6.1.5 and 16; B. Pr. 669 and 740; but see Cr. 1.16.36, 2.8.21, where he seems to have been carried away from the statute by the feudal customs of other countries—Mack. *apud* Stat. 1424, c. 12; and the exceptional case—Anstruther *v.* Anstruther, 1796, 3 Pat. 483.

good title for a possessory judgment as to the right to coal, as against an express title to the coal-heughs.[5] And where a decreet-arbitral decerned one of the parties who had right to the whole coal under the estate which was to be divided, to convey to the other the house, yards, and parks, retaining the remainder, it was held that the coal beneath these subjects was included.[6]

Act 1592, c. 31. But in 1592, by a statute[7] which remained long unprinted—and therefore unknown to Craig, Stair, and Mackenzie[8]—that champion of the prerogative, James VI., assumed in so many words the full right of the Crown to all mines, not only of gold and silver, but of copper, lead, tin, and other whatsoever metals and minerals, which had been let by it all over the kingdom to foreign adventurers for payment of a tenth of the proceeds to the Treasury—'the part which both of the common law and consuetude observed 'by other foreign princes properly pertains to the Prince.' This practice of wholesale leases to strangers having become intolerable to the landowners, the statute enacts 'that it shall be lesum' for the king 'to set in feu-farm to every earl, lord, baron, and other 'freeholder' the mines above mentioned, 'which is or may be 'found within their own lands and heritages,' they paying a tenth part yearly as royalty; and failing their working on due premonition minerals which had been discovered on their estates, 'to 'set the same in feu or tack, or otherwise cause work the same or 'make right thereof to any other person at his Grace's pleasure.' In construing this enactment it has been held that the Crown is not merely entitled, but is bound, when required, to give to each subject a grant of the minerals within his own lands,[9] and that not merely to its own immediate vassals, but to all proprietors of land, though holding of subject superiors;[10] and further, that where such a grant has once been made, an adjudication of the lands without mention of mines and metals carries the mines, &c., in preference to a subsequent adjudication of the lands with express mention of the mines and metals.[11] The reason given by the majority in deciding the last point[12] was, 'that mines of lead and

[5] L. Burly *v.* Sime, 1662, M. 9630. The import of the judgment is misstated in Ersk. 2.6.5.

[6] Bruce *v.* Erskine, 1716, M. 9642; cf. E. Kelly *v.* Nicolson, 1694, 4 B.S.¦150; and as to the effect of the Clan Act—Mitchell *v.* York Buildings Co., 1777, 6 Pat. 795; Anderson *v.* Caddells, 1803, 4 Pat. 532; Forbes *v.* Livingstone, 31st Jan. 1822, 1 S. 282 (N.E. 263), rem. 1 W.S. 657; 29th Nov. 1827, 6 S. 167.

[7] 1582, c. 31. See the history of the enactment in Cochran-Patrick, p. lx.

[8] *Supra*, note [4].

[9] E. Hopetoun *v.* Off. of State, 1750, M. 13527.

[10] D. Argyll *v.* Murray, 1739, M. 13526.

[11] Ochterlony *v.* E. Selkirk, 1755, M. 164.

[12] As given by Monboddo, 5 B.S. 836. This report seems to have been overlooked in the E. of Breadalbane's case, where

'copper, such as those in dispute, were not *inter regalia*, either by 'the common law or by the statute of James I., although the Act '1592 does indeed speak generally of all mines which by that 'Act are supposed to be in the gift of the Crown.' The same reasoning was adopted in a very recent case, in which an entail of lands without mention of mines and minerals was held to extend to these as parts and pertinents of the lands, though, prior to the entail, a separate charter of the mines, &c., had been obtained from the Crown, proceeding on the Act 1592.[13] The Lord Ordinary (Curriehill), in an elaborate note, with which the Inner House concurred, was of the same opinion as the judges in the last case, that the Act 1592 must be controlled by the earlier statute; that it therefore only applied to the working of mines royal, for the conveyance of which the tenth part of the free produce was regarded as a usual and fair reddendo; and that this conveyance completely incorporated these mines with the rest of the landowner's property. Before passing from the respective rights of Crown and landholder, it may be observed that the claim of the former to gold is absolute, and that it would probably be held to emerge, though the precious metal be obtained by washing soil taken from the surface, as of late in the Kildonan Burn, though this could not technically be termed mining. Silver is always found in conjunction with lead.

Nomenclature of reservations.

II. Nothing is more usual than for a proprietor, in feuing out land, especially for building or manufacturing purposes, to reserve to himself the mines, minerals, metals, and quarries, or one or more of them.[14] The possession of the minerals may also be separated from that of the surface by their being feued out, while the ownership of what remains is retained or granted elsewhere, or more commonly by their being leased out to a mineral tenant.[15] In all these cases it is important to know the exact meaning which the law puts upon the different terms used. Both in this country and in England there has been much discussion on this subject, without, it must be confessed, leading to any very definite result. There is, no doubt, perfect consistency between the few cases which have come before the Scotch Courts; but the same thing can scarcely be said of the English decisions, which are, moreover, mostly of later date, and the fruit of much more elaborate discussion.

only the successful argument, as given in M. 164, is quoted. That this was Monboddo's own view appears from the note to his report of the D. of Argyll's case—5 B.S. 680.

[13] E. Breadalbane *v.* Jamieson, *supra*,[3].

[14] See a case of implied reservation—Anstruther *v.* Anstruther, 1792, n. r. affd. 18th March 1796, 3 Pat. 483.

[15] Hunter, i. 269 *et seq.*

'Mines and 'minerals' in Scotland.

Both in Scotland and in the House of Lords, it was determined that a reservation by a superior of 'the haile mines and minerals, 'of whatsoever nature or quality,' under the lands conveyed in a feu-charter, did not include freestone, though it was of singularly fine quality, unknown elsewhere in the district.[16] The ground of judgment does not appear, but the argument of the successful feuar was, that by minerals are meant substances that are useful on account of their specific or chemical qualities, not substances useful merely as mechanical masses—which is a very fair statement of the use of the word in common parlance. In conformity with this decision, freestone was also found to be excluded from a reservation, in a contract of excambion, of 'liberty of working coal 'and other fossils and minerals;' but this was a stronger case for the grantee of the lands, since the mode of working the minerals reserved was described as being 'by pits, shanks, or eyes.' The scientific meaning of 'fossil' as anything that can be dug out of the earth, and the definition of 'mineral' as that which is naturally reserved in an agricultural lease, were both repudiated; and some weight was given to the mode of working.[17] The only definition attempted by a Scotch lawyer is, that 'metals and 'minerals' mean 'all strata which are now destitute of or incap-'able of supporting animal or vegetable life.'[18] Lord Kinloch regarded freestone as in correct language a mineral, being neither an animal nor a vegetable, but the question before him related to the claim of a railway company, which has *primâ facie* no right except in the surface.[19] Lastly, a reservation of the whole quarries, with full power to search and dig for stone quarries and for coal, and to win coal and stones, was held not to embrace blackband—a substance containing iron and a small admixture of carbonaceous matter. The value of the mineral was unknown at the date of the feu; but one of the judges expressly said that made no difference, except as against the granter, and was further of opinion that nothing that could be called a mineral could be conveyed under the name 'stone.'[20] It was, moreover, admissible to look *dehors* the document in arriving at the intention of the party granting; and the vicinity of the lands to the rising city of Glasgow went far to explain the anxious retention of stone for building purposes.

[16] Menzies *v.* E. Breadalbane, 10th June 1818, F.C., affd. 17th July 1822, 1 Sh. App. 225.

[17] D. Hamilton *v.* Bentley, 29th June 1841, 3 D. 1121.

[18] *Per* L. Mackenzie (iii.) in Blair *v.* Ramsay, 22d Oct. 1875, 3 Ret. 25. See obs. by Lds. Chelmsford and Hatherley in the same case—3 Ret. H.L. 41; and *infra*, p. 154.

[19] Jamieson *v.* N.B. Ry., 18th Dec. 1868, 6 Sc. L.R. 188.

[20] Forth and Clyde Nav. Co. *v.* Wilsons & Co., 21st Nov. 1848, 11 D. 122.

In these cases the question was, whether a well-known substance was carried by certain general words in a reservation, and was determined by the Court on a construction of its terms. If a proof of the nature of the substance claimed, or of the use put on certain words in a district, is required, it will most fitly go to a jury.[21] It may be gathered that the Court, in interpreting such ambiguous words as 'mines and minerals,' are not bound by the nomenclature of science, nor wholly by the mode of working or the nature of the substance, but are willing to admit other circumstances which may throw light on the intention of the parties.

In England.

This seems to be the result of the English decisions also. It was decided early in the century that lime-works were not included under the term 'mines'—which was applicable, not to every excavation of the earth, worked by common labourers and near the surface, but only to such workings as required skill and science,[22] which was the case only when the limestone was obtained by sinking shafts and by the use of lifting machinery.[23] The manner of working determined the question where clay was raised to the surface in the same way as coal is usually wrought.[24] The same was the criterion adopted by Kindersley, V.-C., in a case of partition of lands between *pro indiviso* co-proprietors under the exception of 'mines and minerals.' The subject in dispute was a limestone quarry; and no question was raised, looking to the cases already cited, about the non-applicability of the term 'mines' to such a subject. The real question was as to the meaning of the word 'minerals'; and after putting aside the wide scientific use of the term, its popular use as purporting any metalliferous substance (though that was perhaps the meaning it was intended in the deed to bear), and its local signification (as to which the evidence was very conflicting), it was decided 'that the best defi-
'nition of a mineral was that which was worked by means of a
'mine,' as distinguished from a quarry. The distinction is 'that
'where you are working *sub die* after having removed the surface,
'so as not to leave any roof, that is what is called quarrying.
'Mining is when you begin on the surface, and by sinking shafts
'you work underground in a horizontal direction, making a tunnel
'as you proceed, and leaving a roof overhead.'[25] But this defi-

[21] Torbanehill Lease case—Gillespie *v.* Russel, 18th Feb. 1854, 17 D. 1; see 18 D. 677; 19 D. 897—question as to the meaning of the word 'coal' as used in a lease.

[22] Rex *v.* Alderbury, 1 East. 534; Rex *v.* Dunsford, 2 A. and E. 568.

[23] Rex *v.* Inhab. of Sedgley, 2 B. & Ad. 65, *per* L. Tenterden in applying Q. Elizabeth's Poor Law.

[24] Rex *v.* Brettell, 3 B. and Ad. 424, following last case.

[25] Davvell *v.* Roper, 24 L.J. Ch. 779. A similar distinction is deduced etymolo-

nition of the word 'mineral' was authoritatively repudiated in a subsequent case, where the substance in dispute was china-clay, obtainable only by destroying the surface; and it was stated that the result of the authorities appeared to be 'that a reservation of '"minerals" includes every substance which can be got from un- 'derneath the surface of the earth for the purpose of profit, unless 'there is something in the context or in the nature of the transac- 'tion to induce the Court to give it a more limited meaning.'[26] And the latest *dictum* on the subject is to the same effect. 'The 'primary meaning of the word mine standing alone is an under- 'ground excavation made for the purpose of getting minerals. In 'leases and similar documents it is commonly used in a slightly 'different sense—for instance, "all that mine, vein, or seam of '"coal, &c." There the word includes the stratum of the minerals 'as well as the excavation made to win it. "Minerals" on the 'other hand means primarily all substances (other than the agri- 'cultural surface of the ground) which may be got for manufac- 'turing or mercantile purposes, whether from a mine, as the word 'would seem to signify, or such as stone and clay, which are got 'by open working.'[27] But though the mineral may be effectually reserved, so as to prevent the grantee working it, the reserver himself may not be entitled to destroy the surface, if the reservation be not clear in giving him this right.[28] It thus appears that the English and Scotch Courts have arrived at this common result, that the word 'mineral' is of flexible meaning, to be construed very generally if there be nothing in the deed or in the surrounding circumstances to control this construction, but liable to be restricted by the intention of the parties. The intention may be gathered from the custom of the district,[29] from the relation of the parties, and from many other circumstances. Thus a reservation of mines and minerals to the lord of the manor, in allotting the full ownership of parts of a waste to the commoners under an enclosure Act, was construed as favourably as

gically by Turner L.J. in Bell *v.* Wilson, L.R. 1 Ch. 303. *Minare* = *ducere* = to lead a passage underground. *Quadratarius* = stone-squarer—an operation performed above ground. See Brown *v.* Chadwick, 7 Ir. C.L. 101; Cs. Listowel *v.* Gibbings, 9 Ir. C.L. 223.

[26] *Per* Mellish L.J. in Hext *v.* Gill, L.R. 7 Ch. 699, 712.

[27] *Per* Kay J. in Midland Ry. *v.* Haunchwood Co. 20 Ch. D. 552, citing Bell *v.* Wilson,[25], Midland Ry. *v.* Checkley L.R. 4 Eq. 19, E. Rosse *v.* Wainman, 14 M. & W. 859, and Hext *v.* Gill,[26]; though the word 'mines' in the Railways Clauses Acts of both countries has, as was shown in the sequel of the judgment, a much wider meaning.

[28] Bell *v.* Wilson, *supra*, [25], freestone.

[29] Davvell *v.* Roper, *supra*, [25]. The mining customs of Cornwall, Somerset, Gloucester, and Derby are ancient and well recognised—see Rogers, chaps. 18-21.

possible to the lord, the object being to give the commoners only exclusive right to the surface for cultivation, and therefore so as to include stone quarries.[30]

Different classes of reservations.

III. Questions have also arisen, both here and in England, not only, as has just been shown, with reference to the interpretation to be put on the substances reserved, but also in relation to the nature and extent of the right. To determine as to this, the words of the reservation require to be carefully examined. The ordinary form is something similar to that which occurred in a conveyance drawn before the middle of last century, 'reserving to us and our 'heirs and assignees all and singular the mines of, &c., and other 'metals and minerals, with full power to us and our foresaids, 'now and in all time hereafter, to search for, work out, and 'dispose of to our own use the said metals and minerals, and to 'make use of such parts of the lands before disponed as shall be 'necessary for these ends—we and our foresaids always satisfying 'and paying the whole damages which the said A. S. and his 'foresaids shall sustain thereby.'[31] Or the reservation may take this shape—'reserving always to the said Duke, his heirs and 'successors, the privilege and liberty of winning coals, and dig-'ging shanks, and making ways, &c.[32] The purport of these two clauses is very different. The leading words of the former indicate a reservation of a corporeal subject—namely, the mineral-yielding strata, which are just as capable of being made the subject of ownership, and as patient of being feudalised,[33] as is the remainder of the space *a cœlo usque ad centrum*, which remainder alone is actually given out in such a disposition. The rest of the clause is merely accessory to the ownership reserved, in order to make it practically effectual. The second formula is a reservation—or perhaps, more strictly, a re-grant by the disponee[34]—of a servitude in the wider sense of that term, or, more accurately, of a real condition or burden on the disposition. Nor is the distinction unimportant. The chief authority is a case which was very carefully considered, there being a difference of opinion

Ownership and servitude.

[30] E. Rosse *v.* Wainman, 15 L.J. Ex. 67, affd. 2 Ex. 800; Micklethwait *v.* Winter, 20 L.J. Ex. 313; Wakefield *v.* D. Buccleuch, L.R. 4 Eq. 613 and L.R. 4 H.L. 377.

[31] Simson *v.* Ker, 1792, 3 Pat. 238.

[32] Davidson *v.* D. Hamilton, 15th May 1822, 1 S. 411 (N.E. 385). 'Minerals 'are said to be won when full practical 'available access is given to the hewers,' the test being that 'continuous working 'can go forward in the ordinary way.' Lewis *v.* Fothergill, L.R. 5 Ch. 103.111; L. Rokeby *v.* Elliot, 13 Ch. D. 277.

[33] Burly *v.* Sime, 1662, M. 9630; 1 Jur. Styles, 18; Ersk. 2.6.5; Bell's Styles, i. 30, 91; Dunlop *v.* Corbet, 20th June 1809, F.C.; Simson *v.* Ker, *supra*, [31]; see 3 Pat. 244, 245, n.; B. Pr. 740.

[34] *Per* L. Chan. Hatherley in Graham *v.* D. Hamilton, *infra*, [35], at 9 Macph. H.L. 102.

Case of ownership.

both in the Court of Session and in the House of Lords.[35] There was a reservation by the superior in feuing out lands of 'all and 'sundry the coal and limestone, so as it shall be lawful to the said 'Duke and his foresaids to set down coal-pits, shanks, and sinks, 'and win coal and limestone within the bounds of the said lands,' &c.; and in reference to another subject, similar terms were used. The question was, whether the superior had right to use the wastes formed by the *partial* removal of the coal for the transit of minerals obtained in similar reserves adjoining. The majority in the Court of Session based their rejection of such a right partly on the analogy of the use of the surface,[36] in similar circumstances, partly on the ground that the sole use of such an estate is for the removal of its substance, and that the space excavated returns disburdened to the owner of the rest of the soil. In the House of Lords the distinction between the corporeal right of property and the incorporeal right of servitude was pointed out. It would not do to talk of one right of property being disburdened of another. The ownership of the aerial space does not pass, bit by bit, as it is formed. Being a right of ownership, the proprietor of the wastes was entitled to use them as he chose, so long as he did not trespass beyond them: if he trespassed, as by exhausting the whole of the reserved strata, and then using the top of the subjacent strata as the floor of a road for the transit of mineral from adjoining lands, the case would have been different. If the right had been merely a servitude, it would have been strictly construed according to its terms, and would, in the ordinary case, have excluded the communication of any benefit to neighbouring coal-fields. For this reason the case from which the above example of a servitude right has been taken[37] was declared to have been erroneously decided on general grounds, though perhaps really depending on special circumstances. The law of England is identical with the law of Scotland in this matter.[38]

Cases of servitude.

Two other cases of a servitude or real condition may be noted. In a sale of land with the minerals, the seller reserved right to one-tenth of the annual excess of the gross output above a specified quantity, and to keep a hillsman or overseer, with power at all times to inspect the operations carried on, in order to check the output. It having been ascertained by a remit that the inspec-

[35] Graham *v.* D. Hamilton, 5th July 1869, 7 Macph. 976 (by a majority of 5-2), revd. 28th July 1871, 9 Macph. H.L. 98 (diss. L. Chelmsford).

[36] *Infra*, chap. 26 (1).

[37] Davidson *v.* D. Hamilton, *supra*, [32]; see obs. of L. Brougham in Turner *v.* Ballendene, *infra*, [50], 7 W.S. 174.

[38] Proud *v.* Bates, 34 L.J. Ch. 406. As to servitude roads and way-leaves, see *infra*, chap. 26.

tion of operations conducted by means of pits on adjoining lands might give rise to disputes, and would enable the mine-owner to put the holder of the lordship to inconvenience, the Court held that the latter was entitled to insist on the coal being put out on the lands he had sold.[39] The other case [40] was one which involved intricate questions of conveyancing; but on the present matter it was determined that a right granted to a vassal of so much coal in the coal-heughs of the superior's remaining land as would serve for fire and the use of the house and family of the vassal, his heirs and assignees, was not a right of property but of servitude. It was not necessary to determine whether it was a proper servitude, known to the law, grantable to the owner of a particular dominant tenement, like a servitude of peats [41]—nor to decide what was the scope of the right; [42] but it was found to give no title to interdict the servient owner from working his coal. It rather seems, moreover, that a grant of 'as many coals from the coal-'heughs of B. as the said J. M., or his heirs and assignees foresaid, 'may use, sell, or give away at pleasure,' is a grant of an incorporeal real right, and not a conveyance of the ownership of the seams of coal under the lands of B.[43] On the other hand, it also appears that where there is no express conveyance of minerals to a vassal, and the charter contains a clause reserving to the superior 'full power, right, and liberty to win coals and coal-heughs' within the lands conveyed, and a declaration that it shall not be 'leisome 'to the vassal to set down coal-heughs or win coals upon the fore-'said lands'—this is a reservation of the ownership of the coal.[44] Such a view is alone consistent with the rule of law that there can be no servitude which exhausts the possible uses of any heritable estate.[45]

Accessorial rights.

When the ownership of mineral seams is severed from the ownership of the surface and of the other strata, no other right to the use of the surface and of the other strata is conveyed than what is reasonably required for the enjoyment of those minerals only which are so severed. This accessorial right would probably pass *sub silentio*, on the principle that the grant or reservation embraces everything without which it could not be made use of; [46] but as a matter of practice it is invariably added. It

[39] Dixons *v.* Buchanan, 24th Dec. 1825, 4 S. 355 (N.E. 360); 27th Jan. 1829, 7 S. 324.

[40] Harvie *v.* Stewart, 17th Nov. 1870, 9 Macph. 129.

[41] Ibid. pp. 137, 158.

[42] Ibid. p. 149.

[43] Ibid. p. 144; see Graham *v.* D. Hamilton, *supra*, [35].

[44] Bain *v.* D. Hamilton, 19th May 1865, 3 Macph. 821; 4th Nov. 1867, 6 Macph. 1.

[45] Dyce *v.* Hay, 10th July 1849, 11 D. 1266, aff'd. 1 Macq. 305.

[46] Caledonian Ry. *v.* Sprot, 1856, 2 Macq. 449; L. Wensleydale in Rowboth-

is interpreted fairly, according to the intention of the parties. In England, a way-leave which was stipulated for before the invention of railways, has been held to expand with the ordinary modes of management of mines.[47] But no doctrine of expansibility along with the wants of the time will go to supplement a mere way-leave with a right to quarry stones on the lands for the purpose of maintaining an old or making a new road for the transit of minerals.[48] The rule that these merely accessorial or servitude rights, to make use of the surface and superincumbent strata, are confined to the working of the coal reserved, and to it alone, is illustrated by two decisions. In the first there was a reservation of the coal to the superior, along with liberty of digging it in any part of the lands, and an obligation to pay damages for injury caused by any new level which might be required. A purchaser of the coal, who had also right by leases to the coal under adjoining lands, used an existing level within the lands so conveyed to transmit water from these adjoining coal-fields, after raising it by means of a pump. It was held in the House of Lords, affirming the judgment of the Court below, that he had no right to do so. Nothing turned on the circumstance (which is of importance in cases of a different nature[49]) that the water was artificially brought upon the lands.[50] The other case was in reality an application of the doctrines laid down in *Graham* v. *Duke of Hamilton*. Feus of lands situated in the middle of the superior's other property were granted under reservation to him, as to part, of the coals and coal-heughs, to be won and disposed of by him at his pleasure; as to part, of the whole coal, stone quarries, and all other metals and minerals, with power to search for, &c.; and as to the rest, of the coal, with similar powers. The superior let his whole coal-field, both under and beyond the subjects so feued, to tenants who drove a nearly level mine, with its entrance beyond these subjects cross-cutting the coal and other strata beneath these

am *v.* Wilson, 8 H.L. 360; L. Chelmsford in Blair *v.* Ramsay, *infra*, [51]; E. Cardigan *v.* Armitage, 2 B. and C. 197; Harris *v.* Ryding, 5 M. and W. 60; Dand *v.* Kingscote, 6 M. and W. 174. It is probably different where the surface is let without stipulations as to landlord winning the minerals from it—Bell on Leases, i. 205; 2 Hunter, 212; cf. Smith *v.* Macgill, 1768, M. 15266, with L. Eldon in Menzies *v.* Breadalbane, 1 Sh. App. 228. Though the accessorial rights granted expressly do not come up to what is necessary for beneficial enjoyment, the principle is not excluded by the maxim *expressio unius, exclusio alterius*—Marvin *v.* Brewster Iron Co., 14 Amer. R. 322.

[47] Dand *v.* Kingscote, *supra*, [46].

[48] Harrower's Trs. *v.* Erskine, 6th Feb. 1827, 5 S. 307 (N.E. 285).

[49] *Infra*, chap. 29.

[50] Turner *v.* Ballandene, 3d March 1832, 10 S. 415, affd. 7 W.S. 163. On questions as to levels arising under mineral leases, see 2 Hunter, 482.

subjects, to the lands beyond, and thereby conveyed the minerals wrought under these last to the surface. It was held, both by the Second Division and by the Court of Appeal, that while the reserved right was one of ownership, the accessory right to bore through strata not reserved could only be used for the purpose of working the reserved minerals, and accordingly, that the superior and his tenants were not entitled to use the mine under the subjects feued for any other purpose, except in so far as it passed through reserved strata.[51] The Court below regarded the wider reservation of all minerals under the second parcel of land as not in reality extending the right, since no other mineral than coal was workable to profit. The House of Lords—or at least Lords Chelmsford and Hatherley—were of a different opinion; rightly, it is thought, if the construction put upon the term 'minerals' in the cases already cited [52] be of any authority.[53]

[51] Blair *v.* Ramsay, 23d Oct. 1875, 3 Ret. 25, affd. 3 Ret. H.L. 41. L. Chelmsford and L. Selborne differed as to the propriety of L. Ormidale's calling the accessorial right 'a privilege servitude or 'easement,' and not rather a necessary incident. Its nearest analogue is a road of necessity.

[52] *Supra*, p. 150.

[53] As to the insertion of a reservation of minerals in, or the dropping of the same out of, a progress of titles—see *supra*, p. 35; as to prescriptive possession, *supra*, p. 51; as to right of support and surface damages at common law and by statute, *infra*, chap. 28; and as to drainage of mines, *infra*, chap. 29, Part I.

CHAPTER XI.

PART AND PERTINENT.

Apart from, or in connection with, possession.

PARTS and pertinents—with or without redundant terms, such as pendicles, appurtenances, &c.—are such subjects corporeal or incorporeal as are held by the law to have passed with the land or other heritage *sub silentio* in a grant of the same, on a construction of the grant simply as it stands, or as interpreted by possession. It will be convenient to keep separate these two modes of arriving at a knowledge of what a conveyance of land is taken to comprehend, since the element of possession introduces many points of distinction.

I.—PARTS AND PERTINENTS APART FROM POSSESSION.

Supplementary to preceding chapters.

These may be defined in the words used by Mr Bell,[1] 'as such 'accessory parts and fixtures and appendages to lands or houses, or 'such separate possessions or privileges, as accompany the occupa- 'tion and use of the land;' or, as Erskine puts it, 'everything 'which, from its close coherence or connection with land, goes to 'the vassal as an accessory of the subject contained in the feudal 'grant.'[2] It is not necessary for that purpose that these or similar words should be used in the deed, since a grant of the lands of A. is as extensive as a grant of the lands of A. with parts and pertinents.[3] But the clause is almost invariably inserted, and is convenient for expressing the appurtenances of the grant. So long as the element of prescription is left out of account, and there is no dispute as to the identity of the subject, nor any express limitation in the grant, the title to the land is held as

[1] B. Pr. 739.

[2] Ersk. 2.6.4; Cr. 2.3.24; 2.8.39; St. 2.3.60 and 73; More's Notes, p. 200; Bankt. 2.3.163.

[3] *Per* L.J.-C. Hope in Gordon *v.* Grant, 12th Nov. 1850, 13 D. 1, 7; Beaumont *v.* L. Glenlyon, 11th July 1843, 5 D. 1337.

including, as has been already indicated,[4] everything *a cœlo ad centrum*, within the boundaries as drawn on the surface, and the direction of the plumb-line let fall therefrom and produced indefinitely upwards and downwards. To this rule *regalia* form the only exception.[5] The most important of these parts and pertinents have already been discussed under the heads of Accession, Fixtures, Game, and Minerals. It is intended to collect in this part of the present chapter those which remain to be discussed.

Customary surplusage.

The older text-books[6] are encumbered with a detailed explanation of a host of particulars which were, and to some extent still are, appended to a conveyance of land, especially in the *tenendas* clause, some of which particulars relate to rights now obsolete, others to subjects which, as part and pertinent, would pass without mention. To the category of obsolete appurtenances belong Courts and jurisdictions; pit and gallows,[7] which never were, however, included in the ownership of land; fortalices, which are now treated like other country seats;[8] herezeld;[9] steelbow goods, which are believed to have nearly disappeared;[10] the *mercheta mulierum*;[11] and the right to colliers and salters.[12] Of adjuncts which survive, besides those already discussed, it may be briefly said that mills are only peculiar in the matter of thirlage, and woods only in regard to limited estates; that forges, malt-kilns, breweries, gardens, orchards, and broom are so much surplusage; and that the right of ish and entry is part of the law of servitudes. Only two parts and pertinents remain—right to a share in the area of the parish church and churchyard, and right to private lochs.

A.—RIGHT IN AREA OF CHURCH AND CHURCHYARD.

Right in church area. Burgal churches.

The observations which follow do not apply to burgal churches at all, and only with some modifications to that part of burgal-landward churches which is allotted to the town. In the case of purely burgal churches, the magistrates—who, as a rule, have erected and are bound to maintain them—are entitled to charge pew-rents for their occupation, giving a preference to the parishioners,[13] for

[4] *Supra*, p. 104.
[5] *Infra*, chap. 14.
[6] Cr. 2.3.26-31; 2.8, *tot. tit.*; St. 2.3. 62-66 and 71-81; Ersk. 2.6.4-12.14.17. 18.
[7] 20 Geo. II. c. 43.
[8] B. Pr. 752.
[9] 2 Hunt. 284.
[10] 1 Hunt. 314; but the grantee or his incoming tenant would have a right to the modern substitute—the dung and straw at a valuation.
[11] Du Cange and Skene, *s.v.* Sugenheim's Leibeigenschaft, p. 103.
[12] 15 Geo. III. c. 28; 39 Geo. III. c. 56.
[13] As to this point, see L.J.-C. in Mags. *v.* D. of Hamilton, 23d June 1846, 8 D. 844, affd. 21st Feb. 1850, 7 B. App. 1.

whose benefit the churches were built, and charging no more than what is sufficient for the purpose of supporting the fabric, repairing or altering it, and providing for the decent celebration of divine worship, but not for adding to the common good of the burgh. Where there are several parish churches in the burgh, the revenues and charges of each may by force of usage be lawfully accumulated into and defrayed from a common fund.[14] As to burgal-landward and purely landward parishes, a reference can only be given here to another chapter for the rules which regulate the building and maintaining of the parish churches thereof,[15] and the subject must be taken up at the point when a general division of the area of the church has to be made.

General division of landward church.

This must be done when a new church has been built, when an old church has been enlarged,[16] and at any time when any one heritor complains and proves that a proper division never has been made. The amount of proof required is a matter for the Court to determine, and exceedingly narrow distinctions have been drawn. Thus the fact that a certain state of possession had subsisted for double the prescriptive period was held to be presumptive proof of a regular division, though neither decree nor agreement could be produced.[17] The same result followed on fifty years' possession; but here an explicit allocation, though extra-judicial, was further corroborated by the production of an agreement between the heritors and one who had been 'proprietor in 'his own right of an aisle' in the old superseded church, by which he was given an equivalent area in the new.[18] On the other hand, a general division was ordered where no explicit agreement and no decree could be proved, but only that each heritor had taken such part of the area as he chose, and had kept possession of it for more than forty years.[19] The general division may therefore be made extra-judicially by the heritors alone, without interference by the minister, kirk-session, or parishioners,[20] or it may be made judicially by the sheriff, if no point of heritable right is involved, on the petition of any heritor,[21] and subject to

[14] Abercromby *v.* Mags. of Edinburgh, 7th June 1836, 14 S. 902; Clapperton *v.* do., 14th July 1840, 2 D. 1385, esp. 1406, 1412, 1419, 1423; Mags. of Greenock *v.* Gardeners' Society, 27th Nov. 1822, 2 S. 44 (N.E. 38); Watson *v.* Watson, 1760, M. 5431 and 7917 (a case of sale, the validity of which was not in question).

[15] *Infra*, chap. 36.

[16] Not when merely reseated or rearranged internally. Stiven *v.* Kirriemuir, 14th Nov. 1878, 6 Ret. 174.

[17] Cathcart *v.* Weir, 1785, M. 7928.

[18] Smith *v.* Crawford, 22d June 1826, 4 S. 738 (N.E. 746).

[19] Wemyss *v.* E. Morton, 18th Jan. 1838, 16 S. 332.

[20] Heritors *v.* K.S. of Falkland, 1739, M. 7916.

[21] E. Marchmont *v.* E. Home, 1776, M. 7924, and Appx. *v.* Kirk, 2, 5 B.S. 558; D. Roxburghe Pr. 26th May 1875, 2 Ret.

review in the ordinary way. If a question as to the title to the land, in virtue of which the claim is made, is involved, or it is sought to disturb an occupation had for the possessory period, the Court of Session is the exclusive *forum*.[22]

Mode of division in landward-burgal churches.

The general division proceeds by certain steps. In the case of a burgal-landward church, the first is the division between the town's part and the landward part, in proportion to the population of the two districts.[23] The town's part may be dismissed by observing that its further division is intrusted to the magistrates, if the town be a burgh and possess such—they, and not the householders, being regarded as heritors for ecclesiastical purposes;[24] that in every case the rule of allotment is according to the real rent of property within the town;[25] that the magistrates have a customary right to a choice of seats for their own accommodation; and that in many of these churches, as well as in burgal churches, anomalies have crept in and been supported by ancient custom, such as letting and even selling part of the area to parties who are not heritors,[26] or allowing such parties to continue occupation in a new church, similar to what they had somehow obtained in the old.[27] If the last-cited case is not worthless by reason of its specialties, it decides that an agreement between the heritors and such old occupants to continue the latter in their rights is not illegal: but it may be doubted whether, apart from agreement, such interlopers could maintain their rights on the occurrence of a new general allocation, however ancient their occupancy may have been;[28] and whether in any case the pews could descend by inheritance or be validly conveyed to non-parishioners.[29]

Among heritors. Family seat.

The next step in the division of the landward portion of a burgal-landward church, and the first in the division of the whole area of

715; 1st June 1876, 3 Ret. 728, revd. 29th June 1877, 4 Ret. H.L. 76.

[22] Smith *v.* Crawford,[18]; Mags. *v.* D. of Hamilton,[13]; D. Roxburghe,[21]; except where the subject in dispute does not exceed £50 a-year, or £1000 in value, 40 & 41 Vict. c. 50, sect. 8.

[23] Ure *v.* Carnegy, 1793, M. 7929, expressly following Feuars *v.* Heritors of Crieff, 1781, M. 7924; and D. Argyle *v.* Rowat, 1775, M. 7921. See as to the effect of long possession, Sinclair *v.* Mags. of Kinghorn, 1761, M. 7918.

[24] Lockhart *v.* Lockhart, 24th Jan. 1832, 10 S. 243 (repairing a manse).

[25] D. Argyle,[23]; Crieff,[23].

[26] Farie *v.* Leitch, 2d Feb. 1813, F.C. St Andrew's case in Connell on Parishes, Suppl. 79 *et seq.*

[27] Gavin *v.* Trinity Ho. 2d June 1825, F.C., narrating an earlier decision as to the same parish church—North Leith.

[28] See, for other anomalies, Smith *v.* Crawford,[18] (landward parishes); L.P. Hope on 'hereditary seats' in Clapperton *v.* Mags. of Edinburgh,[14] (burgal church); Drummond *v.* Her. of Monzie, 1773, M. 7920; doubted by the judges in D. Roxburghe,[21]; and elaborately examined by L. Deas there, 3 Ret. 741.

[29] Watson *v.* Watson,[14].

a purely landward church (after setting apart seats for the minister and for the elders, both usually near the pulpit, and seats, usually the table-seats, for the poor,[30]) is to allot family pews among the heritors;[31] for they alone, as will presently appear, have any permanent right in and to the occupation of the edifice, except in the anomalous cases just mentioned. This privilege of choice of a family seat is not so much a legal right as an honorary distinction resting on usage,[32] intended to mark the social difference which is supposed to exist between even the smallest landowner and the largest leaseholder or a mere servant. The priority of choice is determined by the amount of the valued rent of the land held by each heritor within the parish.[33] The dimensions of the family seat are not determined by the same rule, except in so far as a large valuation speaks to a capacity to entertain many guests. The family seat is intended to contain the heritor's family—say six or seven souls—a community which does not vary in numbers proportionately to its wealth; and guests, the number of whom will bear some rough proportion to the means of their host, of which his rental is here taken as the test. Thus, in a church containing about 960 sittings there were allocated thirteen sittings to each of two heritors of nearly equal rental, who held between them nearly one half of the valued rent of the parish.[34] In another church of about one-third of that size, the patron, who was also a small proprietor in the parish, got a gallery capable of accommodating twenty people as his family pew.[35] After all the heritors have had family seats allotted to them, the rest of the area of the church—including, of course, the galleries—is divided among them for the accommodation of their domestic servants and tenants. Here the valued rent determines both the priority of choice and the *quantum*—the number of sittings already set apart to each heritor as his family pew being, however, taken *in computo*, in order that the whole divisible area may be allocated proportionally to the valued rent of the whole body of proprietors, except in cases where the church has been rebuilt or enlarged by the heritors in proportion to the

For servants and tenants, &c.

[30] Dunlop, Par. Law, p. 41.

[31] E. Marchmont *v.* E. Home, [21].

[32] *Per* L. Fullerton in Walker *v.* E. Zetland, 22d June 1848, 10 D. 1378.

[33] E. Marchmont, [21]; L. Braxfield in the Crieff case, [23] reported in 2 Hailes, 892; and in Dundas *v.* Nicolson, 2 Hailes, 802. The real rent would probably be the rule where it regulates the rating. See chap. 36.

[34] Walker *v.* E. Zetland, [32].

[35] L. Torphichen *v.* Gillon, 1765, M. 9936; Connell, 545, and Suppl. 73. Right of presentation, the substantial part of patronage, being now abolished, this precedent will not be followed; and the curious question, whether a patron who is not a heritor in the parish has right to any, or to what seat, is not likely to arise—Dunlop, p. 37.

real rent, when this valuation will also probably be the rule of allocation.[36]

A third division is necessary to the end for which the church was erected,—viz., the allocation by each heritor, among his tenants and dependants and the residenters on his estate, of the accommodation to which they are entitled as inhabitants of the parish, in so far as the dimensions of the edifice will admit. This must be fairly done; and the allotment is subject to the control of the sheriff, on the application of an aggrieved party at any moment, without waiting for a general division of the whole church.[37] This is not the only instance in which a special allotment may be demanded. The same occurs when any estate to which a part of the area of a church is attached as pertinent is divided. Each of the owners is then entitled to a share of the said part corresponding to the value of his portion of the land. In neither case is the general allocation in any way affected;[38] and until the special division so demanded is made, possession of the disputed seats must be in common.[39] The tenants and dependants of each heritor should, as far as possible, be seated together.[40]

Allocation among them.

Casual subdivision.

Coming now to the nature of the rights which arise from the erection of a parish church in a country district, or of that part of a burgal-landward church which effeirs to the landward part of the parish, and from the division of the area just described; this cannot be better explained than in the words of Lord President Inglis in the *Jedburgh* case:[41] 'The heritors have the burden, 'which is imposed by statutes,[42] of building and maintaining 'parish churches, as well as other ecclesiastical buildings; and 'the buildings which they so build and maintain are in law the 'property of the heritors.[43] But I need hardly add that they 'are only property in trust—in trust, that is to say, for the whole 'body of the parishioners within the parish; and when, in the 'division of the area among the heritors, the accommodation in 'the parish church comes to be appropriated, so much to one heritor and so much to another, I think, in like manner, each individual heritor becomes trustee for those of the parishioners that 'reside upon his estate.[44] The portion of the area that is assigned

Nature of the several rights.

[36] See 17 & 18 Vict. c. 91, sect. 33.

[37] L. Kinnaird *v.* Matthewson, 1802, 4 Pat. 429.441.442.

[38] Skirving *v.* Vernor, 1796, M. 7930.

[39] St Clair *v.* Alexander, 1776, M. Appx. *v.* Kirk, No. 1.

[40] E. Marchmont *v.* E. Home in 5 B.S. 559.

[41] D. Roxburghe, [21], at 3 Ret. p. 734.

[42] *Infra*, chap. 36.

[43] See L. Cringletie in Ure *v.* Ramsay, 5th June 1828, 6 S. 916, 917; neither the superior of lands in the parish, nor the titular of teinds, has any right or burden, *infra*, chap. 36.

[44] See the cases in last paragraph.

'to him is not his property, in any sense of the word. The heri-
'tors are joint proprietors of the parish church itself—in trust, as
'I said already; but the portion of the area that is assigned to
'each heritor, is given to him not to be occupied exclusively by
'himself and his family—not to be shut up, for that is illegal[45]—
'not to be hired out for money, for that is equally illegal,[46]—but
'to be used for the benefit of the parishioners who are resident
'upon his estate; so that each individual heritor, after the division
'is made, is equally a trustee for a portion of the parishioners, as
'the whole heritors, before the division was made, were trustees
'for the entire parish. Now I do not at all doubt that both the
'burden and the right of the heritors in this matter are civil bur-
'den and civil right, and fall to be adjudicated upon by civil juris-
'diction only.' To this statement of the law, it may be added that the heritor's right to the area of the church so allotted to him, though not one of property, is regarded as pertinent to his land,[47] transferred along with it *sub silentio*,[48] inseparable from it except by a new division,[49] (else might the church be gradually closed to the parishioners),[50] descending, therefore, with the lands to his heir,[51] and passing to the purchaser or other disponee of the lands. It is now part of the burden laid on the heritors to provide the usual church furniture, and the individual heritors have no right of property in the pews so provided.[52]. In former times, each proprietor provided his own, and could consequently dispose of the materials as he chose.[53]

Furniture.

[45] See M'Crone *v.* Campbell, 24th Nov. 1826, 5 S. 42; Dobbie *v.* Halbert, 7th March 1863, 1 Macph. 532. Family pews are in some churches kept locked; and the illegality here laid down has never been judicially determined.

[46] Clapperton *v.* Mags. of Edinburgh,[14]. M'Intosh *v.* Fraser, 8th July 1823, 2 S. 460 (N.E. 412), 8th Feb. 1825, 3 S. 508 (N.E. 354), was a special case, in which the magistrates of a burgh had rebuilt and maintained the burgal-landward church, on agreement with the landward heritors that the latter should pay a rent for the sittings occupied by them; and it was found that so long as the rent was paid, the magistrates could not oust the assignees of one of the original allottees, being themselves heritors. See *per* L.J.-C. in Mags. *v.* D. of Hamilton,[13], at 8 D. 852; and *per* L.O. Manor in D. Abercorn *v.* Pres. of Edinburgh, 17th March 1870, 8 Macph. 733.

[47] Ersk. 2.6.11; Bankt. 2.8.192; B. Pr. 744.

[48] Duff *v.* Brodie, 1769, M. 9644. In the earlier case of Lithgow *v.* Wilkieson, 1697, M. 9637, the final interlocutor, on the other hand, preferred a posterior conveyance of the mansion-house and the seat in church to an earlier conveyance of part of the vendor's lands, without mentioning the seat.

[49] Peden *v.* Mags. of Paisley, 1770, M. 9644; L. Monboddo at 2 Hailes, 720 (St Clair *v.* Alexander); L. Deas in D. Roxburghe, 3. Ret. 745.

[50] L. Cringletie in Ure *v.* Ramsay, 5th June 1828, 6 S. 916-918, Ersk. 2.6.11.

[51] As to town-seats—Watson *v.* Watson,[14]; Milne *v.* Wills, 20th Jan. 1869, 7 Macph. 406.

[52] M'Leod *v.* Carment, 9th Feb. 1830, 8 S. 475.

[53] Ersk. 2.6.11.

Effect of a disjunction and erection *quoad sacra*.

The question arose in a recent case,[54] whether the heritors of lands included in a *quoad sacra* parish, disjoined and erected out of one or more *quoad omnia* parishes, are still entitled to seats in their former parish church, if a new division thereof comes to be required on account of enlargement or rebuilding. In the Court of Session five judges, forming the majority, were of opinion, that under the terms of Sir James Graham's Act of 1844,[55] this right had ceased. Some of their lordships seemed inclined, while reserving the point, to hold that the burden nevertheless subsisted against them of building and maintaining the church of the old parish. Lord Deas held that the right and burden were correlative, and both remained. The House of Lords expressly reserved both questions, and agreed with Lord Deas and Lord Mure in holding that neither point arose, there being no room for re-allocation; since the new church of the old parish, about which the question arose, came simply in place of the old church, having been obtained under a contract of excambion with a private heritor, and was not provided, as in the ordinary case, by the general body of heritors under their statutory obligation.[56]

Churchyards.

The rules of law in regard to the property and use of the parish church apply equally to the churchyard, with some modifications, which may be traced in the main to the difference between the occupation had of the two subjects. When a heritor or the residents on his land relinquish their connection with the church by ceasing to hold land or to reside within the parish, it matters nothing to them that their pews are at once occupied by entire strangers; but in quitting the parish, they leave behind them the mortal remains of those who had been dear to them deposited in the churchyard, it may be at a spot marked by a monument erected to their memory. It is also matter of constant practice to allow burials to take place in churchyards, the guardians of which are under no legal obligation to admit them. It may therefore be anticipated, that the main distinctions will appear in regard to the allocation of the area.[57]

Ownership thereof.

'The property of the churchyard belongs to the heritors, for

[54] D. Roxburghe (Jedburgh), 26th May 1875, 2 Ret. 715; 1st June 1876, 3 Ret. 728; revd. 29th June 1877, 4 Ret. H.L. 76.

[55] 7 & 8 Vict. c. 44, sect. 8.

[56] See *infra*, chap. 36. In Mags. of Fortrose *v.* Maclennan, 26th Nov. 1880, 8 Ret. 124, the decision of L.O. Currie-hill was acquiesced in, that lands and heritages disjoined *quoad sacra* under the Act were not freed from liability for parochial ecclesiastical burdens in the old parish.

[57] The obligation to provide a churchyard is treated of *infra*, chap. 36.

'the interment of those in their respective families, and other 'inhabitants upon their several properties,'[58] and for that purpose alone. Accordingly, the general body of heritors cannot encroach upon any part of the churchyard which has been allocated to and used as the burial-ground of any one of their number (and the same would apply by a parity of reasoning to any inhabitant of the parish), against his will, for the purpose of enlarging the parish church, or for any other purpose inconsistent with the right of sepulture, except on proof of sheer necessity or strong expediency.[59] If this be proved, the operations must be carried on in such a way as to be least offensive to the feelings of the relatives of the departed.[60] The heritors have the sole right of management; but they usually delegate their functions to the minister and kirk-session, sometimes to their own clerk or the beadle.[61] They are the owners of the trees which grow in the churchyard, as well as of all the strata beneath it. It has been laid down by a learned author,[62] that they may work the minerals, provided that can be done without interfering with the proper use of the ground. The profits must be turned to some parochial purpose. The grass, by an old custom, being an annual crop, goes to the minister, but he is not at liberty to make use of it by grazing.[63]

Allocation of lairs.

The regular mode of allocating lairs would be to proceed in the same way as in the division of the church, as already described, and thus allot the whole surface of the burying-ground among the heritors, according to valued or real rent, reserving portions for the minister and his family. But in point of fact, this is never done, for the reasons stated at starting; and the only allotment in which some sort of order is usually seen, is that of the family lairs of the heritors. Tenants, residenters in the parish, and others, have as good a right to bury their dead—who have been parishioners — as the heritors themselves, whether resident or

[58] *Per* L. Covington in Cunninghams *v.* Cunningham, 1778, 5 B.S. 415; Ure *v.* Ramsay, 5th June 1828, 6 S. 916; Wilson *v.* Brown, 30th June 1859, 21 D. 1060.

[59] Hill *v.* Wood, 30th Jan. 1863, 1 Macph. 360.

[60] Ibid.; and see Off. of State *v.* Ouchterlony, 27th June 1823, 2 S. 437 (N.E. 390), affd. 1 W.S. 533. Robertson *v.* Salmon, 1868, 5 S.L.R. 405; Turner *v.* Mackenzie, 1869, 41 Jur. 283 (absentee representatives). Parliament may sanction desecration for a public purpose, as making a road or railway—*e.g.*, Ramshorn Kirkyard, Glasgow; Calton Burying Ground, Edinburgh.

[61] Ure *v.* Ramsay, [58]; Wilson *v.* Brown, [58].

[62] Dunlop, Par. Law, p. 84, quoting Mackenzie's Remarks on 1597, c. 232; Forbes on Tithes, p. 215; and the Greenock Case, 1777, 2 Hailes, 758.

[63] Hay *v.* Williamson, 1778, M. 5148; Spence *v.* Hall, 1st Dec. 1808, F.C. (Therefore he does not require to fence it, that being the duty of the heritors.) It is not computed in fixing his grass glebe—Beaton *v.* Dallas, 1734, Elch., Glebe, No. 1.

absentee; but the question, who shall be regarded as parishioners has never been moved—doubtless because, in such matters, place is given less to strict legal right than to a courteous deference to the wishes of the dead, or of their relatives. The right which the heritor—with whom we are chiefly concerned—obtains by allotment of a part of the churchyard, passes as pertinent of his land.[64] It is not ownership, and never can become such by long possession, though this possession does away with the necessity of proving express allocation, 'and gives a title of the most solemn description.'[65] It is rather a right of use for this one special purpose, involving a right to prevent anything inconsistent therewith (of which an example, the extension of a church over a burial-place, has just been cited), and anything unsuited to that sentiment of sacredness which clings to such a spot without the aid of any formal consecration. The *Scone* case illustrates at once this sort of right, and also the rule that there is no room in our law for a *locus religiosus*, put *extra commercium*.[66] A parish minister and one of his sons had been buried close to the parish church, which, with the surrounding ground, was by excambion afterwards thrown into the park of a nobleman, who took down the wall which encircled this piece of ground. It was held that another son, though resident out of the parish, was entitled to insist on the burial-places being enclosed with a stone fence or railing, and on the relations (explained by the Lord Justice-Clerk to mean the immediate descendants) having access to the enclosure at all reasonable times on giving notice.[67] This decision is all the stronger in favour of the decent preservation of burying-grounds, since the space surrounding the church was not the ordinary parish churchyard. But it does not go so far as to justify the parishioners in erecting on the soil of the churchyard a moveable hut, for the purpose of sheltering from the weather watchers against body-snatchers, when equally convenient stances are offered in the neighbourhood. Such a misuse of the ground could be prevented by any individual heritor.[68]

Nature of several rights therein.

When burial-places have been once allocated, be it to a heritor or to any other parishioner, it is a very delicate matter for the heritors or their managers to decide when they will be justified in making a fresh allotment of a particular area. The question is, in

Heritors' power to reallocate.

[64] Ersk. 2.6.11; Bankt. 1.3.12, 2.8. 193; Ure *v.* Ramsay, [58].

[65] Hill *v.* Wood, [59], per L. Benholme, 1 Macph. 373.

[66] See Menteith *v.* Hope, 1695, 4 B.S. 261.

[67] Wright *v.* E. Mansfield, 1820, n.r., affd. 17th March 1824, 2 Sh. Ap. 104.

[68] Ure *v.* Ramsay, [58].

the first place, one of time. A decent interval since the last interment must be allowed to pass before the grave can be presumed to be tenantless; and in a case to be immediately noticed, the question was moved whether twenty-two years would be enough.[69] But mere lapse of time will not be sufficient if the allottee or his representatives are still parishioners (and perhaps even whether or not), provided there be allottable space in the churchyard unoccupied.[70] If the churchyard is plainly too small for the population, it must be extended, or the Burials Acts adopted.[71]

Headstones, enclosures, tombs.

A practical barrier against frequent re-allocation, and a customary memorial to the dead, or shelter to their remains are afforded by the erection of headstones, enclosures, and tombs. In regard to these, the law is thus laid down by Lord Deas:[72] 'I have 'always understood the law to be, that in a parish burying-ground 'no person is entitled to erect a monument where there was not 'one before, without the sanction, express or implied, of the 'general body of heritors; but that if the general body assent, no 'individual heritor can object to appropriate erections or enclosures, 'so long as reasonable access is left through the burying-ground, 'although it be more limited than before.' The generally recognised congruity between the primary use of the burying-ground and such erections, sufficiently distinguishes them from such others as the hut already mentioned; and the heritors may be left to protect themselves against unconscionable encroachment on the space, or desecrations of the sanctity of the churchyard. On the other hand, the churchyard is a place of burial; and it may be conjectured that any one heritor would have a right to prevent the ground being cumbered with a cenotaph erected in memory of any person, more especially of a non-parishioner.[73] The case from which the remarks of Lord Deas are taken turned on the question whether an enclosure round a burying-place, long used as such, so materially affected the access of another heritor to his part of the churchyard as to entitle him to prevent its erection; and that again depended on what sort of access must be left in such a locality. It was held to be 'a different sort of thing from access to a

Cenotaphs.

[69] *Per* Lord (then Sheriff) Gordon in Wilson *v.* Brown, [58].

[70] Ibid. A heritor attempted to extend his burial-place by annexing lairs acquired by a parishioner on payment, in one of which the latter had laid a relative.

[71] 18 & 19 Vict. c. 68; 20 & 21 Vict. c. 42; 44 & 45 Vict. c. 27; see Fulton *v.* Dunlop, 31st May 1862, 24 D. 1027, *infra*, chaps. 36, 38.

[72] In M'Bean *v.* Young, 22d Jan. 1859, 21 D. 314, 321.

[73] See Paterson *v.* Beattie, 4th March 1845, 7 D. 561 (Martyrs' Monument). Right denied to purchaser of a lair in a cemetery with funds of deceased to remove headstone erected long before by the mother of both—Wright *v.* Wright, 20th Oct. 1881, 9 Ret. 15.

'dwelling-house;' and, there being no real or practical inconvenience, as funerals are ordinarily conducted, but only the necessity for a little more management, interdict was refused. When re-allocation requires the removal of headstones reared to the forgotten dead, the heritors should see to their safe custody, as documents which may turn out to be valuable as evidence. Two cases have recently occurred in which attempts to divert part of the area of a churchyard from its proper use for sepulture were defeated at the instance of individual heritors and parishioners. In the first the churchyard was an old one still in use, though for two hundred years another had existed round the parish church, and the principal heritor proposed to use a portion of it, partly covered by his family mausoleum, as site for an Episcopal chapel.[74] In the other case, interdict was granted against a heritor proceeding further with a contract of excambion, by which, in exchange for an addition to the parish churchyard, the heritors (as bound by the vote of a majority) agreed to convey to him a chapel, with its site, which was surrounded by the churchyard, and had been from time immemorial and till very recent times used as part thereof. The contract contained no effectual restriction on the use to be made of the chapel. It was not concealed that the purpose was to turn it into a Roman Catholic place of worship; but the decision proceeded on the broader ground of diversion, without determining what religious services might be allowed in Scotch parish churchyards, or whether there might not be cases of excambion which would be legal, as where the part given out had never been used and was unsuitable for burial, or had ceased to be used for a long period.[75]

B.—PRIVATE LOCHS.

Sorts of private lochs.

A private loch or lake passes as part and pertinent of land surrounding or adjacent to it without express mention of the particular pieces of water by name, and even without use of the phrase *cum lacubus*, or its English equivalent. When a loch is surrounded by a proprietor's land, the case is a simple one. It is his, not only the *solum*, but the water—if it do not flow into a stream in which others have an interest—to do as he chooses with both.[76] He may prevent the public from fishing in it, though there is a

Enclosed by one estate.

[74] Wright *v.* Elphinstone, 16th Mar. 1881, 8 Ret. 1025—per L.O. Adam.

[75] Russell *v.* Ms. of Bute, 8th Dec. 1882, 10 Ret. 302.

[76] St. 2.3.73; B. Pr. 651, 1110. Even so large a lake as Lough Neagh in Ireland is not *inter regalia*—Bristow *v.* Cormican, 3 App. Cas. 641.

public access to it, and they have fished for forty years.[77] He may drain it dry, although the effect is unavoidably to send moss or other polluted matter down a stream, and poison the fish, to the damage of the inferior proprietors.[78] If it has no outlet, except during wet weather—if it is a *stagnum* in the sense of the Roman and Scotch law, having no distinct or perennial stream of water flowing from it—he may send the water in any direction he chooses, and may, within the prescriptive period, but not later, alter that direction; though he is not entitled to take from the stream he thus enriches as much of its ordinary flow as he gives, for the supply from a *stagnum* is precarious.[79] But if there be a constant discharge into a stream, the loch must be held to be a part of the stream, 'which no man hath power to divert from its natural 'course.'[80]

Stagnum.

Another set of considerations comes into play when a private loch is adjacent to the lands of two or more proprietors. There is a legal presumption in that case of common property in all of them. Otherwise stated, the production by a proprietor of lands bordering on a private loch of a charter conveying these lands with pertinents—with or without the phrase *cum lacubus*—is *primâ facie* evidence of his having a joint right of property in the loch with the other riparian proprietors.[81] The few decided cases determine with considerable precision what shall be sufficient evidence to rebut this presumption. In a very early case a riparian proprietor who was infeft in a loch *per expressum*, and alleged immemorial possession of it by fishing, building eel-arks, and debarring the other riparian proprietor from fishing *vid facti*, was preferred to the exclusive ownership of the loch, as against the latter, who had an older infeftment from the same author of his lands *cum lacu et piscationibus*, and offered to prove prescriptive possession by fishing, in spite of the interruptions. No proof was allowed, so that the *ratio* of the judgment must have been that an express conveyance, though posterior, must prevail over the general clause, unless the latter were fortified by exclusive possession, which it admittedly was not.[82] This judgment is

Lochs abutting on different estates.

[77] Montgomery *v.* Watsons, 28th Feb. 1861, 23 D. 635.

[78] Mayor of Berwick *v.* Hayning, 1661, M. 12772, 2 B.S. 292. See Sir Geo. Mackenzie's argument, Works, vol. i. Pleadings, p. 24.

[79] Mags. of Linlithgow *v.* Elphinstone, 1768, M. 12805, 5 B.S. 935; Cowan *v.* L. Kinnaird, 20th June 1863, 1 Macph. 972; 15th Dec. 1865, 4 Macph. 236; 3.4 D. (43.14).

[80] Mags. of Linlithgow, [79]. As to the law of running water, see *infra*, chap. 29.

[81] Scott *v.* L. Napier (St Mary's Loch), 25th June 1867, revd. 11th June 1869, 7 Macph. H.L. 35, where the opinions of the Scotch judges are also printed. St. 2.3.73; B. Pr. 651, 1110; Bankt. 2.3.165.

[82] Scot *v.* Lindsay, 1635, M. 12771.

scarcely reconcilable with the authorities already quoted, and with others to be presently cited, as to the effect of prescription on a title of part and pertinent. At the present day, a proof of exclusive possession would have been allowed. This was what was done in the *St Mary's Loch* case,[83] where the question as to the effect of an express infeftment did not require to be determined, since the express grant, though prior to the general grant 'with pertinents' held by the other party (who maintained nothing more than a joint right of property), made the lochs a separate subject, and had dropped out of the progress. The parties were thus left on an equal footing in respect of title; and it was found that exclusive possession was not proved by the following acts, which were those mainly relied on: prohibiting the use of a boat by a person who was neither a riparian proprietor nor tenant, for this was in support of the common interest; giving permission to a sportsman to fish; instructing a tenant to prevent strangers from fishing; forbidding any fishing with the otter or lath; and allowing the millers of Selkirk to draw off an extra supply of water by a siphon. And the exact opposite of what is deemed to be the purport of the case of *Scot* was determined in a very recent decision, where it was found that a posterior express grant of a loch will not prejudice a prior grant of riparian lands with pertinents, unless there be exclusive possession for the prescriptive period. Another point in the law of prescription, as applied to the interpreting of titles, was determined in the same case,—that express conveyance of a loch in a charter of lands discontiguous from it, will require the plainest words or the strongest proof of possession to carry the property of the loch—water and *solum*. Accordingly, when the principal subject conveyed was a mill, 'with the loch of 'Derculich and fishing thereof, and the mill-dams and watercourses belonging to the said mill,' it was presumed that nothing more than a water servitude was meant.[84] The most ordinary exercise of property in a loch is by fishing for other fish than salmon; and an express conveyance of fishings—*cum piscationibus*—is not required to let in proof thereof. Thus where, of two proprietors whose lands surrounded a loch, one had this clause in his titles, and the other not only wanted the clause, but lay under a reservation to her superior of 'fishing as used and wont,' and possession by the two proprietors had been promiscuous, it was held that the reservation was only limited and personal to the superior; that his vassal had a title to fish for trout in the loch; and that neither

Effect of possession.

Discontiguous.

[83] Scott *v.* L. Napier, [81]. 1874, 1 Ret. 334.

[84] Stewart's Trs. *v.* Robertson, 6 Jan.

she nor her tenants could be interdicted from sailing or fishing.[85]

Servitude rights.

It may sometimes, however, be clearly made out, that one of the riparian proprietors has the ownership of the loch, and the others either no right in it at all, or only certain rights of servitude.[86] Thus a loch was surrounded by two estates, one held *cum lacubus et piscationibus*, with proof of possession and vindication of exclusive right of ownership *ab antiquo*, the other with liberty and privilege of the loch where contiguous to the lands for bleaching, washing, &c., so long as undrained. The loch was found to be part of the first-mentioned lands.[87] It may then come to be of some consequence to determine the boundaries of the loch, so as to fix the limit of these conflicting interests. The extent of the sheet of water varies, in many cases, with the state of the weather. These fluctuations present a problem to the land-surveyor and jurist which is similar to that which is presented by the ebb and flow of the sea; and the further difficulty of artificial draining is sometimes added. The rule which obtains in cases where there has been no artificial tapping is, that the loch must be taken 'in its ordinary state, neither swelled by 'floods nor decreased by any unusual drought;[88] and not, as was afterwards contended, the medium line between the highest and lowest points to which the water usually rose in winter and summer during the prescriptive period.[89] The area of the loch in such a question will not be affected by any artificial operations, either in the way of damming up or draining out, executed within the prescriptive period, whether performed by the proprietor himself,[90] by another with his acquiescence,[91] or by another against his will.[92] The state of the loch beyond the prescriptive period is accepted as its natural state.[93]

Boundary, how drawn.

The *solum* and the water.

When the joint right of riparian proprietors in a loch is more narrowly looked into, it appears that a distinction is made between the *solum* and the water. The *solum* is regarded as an extension of each estate to the middle of the loch, giving a right of exclusive property in the section thus defined, and therefore

[85] Macdonald *v.* Farquharson, 14th Dec. 1836, 15 S. 259.

[86] Cunninghame *v.* Dunlop, 20th Dec. 1836, 15 S. 295; 1st June 1838, 16 S. 1080.

[87] Baird *v.* Robertson, 2d Feb. 1836, 14 S. 396. The symbol in taking sasine was a drop of water.

[88] Dick *v.* E. Abercorn, 1769, M. 12813, (see case of E. Crawford in Sess. Pa.); cf. Glen *v.* Bryden, 8th June 1830, 8 S. 893 (interdict).

[89] Baird *v.* Robertson, 20th June 1839, 1 D. 1051.

[90] Graham's Tr. *v.* Boswell, 14th Nov. 1835, 1 D. 1053, note.

[91] Baird *v.* Robertson, [89].

[92] Cunninghame *v.* Dunlop, 1st June 1838, 16 S. 1080.

[93] Note to 1 D. 1061; cf. with L.O.'s note.

sole right to the minerals beneath it.[94] It is conceivable that such use might be made of the *solum* by a single heritor, as to give the others a claim to object in defence of their joint right in the water—as by cutting off a part of the loch by means of a mole, or by putting down obstructions to boating; but no instance of such encroachment has been recorded. The boundaries between each estate beneath the water will be defined similarly to the seaward and riverward marches, already described.[95] The right of the same parties in the water is very different, and was thus described in the first *Loch Rannoch* case:[96] 'A joint right 'or common property in the loch of Loch Rannoch, and a joint 'right of sailing, fishing, floating timber, and exercising all acts 'of property thereupon, and of drawing nets upon the shores 'thereof, adjoining to their respective lands, but not upon the 'shores of the lands belonging to each other.'[97] The rights of parties standing thus, one of the two alienated a part of his land, 'with lakes and pertinents,' and the disponee sought to participate in the use of the loch. The Court of Session by a large majority[98] and the House of Lords found the conveyance was good to carry a share of the joint right; that there was nothing to prevent such an alienation, the right being divisible even against the will of a joint owner; but that each of the riparian proprietors had an interest to prevent abuse of the water, as by putting upon it an outrageous fleet of boats, for which purpose he might come to the Court to impose regulations on all concerned. This joint right, like any ordinary *pro indiviso* right to land, may be included under the fetters of an entail.[99]

II.—Part and Pertinent as interpreted by Possession.

In treating of the Positive Prescription, it was shown[100] that its two main functions were to protect a favoured progress of

Explicative Prescription.

[94] Cochrane *v.* E. Minto, 5th July 1815, 6 Pat. 139.

[95] *Supra*, pp. 97, 102.

[96] In 1798. Interlocutor quoted in Menzies *v.* Macdonald, 10th March 1854, 16 D. 827, 828, affd. 10th June 1856, 2 Macq. 463, 19 D. H.L. 1.

[97] An exclusive right to islands in a loch will be more easily presumed. Here two islands were found to belong to the Menzies estate. See a curious question (one of fact) as to whether a piece of water formed two lochs, or only one. Mackenzie *v.* Bankes, 30th Nov. 1877, 5 Ret. 278, aff. 27th June 1878, 5 Ret. H.L. 192.

[98] Whole Court—diss. L.J.-C., L. Deas, and L. Wood, chiefly for the reasons that this was to curtail a man's rights without his consent, and was inconsistent with the nature of common property. See also obs. of L. Selborne in Mackenzie *v.* Bankes, 5 Ret. H.L. 202.

[99] Stirling *v.* Dun, 21st Dec. 1827, 6 S. 272, affd. 22d June 1829, 3 W.S. 462; see Stewart *v.* Nicolson, 2d Dec. 1859, 22 D. 72. As to division among heirs-portioners, and liability for terce, cf. L. Rutherfurd, 16 D. 846-7, with L. Deas, ibid., 857-8.

[100] *Supra*, p. 27.

titles against certain objections, and to explain the meaning of titles, the validity of which was not questioned; and that the latter, which was called Explicative Prescription, could not be fully illustrated in that place, on account of its being mixed up with matters which required explanation elsewhere. One of these was the law of 'part and pertinent.'[101] What follows in the present chapter should therefore be read in connection with the chapter on Prescription. For, whether it be that this function of prescriptive possession existed prior to, or was statutorily created by, the Act of 1612,[102] certain it is that the rules applicable to Protective Prescription—which alone was in the contemplation of the framers of that Act—apply equally to that function of prescription which makes it so useful here, as well as in the doctrine of *regalia* and servitudes. From it the rules already given, which regulate the sort of possession that is requisite for prescription, have received their main illustrations. The present subject affords proof that there is the same identity in the sort of title required. Thus, where the owner of lands with part and pertinent brought declarator of a right of commonty in an adjacent moor, and alleged possession for forty years, not as inferring the positive prescription thereof as a separate tenement, but as proof that it was included in 'part and pertinent,' it was held that he must produce the ordinary prescriptive title.[103] If he cannot, as by possessing without a sasine, the only benefit accruing to him from his possession, even if immemorial, will be, that he will be entitled to continue it till another party produces a special right.[104] As has been shown elsewhere, the distinction which it has been attempted to draw between prescription extensive of the terms of a grant—as converting 'fishings' into 'salmon fishings'—which requires the full prescriptive period, and prescription simply explanatory of its terms,[105] which is satisfied with a shorter period, was rejected at the time, and has never been given effect to either before or since. It is true that in an earlier case Lord Deas, in explaining a judgment of the Court,[106] drew a distinction between the effect of a minority in the course of the positive prescription and its effect on a tract of usage as construing a clause

Nature of the possession therein.

Title required.

Period.

[101] Cr. 2.3.24, 2.8.39; St. 2.3.73; Bankt. 2.3.170; Ersk. 2.6.3; B. Pr. 739.

[102] *Supra*, pp. 24, 49.

[103] Dunbar *v.* Sinclairs, 1714, M. 9640, 10817; Brand *v.* Charteris, 18th Dec. 1841, 4 D. 292.

[104] Glendonwyne *v.* Gordon, 1716, M. 9643.

[105] Fraser *v.* Grant, 16th Mar. 1866, 4 Macph. 596; see *supra*, p. 50.

[106] Baird *v.* Fortune, 13th June 1861, 23 D. 1080.

of pertinents. But the House of Lords,[107] in reversing the judgment of the Court of Session, had expressly denied effect to usage short of the prescriptive period as being too recent to be useful as contemporaneous exposition of an ancient document.[108]

Consistent with the title

The case of the *Officers of State* v. *The Earl of Haddington* is an excellent example of the rule of which a few illustrations from other departments of the law have been already given,[109] that prescription on a clause of 'part and pertinent,' or any similar *addendum* to a grant, will carry nothing that is inconsistent with the grant itself. The Crown granted out the Keepership of the King's Park, Holyrood, 'with all rents, profits, 'and emoluments belonging thereto,' and in the *tenendas* all liberties, profits, &c., both beneath and above the ground in quarries, stone and lime. For a very long period the Keeper had been in the habit of giving gratuitously and letting out permission to quarry stones within the park, and had latterly himself quarried. The Court of Session, on reconsideration of the question as to his right to meddle with the *corpus* of the subject, were of opinion that, though there could be no positive prescription inconsistent with or in opposition to the Crown grant, the conditions and extent of the Keeper's right might be explained by ancient and continuous usage in consistency with its terms, and accordingly gave effect to the usage under some limitations. But the House of Lords reversed, and found that the Keeper had no right to the stone to any extent, such a right not being natural to the grant of a keepership, but inconsistent with it. The long usage had to be ascribed rather to tolerance on the part of the Crown; and was, moreover, till within recent times very badly authenticated. Again, it has been decided that, while the ordinary predial servitudes are *naturalia* of a grant of lands, and may therefore be obtained by prescription on part and pertinent, the opposite is true of a right of hunting in the lands of another, though this is a valuable privilege capable of being feudalised, and was here contained in the *tenendas*.[110] It is the same with the minor *regalia*, except in the case of a barony title.[111] The

[107] Do., 25th May 1859, 21 D. 848, revd. 25th April 1861, 4 Macq. 127.

[108] This is consistent with the L. Chancellor's dicta in Off. of State *v.* E. Haddington, 24th Sept. 1831, 5 W.S. 570, 596, revg. 4th June 1830, 8 S. 867. The earlier stages of the case are reported 24th June 1823, 2 Sh. 420 (N.E. 374), rem. 26th May 1826, 2 W.S. 468.

[109] *Supra*, p. 42.

[110] E. Aboyne *v.* Farquharson, 16th Nov. 1814, F.C., affd. 22d April 1818, 6 Pat. 380.

[111] *Infra*, Part II.; and esp. D. Montrose *v.* M'Intyre, 10th March 1848, 10 D. 896; L. Adv. *v.* Sinclair, 14th June 1865, 3 Macph. 981, affd. 7th June 1867, 5 Macph. H.L. 97; L. Adv. *v.* Hebden, 26th Feb. 1868, 6 Macph. 489.

same principle is applied, as has been already pointed out,[112] in that rule according to which a bounding charter is incapable of founding prescription of any corporeal subject beyond the bounds; but may, on the other hand, be the title of the dominant subject, on which a servitude beyond its bounds may be acquired by prescription, it being of the essence of a predial servitude to be exercised on the lands of another.

Explaining a non-bounding title.

But when lands or other heritable subjects are held by titles, which are not of the nature of bounding charters, these titles are deemed ambiguous as to the extent of the right conveyed, and therefore patient of explanation by the state of possession for the prescriptive period. He who possesses under an express right is *in dubio* preferred to him who possesses only as a pertinent;[113] but the latter will prevail on proof of exclusive prescriptive possession.[114] Thus it was found, in conformity with old decisions, that a barony title—which in this matter is no better than an ordinary non-bounding charter[115]—was apt and sufficient to found positive prescription of the right of property in an island *ex adverso* of the barony lands, though it had been expressly granted out by the Crown as a separate tenement, and though this grant had been fortified by an old decree, since this might be lost by the negative prescription.[116] Precisely the same point was decided in a case where an infeftment with part and pertinent, along with prescriptive possession of an adjoining moor, was relevantly opposed to an express title to the moor, backed up by an old decree which found the other right to be one of servitude only.[117] While the existence of a decree in conformity with the express title is an important adminicle of evidence in its favour, a decree in favour of the holder of the general title is equally important in proof of his possession. Thus the production of a Crown plan of the lands, and of a possessory judgment which had been acquiesced in, formed part of the proof which established the right of ownership of certain grazing-lands in the proprietor of an adjoining estate with parts and pertinents, as against an express infeftment, on which no possession had followed.[118] Even proof by documentary evidence that a piece of land had been of old the glebe of a united parish

[112] *Supra*, p. 91.

[113] Ersk. 2.6.3; Lugton *v.* Somerville, 1628, M. 9628.

[114] Young *v.* Carmichael, 1671, M. 9636; Cs. Moray *v.* Wemyss, 1675, ibid.; E. Leven *v.* Findlay, 1711, M. 10816.

[115] See *supra*, p. 44; Carnegie *v.* MacTier, 18th July 1844, 6 D. 1381.

[116] Mags. of Perth *v.* E. Wemyss, 19th Nov. 1829, 8 S. 82.

[117] E. Fife's Trs. *v.* Cuming, 16th Jan. 1830, 8 S. 326.

[118] Mackenzie *v.* Mackenzie, H.L. 18th March 1818, 6 Pat. 376.

was outweighed by prescriptive possession on the part of the owner of the surrounding land as pertinent thereof.[119] It is different if the heritor's possession has been, not on part and pertinent, but on an agreement by the Presbytery to grant a feu which never was granted.[120]

Coexisting possession.

In all these cases there was alleged or proved exclusive possession on one side. It may, however, happen, that neither party has an express title, and that there has been promiscuous possession. Commonty or common property is then presumed.[121] Thus, where the proprietor of a barony, which consisted partly of uncultivated moorland, feued out portions of his estate with part and pertinent, and the feuars had pastured their cattle and cut feal and divot immemorially on the moor, while the baron had also wrought coal beneath it, it was found that the right of the feuars was one of property, and that this extended also to the minerals—a clear distinction being drawn between their case and the case of other feuars on the same estate, who, in addition to their grants with parts and pertinents, had the clause, 'together 'with the pasturage of cattle and privilege of commonty within 'the bounds of the common muir,' that being plainly a right of servitude only; and also the case of others, again, in whose charters the superior had reserved the minerals. Such a reservation was necessary to restrict the right of property, and could not be gathered from the feuars' refraining from working the coal, as that was *res meræ facultatis*.[122] It thus appears that the same sort of possession may denote property or servitude, according as there is a general clause only, or a special clause, adjected. On the other hand, the same clause in two different titles to different pieces of land belonging to the same proprietor, may be explained to denote in the one case a right of commonty in an adjacent moor, in the other only a servitude right of pasturage.[123] Accordingly, proof of possession is the recognised mode of determining the rights of competing commoners.[124] When the common comes to be divided, the ordinary effect of possession of the parts, thus or in some other way acquired in severalty, is not interfered

[119] Crawfurd *v.* Maxwell, 1724, M. 10819; see M. Queensberry *v.* Gibson, 14th Feb. 1829, 7 S. 418.

[120] Scot *v.* Ramsay, 15th Feb. 1827, 5 S. 367 (N.E. 341); see also the cases on the ownership of lochs, *supra*, p. 168.

[121] Ersk. 3.6.3, approved by L. Moncreiff in Carnegie *v.* MacTier, 18th July 1844, 6 D. 1381, 1407.

[122] Johnston *v.* D. Hamilton, 1768, M. 2481, and L. Coalston's note, printed in note to D. Buccleuch *v.* Erskine, 16th June 1812, F.C.; following E. Wigton *v.* Feuars, 1739, M. 2287, 2468; 5 B.S. 209, 662; Elchies, Commonty, No. 2. See Bain *v.* Mags. of Wick, 4th March 1834, 12 S. 522.

[123] E. Airlie *v.* Rattray, 11th March 1835, 13 S. 691; Ersk. 2.6.3.

[124] Carnegie *v.* MacTier, [121].

with by the old clause, 'with the free common of A.,' being retained in the titles of the principal lands.[125]

Discontiguity. It was early decided[126] that the discontiguity of a corporeal subject from the principal lands is not an absolute bar to its being acquired as part and pertinent, but only a difficulty in the way of proof. And this doctrine has been sanctioned by the Court of last resort in a recent case.[127]

'On' the title. The *Dunfermline Palace* case just quoted suggests the only other point which requires to be noticed here. The judgment of the Court of Session was reversed on the *ratio* that it was not sufficient, in founding on a conveyance—here a barony title—with parts and pertinents, as a prescriptive title to lands not expressly mentioned therein, to show that the proprietor possessed them *with* his undoubted property for more than forty years; he must show that his possession of them was *as* part and pertinent.[128] So also, in the *St Mary's Loch* case, it was pointed out that possession could not be ascribed to part and pertinent of the land, so long as a special conveyance of the loch, beginning, '*unà cum*,' with separate infeftment, remained in the title.[129] The same rule had been further elucidated in the earlier case of *Cults*. The question there was, whether a piece of land, extending to about 800 acres, was included under a strict entail so as to be protected against the diligence of creditors. It was not mentioned by name; but the First Division were of opinion, by a majority,[130] that, in spite of its magnitude, and though it had been at one time a separate holding, it might be merged in a larger estate by prescriptive possession as part and pertinent. On a proof being taken, however, it was held, both in Scotland and in the House of Lords, that this possession had not been made out.[131] Facts must be proved 'which 'will show that the one tenement has been occupied, and really in 'fact has become portion of the other. It will not do to talk about 'the general estate; we must know the particular specific lands to 'which it is supposed to be annexed. It is contiguous to Inch, but 'so it is also to various other tenements. Mere contiguity cannot 'be sufficient to show annexation, or absorption, or mergency.'[132]

[125] Walker *v.* Miln, 10th June 1871, 9 Macph. 823.

[126] Cr. 2.3.24, case mentioned there; Ersk. 2.6.3; Forsyth *v.* Duric, 1632, M. 9629. The case of Bruce *v.* Dalrymple, 1709, M. 9638, did not turn on prescription. But see Balf. Prac. p. 175.

[127] L. Adv. *v.* Hunt (Dunfermline Palace), 31st Jan. 1865, 3 Macph. 426, revd. 11th Feb. 1867, 5 Macph. H.L. 1. For incorporeal rights discontiguous, see Baird *v.* Fortune, *supra*, [106]; Patrick *v.* Napier, 28th March 1867, 5 Macph. 683.

[128] *Supra*, p. 42.

[129] Scott *v.* Napier, H.L. 11th June 1869, 7 Macph. H.L. 35, *supra*, p. 169.

[130] Dalrymple *v.* E. Stair, 10th March 1841, 3 D. 837.

[131] King *v.* E. Stair, 28th Feb. 1844, 6 D. 821, affd. 30th April 1846, 5 B. Ap. 82.

[132] *Per* L. Campbell, 5 B. Ap. 100-1.

CHAPTER XII.

PRIVILEGES INCIDENT TO LAND-OWNERSHIP.

THERE are certain privileges incident to holding heritable property in Scotland, which can hardly with propriety be called pertinents, seeing that they do not attach to every estate, but only to holdings of a certain description or value, and on certain conditions laid down by Act of Parliament.

Of being Commissioner of Supply.

I. *Of being a Commissioner of Supply.*—The first of these is the right to be entered on the Commission of Supply for the county in which a certain amount of property is held. In burghs, the magistrates alone are commissioners, with power to appoint stent-masters.[1] In counties, the commissioners were yearly, or, before the Union, at longer intervals,[2] appointed by name; but with the condition, contained in the British statutes, that none of those named should be capable of acting without being infeft in superiority or property, or possessed as proprietor or liferenter of lands valued in the tax-roll of the county where he acted, to the extent of £100 Scots of valued rent.[3] In 1798, when the land-tax was made perpetual, the commissioners named the year before shared in the change.[4] They now sat so long as they held the qualification—additions being made from time to time down to the year 1857.[5] Meanwhile, the qualification required for acting

Old qualification.

Present qualification.

[1] Act of Convention of January 1667. 7 Thomson's Acts, 539; ratified 1670, c. 3, and followed in the later Land Tax Acts. Now also the senior magistrate of a populous place, under the Police Act, is an *ex officio* Commissioner for the County, 33 & 34 Vict. c. 37. For a history of the Commission, see note of L. Curriehill (2) in Wakefield *v.* Renfrew Comrs., 29th Nov. 1878, 6 Ret. 259; and see the chapters on County Burdens and Land Tax, *infra*, chaps. 40 and 41.

[2] 1672, c. 4; Act of Convention, 1678; 1681, c. 3; 1685, cc. 12 and 34; 1686, c. 2; 1689, c. 32; 1690, cc. 6, 9, 10; 1693, c. 9; 1695, c. 10.

[3] Both superior and vassal could act in virtue of the same £100 valued rent—Hay *v.* Hepburn, 1735, M. 2436; Gordon *v.* Anderson, 1766, M. 2444; Bankt. 4.18.1.

[4] 37 Geo. III. c. 35; amended, 38 Geo. III. c. 26; made perpetual, 38 Geo. III. c. 60.

[5] The Acts of the Queen are: 1 & 2 Vict. c. 57; 7 & 8 Vict. c. 79; 11 & 12 Vict. c. 62; 16 & 17 Vict. c. 111; 20 & 21 Vict. c. 46.

by those persons who were so added to the commission, was altered by the Valuation Act of 1854 (which introduced the present system of ascertaining the real rent)[6] to the following: 'The 'being named an *ex officio* Commissioner of Supply in any Act 'of Supply, or the being proprietor or the husband of any pro- 'prietor infeft in liferent or in fee not burdened with a liferent in 'lands and heritages within the county of the yearly rent or value, 'in terms of this Act, of at least £100; or the being eldest son 'and heir-apparent of a proprietor infeft in fee not burdened with 'a liferent in lands and heritages, within such county of the yearly 'rent or value, in terms of this Act, of £400; and the factor[7] of 'any proprietor or proprietors[8] infeft in liferent or in fee unbur- 'dened as aforesaid, in lands and heritages within such county, of 'the yearly rent or value, in terms of this Act, of £800, shall be 'qualified to act as Commissioner of Supply in the absence of such 'proprietor or proprietors: provided always that, with reference 'only to the qualification of Commissioners of Supply under this 'Act, the yearly rent or value of houses and other buildings, not 'being farmhouses or offices or other agricultural buildings, shall 'be estimated at only one half of their actual yearly rent or value, 'in terms of this Act,' reserving vested rights. A parish minister possessing as part of his benefice a glebe worth £100 a-year is not qualified, not being 'infeft in liferent or in fee.'[9] A person entered more than once on the roll, as proprietor and as factor, or as factor for more than one proprietor, is only entitled to one vote, though one or all of his constituents are absent, since the Acts give only a qualification, not a right of voting by proxy.[10]

As of right.

Three years afterwards, the necessity for a special nomination was repealed by an enactment[11] that all persons, being males and of full age, who possessed the qualification of the last Act, otherwise than by nomination *ex officio*, shall be commissioners while so qualified (sect. 1). As to proving the qualification, the valuation roll made up under the Valuation Act is to be *primâ facie* evidence of the ownership and conclusive evidence of the value; and, to exclude the claims of long leaseholders, the fact of their being

[6] 17 & 18 Vict. c. 91, sect. 19, *infra*, chap. 13.

[7] Not merely one holding a mandate to attend certain meetings (*per* L. Neaves in Walker *v.* Zetland Commissioners, 28th Jan. 1870, 8 Macph. 443).

[8] The plural contemplates the case of co-proprietors of the same estate, and does not qualify the factor of two proprietors, neither of whose estates is valued at £800, ibid. It includes trustees —Boyd *v.* Lanark Comrs., 1876, 14 Sc. L.R. 489.

[9] Leslie *v.* Orkney Comrs., 30th Jan. 1883, 20 Sc. L.R. 362.

[10] Craigie *v.* Aberdeenshire Comrs., 18th Oct. 1879, 7 Ret. 53.

[11] 19 & 20 Vict. c. 93.

lessees is to be incorporated in the roll (sect. 2).[12] The Clerk of Supply is to keep open for inspection till the 30th of October in each year, a list of all such claims to be put on the Commission as have been given in to him before the 20th of the same month; and objections thereto on the part of any Commissioner must be notified in writing, both to the clerk and the claimant, within ten days of the first-mentioned date; and the clerk must give ten days' notice to both claimant and objector, of the time (not later than 20th November) and place where a committee, appointed at the annual spring meeting,[13] shall meet to dispose of such claims, which must be done before 20th December in each year,[14] so that a list of the commissioners, corrected to date and open to inspection, may be drawn up as conclusive evidence of their title to act and vote.[15] A summary appeal from the committee lies to the Lord Ordinary on the Bills, whose judgment is final.[16] The oaths, formerly required under a penalty of £20 sterling,[17] are now superseded by the single oath of allegiance.[18] The qualification for acting as Income-Tax Commissioner is noticed on a later page.[19]

Membership of parochial board.

II. *Right to be Members of the Parochial Board.*—The Poor Law Act of 1845[20] distinguishes between burgal parishes[21] and combinations[22] of parishes on the one hand, and those which are not burgal or part of any combination on the other. In the former case, the members of the parochial board are all either elected by the ratepayers or nominated by the magistrates or kirk-session; and the only property qualification for a candidate is, that he shall be owner[23] or occupier of lands and heritages[24] of a certain annual

[12] The omission to add 'lessee' in the valuation roll does not exclude inquiry as to the nature of the party's interest. *Per* L. Neaves in Walker, *supra*, 7.

[13] 30th April, but alterable within the limits, 1st April–12th May, both inclusive—28 Vict. c. 38, and that again from time to time—42 & 43 Vict. c. 42, sect. 10.

[14] 20 Vict. c. 11 (repealing 19 & 20 Vict. c. 93, sect. 3), and 19 & 20 Vict. c. 93, sect. 4.

[15] 19 & 20 Vict. c. 93, sect. 5.

[16] Ibid., sect. 6.

[17] As to the effect of want thereof, see Sutherland *v.* Sutherland, 1751, M. 2436; and Campbell *v.* Macdowal, 20th Feb. 1787, F.C.

[18] 21 & 22 Vict. c. 48; amended, 22 Vict. c. 10.

[19] *Infra*, chap. 41.

[20] 8 & 9 Vict. c. 83.

[21] *I.e.*, parishes exclusively composed of a royal burgh or part thereof, or of a burgh which sends or contributes to send a member to Parliament; cf. s. 1 of the Act, with Heritors of Dunbar *v.* Mags., 4th July 1833, 11 S. 879; rev. 10th April 1835, 1 S. & M'L. 134.

[22] Act, s. 16.

[23] *I.e.*, liferenters, as well as fiars, tutors, curators, commissioners, trustees, adjudgers, wadsetters, or other persons who shall be in the actual receipt of the rents and profits of lands and heritages (sect. 1).

[24] 'Lands and heritages' shall extend to and include all lands, fishings, fresh waters, ferries, quays, wharfs, docks, canals, railways, mines, minerals, quarries, coal-works, lime-works, brick-works, iron-works, gas-works, factories and man-

value, within the parish or combination, as the Board of Supervision may from time to time fix, but in no case more than £50 (sect. 17). In parishes of the other sort, on the contrary, while the parochial board of any parish in which no assessment for the poor is levied is still to consist of the heritors and kirk-session, or of these officials with the addition of the magistrates of any burgh within the bounds, the statute enacts that where assessment is resolved upon, the board shall consist of certain members, including 'the owners of lands and heritages of the yearly value of £20 'and upwards.'[25] It has been pointed out[26] that the definition of the word 'owner' given in the Act[27] includes many cases of a plurality of holders of the same subject; that it could never have been intended that all should have a voice, and thus swamp the votes of the other members of the board; that there is no provision for one of the number voting rather than another; that the result seems to be, that in such a case, none of them have a right to be on the board; and that, as shall presently appear, they are also excluded from voting for the elective members (sect. 23). This may be reasonable enough, if they are proprietors only in a fiduciary capacity, as guardians of a minor or trustees under one trust, for in that case their right is one and indivisible. But the contrary is true where the radical interest is held by several *pro indiviso;* and it would probably be held that all would be enfranchised if the real value of their interest exceeded the statutory amount. The husbands of owners of lands and heritages are entitled to vote and act, in right of their wives, in all 'meet-'ings and matters' under the Act (sect. 26). No provision was made in the Act of 1845 for the mode of ascertaining the value of the lands and heritages of one who claimed a seat at the board as a matter of right.[28] It is 'competent for any heritor, being a 'member of the parochial board, to appoint, as heretofore, by a 'writing under his hand, any other person to be his agent or 'mandatary to act and vote for him at such board; and such 'appointment shall remain in force till recalled, and such writing 'of appointment is hereby declared to be valid and lawful although 'the paper whereon it is written should not be stamped' (sect. 22).[29] The purport of the mandate cannot be controlled by parole

ufacturing establishments, houses, tenements, shops, warehouses, mills, cellars, stalls, stables, gardens, yards, and all buildings and pertinents thereof (sect. 1).

[25] Sect. 22.

[26] Smith on the Poor Law, p. 28.

[27] See note [23], *supra.*

[28] Sect. 24, which held the collector's books as evidence of value, did so only for the purpose of ascertaining the number of votes to which each person was entitled at an election to the board.

[29] This is not altered by the Stamp Act, 33 & 34 Vict. c. 97, sect. 102.

evidence; the date of the meeting for which it is granted is not essential; the fact that it is written on an erasure does not invalidate the authority; and if intended for a particular vote, the mandate may be used at a different meeting from that set forth in it.[30]

Suffrages.

III. *The right of Voting at the Election of Members of certain Public Bodies.*—The right of suffrage, parochial, civil, and parliamentary, is intimately connected with the payment of rates, as a public right correlative to a public duty; and might therefore have been postponed to that part of this work which treats of the public burdens laid upon heritable property. Still it appears to be possible, with an occasional reference to a later page, to elucidate a subject which has its logical place here.

The Parliamentary franchise. Before 1832.

(1) *Right to vote at Elections for Members of Parliament.*—The parliamentary suffrage is undoubtedly the most important of these rights, both actually and historically. Among them all it has had a virtual monopoly of litigation; and on it the legal acumen of three judges of the Court of Session is exercised for a longer or shorter period, annually, at the present time, in spite of the depreciation of votes by the operation of the Reform Acts of 1832 and 1868. In former times, the peculiar freehold qualification in counties had the merit of elucidating many subtleties of feudal law.[31] But the Reform Act of 1832 has practically rendered this qualification obsolete, by confining it to those who were then on the roll, or entitled to be put on it (sect. 6). That Act itself, though expressly saved by its successor, the Reform Act of 1868 (sect. 56), has been practically superseded by it, except in a few minor points. Both Acts, so far as they relate to the qualification required for the parliamentary franchise, are printed in the Appendix, along with a note of the authorities and decided cases. As the law is wholly statutory, except in regard to legal incapacity, it may be more accurately and usefully set forth in that form than in a *résumé* of the subject in the text. As introductory, however, to a study of the Acts, a very succinct abstract may now be given of the law relating to the qualification and to registration procedure. The mode of voting is purely a matter of election law.

Under Reform Act of 1832. In counties.

The Act of 1832[32] kept up the distinction formerly existing between the county and the burgh qualification. In counties, every person not subject to any legal incapacity was enfranchised

[30] Thompson *v.* Parochial B. Inveresk, 30th Nov. 1871, 10 Macph. 178, aff. 28th Feb. 1876, 3 Ret. (H.L.) 1.

[31] See Wight's two treatises on Elections, 1773 and 1784; Bell on Election Law; Cay, p. 32; cases in Mor. *s. v.* Member of Parliament; Shaw's Dig. *s. v.* Freehold qualification.

[32] 2 & 3 Will. IV. c. 65. *Infra*, Appx. No. 7.

who had been owner for six months before registration of heritable subjects (including feu-duties) within the shire in his possession, natural or civil, of the yearly value of £10, after deducting any considerations due annually or at longer intervals as conditions of his right (sect. 7). The right is in the liferenter, not in the fiar: joint owners possessing a share of the requisite value are each enfranchised; husbands may vote in right of their wives, or as holding by courtesy (sect. 8). The qualification in virtue of which registration was obtained had to be kept up, or an equivalent acquired at the date of voting (Schedule I.)[33] In burghs the old mode of election by the corporation was abolished (sect. 10); and in its place was substituted a franchise founded on occupancy, either as proprietor, tenant, or liferenter of buildings within the burgh of the yearly value of £10; provided the claimant had paid all assessed taxes—now inhabited-house duty—for the year ending in the April preceding registration; provided also he had resided within seven miles of some part of the burgh for six months next before the preceding 31st of July. An ambiguous proviso attaches the right to 'true ownership' without occupation, which has been held to relate to sole ownership in fee. Receipt of parochial relief disqualifies, if within twelve months of the preceding 31st of July; and the same rule as to husbands and courtesy-holders applies as in counties (sect. 11). Occupancy in continuous succession of qualifying premises in the same burgh, is made equivalent to occupancy of the same buildings; and joint occupiers of a sufficient value are all entitled to the suffrage (sect. 12). It thus appears, that in counties ownership (or tenancy, sect. 9), apart from occupancy is the basis of the right; in burghs occupancy comes to the front, and ownership enters only under a proviso.

In burghs.

Under Reform Act of 1868. In counties.

The same rule is retained in the Reform Act of 1868,[34] which, besides creating the lodger and university franchises, is mainly concerned with lowering the qualification. In counties, ownership, by one of full age and subject to no legal incapacity, of lands and heritages valued at £5 a-year, after deduction of any annual consideration which is a condition of the right, and any annuity, liferent provision, or such other annual burden, entitles to the franchise (sect. 5). The old rule as to successive occupation is extended to counties, and to successive ownerships (sect. 13). The liferenter is again preferred to the fiar; joint owners, in fee or liferent, to the number of two only (to any number if they

[33] See County Voters Act, 1861, sects. 42 and 45—repealed by the Reform Act of 1868, sect. 54.

[34] 31 & 32 Vict. c. 48. *Infra*, Appx. No. 8.

have acquired by marriage or *mortis causâ*), are provided for; and the rules as to husbands and courtesy-holders are retained (sect. 14). Receipt of parochial relief disqualifies (sect. 50). In burghs the right is bestowed on inhabitants, occupiers as owners or tenants of any dwelling-house within the burgh, for twelve months before the 31st of July preceding registration, who have not during that period been exempted from payment of poor-rates on the ground of inability to pay; who have not failed to pay poor-rates (if any are levied) on the said dwelling-house, or as inhabitant of any parish in the burgh, due for the year ending on the preceding Whitsunday; and who have not been in receipt of parochial relief in the year closing on the last 31st of July. Joint occupation, either as owner or tenant, gives no right to the suffrage (sect. 3). It follows that a change from the old burgh franchise is here made in these particulars: a household is substituted for a value qualification; persons not inhabitants are excluded; occupation is imperative; the description of premises is narrowed; the seven miles' limit disappears; for payment of inhabited-house duty are substituted payment of poor-rates, and independence of parochial relief; and joint occupancy gives no claim to the suffrage. In view of these distinctions in burghs, and the larger number of enfranchising subjects in counties, the old Reform Act is still of some value; though it may be doubted whether matters would not have been put on a better footing by its total repeal, saving existing rights.

In burghs.

In order to be entitled to vote in county or burgh, the name of the voter must appear in the register, made up in terms of the Burgh [35] or County [36] Voters Acts of 1856 and 1861. The following are the provisions which more directly concern the voter: Proceeding in the same order as above, the assessor [37] in counties, with the help of the valuation roll (sects. 4 and 5), of the sheriff-clerk (sect. 6), and the collector of poor-rates in each parish,[38] before the 25th of August in each year,[39] makes out and signs a list of all persons entered in the last register who have died or become disqualified, and of all who shall appear to have become entitled to vote, which list is advertised to be open for inspection from 26th August to 4th September, both inclusive, and circu-

Registration.

In counties.

[35] 19 & 20 Vict. c. 58 (amended by 20 & 21 Vict. c. 70).

[36] 24 & 25 Vict. c. 83. Both Acts repeal the registration clauses of the old Reform Act, and are themselves amended by the Reform Act of 1868.

[37] County Voters Act, 1861, sect. 2.

[38] Act 1868, sect. 19 (2).

[39] The dates in Act 1861 are mostly altered by Act 1868, sect. 21. The corrected dates are here substituted without further references.

lated in paid copies (sect. 8).[40] Claims to be put on the roll must be notified to the assessor on or before the latter date (sect. 9, Sched. C. No. 1). Of these, a list is made up and published from 12th to 24th September, both inclusive (sect. 10). Names already entered on the assessor's list as qualified may be struck out by desire of the party (sect. 12). Any one whose name is entered on the register for the same county may object to the name of any other person being entered or remaining on the register, on giving notice to the party and to the assessor on or before the 4th of September (sect. 21, Sched. C. 2 and 3); and of these, a list must be made up and published by the assessor (sect. 22). The sheriff revises the register between 11th September and 11th October (sect. 23), adding, if he thinks fit, omitted claimants, and hearing objectors and witnesses and havers. The adjusted list entered in a book, signed by the sheriff-clerk, is the register of voters for the year (sect. 31), subject to appeal. This is now provided for by the Act of 1868 (sects. 22 and 33).[41] It is obtained by a final judgment of three judges of the Court of Session—one from each Division, and the third from the Outer House—on a special case prepared by the sheriff. They have power to remit an insufficient special case to the latter for fuller statement. Neither the right of voting nor the state of the poll is to be affected by a pending appeal (1861, sect. 35; 1868, sect. 55). The register, as finally made up, is conclusive of the right of suffrage, and is not affected by loss of the qualification during the year.[42]

In burghs.

In burghs the assessor's list is made up with the help of the valuation roll and of the collector of poor-rates by the 1st of September,[43] and published, exhibited, and distributed in copy, from the 16th to the 21st of the same month, both inclusive (Act 1856, sect. 2). Claims and objections must be notified to him, and objections notified to the party, on or before the last date; and of these he makes up signed lists, which are advertised, and open for inspection from the 25th of September to 1st October (sects. 3, 4, 5). The Revising Court is held by the sheriff between 25th September and 16th October, and is guided by the same rules as in counties (sects. 19-25); and the rules as to appeals are identical (Act 1868, sects. 22 and 23).

[40] As amended Act 1868, sect. 19 (5).

[41] Repealing the provisions thereanent in the Act 1861, as well as those in the Burgh Voters Act.

[42] Act 1868, sect. 54, repealing Act 1861, sect. 42.

[43] Burgh Voters Act, 1856, 19 & 20 Vict. c. 58. Amended as to dates by the Reform Act of 1868, sect 20.

Registration—when valid.

The most important points decided in questions as to the validity of registration are these: In order to establish a rule for all places, the post-office of the assessor's post-town must be taken as the place at which he receives notices of claims or objections sent by post, at least in determining the question of timeous reception, even when the last day for notice is a Sunday.[44] In the case of notice of objection being sent to the party objected to, it is sufficient if it be posted on the last day mentioned by the statute.[45] Claims must proceed from the party claiming, or from his agent duly, but not necessarily in writing, authorised to claim;[46] not from an agent without his knowledge, and this objection is not got rid of by subsequent homologation.[47] If it is founded on successive holdings, it should specify all of them; but the assessor's list need contain only the last.[48] The claim cannot be so corrected by the sheriff as to substitute in the register a different qualification.[49] Notice of objection may be signed by a mandatary, both in counties and burghs, though holding only a general mandate;[50] by a paid agent for one of the candidates;[51] but not by a voter in a different member of a group of burghs from that of the person objected to.[52] The notice must be in terms of the statutory schedules,[53] and ought to be founded on radical flaw in title.[54] An objection withdrawn after being lodged may be insisted in by any other elector.[55] In counties the valuation roll is conclusive of the value, and the sheriff cannot alter the description of the subjects as appearing therein;[56] but the fact of occupation may be proved *aliunde*.[57] Trivial errors in the valuation roll, and errors or omissions which have crept into it or into the assessor's list *per incuriam*, and without any fault of

[44] Morton *v.* Reid, 1870, 9 Macph. 29. See Rose *v.* Farquhar, 1868, 7 Macph. 286; Bruce *v.* Rose, ibid.; Mackenzie *v.* Cameron, ibid., p. 291.

[45] M'Creath *v.* Smith, 1869, 8 Macph. 15.

[46] Rutherford *v.* Lockie, 1880, 8 Ret. 6.

[47] Arbuckle *v.* Innes, 11th March 1826, affd. 2 W.S. 528, sequel, 5 S. 505; Stewart *v.* Grant, 14th June 1831, 9 S. 727; Brydone *v.* Haldane, 1865, 3 Macph. 414.

[48] Hill *v.* Collins, and Adshead *v.* Wright, 1868, 7 Macph. 283.

[49] Watt *v.* Miller, 1868, 7 Macph. 284.

[50] Dinnell *v.* M'Master, 1868, 7 Macph. 289; Act 1856, sect. 36.

[51] Wilson *v.* Blackwood, 1868, 7 Macph. 290.

[52] Grant *v.* Mackenzie, ibid.

[53] Act 1856, Sched. A. 4 and 5; Act 1861, Sched. C. 2 and 3; Muir *v.* Pattersons, 1868, 7 Macph. 293, but the absence of lines ruled between the columns and of headings thereto, and of the town of objector's residence has been ignored. Lamont *v.* Richardson, 1879, 7 Ret. 32.

[54] Thus an objection to propulsion by an entailed proprietor is *jus tertii* to one who is not a substitute, Skeete *v.* Buchanan, 1879, 7 Ret. 15.

[55] Bruce *v.* Rose, 1868, 7 Macph. 291.

[56] Act 1868, sect. 5; Hilson *v.* Brown, 1870, 9 Macph. 26; Alexander *v.* Thomson, 1868, 7 Macph. 325; see M'Clure *v.* Crawford, 1868, 7 Macph. 326; Wilkie *v.* Adair, 1879, 7 Ret. 49.

[57] Brown *v.* Holmes, 1868, 7 Macph. 325.

the elector, are corrected or disregarded;[58] but not such as have arisen in any other way.[59] The special case drawn up by the sheriff should be a statement of the facts proved, and of the question at issue, not a narrative of the evidence given by the witnesses;[60] and the appellant should see to its being properly framed, for, if not, the judgment stands.[61]

Municipal franchise. Royal and Parliamentary burghs.

(2) *Right to Vote at Municipal Elections*—(*a*) *In Royal and Parliamentary Burghs.*—In these burghs the civic suffrage has followed closely on the track of the parliamentary franchise. The Reform Act of 1832 was succeeded in the following year by the two Acts for the election of Councils in Royal[62] and Parliamentary Burghs,[63] both of which bestowed the right of election on those who were qualified as parliamentary electors. And the same year which produced the last Reform Act produced also a Municipal Elections Amendment Act,[64] which, in the matter of qualification for the suffrage, is the ruling statute. In every royal burgh (including those contained in Schedule F. of the Act of 1833), the right of electing the town council shall be in and belong to all who are qualified in respect of premises within the royalty, original and extended, to vote for a member of Parliament[65] under the Reform Acts, and are duly registered as such; or who are possessed of the qualifications therein described for premises within the royalty, but beyond the parliamentary boundary, or within any extensions of the municipal boundary beyond either of these; or, in burghs which do not send or contribute to send a member to Parliament, persons possessed of the said qualification for premises within the royalty, original or extended (sects. 3 and 4). In parliamentary burghs the same right rests in persons qualified to vote for a member of Parliament therein, and also in all who are posssessed of the qualifications of the Reform Acts within the municipal, though extending beyond the parliamentary, boundaries (sect. 5). And now words, occurring in the said Act of 1868 and the Acts therein re-

[58] Stewart *v.* Bruce, 1868, 7 Macph. 287; Duncan *v.* Small, 1868, 7 Macph. 326; Blackwood *v.* Euman, 1868, 7 Macph. 328; Thomas *v.* M'Pherson, 1873, 1 Ret. 7; Rutherford *v.* Wilson, 1873, 1 Ret. 3; Nelson *v.* M'Gowan, 1876, 4 Ret. 3; Ferguson *v.* Lang, 1878, 6 Ret. 13; Morrison *v.* Anderson, 1879, 7 Ret. 7; Anderson *v.* Mercer; Anderson *v.* Lees, 1879, 7 Ret. 28.30; Murray *v.* Donnan, 1882, 10 Ret. 13.

[59] Veitch *v.* Young, 1870, 9 Macph. 28; Anderson *v.* Ireland, 1876, 4 Ret. 1; Anderson *v.* Fairgrieve, 1879, 7 Ret. 31.

[60] Hilson *v.* Otto, 1870, 9 Macph. 18. But documents may be read, which are only referred to, not embodied in the case—Bell *v.* Donaldson, 1879, 7 Ret. 34.

[61] Maitland *v.* M'Credie, 1868, 7 Macph. 288.

[62] 3 & 4 Will. IV. c. 76 (excepting nine small burghs in Sched. F.)

[63] 3 & 4 Will. IV. c. 77.

[64] 31 & 32 Vict. c. 108.

[65] See Reform Acts of 1832 and 1868, and Notes in Appx. Nos. 7 and 8.

cited, and importing the masculine gender, are to be held, with reference to qualifications for voting and nominating candidates, to include females who are not married, and married females not living in family with their husbands, but not so as to qualify them for election as town-councillors.[66] Rules for the preparation of the municipal registers are laid down for royal burghs which return or contribute to return a member (sect. 6), and for those which do not.[67] In parliamentary burghs the register is that which is made up under the Registration Acts[68] (Act 1868, sect. 5). In every case the names of the now enfranchised women must be entered in a separate list.[69]

In police burghs.

(*b*) *Police Burghs.*—Both the Police Acts of 1850[70] and 1862[71] confer the rights of adopting or refusing to adopt the Acts,[72] of electing and of being elected commissioners,[73] on all householders; and companies or copartnerships occupying lands of the yearly value required by the Acts may authorise one or more of the partners to vote, according to value, but not more than one of the partners on each qualification. The word 'householder' was differently defined in the two Acts,[74] but is now statutorily interpreted, for the purposes of both, to mean 'a male occupier of 'lands or premises of the yearly value of £4 and upwards as ap- 'pearing on the valuation roll, also a female occupier of lands or 'premises as aforesaid, who is not married, or being married does not 'live in family with her husband, provided always that no female 'shall be eligible for election as a commissioner or trustee.'[75] Where the valuation roll of a burgh constituted under the Act of 1850 contained an entry of David Swan, junior, & Company, as occupiers, but before the election a change took place in the firm, which was then named David Swan & Sons, and a partner of the new firm was by it authorised to vote, it was held to be no objection to this partner's election as commissioner that the new firm was not entered on the roll, since he had a substantial qualification, and the misnomer arose *ex necessitate rei*, but that the objection was cognisable by the Court in spite of sect. 12 of the Act, making the returning officer's deliverance on a voter's qualification final.[76] A proviso is added to the clauses of the Police Acts re-

[66] 44 Vict. c. 13, sect. 2.

[67] Municipal Elections Amendment Act, 1870, 33 & 34 Vict. c. 92, sect. 6.

[68] *Supra*, p. 183.

[69] 44 Vict. c. 13, sect. 3.

[70] 13 & 14 Vict. c. 33; amended, 19 & 20 Vict. c. 103, and 23 & 24 Vict. c. 96.

[71] 25 & 26 Vict. c. 101.

[72] Act 1850, sect. 12; Act 1862, sect. 27.

[73] Act 1850, sect. 30; Act 1862, sect. 46.

[74] Act 1850, sect. 2; Act 1862, sect. 3.

[75] 45 Vict. c. 6, sect. 3.

[76] M'Donald *v.* Robertson, 17th May 1876, 3 Ret. 645; Act 1862, sect. 27.

ferred to, 'that no more than six partners of any company or co-'partnership shall be entitled to vote in respect of the lands or 'premises occupied by such company or copartnership' (Police Act 1868, sect. 4). No householder is to have more than one vote; and the right to vote is lost by exemption from payment of police-rates on the ground of poverty, and by failure to pay 'all 'rates due and payable under the Police Acts at the time of so 'voting' (Act 1868, sect. 5);[77] but objections by disappointed candidates on these points must be taken before the committee of commissioners provided for by the Acts, and before it alone.[78]

Voting for parochial boards.

(3) *Parochial Boards.*—The qualification required of elected members, both in burgal and non-burgal parishes, and that of members in non-burgal parishes, having right to sit in virtue of land-ownership, have been already noticed.[79] The right to vote in the appointment of the elected members is different in the different classes of parishes. In burgal parishes and combinations every person assessed for the support of the poor is entitled to vote—the owners of lands and heritages worth less than £20 a-year in the collector's books having one vote, less than £60 two votes, less than £100 three votes, less than £500 five votes, above that sum six votes, doubling in case of occupancy being combined with ownership, but in no case rising beyond six votes. Persons unable to pay or in arrears with their poor-rates are excluded (sect. 19). The voting may be by wards, but not so as to increase the voting power of individuals (sect. 20). The electors in parishes not burgal or combined are, *inter alios*, owners of lands and heritages under £20 of yearly value, not being the provost or bailies of any royal burgh or members of the kirk-session, nor disqualified by inability or failure to pay their poor-rates (sects. 23, 24). Corporations, joint-stock companies, joint owners, and joint occupants vote by a member of the joint concern whose name is entered in the parish books for the purpose (sect. 25); and husbands vote and act in right of their wives (sect. 26).

Voting for school boards.

(4) *School Boards.*—The enactment of the Education Act[80] is in these words: 'The electors shall consist of all persons being 'of lawful age and not subject to any legal incapacity[81] whose

[77] This clause is fuller than that of Act 1862 (sect. 53). It differs materially from the Reform Act of 1868, sect. 3, as interpreted in Hewat *v.* Henderson, 1874, 2 Ret. 12; for here non-payment of arrears would be a bar. See Act 1850, sect. 34.

[78] Act 1850, sect. 31; Act 1862, sect. 48; Macdonald *v.* Robertson, *supra*, [76].

[79] *Supra*, p. 179. Poor Law Act, 1845.

[80] 35 & 36 Vict. c. 62, sect. 12 (2).

[81] See Reform Act of 1832, sect. 7, note in Appx. No. 7. The *statutory* disabilities there mentioned do not apply to such elections.

'names are entered on the latest valuation roll applicable to the 'parish or burgh[82] for which the board is to be elected, made up 'and completed not less than one month prior to the election, as 'owners or occupiers of lands or heritages of the annual value of 'not less than £4, situated within such parish or burgh, and the 'valuation roll or a certified copy thereof shall be conclusive 'evidence that the persons therein named had and continue to 'have the qualifications annexed to their names respectively in 'the said roll.' The qualification thus laid down has not been the subject of judicial comment in the Court of Session—that being a matter for the summary determination of the sheriff;[83] but it may be gathered, from the opinion of a high authority,[84] that the following would be excluded: minors, persons of unsound mind, aliens; corporations, joint-stock companies, mercantile and other firms; trustees, tutors, curators, and judicial factors, agents or factors as such; joint owners and joint occupiers of uncertain number in the roll; tenants not being occupiers, lodgers, undischarged bankrupts, owners in right of their wives, and married women. Women were expressly intended by the Legislature to come in under the word 'persons' if otherwise qualified. Joint owners and occupiers seem to be each entitled to vote if the pecuniary qualification be sufficient when divided.

[82] A parish is 'any parish which does 'not wholly consist of a burgh or part of 'a burgh, and shall include any school 'district formed under this Act.' A burgh is any royal burgh or parliamentary burgh, and certain towns contained in a schedule appended to the Act, whether burghs or not, sect. 1. See also sects. 8-11, and 41 & 42 Vict. c. 78, sects. 29, 30.

[83] Sect. 14.

[84] Lord (then Sol.-Gen.) Rutherfurd Clark in an opinion quoted in Marwick's Suggestions for School-board Elections, p. 13.

CHAPTER XIII.

VALUATION.

BEFORE taking leave of the more general part of the law of land-ownership, it will not be out of place to explain shortly the system of land valuation in Scotland, which, reaching back to prehistoric times, has only received its full development and elasticity in our own day. In a practical treatise it will not be expected that anything more than a word or two should be devoted to the obscure history of the old and new extents, which have taken refuge with antiquarian experts since doomed to practical uselessness by the Reform Act of 1832. The system of valued rent claims more attention, as being still regulative of rights and liabilities in modern times. But the chief practical interest rests with the valuation instituted in 1854 and continued by annual revision down to the present date.

Old and new extent.

I. *Old and new extent.*[1]—From the very earliest times to which the old chartularies carry us back, a twofold division of land appears: first by magnitude into ox-gate or ox-gang, husband-land, and plough-gate, extending, in the Lowlands at least, to 13, 26, 104 acres respectively;[2] and next by value, as pound, merk shilling, or penny land, with multiples of each. Even in the time of Alexander III. there are traces of an old extent:[3] and it is certain that in the western and extreme northern districts, which were overrun and settled by the Norsemen, a division according to money value was in much earlier times universal and

[1] The most accessible authorities are, Skene de V.S., *voce* 'Extent'; Cr. 2.17.36; St. 3.5.38; Kames's Hist. Law Tracts, No. xiv., epitomised in Ersk. 2.5.31-35 incl.; Wight's Treatise, p. 148 *et seq.;* Wight's Inquiry, p. 159 *et seq.;* Bell on Election Law, p. 154 *et seq.;* B. Pr. 1831; Argument for the complainer, drawn by Mr Thomas Thomson in Cranston *v.* Gibson, 16th May 1818, F.C.; Innes's Scotch Legal Antiquities, p. 270 *et seq.*

[2] The *davach* was a purely north-eastern division, and seems to have been equal to four plough-gates.

[3] Noticed by Hailes, Annals, i. 224 (3d ed.)

exclusive, and probably regulated both rent and taxation; while in the eastern and southern parts, which were more fitted for cultivation, the division by magnitude prevailed.[4] Mr Innes[5] has brought the two measurements to terms with each other by citing a case in 1585, in which it was laid down—apparently as a general proposition—that a forty-shilling land of old extent is equal to a plough-gate, 'and that indiscriminately over the best 'land of Lothian and some of the poorest.' The 'old extent' here mentioned is believed to have been a valuation made by Alexander III. about 1280, in view of a general aid towards his daughter's dowry, and was the only general tax-roll down to the middle of the seventeenth century. In the interval it was being continually tinkered piecemeal, according as the devastation of war in one quarter, and the improvements consequent on quiet in another, altered the balance of value. This process went on both in levying the royal aids, and more especially in the answers returned by the inquest impannelled on a brieve of mort-ancestry to the questions *quantum valuerunt* [*terræ*] *tempore pacis* and *quantum nunc valent*.[6] The answers were originally the fruit of an actual inquisition into the rental of the property at the time; but this was given up as inconvenient, and a random answer given, which, after being frequently the same as the old extent, came in the sixteenth century, by reason of the improvement in agriculture and depreciation of money, to add a fractional part, or more commonly to return a multiple. All this time Church land had of course been beyond the reach of returns, and being taxed separately, according to Bagimont's Roll, had never been extended; nor had lands held feu of the Crown, which were valued at the feu-duty reserved. After the Reformation these Crown feus became more numerous, and the position of the Church lands in regard to taxation more anomalous from their being converted into temporal lordships. Yet nothing was done to obtain a new general valuation till the disturbances which arose in the time of Charles I.; and the system of valued rent then instituted was actually abandoned in favour of the old extent by the Convention of Estates in 1666, after the Restoration. But in the following year it was supplanted for ever by the new system.

II. *Valued Rent.*—On 15th August 1643,[7] in voting a supply Valued rent.

[4] The case cited by Hailes is from Aberdeen, so that both measurements probably existed side by side in Alexander III.'s time.

[5] P. 283.

[6] As to the meaning of the distinction, see Craig, who is puzzled; Stair, who is beside the mark; Kames, who supposes a second general extent; and Thomson, who finds the same nomenclature in England, *loc. cit.*[1].

[7] Thomson's Acts, vi. part I. p. 26.

of twelve hundred thousand merks Scots, for the support of the Scotch army sent to suppress the rebellion in Ireland, the Convention of Estates thought fit to levy the money, not 'as the taxations have been or by the divisions of temporalities and spiritualities,' but 'promiscuously,' conform to a 'particular roll, to be made 'up by commissioners, of the just and true worth of every person 'or persons their present year's rent of this crop and year 1643 'to landward, as well of land and teinds as of any other thing 'whereby yearly profit and commodity ariseth.'[8] The same plan was followed by the Usurper's Parliament;[9] and after the temporary revival of the old extent in 1666, resorted to again in 1667 by the Convention of Estates,[10] and in 1670 by the Parliament.[11] A certain sum was laid on each burgh and sheriffdom, and the partition thereof intrusted to the magistrates in the former, and to commissioners expressly nominated in the latter. Powers were given to correct the older rolls and to revalue subdivisions made since their date. The rolls so made up have not been preserved, but their results were transferred to the cess-books, which now became the sole rule for taxation, and eventually for other rights and burdens.

Subdivision thereof.

When a property standing in the cess-books of a county as of a certain valued rent came to be subdivided by sale or otherwise, it was necessary for many reasons—such as for payment of the land-tax, and ecclesiastical burdens, and especially for the purpose of settling the right to the suffrage before 1832—to allocate the *cumulo* valuation. Since the first Reform Act, this allocation has lost most of its practical interest, and litigation has almost ceased. But divisions of *cumulos* are still necessary, to fix the respective liabilities of the parties for land-tax, and their rights and liabilities in parochial-ecclesiastical affairs. It will, however, be sufficient to state shortly the rules which have been evolved by a long series of decisions, and to refer to the authorities generally.[12] The best test of the valued rent which ought to be allocated to each parcel would be the value of each at the original valuation; but, the original rolls having been lost, this criterion can only be gathered from the use of payment of cess or land-tax, or the express words of the titles. Failing this, the real rent at the date of division is taken.[13] But where this would lead to a demon-

[8] Ibid., p. 30, col. 2, foot.

[9] 1655, Thoms. Acts, vi. pt. II. p. 837; and 1656, ibid., p. 849.

[10] Thoms. Acts, vii. 539.

[11] Thoms. Acts, viii. 8.

[12] Collected down to 1818 in Bell's Election Law, p. 170 *et seq.* See Wight, Inquiry, 183, and Mor. *v.* Member of Parliament.

[13] Innes *v.* Sutherland, 1753, M. 8642; Duff *v.* Abercrombie, 1807, M. Appx. M. of Parliament, No. 10; Spiers *v.* Waddell,

strably false estimate of the respective values of the parcels of land—as when subsequent to the original valuations industrial buildings or works, such as mills or railways, have been constructed on one or both—the Court will look to the agricultural value of the subjects.[14] Once divided, the subdivisions cannot again be united in the roll so as to allow of a second division of the slumped mass in other proportions; nor can two *cumulos* be slumped for the same purpose.[15] Any agreement for a division of the *cumulo* valuation between the parties is sustained by the commissioners if it is fair and reasonable.[16] Formerly, from favour to the franchise, and now, because nothing in the way of subdivision can affect the whole sum sent into the Exchequer as cess, irregularities in the allocation, in regard to any of the rules now stated, may be protected from challenge by acquiescence, on the part of those who had a right to object, for a length of time much shorter than the prescriptive period.[17] The subjects which the commissioners were originally directed to value, indicate what subjects they should have in view in proceeding to divide a *cumulo*. They were generally everything 'whereby yearly profit and 'commodity ariseth.' More particularly were mentioned 'money-'rent, victual-rent, casualties paid by tenants, salmon and other 'fishings.'[18] This was not intended as an exhaustive enumeration; and the general direction seems to read short for the more detailed enumeration of the new Valuation Act, except that in 1681 coal and salt works were exempted from valuation.[19] Glebes are excluded by usage;[20] and Crown property, though sometimes entered, has no proper place in a tax-roll.[21] The decisions of the commissioners are open to review by the Court of Session, both for irregularity and for error on the merits.[22] The same rules will apply in burghs to the stent or cess rolls made up by the magistrates.[23]

19th Nov. 1824, 3 S. 303 (N.E. 213); Buchanan *v.* Cuninghame, 8th June 1826, 4 S. 687 (N.E. 694); L. Adv. *v.* Edinburgh Comrs. of Supply, 5th June 1861, 23 D. 933, 949, affd. 4 Macq. 387.

[14] Deeside Ry. Co. *v.* Pitfodels Land Co., 16th July 1869, 7 Macph. 1068.

[15] Boyes *v.* Renfrewshire Freeholders, 1787, M. 8652; Blackwell *v.* Smith, 4th July 1822, 1 S. 539 (N.E. 495); Macdonald *v.* Riddell, 6th March 1830, 8 S. 664; Macdonald *v.* Grant, 2d March 1831, 9 S. 527.

[16] L. Drummore, 1745; Elch. M.P. No. 37; Dennistoun *v.* Campbell, 7th July 1824, 3 S. 218 (N.E. 154).

[17] See the cases in Mor. pp. 8641, 8642, 8647, 8652, 8656, 8665, 8669; and Blackwell *v.* Smith, *supra*, [15].

[18] Act of Convention of 1643, *supra*, [7].

[19] 1681, c. 108; Thoms. Acts, viii. 363.

[20] M'Lea *v.* Walker, 7th April 1819, 1 Bligh, 535.

[21] Adv.-Gen. *v.* Garioch, 1845, 12 D. 447; cf. Bruce *v.* Veitch, 28th Nov. 1810, F.C.; Mersey Dock Cases, 11 H.L. 443.

[22] First decided in 1751, Gordon *v.* Gordon, M. 7345.

[23] On the whole of this subject, see Land-Tax, *infra*, chap. 41.

Real rent.

III. *The Valuation Act of* 1854.—The rapid progress of subdivision of estates, especially in the neighbourhood of towns; the equally rapid enhancement of the value of parts of the country consequent upon the revival of trade which followed the great French war at the beginning of the present century, along with the comparative backwardness of other districts; and the inveterate tendency of public taxation to settle down on the land as the most obvious and constant factor of the national wealth,—all made it plain that the old valuation of the cess and stent rolls was incapable of meeting the wants of modern times. More particularly it had been shown by the almost universal adoption of the first mode of poor assessment, permitted by the Poor Law Statute of 1845, in preference to, and frequently after an unsuccessful trial of, the other modes, that some general plan must be adopted for discovering and fixing down authoritatively the real value for the time being of land-holdings and their appurtenances, and for the annual revision of the result. This was provided for by the Valuation Act of 1854,[24] a statute which has required little amendment in the course of time, and none in any essential point, and one which, for comprehensiveness and simplicity, is still unequalled in the sister country. The present chapter will contain, first, a short sketch of the machinery of the Act, so far as it comes within the scope of this work; next, a print of the clauses which treat of the subjects and rules of valuation; and lastly, a review of the decisions which have elucidated these rules.

Purpose of the Valuation Act.

The purpose of the statute, as stated in the preamble, is the establishment and annual revision of one uniform valuation of lands and heritages in Scotland for the assessment and collection of all local assessments leviable according to the real rent: in particular, the old prison-money (sect. 32), and other municipal, parochial, and public assessments, with the exception of rates for the repair of parish churches which have been allocated according to the valued rent (sect. 33);[25] and also for the purpose of registration of parliamentary voters (sect. 34). Even rates levied under local Acts on land according to a different valuation, may be brought under the machinery of the statute, after certain procedure before the sheriff (sect. 39); and the Commissioners of Supply may resolve to adopt the statute in regard to rogue-money and all other assessments formerly levied on the valued rent (sect. 40). No alteration is made on any power of classification, or of making deductions from

[24] 17 & 18 Vict. c. 91.

[25] The exception, in this section, of poor-rates levied on means and substance, is annulled by 24 & 25 Vict. c. 37, which makes that mode no longer available.

gross rental, vested in any authority which is entitled to impose assessments, though these items are not to appear in the roll made up in terms of this Act; nor does the Act 'exempt from, 'or render liable to, assessment any person or property not pre-'viously exempt from or liable to assessment' (sect. 41).[26]

Machinery.

The Commissioners[27] of Supply of every county, and the magistrates[28] of every burgh,[29] shall annually cause to be made up a valuation roll, showing (1) the yearly rent or value for the time of the whole lands and heritages within such county or burgh, distinguishing the parishes and specifying the nature of such lands and heritages; (2) the names and designations of the proprietors, reputed proprietors, and husbands of the same, and (3) of the tenants and (4) occupiers, if such there be (sect. 1); (5) the word 'lessee' in the column of proprietors immediately after the name of any lessee entered therein under the provisions of the Act;[30] (6) in counties the feu-duty, ground-annual, rent, or other yearly consideration payable as a condition of his right by every proprietor of lands and heritages entered as of the yearly value of £5 or upwards, and the name of the person to whom it is payable;[31] (7) the same in burghs for £10 or upwards; and (8) in both the rent payable by every £10 tenant in a lease for not less than fifty-seven years.[32] In burghs all these particulars must be stated as to each dwelling-house separately.[33] For these purposes the commissioners or magistrates may demand the assistance of the income-tax officer of their district (sect. 2), and must appoint an assessor or assessors[34] to ascertain the value of all lands and heritages therein other than that of railway and canal companies (sect. 3).[35] A new valuation roll must be made up by the 15th August in each year (sect. 4), and notice sent of each entry made or to be made in it (unless it be merely a repetition of the last) between 15th July and 25th August, both inclusive, to the party concerned (sect. 5).

[26] See 30 & 31 Vict. c. 80, sect. 9.

[27] See the new qualification of this Act, *supra*, p. 178.

[28] Including the Provost and Council (sect. 42).

[29] Royal or Parliamentary (sect. 42); see sect. 36 for the boundaries.

[30] Commissioners of Supply Act, 1856, 19 & 20 Vict. c. 93, sect. 2.

[31] 31 & 32 Vict. c. 48, sect. 16, Reform Act of 1868.

[32] 24 & 25 Vict. c. 83, sect. 4, County Voters Act of 1861. (To satisfy the Reform Act of 1832.)

[33] 31 & 32 Vict. c. 48, sect 15.

[34] Who may be the Surveyor of Income and Assessed Taxes, 20 & 21 Vict. c. 58, sect. 1, and then the expenses fall on the Crown.

[35] The following cases redd the marches between the Railway Assessor and his brethren: Forth and Clyde Canal, 1859, 24 D. 1453; Caledonian Railway Co., Ca. 89 of the Inland Revenue Abstract, 1872, 11 Macph. 988; see Argyll Comrs. *v.* Caledonian Canal, 19th March 1872, 10 Macph. 639.

The assessor may demand a written statement of the particulars required by the Act from the persons who will fall to be entered in the roll, under penalty of £20 for neglect and £50 for misstatement (sect. 7). Appeals against the assessor's determination (not against any return made to him)[36] lodged not later than the 10th of September will be heard by the magistrates or the county valuation committee, as the case may be, and disposed of by the 30th of the same month.[37] The county valuation committee is elected by the Commissioners of Supply at their spring meeting annually, and comes in place of them for the purposes of valuation. There may be more than one such committee in a county, having jurisdiction in different districts.[38] This appeal is also open, but without further redress to any one interested to complain of any particular set forth in the roll, other than the yearly rent or value.[39] Any person entered in the roll may appeal on giving the assessor six days' notice, specifying the amount he wishes to be substituted (sect. 9).[40] From the determination of the commissioners or magistrates as to matter of value, the assessor, whether an Inland Revenue officer or not, or the party entered may appeal to a Court consisting of any two judges of the Court of Session, by requiring the commissioners or magistrates 'to state specially 'and to sign the case upon which the question arose, together 'with the determination thereupon,' and transmitting it to the Inland Revenue.[41] The case must also now set forth the grounds of appeal or complaint, and the replies thereto, in such terms as shall be submitted by the parties, within ten days after the said determination; and along with the case may be submitted a certified copy of evidence, taken, as is allowable, in shorthand at the request and expense of either party.[42] The names of tenants or occupiers of lands and heritages separately let for a shorter period than one year, or at a rent of less than £4, need not be entered; and if not entered in the latter case, the proprietor has

[36] Rule, 1883, 10 Ret. 502.

[37] Sect. 8; amended 30 & 31 Vict. c. 80, sect. 7; 42 & 43 Vict. c. 42, sect. 4.

[38] Last Act, sect. 5.

[39] Last Act, sect. 6; Rule, *supra*, [36].

[40] The procedure is laid down in sects. 10, 11, 13, 14, 15, 16; Expenses, sect. 18; 20 & 21 Vict. c. 58, sect. 2; 31 & 32 Vict. c. 48, sect. 48; Penalties, sects. 37 and 38 of the present Act (see Robertson *v.* Hamilton, 27th Nov. 1878, 16 Sc.L.R. 181, an alleged over-return); Railway Valuation, sects. 20-29; Preservation of Rolls, sect. 35.

[41] 20 & 21 Vict. c. 58, sect. 2, as amended by 30 & 31 Vict. c. 80, sect. 8; 42 & 43 Vict. c. 42, sect. 7. As to the form of the case, see Bank of Scotland, Ca. No. 101, 1873, 11 Macph. 991; and Stirling & Sons, Ca. No. 104, 1873, 11 Macph. 992. Not merely a narrative of the evidence adduced, Rule, *supra*, [36]. There is a question whether a third party may appeal, *ibid.*, and M'Gregor, Ca. 105, 4 Ret. 1144. See Registration Cases, p. 185, *supra*.

[42] 42 & 43 Vict. c. 42, sects. 8, 9.

to pay the whole assessments, with relief against the occupiers for their share thereof (sects. 2 and 31). The valuation roll, when made up, is not to be invalidated by reason of any mistake in the names of the lands or of the parties interested, nor of any informality in the proceedings taken for making it up (sect. 30). It has already been pointed out what authority as evidence is conferred upon the valuation roll, in questions of qualification for Commissionership of Supply and for the suffrage.[43]

Subjects valued.

The 'lands and heritages,' which are the subjects entered in valuation roll, are defined by the interpretation clause as extending to and including 'all lands, houses, shootings, and deer-forests, 'where such shootings or deer-forests are actually let; fishings, 'woods, copse, and underwood, from which revenue is actually 'derived; ferries, piers, harbours, quays, wharfs, docks, canals, 'railways, mines, minerals, quarries, coalworks, waterworks, lime-'works, brickworks, ironworks, gasworks, factories, and all build-'ings and pertinents thereof, and all machinery fixed or attached 'to any lands or heritages: provided always that no mine or 'quarry shall be assessed unless it has been worked during some 'part of the year to which such assessment applies' (sect. 42).

Rule of valuation.

The rule for estimating the yearly value of these lands and heritages is given in the 6th section, which enacts that 'the same shall be 'taken to be the rent at which, one year with another, such lands 'and heritages might in their actual state be reasonably expected 'to let from year to year; and where such lands and heritages 'consist of woods, copse, or underwood, the yearly value of the 'same shall be taken to be the rent at which such lands and 'heritages might in their natural state be reasonably expected to 'let from year to year, as pasture or grazing lands; and where 'such lands and heritages are *bonâ fide* let for a yearly rent con-'ditioned as the fair annual value thereof, without grassum or 'consideration other than the rent, such rent shall be deemed 'and taken to be the yearly rent or value of such lands and heri-'tages in terms of this Act: provided always, that if such lands 'and heritages be let upon a lease the stipulated duration of 'which is more than twenty-one years from the date of entry 'under the same, or in the case of minerals more than thirty-one 'years from such date of entry, the rent payable under such lease 'shall not necessarily be assessed as the yearly rent or value of 'such lands and heritages, but such yearly rent or value shall be 'ascertained in terms of this Act irrespective of the amount of 'rent payable under such lease, and the lessee under such lease

[43] *Supra*, pp. 178, 185.

'shall be deemed and taken to be also the proprietor[44] of such 'lands and heritages in the sense of this Act, but shall be entitled 'to relief from the actual proprietor thereof, and to deduction 'from the rent payable by him to such actual proprietor, of such 'proportion of all assessments laid on upon the valuations of such 'lands and heritages made under this Act, and payable by such 'lessee as proprietor in the sense of this Act, as shall correspond 'to the rent payable by such lessee to such actual proprietor as 'compared with the amount of such valuation.'

Purview of Act.

Coming now to the mass of case-law which has arisen out of the interpretation of this statute, it appears that the purview of the Act has been fixed down in two different directions. It was intended to facilitate the collection of local public assessments, and of these only. Accordingly, it is not conclusive in estimating the amount of provisions to younger children of an heir of entail;[45] nor of composition due under a feu-charter;[46] nor of imperial taxation, unless the valuation be conducted by revenue officers, as empowered by a later statute.[47] Again, it was decided that the whole Act is governed by the 41st clause, already cited, in a case where the collector of an assessment on real rent imposed upon heritors for the purpose of rebuilding a parish church, sought to assess tenants under leases for more than twenty-one years, who, in conformity with the latter half of the 6th section, were entered on the valuation roll as proprietors. It was held, both by the Court of Session and the Court of Appeal, that tenants, not being subject to the assessment, apart from the Valuation Act, were not rendered liable by its terms.[48] In similar circumstances this decision was fully recognised; but a proprietor who had let land on long building-leases, sought to have it declared that he was liable to a similar assessment on the rent he actually received (£80), and not on £1100, the sum which appeared on the roll as the yearly value of the subjects let. The Court, by a narrow majority, read the

[44] *E.g.*, Murray *v.* Donnan, 1882, 10 Ret. 13. The word 'proprietor' shall apply to liferenters as well as fiars, and to tutors, curators, commissioners, trustees, adjudgers, wadsetters, or other persons, who shall be in the actual receipt of the rents and profits of lands and heritages (sect. 42). *E.g.*, a bondholder in possession on a decree of mailles and duties: not, if he is not in possession, or if his only intromission has been to expose the subjects to sale. Ritchie, Bryden's Trs., New Ca. 6 and 7, 9 Ret. 1244.

[45] Leith *v.* Leith, 10th June 1862, 24 D. 1059, 1082.

[46] Hill *v.* Caledonian Ry., 21st Dec. 1877, 5 Ret. 386.

[47] 20 & 21 Vict. c. 58; Menzies *v.* Inland Revenue, 18th Jan. 1878, 5 Ret. 531.

[48] M'Laren *v.* Clyde Trs., 17th Nov. 1865, 4 Macph. 58, affd. 28th May 1868, 6 Macph. H.L. 81; see sect. 33.

33d section (applying the new valuation to local rates) strictly, and as unaffected by the provisions of the 41st, and held that the latter sum must be taken as the real rent on which he was liable to be assessed.[49]

Cases on subjects of valuation.

Turning now to the subjects which ought to appear in the valuation roll, there are some which may be noted as not being expressly included in the enumeration of 'lands and heritages' in the interpretation clause. They are enrolled in the character of heritable subjects yielding rent or profit, or capable of so doing.[50]

Subjects not enumerated in the Act.

Private railway.

A private or way-leave railway was held to be rightly enrolled as the property of the owner of the land over which it ran, who had also a right to dispose of it on certain conditions, and as in the occupation of parties who had a perpetual servitude or privilege of using it, and as of the yearly rent which they had to pay for this use.[51]

Way-leave.

A way-leave through mineral workings must be taken into account in valuing a mine.[52]

Water-power.

The possession of water-power adds to the value of the subjects which supply the water, and of those which are supplied; and the fact that it is assessed in the one does not exempt the other.[53]

Multures.

It was at one time held that multures commuted into an annual payment by arrangement were included under lands and heritages;[54] but the contrary has been since then determined, both when the commutation has been private and when it has been made under the provisions of the Act of 1799.[55]

Kelp-shores.

Kelp-shores, whether let by the proprietor to an individual or not, and whether their use be promiscuous among the neighbouring cottars or confined to one or more, are assessable subjects at the rent stipulated—failing which, the rent which they might reasonably be expected to yield.[56]

Peat-cutting.

The privilege of cutting and driving peats, let out to various parties

[49] Traquair's Trs. *v.* Her. of Innerleithen, 9th Dec. 1870, 9 Macph. 234.

[50] As to Crown property, see Bruce *v.* Veitch, 28th Nov. 1810, F.C.; Barracks Comrs. *v.* Milroy, 21st Nov. 1815, F.C.; Ordnance *v.* K.-S. of N. Leith, 14th June 1825, 4 S. 89 (N.E. 91), 7 S. 416; L. Adv. *v.* Garioch, 22d Jan. 1850, 12 D. 447; Adv.-Gen. *v.* Edinburgh Comrs., 22d Jan. 1850, 12 D. 456; Adv.-Gen. *v.* Oliver, 19th Jan. 1852, 14 D. 356; Adv.-Gen. *v.* Beattie, 29th Jan. 1856, 18 D. 378; Univ. of Edinburgh *v.* Greig, 20th July 1865, 3 Macph. 1151, revd. 6 Macph. H.L. 97, and the English cases collected in Mersey Docks *v.* Cameron, 11 H.L. 443.

[51] Addie and Rankin, 1859, 24 D. 1454; see under the Poor Law Act (by sect. 45 of which such a railway could not be valued as a separate subject) Miller *v.* Gordon, 17th June 1859, 21 D. 975.

[52] Wallace, Ca. 167, and Barr, New Ca. 10, 1881, 9 Ret. 1238, 1245.

[53] Shaws Water Co. *v.* Greenock Police Trs., 10th July 1862, 24 D. 1306, revd. 28th July 1863, 1 Macph. H.L. 59.

[54] Campbell, Case 39, 1864, 4 Macph. 1132.

[55] Ds. of Sutherland; M'Leod, Cases 64 and 65, 1869, 11 Macph. 980.

[56] British Seaweed Co., Ca. 47; Gordon, Ca. 48, 1866, 4 Macph. 1139 and 1141.

by the owner of a moss, was rightly set against his name at the rent obtained, deducting the moss-grieve's wage but not the annual expense of keeping up the access.[57] It is no plea for exclusion from the roll that the subject, on account of being the property of a public institution or of being set apart for some public end, does not yield profit to any one, provided it be capable of yielding rent. Thus, ecclesiastical buildings (except parish churches),[58] such as Dissenting chapels,[59] schools,[60] prisons,[61] district asylums,[62] and colleges,[63] are all swept in, even though it could be proved to the assessor that these buildings or any of them were exempted from all taxation, local or imperial.[64]

Public buildings.

Cum omni re.

The subject valued must be taken *cum omni re*, with all its attendant advantages and disadvantages, provided these be plainly identified with it, and not with something quite different. Examples of this rule have been already given: it may be further illustrated by regarding the different result of two cases, at first sight somewhat similar. A shop was let for £150, whereof £90 was in name of rent and £60 for the goodwill of the business formerly carried on there. The assessor regarded locality and connection in the trade as important elements in fixing the annual value, and entered the shop at £150. His determination was sustained.[65] On the other hand, where the owner of a villa got from a railway company, anxious to encourage building near its line, a free ticket available for some years and transferable to tenants, and for a sum of more than £9 a-year transferred it to a tenant, it was held that this sum could not be added to the rent paid for the house. Though the possession of the ticket naturally enhanced the value of the house, the sum paid for it was presumed to be a fair equivalent for the right of travelling, which right was separable from the possession of the house.[66] Again, the depreciation of rent of an inn caused by an obligation of the tenant to the landlord, a brewer, to purchase ale from him alone, will not be given effect

Goodwill.

Railway ticket.

Restriction on wares.

[57] Forbes, Ca. 95, 1873, 11 Macph. 990.

[58] New Monkland, Ca. 83, 1872. 11 Macph. 986, overruled in Kingoldrum, Ca. 123, 1877, 4 Ret. 1149.

[59] Menzies, Ca. 91, 1873, 11 Macph. 989.

[60] New Monkland, *supra*, [58].

[61] Renfrewshire Prison Board, Ca. 45, 1865, 4 Macph. 1137.

[62] Banffshire Lunacy Board, Ca. 71, 1870, 11 Macph. 982; Barony, Ca. 122, 1877, 4 Ret. 1149.

[63] University of Glasgow, Ca. 72, 1870, 11 Macph. 982; and see University of Edinburgh *v.* Greig, [50].

[64] Last case.

[65] Glasgow Iron Co., Ca. 90, 1873, 11 Macph. 989. See also as to goodwill, Yule, Ca. 127, 1877; and as to rights of fowling on Ailsa Craig, Girvan *v.* Campbell, 1875, 3 Ret. 1.

[66] Mitchell, Ca. 49, 1866, 4 Macph. 1142; see also Renfrew, Ca. 59, 11 Macph. 979.

to in the roll.[67] Considerations similar to those which have been already explained in treating of the law of fixtures, as between heir and executor, will govern the determination of what is 'fixed or attached to any lands or heritages,'[68] and therefore assessable, and what is moveable furniture, and therefore exempt.[69] Fixtures.

The rules for estimating the annual value to be entered in the roll are very carefully laid down in the 6th section, which has been quoted at length. The latter half of the section lies beyond the scope of this work,[70] except in so far as it has already served to illustrate the purpose of the Act in general. The earlier part of the section distinguishes two sets of cases,—the simpler case, here to be first discussed, of the subjects being let *bonâ fide* for a yearly rent conditioned as the fair annual value thereof, without grassum or consideration other than the rent; and the more difficult case where that is not so. In the former case, the rent so conditioned must be entered in the roll as the yearly value,[71] giving effect to any abatement which may be allowed permanently or from time to time during a lease.[72] The mere fact that a house worth about £20 a-year is let at £19, 19s., to avoid the inhabited-house duty, is not sufficient to redargue *bona fides*. It would be in vain for the assessor to stand up for the extra shilling. He must show some more palpable inadequacy.[73] But where an inn and the farm attached were let for £19, 5s. and £126 respectively to the same tenant, and the assessor alleged that the true return should have been £20 and £125, 5s., it was held that he was not bound to follow the figures given in the lease, there being also contained in it an obligation on the tenant to insure the premises.[74] And when a farm admittedly worth £71 a-year was let for £50 to an old servant, there was held to be a 'consideration other than rent,' which let in proof of the actual value.[75] The rent is still taken as the test of value, though it Cases on rules of valuing. Subjects let. Other consideration.

[67] Jerdan, Ca. 118, 1876, 4 Ret. 1148.

[68] Sect. 42. See Chalmers, Ca. 75, 1871, 11 Macph. 983.

[69] Fraser, 1858, 24 D. 1452; D. Richmond, Ca. 56, 1867, 11 Macph. 978; Summerlee Iron Co., Ca. 114, 1875, 4 Ret. 1146; Hart & Co., Ca. 171, 1880, 9 Ret. 1239.

[70] See Robertson, 1861, 24 D. 1452. A lease for fourteen years, and for the life of the tenant, does not make him proprietor in the sense of the Act.

[71] This was the rule already established under the Poor Law of 1845—Ainslie *v.* Turnbull, 12th July 1854, 16 D. 1043. See Murray *v.* Bruce, 25th May 1852, 1 Stu. 723, 24 Sc. Jur. 447.

[72] Maxwell, New Ca. 3, 9 Ret. 1243.

[73] Hope, 1860, 24 D. 1453; Bell, Ca. 50, 1866, 4 Macph. 1143; Ford, Ca. 126, 1877.

[74] Walker, 1862, 24 D. 1453.

[75] Kerr's Trs., Ca. 76, 1871, 11 Macph. 983; cf. M'Gregor, Ca. 105, 1874, 4 Ret. 1144.

covers subjects which do not, as well as subjects which do, fall to be valued. The proper plan in such a case is to deduct the annual cost and value of the former from the *cumulo* rent, not to make out a new valuation of the latter. This was done with regard to furniture of a shooting-lodge, and the expense of keeping up the gardens attached.[76] Where subjects let at a stated rent are by the tenant sublet at a higher rent, the former sum must be deemed to be the annual value;[77] but the benefit of this rule was withheld where there was a lease of a large estate to the owner's son, with power to him to raise the existing rents, and generally to exercise the powers of a landlord, subject to his father's approval, and the rent was such that, in the course of eight years, it came to be more than a third below the aggregate of the rents received from the sub-tenants.[78] At one time the head rent alone could be entered in roll,[79] but since the Reform Act of 1868, which made actual occupation by tenants a requisite to their being registered as voters, the sub-rents are also entered as a guide to the framer of the electoral roll.[80] If part only of leased premises be sublet, the valuation of the remainder is obtained by deducting the actual sub-rent from the principal rent, not the part thereof apportioned to the sublet portion in the principal lease.[81] The sub-tenant is entered as occupier, though subletting is expressly excluded in the original lease, so long as the landlord does not object.[82] Some difficulty is caused by a rise or fall of rent under a new lease to the same or to a different tenant. The roll is made up as from Whitsunday to Whitsunday, and the rule is to regard, not the conventional term for payment of rent, but the possession had during that period. Thus, a lease at a rent of £111 expired at Whitsunday 1858, as far as concerned the possession of houses, grass, and turnip-land, and at the separation of the crop or Michaelmas for the rest of the farm, and was relet at £145 a-year as from the said Whitsunday, which was declared to be the term of the new tenant's entry. The new tenant was held to be rightly described in the roll for the year from Whitsunday 1858 to Whitsunday 1859, as tenant and occupier, and the value at the

Furniture—upkeep.

Sublease.

Incoming and outgoing tenants.

[76] D. Richmond, Ca. 56, 1867, 11 Macph. 978; L. Middleton, New Ca. 21, 1882, 10 Ret. 28.

[77] Campbell, 1861, 24 D. 1457. See Bruce, Ca. 58, 1868, 11 Macph. 978; Buchanan, Ca. 111, 1874, 4 Ret. 1145; Lawson's Reps. 1883, 20 Sc. L.R. 432. This is hard to reconcile with two earlier cases of salmon-fishings—Scott, 1861, 24 D. 1455, 1456.

[78] Bruce, New Ca. 23, 1882, 10 Ret. 34.

[79] Murdoch, Ca. 44, 1865, 4 Macph. 1135.

[80] Fraser, Ca. 52, 1867, 11 Macph. 976; Hay & Co., Ca. 70, 1869, 11 Macph. 981.

[81] Riley, 1883, 20 Sc. L.R. 321.

[82] D. Richmond, Ca. 66, 1869, 11 Macph. 981.

new rent of £145.[83] But this mode of fixing the value has been modified by later decisions, if, indeed, as would appear from the statement of the case, it did not turn on the special terms of the leases. The valuation year comprises the last half of one crop and year and the first half of another; and in case either of a Whitsunday entry or of a rise of rent as a lease runs on, the value will be the mean between the new and the old rent.[84] Thus, in the case of a similar entry at Whitsunday and separation, the rent was payable partly in a fixed money payment at Candlemas twenty-one months thereafter, and partly at the Lammas following, by grain rent convertible according to the fiars of the crop reaped in the year after that of entry. The incoming tenant was rightly entered in the roll as tenant and occupier for the year beginning on the said Whitsunday, at a rent made up of the mean of the rent payable by him and his predecessor, the grain rent being converted according to the fiars last struck before the Whitsunday.[85] It makes no difference that the incoming tenant got possession of the fallow at the preceding Martinmas[86] or March.[87] In the last case entry was given to the fallow-break—one-seventh of the farm—on 1st March 1864; to the houses (except the barn and cot-houses) and grass—two-sevenths of the whole—at Whitsunday; to the rest of the lands at the removal of the crop; and to the barn and cot-houses at Whitsunday 1865. It was held that the new tenant was rightly entered in the roll for the year 1864-65, and that his possession for that period being equal at least to one-half of the whole farm for the said year, the value must be struck at the mean of the old and new rents. If a tenant purchases the subjects possessed by him as such, before the expiry of his lease, he is not entitled to insist on the rent being entered as necessarily the fair value.[88] The higher absorbs the lower right.

Improvements.

The Valuation Appeal Court has very frequently had to decide on the mode of valuing improvements made by landlords or by tenants of lands and heritages; and the rules have been well settled in consequence. If the meliorations are made under agreement with the landlord that they shall be removeable at the ish of the lease, they appear not against the name of the landlord, but against that of the tenant, who, with respect to them, is both proprietor

[83] Forbes, 1858, 24 D. 1449.

[84] D. Richmond and Leith, 1861, 24 D. 1450.

[85] Hunter, 1859, 24 D. 1449. The fiars prices last struck must be taken in all such cases, being the nearest approximation possible. It is all one in the long-run. Hunter, 1860, 24 D. 1450.

[86] L. Blantyre, 1859, 24 D. 1449.

[87] L. Blantyre, Ca. 42, 1865, 4 Macph. 1135.

[88] Grant, Ca. 92, 1873, 11 Macph. 989.

and occupier.[89] The rent actually received is in such a case the annual value of the subject let. The same is the case where, without any agreement with the landlord, a tenant or sub-tenant builds a house on the land let to him. The tenant does not thereby become the owner of the house; and the landlord during the currency of the lease gets no increase of rent.[90] Even if the buildings have been erected under agreement with the landlord, the rent actually received will be taken if the subject is held on from year to year after they were made.[91] These are exceptional cases. The more ordinary state of matters is that the parties stipulate either in the lease or during its currency for the expenditure of a limited sum of money in improvements on the land, and for the distribution of the burden so caused. When the expenditure is made by the landlord, and the tenant is taken bound to pay interest, the assessor adds the interest to the rent in order to get at the annual value;[92] whether the stipulation be made in the lease itself, or during its currency; whether the interest be paid on the landlord's own funds, or by way of Government or Improvement Company's rent-charge.[93] In every case the interest on permanent improvements only, such as covered, and now also sheep, drains, fixed machinery, buildings, fences (including wire-fences), is added; not temporary meliorations, such as the spreading of lime.[94] Conversely, the rent stated in the lease is taken as the value, though deductions are stipulated for in certain years to be laid out by the tenant in permanent improvements;[95] or the same destination is provided for the excess of a grain rent over a given sum.[96] In all these cases the assessor can at once ascertain at what sum the parties themselves value the subject and its improvements; and this is the readiest way to assess the 'consideration other than rent.' The same can scarcely be said in cases where the tenant, under certain conditions, makes the outlay; though when the same ready mode is available it is adopted. Thus, a tenant became bound to erect buildings on his farm, the landlord paying £150 on their completion and their

[89] Graham Bros. and City of Perth, Ca. 73 and 74, 1873, 11 Macph. 982, 983.

[90] Grant, 1858, and Morrison, 1859, 24 D. 1452; Fraser, Ca. 52, 1867, 11 Macph. 976; Nitshill Coal Co., Ca. 164, 1879, 9 Ret. 1238; Coltness Iron Co., New Ca. 19, 1882, 10 Ret. 21; Thompson, 1883, 20 Sc. L.R. 322; Goswell, 1883, 20 Sc. L.R. 431.

[91] D. Richmond, Ca. 57, 1868, 11 Macph. 978.

[92] Allan, 1858, 20 D. 1355.

[93] Lockhart, 1858, 24 D. 1451; Home, ibid. (not merely the excess of the rent-charge over the usual rate of interest).

[94] Dunlop, 1858, 20 D. 1355; Home, *supra*, [93]; Hamilton, New Ca. 13, 1881, 9 Ret. 1245.

[95] Udny, Ca. 86, 1872, 11 Macph. 987; cf. Kinloch, Ca. 119, 1876, and Hepburn, Ca. 120, 1876, 4 Ret. 1148.

[96] Hay, 1861, 24 D. 1451.

value, restricted to £150, at the end of the lease. The buildings were admittedly of greater than the restricted value. The assessor proceeded to value the farm irrespective of the lease, but was set right by the Court, who held that he should have added to the rent interest on the £150 at five per cent.[97] Usually, however, when the tenant has executed improvements agreed upon, the rights of the parties are so indistinctly marked that the assessor is bound to proceed as if no lease existed.[98]

Subjects not *bonâ fide* let at their fair value.

These cases lead on in the interpretation of the 6th section to the rule which is there enacted for the valuation of subjects which are not *bonâ fide* let at their fair annual value. The yearly value is then to 'be taken to be the rent at which, one year with another, 'such lands and heritages might in their actual state be reason-'ably expected to let from year to year.' It was early held that in the case of grass parks let out to graziers for the season, where the fences were kept in repair, the ditches cleaned out, and, it might be, top-dressing laid on by the landlord, the latter must be held to be the occupier at the rent which the fields would have yielded as an agricultural subject, not at the enhanced rent obtained for them as separate parks.[99] Woods, copse, and underwood are specially provided for by the Act. They are to be estimated as if they, in their natural state, were 'let from year to year as 'pasture or grazing lands,'[100] though, on account of immaturity or ill growth, they yield no revenue.[101] If land for planting be resumed by a landlord, it is valued as in its natural state, and not at the sum to be deducted from the rent payable by the tenant; yet the rent of the remainder is taken under the full deduction.[102] If the area covered by wood is let to a shooting tenant, to the exclusion of the agricultural tenant cutting grass, but with reservation to the landlord of right to cut, prune, and carry away the timber, the value of the landlord's interest will appear in the roll.[103] In regard to houses there is no certain guide. An empty house, finished except as to certain internal embellishments, which are usually left to the purchaser to arrange according to his taste, is entered, not at a nominal sum, but, in the case cited, at about one-fifth of its value when finished and occupied.[104] In towns

Grass parks.

Woods.

Houses in town.

[97] Skene, Ca. 53, 1867, 11 Macph. 976.

[98] Grant, 1859, 24 D. 1450; M'Culloch, Ca. 36, 1863, 1 Macph. 1196; D. Montrose, Ca. 37, 1863, 1 Macph. 1197; see Russel *v.* Hutchison, 28th Jan. 1857, 19 D. 326 (Poor Law).

[99] Allan, 1858, 20 D. 1356; Campbell, bid.; Ker's Trs., Ca. 131, 1878, 9 Ret. 1236.

[100] Sect. 6.

[101] Allan *v.* Dunlop, 1858, 20 D. 1354, overriding sect. 42, 'woods, &c., from 'which revenue is actually derived.'

[102] Innes, Ca. 115, 1875, 4 Ret. 1147.

[103] L. Forbes, 1861, 24 D. 1458.

[104] Paterson, Ca. 135, 1878, 9 Ret. 1237.

it is usually possible to compare an unlet house with others in a similar position which are let for a term of years—not by yearly sets — and, by discounting disadvantages or adding for greater size and amenity, to get at a fair result.[105] Such a criterion as area of flooring, though useful as a factor in the equation, is by no means conclusive.[106] If a house be let furnished, it is preferable to resort to a comparison with similar and similarly situated unfurnished houses, rather than to the rule of thumb of taking half the rent for the house, and the other half for the furniture.[107] In the country a comparison is not so easily reached, as the circumstances are more variable. In the case of a mansion-house, a valuable rule has been laid down, and too often neglected —that it is not to be valued at what the bare house, unfurnished, would let for without shootings or fishings, but what it is worth to the proprietor of the estate.[108] Otherwise the upkeep of house, gardens, and policies might run away with the rent altogether. Sometimes a dwelling-house is nearly connected with another subject; and it is often attempted, in view of the house-duty, or of the classification of subjects, which is frequently adopted in laying on assessments, to slump or to shuffle the valuations. Of this an example has already been adduced in the case of an inn, and the farm let along with it.[109] Another case, more frequently met, is that of a dwelling-house and shop.[110] If the commissioners are satisfied that the allocation is *bonâ fide*, it stands; otherwise not. In such cases there is a separate entry in the roll. But it may be that the dwelling-house—the more highly rated subject—is plainly an accessory, and nothing more than an accessory, to the subject with which it is let. Such is the case of a farmhouse, no larger or better than is suitable for the farm.[111] The value of both together is then estimated as of a *unum quid*—a farm—and the house is not separately entered. Any excess of value over that of a suitable farmhouse would be admitted to the roll, if proved. Where in connection with a dwelling-house other buildings and accessory premises, such

In country.

Houses in connection with other subjects.

E.g., inn,

or shop,

or farmhouse.

[105] Muir, Ca. 134, 1878, 9 Ret. 1237.

[106] Macfarlane, Ca. 81, 1872, 11 Macph. 985; Binning, Ca. 88, 1872, 11 Macph. 988. As to a hotel, see Philp, 1863, 38 Sc. Jur. 592. Where let by the week or month there is no actual annual rent—Robertson *v.* Hamilton,[40], contrast with an anomalous case, M'Intyre, Ca. 172, 1880, 9 Ret. 1239.

[107] Skinner, Ca. 183, 1879, 9 Ret. 1237.

[108] Gladstone (Fasque), Ca. 84, 1872, 11 Macph. 986.

[109] Walker, 1862, 24 D. 1453, *supra*, [74].

[110] Urie, Ca. 96, 1873, 11 Macph. 990.

[111] Henderson, Ca. 79, 1871, 11 Macph. 985; cf. Glass, Ca. 87, 1872, 11 Macph. 988.

as vineries, garden, and outhouses are possessed, the whole should be valued as a *unum quid*, not at so much a year for each subject.[112] Shootings and deer-forests are so far peculiar that they are not to be entered 'unless they are actually let;'[113] nor are fishings, unless 'revenue is actually derived' from them,—the difference being, that in the latter case, and not in the former, sale of the produce entails entry on the roll. In one case, where no revenue was derived from salmon-fishings, the Court seems to have been satisfied with proof that the last proprietor had let them to a tenant.[114] The decision seems inconsistent with the interpretation clause, and would probably not be repeated. It could only be supported by stretching the meaning of the word 'revenue' beyond its ordinary sense.[115] The same clause specially provides also for the case of mines and quarries, that they shall not be enrolled unless they have been worked during some part of the year to which such enrolment applies; but this exemption does not cover the case of part unopened or, though opened, not at any time during the year wrought, of a mineral field which was all let at a fixed rent, with option of lordships.[116] If let, the rent or lordship actually paid to the proprietor is taken—the greater of the two for the time being[117]—and it should be ascertained whether this is meant to cover the machinery, railways, and pit-head buildings.[118]

Shootings and deer-forests.

Fishings.

Mines.

The dimly marked line has now been reached, perhaps overstepped, which divides heritable property as a principal, and heritable property as an accessory—a mere tool or instrument of trade or manufacture. It will be enough for the present purpose to indicate that the difficulty of letting many trade premises or public undertakings, and their unmarketable nature (combined, it may be, with large earnings), introduce elements foreign to anything which has been commented on above, such as percentages on original costs, gross earnings, deductions for tear and wear, for tenants'

Heritages as tools of trade, &c.

[112] M'Jannet, New Ca. 22, 1882, 10 Ret. 32.

[113] Sect. 42. See as to let shootings under the Poor Law, Crawfurd *v.* Stewart, 6th June 1861, 23 D. 965. Under this Act, D. Montrose, Ca. 37, 1863, 1 Macph. 1197.

[114] Baird, 1861, 24 D. 1456. See the equally anomalous cases immediately preceding, Scott, 1861, 24 D. 1455, 1456 (sublease).

[115] See as to 'wood,' &c., *supra*, p. 205.

[116] Blantyre Parochial Board, 1883, 20 Sc. L.R. 511.

[117] Mackintosh *v.* Playfair's Trs., 20th May 1841, 3 D. 893 (Poor Law).

[118] Carron Co., Ca. 40, 1864, 4 Macph. 1133; Summerlee Iron Co., Ca. 114, 1875, 4 Ret. 1146. As to a glebe quarry, see Her. of Kirkmabreck, 1861, 24 D. 1456.

profits, and for general expenses. A note is appended, collecting all the principal cases of this sort under short headings.[119]

[119] Factories: Pollok, 1861, 24 D. 1457; Annandale & Sons, Ca. 54, 1867, 11 Macph. 977; Stirling & Sons, Ca. 69, 1869, 11 Macph. 981; Thomson, Ca. 78, 1871, 11 Macph. 984; Shields, Ca. 113, 1875, 4 Ret. 1146; Barbour, Ca. 133, 1878, 9 Ret. 1236; Thompson, 1883, 20 Sc. L.R. 322. Ferries: Anderson *v.* Gillanders, 1853, 15 D. 577; Edinburgh, Perth, and Dundee Ry. *v.* Arthur, 1854, 17 D. 252; Scottish Central Ry., Ca. 38, 1863, 1 Macph. 1198; L. Blantyre, Ca. 125, 1877, 4 Ret. 1150. Gasworks: Falkirk Gas Co., Ca. 41, 1864, 4 Macph. 1133; Inverurie, Ca. 85, 1872, 11 Macph. 986; Renton and Leven, Ca. 93 and 94, 1873, 11 Macph. 989, 990; Glasgow Gas Co. *v.* Adamson (Poor Assessment), 1863, 1 Macph. 727; Dundee Gas Comrs., New Ca. 1, 1881, 9 Ret. 1240; Falkirk J.S. Gas Co. 1883, 20 Sc. L.R. 427. Harbours: Stonehaven, Ca. 46, 1865, 4 Macph. 1139; Clyde Trs., Ca. 51, 1866, 4 Macph. 1143; and Ca. 60, 1868, 11 Macph. 979; Nith, Ca. 97, 1873, 11 Macph. 991; Kirkwall Harbour Trs., New Ca. 4, 1881, 9 Ret. 1243. Water Companies: Hay, 1850, 12 D. 1240, affd. 1854; 1 Macq. 682 (Poor); Mags. of Glasgow, 1857, 20 D. 290 (Poor); Castle Douglas Mags., New Ca. 5, 1881, 9 Ret. 1243; Dalbeattie L.A., New Ca. 20, 1882, 10 Ret. 23. Tramways: Craig, 1874, 1 Ret. 947 (Poor). Furnaces: Addie, and Carnbroe Ironworks, Ca. 61 and 62, 1868, 11 Macph. 979, 980. Bridge Dues: Dumfries, Ca. 77, 1871, 11 Macph. 984; Arthur *v.* Glasgow Police Comrs. 1870, 4 Poor Law Mag. (2d series), p. 22; Ayr Bridge Trs., New Ca. 17, 9 Ret. 1246. Railways: see Deas on Railways, p. 551 *et seq.* Market-dues for stances, &c.: Inverness, Ca. 110, 1874; Inverurie, Ca. 116, 1875; Aberdeen, Ca. 124, 1877, 4 Ret. 1144, 1147, 1149. Pier: Hunter's Trs., New Ca. 24, 1882, 10 Ret. 36; 1883, 20 Sc. L.R. 435. Public Hall: Blyth Hall Trs., 1883, 20 Sc. L.R. 433. Asylum: Barony Parochial Board, New Ca. 25, 1882, 10 Ret. 39.

PART II.

RESTRICTIONS IN FAVOUR OF THE CROWN AND THE PUBLIC.

CHAPTER XIV.

REGALIA.

HAVING thus examined the nature and general scope of property in lands and other heritages, it is now time to go on to the limitations and restrictions which are or may be imposed on their use. It has already been said that the relation of a person and thing called ownership involves, by a convenient though not exhaustive enumeration, the right of the person to make use of the thing, to reap its fruits, and to dispose of it by destruction, conversion, sale, or mortgage, and that absolutely and exclusively. The mere statement of this general rule, however, demonstrates that it can only be carried out in practice with very considerable reservations. It will be impossible to classify these reservations with any approach to accuracy. Perhaps the most logical division would be into—(1) restrictions imposed *by law*, subdivided into those which are imposed for the benefit of the Crown and the general public, those which arise from neighbourhood, and those which are inherent in the nature of the subject; and (2) restrictions *conventionally* imposed either for the benefit of neighbouring property, or by way of limited interest, or by diligence. But the most convenient classification seems to be into—(1) restrictions in favour of the Crown and the public; and (2) restrictions conceived in favour of individuals; and this will consequently be the division adopted in this work.

Restrictions on ownership generally.

The chapters which follow in this Part are concerned with reservations and restrictions in favour of the Crown and the public. These take three different forms—first, restrictions and conditions in favour of the public, for whom the Crown acts as factor or trustee; secondly, reservations in favour of the Crown-patrimony;[1] and thirdly, liability to sustain the loss or deterioration of property for some public end.[2] The last of these can be kept

Division of subject.

[1] Chaps. 14-20.

[2] Chap. 21.

quite distinct from the others; the first two are not so easily separable. They both fall under the head of *regalia*.

Regalia.

Regalia, or *jura regalia*, in the widest meaning of the words, include all the rights of the Crown; but, as applicable to the ownership of subjects within the realm, they are described by Stair to mean 'those things which the law appropriateth to princes 'and States, and exempteth from private use, unless the same be 'expressly granted and disponed by the king.'[3] The reason for this exemption—for this appropriation of the ownership of certain things to the Crown by virtue of its prerogative—may perhaps be traceable in a few unimportant particulars to royal whim or caprice, as in the case of the claim to royal birds and fish. But in most cases it may be presumed, though it cannot be historically proved, that only those things were put beyond the reach of ordinary commerce, the appropriation of which by an individual would usually be to the public loss. This will appear plainly enough in the case of those rights which will be described in the immediate sequel. It is also true of rights of forests, and of the obsolete fortalices and jurisdictions. The division of *regalia* into *majora* and *minora* marks the important distinction between those which cannot and those which can be alienated by the Crown to a subject; those rights which the Crown holds as trustee for the public, and those which it holds for its own profit. But the attempt to use this distinction in classification is frustrated by the circumstance that the two sorts of rights are often coexistent in the same subject at the same time. The simplest division will be that which follows the nature of the subjects themselves. It will then appear that with the exception of forests, and mines of gold and silver, which have been already discussed, and treasure, all the *regalia* are connected with water—more particularly with the sea and navigable rivers; so that it may be said that, since royal forests are unknown in Scotland, and royal mines and hid treasure almost unknown, the owner of any parcel of the *terra firma* of Scotland is in respect to its use absolutely free from interference on the part of the Crown.

R. majora and *minora.*

Treasure-trove.

The Scotch agrees with the Roman law in defining treasure as '*vetus quædam depositio pecuniæ cujus non extat memoria, ut jam 'dominum non habeat.*'[4] But the ownership differs under the two systems. The Roman law, which at first gave the whole treasure to the finder in all cases, then gave the fisc a share, then returned

[3] St. 2.3.60 *et seq.* See Cr. i. 15 and 16, *tot. tit.*; Ersk. 2.1.6, 2.6.13-18; Bankt. 2.3.20, 2.3.83-111; B. Pr. 638 *et seq.*

[4] 31, § 1 D. (41.1); Cr. 1.16.40; St. 2.1.5, 2.3.60; Ersk. 2.1.12; Bankt. 1.3.16, 2.1.8; B. Pr. 1293.

to the old law, and finally[5] gave the whole to the finder if the treasure was discovered on his own ground, or on that of his master who had employed him specially to search; but half only to the finder of treasure by chance, as in ploughing, on another's ground, and no part of it if he went there on purpose to search without the owner's knowledge. In these last cases the owner of the ground got the half and whole respectively. All interest in the treasure was lost by resorting to magic[6] for its discovery. On the other hand, the law of Scotland, in consistency with the rule that obtains in regard to all things at one time appropriated but lost beyond proof or reasonable presumption of the former ownership, gives the treasure to the Crown. The right is very analogous to its caduciary right of inheritance as *ultima heres*. As in Roman law, so in Scotland, it would be held that other valuables besides money might form the treasure. The antiquity of the deposit is an important element,[7] but there is no period of limitation of proof of the original ownership. Concealment of discovered treasure does not amount to theft.[8]

Wrecks, &c.

A similar rule of law gives unclaimed wrecks and stranded goods to the Crown, which frequently granted the right to subjects, as admirals, vice-admirals, or barony proprietors. In these days of rapid communication, careful registration, and underwriting agencies, these grants are nearly valueless. They are, however, recognised and respected in the principal modern statute,[9] which provides for notices, and for the surrender of these subjects by the receiver of wrecks on payment by the donatary of expenses and salvage.[10]

[5] L. un C. (10.15). The history is traceable in these passages — 1.2.3 C. Theod. (10.18); 7 § 12 D. (24.3); 39 I. (2.1); 63 D. (41.1). In *loca religiosa*— 39 I. (2.1); 3 §§ 10 and 11 D. (49.14). *Magic*—Collatio L. Rom. et Mos. 15.2; C. (9.18); C. (10.15).

[6] See on the whole of this interesting subject — Gothofredus *apud* C. Theod. (10.18); Gesterding, p. 93; Pagenstecher, p. 81.

[7] Cleghorn *v.* Baird, 1696, M. 13523. The date of the coins proved the deposit to be a deceased woman's 'pose.'

[8] Hume on Crimes, i. 63.

[9] Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, sect. 471.

[10] The authorities on wrecks are to be found in Skene, *s.v.* Wrek; St. 1.7.3, 2.1.5, 3.3.27; Ersk. 2.1.13; B. Pr. 1292. Cases in Mor. *s.v.* Wreck, and 5 B.S. 638; Comrs. of Customs *v.* L. Dundas, 2d Dec. 1812, F.C.; M. Breadalbane *v.* Smith, 28th Jan. 1850, 12 D. 602; and esp. L. Adv. *v.* Hebden, 26th Feb. 1868, 6 Macph. 489 ('wrak' in *tenendas*).

CHAPTER XV.

SEAS, NAVIGABLE RIVERS, AND THEIR SHORES.

Introduction.

THE Roman law, which, with the modifications introduced by feudal theories, was the guide of our early jurisprudence in its division of things, classed seas, navigable rivers, and the shores of both among the *res communes*, which were subject to no ownership, but to the use of all.[1] By a dangerous change of phraseology, the sea-shore is in one place[2] called a *res publica*, referring only to the public use—not, as the phrase usually denotes, to its being public or State property.[3] The feudal law which demanded an owner for everything within the realm and for a certain distance beyond its shores, found an owner for these subjects in the sovereign, leaving the right of user untouched. Navigable rivers are treated in all respects as if they were parts of the sea; but an entirely different set of considerations comes into view when the shore or beach is reached. These two subjects will now be discussed in their order.

I.—SEAS AND THEIR SHORES.

High seas.

Narrow seas.

The seaboard landholder has, as such, no greater right in the sea *ex adverso* of his lands than any other member of the public. The high seas belong to no one. The narrow seas, and a strip formed by an imaginary line drawn three miles out to sea from low-water mark along the general line of the coast, disregarding gulfs and minor inlets, are regarded as belonging to the sovereign,[4] as custodier of, or trustee for, the public rights of navigation and the national

[1] Cicero, Top. 7.32; 5 I. (2.1); 96 D. (50.16).

[2] 112 D. (50.16); cf. 3 pr. D. (43.8).

[3] *E.g.*, streets, highways, public buildings, perennial streams.

[4] Vattel, 1 § 289; Pufend. 4.5.7-8; see Cr. 1.15.13; St. 2.1.5; Bankt. 1.3.3; 1488, c. 3; 1581, c. 120; Hale de jure Maris, c. 4; Gammell *v.* Woods and Forests, 13 D. 854, affd. 3 Macq. 419; Gann *v.* Free Fishers of Whitstable, 11 H.L. Ca. 192; Foreman *v.* do., L.R. 4, H.L. 266, and the authorities cited in the next case.

rights of fishing. This ownership was held in England not to involve criminal jurisdiction over foreigners at common law,[5] but this supposed defect has been amended or declared non-existent by statute.[6]

Ownership of narrow seas.

It is a rule common to English and Scotch law, that the ownership of the British seas, beyond the debatable strip of foreshore and within the line thus drawn, is vested in the Crown, both the water, with its products and uses and the soil beneath it.[7] The only exclusive rights connected with the water which have been vindicated by the Crown, and frequently conveyed to a subject, are the rights of salmon-fishing,[8] and oyster-fishing when this extends, as it usually does, beyond the foreshore.[9] The Crown's right, as trustee for the public, is chiefly concerned with the protection of white-fishing and navigation. Its right in the *solum* of the sea is partly fiduciary, partly patrimonial. Its fiduciary side is best shown by the Crown's control over harbours.[10] By virtue of its patrimonial right of ownership of the soil *aquâ coopertum*, the Crown can put a stop to erections thereon by the adjacent proprietor, or by any one else, and to dilapidations by the removal of marine animals, such as oysters and mussels, which are so far stationary in their habits as to be practically *partes soli*.[11] There has been an entire absence of litigation, both here and in England, in regard to rights in the sea, except as incidental to questions respecting the foreshore. This is all the more extraordinary, inasmuch as it has been found possible and profitable in many parts of both countries to extend mines for long distances beyond the foreshore. The only recorded question arose some years ago between her Majesty and the Prince of Wales, as to the property in minerals around the coasts of Cornwall. It was argued for the Crown, before the arbiter, Sir John Patteson, that to it belonged the *fundus maris* below low-water mark: for the Prince, first, that all which adjoined and was connected with the county of Cornwall passed to the Dukes of Cornwall under the terms of the original grant, and therefore, that even if the bed of the sea elsewhere belonged to the Crown, it had passed in this case to the Prince; and secondly, that the bed of the sea did not belong to

Case of the Duchy of Cornwall.

[5] Franconia Ca.—Reg. *v.* Keyn, 1876, L.R. 2 Ex. D. 63.

[6] 41 & 42 Vict. c. 73. The L. Chancellor, in introducing the Bill, betrayed grave doubts of the soundness of the judgment.

[7] Co. Litt. 107 a, 260 b; Callis on Sewers, p. 53; Hale de J.M., chaps. 4 and 5; Hall on the Sea-shore, pp. 2, 154; St. 2.1.5; Ersk. 2.1.6; B. Pr. 639.

[8] *Infra*, chap. 48.

[9] Ds. Sutherland *v.* Watson, 10th Jan. 1868, 6 Macph. 199; L.J.-C. Moncreiff in Agnew *v.* L. Adv., 21st Jan. 1873, 11 Macph. 309, 322.

[10] *Infra*, chap. 16.

[11] Ds. Sutherland *v.* Watson, [9], according to the view of L. Neaves.

the Crown, and that the Prince was entitled to the mines thereunder, as first occupier of a *res nullius*. The arbiter found that the right to all mines and minerals lying below low-water mark under the open sea, adjacent to, but not being part of, the Duchy of Cornwall, was vested in her Majesty in right of her crown, although such minerals may or might be won by workings commenced above low-water mark and extended below it. This was thereafter enacted *and declared* to be the rule between the parties by an Act of Parliament, which recited the award.[12] Lord Chief-Justice Coleridge[13] was of opinion that the same question might arise between the Crown and private persons all round the British islands, and would be similarly decided, seeing that 'Parliament 'did but apply to a particular case that which is, and always has 'been, the law of this country.' Against this expression of opinion must be set the very high authority of Lord Chief-Justice Cockburn,[14] who said that 'beyond low-water mark the bed of the sea 'might be said to be unappropriated, and if capable of being 'appropriated, would become the property of the first occupier.' The case in which these opinions were delivered did not require for its decision that the present question should be settled; and they were accordingly merely *obiter dicta*. The former of the two is supported by the most obvious reading of Sir John Patteson's award, especially looking to the pleadings of the parties; the latter by a minute criticism of the award and a denial that the statute proceeded on or declared the general law. The ownership of the Crown is further supported by the theory of feudal law, which appropriates to some one every immoveable subject that is capable of appropriation, by many *dicta*,[15] and *a fortiori* by many cases in regard to the foreshore. It must, however, be kept in mind, on the other hand, that no attempt has been made to vindicate the supposed Crown right except by occasional grants of submarine minerals;[16] that possession adverse to it may perhaps grow into prescriptive acquisition of the minerals by the seaboard

English *dicta*.

Submarine minerals.

[12] 21 & 22 Vict. c. 109, Preamble and sect. 2. See Coleridge L.C.-J. in the Franconia case, L.R. 2 Ex. D. 155; and Lindley J., ibid. p. 86 *et seq.*

[13] Ibid. p. 157.

[14] Ibid. p. 199.

[15] L. Westbury in Gann *v.* Whitstable Free Fishers, 11 H.L. Ca. 192, 207; Erle C.J. in do. 11 C.B.N.S. 387; Malcolmson *v.* O'Dea, 10 H.L. Ca. 593; Att.-Gen. *v.* Chambers, 4 De G. M. and G. 206, 213; L. Adv. *v.* Hamilton, 23d Jan. 1849, 11 D. 391, affd. 1 Macq. 46. (L. St Leonards, p. 49); Off. of State *v.* Smith, 11th March 1846, 8 D. 711, affd. 6 B. App. 487; Foreman *v.* Whitstable Free Fishers, L.R. 4 H.L. 266.

[16] The only printed grant of these, which may be *possibly* read as going beyond low-water mark, is to the Earl of Kelly—Thomson's Retours, Fife, No. 642. Craig, 2.8.20, refers to submarine minerals, and classes them, like other *res nullius* of the civil law, *inter regalia*, but would give the mineral, when won, to the miner as a reward for his labour.

proprietors; and that the Crown's right at best will frequently be only passive, not active—a right to prevent the latter from working minerals below the sea *ex adverso* of their land or of adjacent lands, not a right to enter the seaboard lands for the purpose of access to these minerals. For even if the foreshore belonged to the Crown, it would often be impossible to erect thereon the apparatus necessary to work the submarine minerals without encroaching on the rights of the public to the free use of the shore.

The foreshore.

Between the sea-bottom—the soil *semper aquâ maris cooperтum*—and the *terra firma*, in parts of the coast which are flat or shelving, lies a strip of land called the '*littus maris*,' sea-shore, sea-beach, or, in more technical language, foreshore. Before proceeding to consider the rights which affect this strip, it is necessary to define its limits. The rule of the civil law with reference to its landward boundary was that it extended as far as the greatest winter flood reached,[17] which Lord Stair,[18] contrary to the more obvious meaning of the expression, says must be understood of ordinary tides, not of extraordinary spring-tides. The rule of the common law, both in Scotland[19] and England is different, and is nowhere more authoritatively laid down than in the English case of the *Attorney-General* v. *Chambers*,[20] where the Lord Chancellor took the opinion of Mr Baron Alderson and Mr Justice Maule, who returned a joint opinion, which was adopted by the Court. After citing the Roman definition, they remark that 'this definition (even thus expounded by the authorities) of the civil law is clearly not the rule of the common law of England. Mr Justice Holroyd, no mean authority, in his very elaborate judgment in the case of Blundell *v.* Catterall,[21] mentions this as one of the instances in which the common law differs from the civil law, and says that it is clear that, according to our law, it is not the limit of the highest tides of the year, but the limit reached by the highest ordinary tides.' After dismissing the spring-tides at the equinox as not being ordinary in the sense of frequently happening, and the spring-tides of other months as being excluded by the authority of Lord Hale,[22] who says ordinary tides or neap-tides, which happen between the full and change of the moon, are the limit of that which is properly called *littus maris*, and who excludes the spring-tides of the month, assigning as the reason

Its limits.

[17] 3 I. (2.1).
[18] 2.1.5.
[19] Ersk. 2.6.17; B. Pr. 641.
[20] 1854, 4 De G. M. and G. 206.
[21] 5 B. and Ald. 268, 290.
[22] See the Tract De Jure Maris, c. (usually, but not with certainty ascribed to Lord Hale), in Hargrave's Tracts, and in Appx. to Hall on Sea-shores; and see Hall's Essay, p. 5; and L. Brougham in Off. of State *v.* Smith, 6 B. App. 494.

that the lands covered with these fluxes are for the most part of the year dry and maniorable—*i.e.*, not reached by the tides,[23]—they proceeded: 'We think that Lord Hale's reason may guide us 'to the proper limit. What are, then, the lands which for the most 'part of the year are reached and covered by the tides? The 'same reason that excludes the highest tides of the month (which 'happen at the springs) excludes the lowest high tides (which 'happen at the neaps), for the highest or spring-tides and the 'lowest high tides (those at the neaps) happen as often as each 'other. The medium tides, therefore, of each quarter of the tidal 'period afford a criterion which we think may be best adopted. 'It is true of the limit of the shore reached by these tides that 'it is more frequently reached and covered by the tide than left 'uncovered by it. For about three days it is exceeded, and for 'about three days it is left short, and on one day it is reached. 'This point of the shore, therefore, is about four days in every 'week—*i.e.*, for the most part of the year, reached and covered by 'tides. We therefore beg to advise your lordship, that in our 'opinion the average of these medium tides in each quarter of a 'lunar revolution during the year gives the limit' of the foreshore landwards.[24] Seawards it is the low-water mark of the same tides.

Rights in foreshore classed.

The rights which are connected with the foreshore as thus defined may be discussed under three heads: (1) as between subject proprietors; (2) as between the public, represented by the Crown in its fiduciary capacity, and the seaboard proprietor; (3) as between a seaboard proprietor and the Crown as patrimonially interested. It would be more logical to reverse the order; but as the Crown began to assert its rights only about the middle of the present century, after there had been a long series of cases between subjects, and these cases are necessary to a right understanding of the whole theory of the law, it is thought better to proceed in the order named.

In questions between subjects.

1. *As between Subject Proprietors.*—This matter has been partly anticipated in the remarks already made on boundaries, both in the interpretation of the terms used to designate seaward limits, and in the laying down on the foreshore of the march-lines of conterminous seaboard properties. It is sufficient to refer to the cases there examined,[25] with the observation that in none of them

[23] See Lowe *v.* Govett, 3 B. and Ad. 862.

[24] But see L.J.-C. Hope's opinion in Nicol *v.* Blaikie, 23d Dec. 1859, 22 D. 335, 342—'ordinary *spring*-tides'; Do. L. Moncreiff in Off. of State *v.* Smith, 8 D. 721. See remarks of Ls. Brougham and Campbell in the same case, 6 B. App. 495, 500. Interlocutor in Agnew *v.* L. Adv., 21st Jan. 1873, 11 Macph. 309.311. Ersk. 2.6.17 is ambiguous.

[25] *Supra*, p. 95 *et seq.*

did the Crown interfere, and to proceed at once to the remaining cases which have been adjudicated on between subjects other than the public. The rule was laid down in an early case,[26] and has been followed ever since. The proprietor of a seaboard barony, with the privilege of wreck and ware in his *tenendas*, brought a declarator against inland neighbours whose lands did not reach the sea, for the purpose of debarring the latter from gathering sea-tangle on the shore of the barony. 'The Lords found, whatever the king 'might say against the pursuer, yet he had right to debar the 'defenders from gathering sea-tangle or other ware, so far as his 'ground fronts on the sea, but [without] prejudice to the de-'fenders' possession if they were able to prove use and wont past 'the memory of man; seeing the right to this might be prescribed 'as well as any other servitude.' It thus appears that the right of a seaboard heritor to prevent interference with the shore *ex adverso* of his land is limited in two directions: by the possibility of the Crown's interference, and by the existence of a servitude. The former limitation will be discussed in the next two sections; the latter has been further elucidated by later cases. Thus the interference must be such as may be properly classed under the head of servitude. The greater part of the lands of a proprietor in Orkney lay along the sea-shore; while those of his inland neighbour touched the shore only for a short space at one end. The tenants of both had been immemorially in the use of carrying off the sea-ware from the whole shore for manure, dividing it in some proportion to their holdings. In so doing, the tenants of the inland heritor had to pass over the lands of the other. When the manufacture of kelp—which is made, not from drift-ware, but from tang which grows on the rocks and is cut off at low water—was introduced, these tenants attempted to share with the seaboard proprietor's tenants in the manufacture. In an action between the two heritors it was found that the inland proprietor had no right to cut ware on the other's foreshore for the purpose of making kelp, reserving to him right to carry off what wreck and ware should be cast thereupon, conform to use and wont.[27] The distinction taken by the Court is clear enough, and is in exact accord with legal theory. The taking of ware for manure to a dominant tenement was in every respect a predial servitude, established by the positive prescription; while the cutting of tang

Rule of exclusive right.

[26] Fullerton *v.* Baillie, 1697, M. 13524; Skene De V.S., *voce* Ware.

[27] E. Morton *v.* Covingtree, 1760, M. 13528. See L. Neaves in Agnew *v.* L. Adv., 11 Macph. 332. The decision was not based, as his Lordship seems to suggest, in any way, on the possession of the kelp-ware, which was not prescriptive.

Ownership and servitude.

for manufacture and export was nothing of the sort. The question whether the privilege of taking drifted ware for manure to an inland farm could be classed as a servitude was raised in a recent case, already commented on,[28] but did not require to be decided, as the possession was insufficient. The alleged servient tenement was a barony *de facto* bounded by the sea, with part and pertinent, and, in the *tenendas* 'wrack and ware.' The Court of Session held that the privilege fell under the titles of the dominant tenement (which referred to possession) as interpreted by usage. In reversing, the Lord Chancellor thought there could be no servient tenement, since the seaboard proprietor's right was only to take personal chattels, under his Crown titles. This would undoubtedly be the law if the proprietor had not the ownership of the foreshore; for in that case he would only have the incorporeal right, incapable of supporting a servitude, of taking ware from Crown property. If, on the contrary, he were owner of the foreshore, the opinion of Lord Wensleydale that a servitude of taking ware might be constituted against him would be supported both by theory and practice.[29] The only other case in which a distinction was drawn between right to kelp-ware and right to use drift-ware for manure, turned on the fact that the seaboard land had been designed as a glebe (that being equivalent to a bounding-charter), and that the sea-shore was not expressly mentioned. The question arose between the minister and the heritor from whose lands the glebe had been severed, and the minister was held not to be entitled to the kelp-ware.[30] Looking to modern decisions as to the effect of holding lands *de facto* bounded by the sea, it may be doubted whether such a decision would be repeated.

Macalister v. *Campbell.*

The only other decision which belongs to the present section is the case of *Macalister*,[31] which cannot be better narrated than in the words of Lord Wood:[32] 'There the lands of the pursuer had, 'in fact, the sea for their boundary, in the direction of a bay, 'along part of which they were situated. The title was one with 'parts and pertinents; but it contained no grant of the shore, 'and it was silent as to the boundary seaward. One of the 'defenders was a proprietor of lands lying along the rest of the 'same bay, and another a neighbouring proprietor of lands in the 'vicinity of the shore of the bay, but not contiguous to it. They

[28] Baird *v.* Fortune, 25th May 1859, 21 D. 848, revd. 25th April 1861, 4 Macq. 127; 23 D. H.L. 5.

[29] 4 Macq. 150. See Macalister *v.* Campbell, [31].

[30] L. Reay *v.* Falconer, 1781, M. 5151.

[31] Macalister *v.* Campbell, 7th Feb. 1837, 15 Sh. 490.

[32] In his note, as L.O. in Paterson *v.* Ms. of Ailsa, 11th March 1846, 8 D. 752, 759.

'claimed a right to take shell-sand and wreck or sea-ware from
'the shore opposite to the pursuer's lands, and to prevent their
'exercising it the pursuer brought a process of declarator against
'them, for declaration of his own exclusive right to the whole
'shell-sand, wreck, or sea-ware, subject only to a servitude contained
'in his titles in favour of the Duke of Argyle, and that neither of
'the defenders had any right therein. The pursuer averred con-
'stant, peaceable, and uninterrupted possession and use of the
'whole shell-sand, wreck, or sea-ware on the shore adjoining to his
'lands beyond memory of man, subject to the said servitude
'right. The defenders averred that, in virtue of the titles of
'their lands, they had full, constant, and uninterrupted use and
'possession for forty years, along with other neighbouring pro-
'prietors, of taking shell-sand, &c., from the said shore. So
'standing the case, the defenders pleaded, *inter alia*, that the
'pursuer had not condescended upon any title in virtue of which
'he could prescribe a right by possession to the sea-shore, or to
'the shell-sand, wreck, or sea-ware, to which he laid claim.
'They contended that the sea-shore was *inter regalia*, or was *juris*
'*publici*, and could not be acquired as part and pertinent of a
'grant of lands, unless there were an erection into a barony; and
'that as the pursuer's titles only conveyed the lands with part
'and pertinent, "without even stating that they were bounded by
'"the sea or sea-shore, the shore was reserved out of the grant," and
'still remained with the Crown; and that if the pursuer had no
'right to the shore opposite his lands, then his right to the shell-
'sand, &c., was no higher than that of any of the lieges, and he
'could not exclude them, even if he proved peaceable possession;
'or, at least, he could not exclude them unless he averred im-
'memorially excluding all others from possession; for otherwise
'he averred no more than the enjoyment of that which it was
'equally competent to any other of the lieges to enjoy, without
'acquiring any right of an exclusive character. This argument
'was disregarded, and the objection to the pursuer's title repelled.
'The averment of the pursuer seems to have been considered as
'amounting to one of exclusive possession as regarded the de-
'fenders, it being explained that the word "exclusive" was not
'used in respect of the servitude admitted to exist in favour of
'the Duke of Argyle; and therefore, the averment, if proved, was
'taken to be sufficient to meet the claims of the defenders, even
'putting it as one of a servitude upon the right of the pursuer to
'the shore, assuming him to have such right; and it was held,
'that the law being that a grant of land, described as bounded by

'the sea, comprehended the sea-shore, which was not reserved from 'the grant, the same rule must apply where the grant was one of 'lands on the sea-coast, actually bounded by the sea, although the 'boundary was not set forth in the title.' Lord Medwyn, in this case of *Macalister*, said it would be a very serious matter to cast doubt on this last doctrine, considering the great value of the ware, amounting on the coast of the Forth to 15s. or 20s. per acre of what is next to the coast.[33] Finally, the owner of lands bounded by the sea has a right to object to any one intruding on the shore for any purposes other than those which are available to the general public; as, for instance, to one who alleges a right of salmon-fishing in the sea *ex adverso* of his lands, fixing ring-bolts or other machinery for catching salmon on his foreshore. Even if the right of salmon-fishing were made out, it did not necessarily follow that it could be prosecuted in such a manner.[34]

Exercise of ownership.

In questions between neighbours on the sea-shore, either alongside of each other or seaboard and inland, the rules, so far as developed, seem to be that the formation or maintenance of an artificial barrier against the sea cannot, except by Act of Parliament, be enforced upon an unwilling seaboard proprietor;[35] that if by the erection of such a barrier a foreshore owner increases the violence of the attacks of the sea—the common enemy—on neighbouring lands he is not responsible;[36] and that he is not entitled to remove any existing barrier, natural—such as a bank of sand—or artificial—such as a sea-wall, more especially if ancient or erected by contribution,—so as to endanger the safety of adjoining lands.[37]

Questions between landowners and the public.

2. *As between Seaboard Proprietors and the Public.*—It is settled law that, whether the Crown has or has not a patrimonial right in the foreshore, it holds a certain guardianship[38] over it in trust for certain public uses. This guardianship is, as to certain of these purposes at least, inextinguishable and inalienable; and may therefore be classed among the *regalia majora*. Any claim on the part of the Crown itself or of its grantee to extend to the foreshore the ordinary uses of private property, must be exercised subject to the rights of the public, which are deemed to be of paramount im-

[33] 15 Sh. 493.

[34] Nicol *v.* Blaikie, 23d Dec. 1859, 22 D. 335. Cf. a legitimate use of the shore of another by the grantee of salmon-fishing, L. Adv. *v.* Sharp, 31st Oct. 1878, 6 Ret. 108.

[35] Hudson *v.* Tabor, 2 Q. B.D. 290.

[36] Rex *v.* Pagham Comrs., 8 B. and C. 353.

[37] Att.-Gen. *v.* Tomline, 14 Ch. D. 58.

[38] The term is used by L.J.-C. Hope and L. Brougham in Off. of State *v.* Smith, 11th March 1846, 8 D. 711.715, affd. 6 B. Ap. 487.496.

portance,[39] in a way to which nothing on *terra firma*, except perhaps public roads, affords any parallel.[40] The Crown may have lost its original right of property, *jure coronæ*, in part or the whole of the coasts of Scotland, yet this fiduciary relation remains untouched.[41] In this sense the sea-shore is common to all, or public.[42] The two questions which are of chief practical importance are these: To what purposes does the public right of user extend? and to what extent does it restrain the owner of the sea-shore in the exercise of his right of property?

Public uses for navigation.

(*a*) *For Navigation.*—It is doubtful how far some jurists are justified in regarding the shore as an accessory of the sea,[43] rather than of the land, partaking, as it does, of the character of both; but the view is at least so far correct, that the shore is available to the public for all the purposes of navigation.[44] Certain limitations of the freedom of traffic will be noticed further on, under the head of Ferries and Harbours; and others are introduced by the levying of customs. With these exceptions, it may be laid down that the public is entitled to make free use of the foreshore for all purposes necessary to navigation. The Customs laws, and the inconvenience of resorting to an unfurnished creek, or to an unprotected strip of sand, instead of to a port accessible on payment of the ordinary dues, and in many places the impossibility of exit from the shore by a public road, are usually sufficient to protect the landowner from systematic resort to his foreshore. But the right exists none the less, and may be exercised in case of mischance or storm. It is chiefly made use of by seaboard heritors and their tenants in importing coal, lime, and other heavy goods. Lord Stair enumerates some of the 'common uses' of the shore—as 'casting anchors, dis-'loading goods, taking in of ballast, or water rising in fountains 'there, drying of nets, erecting of tents, and the like.' There are no decisions, either in England or Scotland, relating to the exercise of these rights on the foreshore,[45] and such *dicta* as relate to this

[39] Hale de J.M. in Hargrave's Tracts, p. 85; Williams *v.* Wilcox, 8 A. and E. 314.

[40] Callis on Sewers, p. 74.

[41] The theory of a *pro indiviso* ownership still resting in the Crown, to support the public uses, which was put forward by L.J.-C. Hope in the passage quoted,[38], has found no favour.

[42] Cr. 1.15.13; Balf. Pract. p. 626; St. 2.1.5; Bankt. 1.3.2-4; Ersk. 2.1.6; 2.6.17; Bell Pr. 643; Bract. 2.1.5; Callis, p. 54; Hall on the Sea-shore, p. 157 *et seq.*; Angell on Tide-waters, p. 17 *et seq.*; Blundell *v.* Catterall, 5 B. and Ald. 268, and cases cited there; Kent Com. 3, 544.

[43] Ersk. 2.1.6; Callis, 54—following what seems to have been the theory of the civil law.

[44] Authorities in [42]; and B. Pr. 645; Att.-Gen. *v.* Parmeter, 10 Price, 378, 401.

[45] Questions as to navigation have occurred mainly as to places below low-water mark of narrow seas or navigable rivers, *infra*, p. 237. See cases of harbour, &c. trustees illegally authorising

matter seem to take this statement of the law for granted.[46] It may be presumed, however, that the taking of sand or stone from the shore for ballast, will not be recognised by the Courts as an absolute right, but as a right subject to regulation. Otherwise its exercise might be a source of great loss to the seaboard proprietor, by depriving him of his natural bulwark against the sea.

For fishing.

(*b*) *For Fishing.*—Subordinate to the right of navigation, and sacrificed to it when they clash,[47] is the public right of white-fishing in the sea; with certain incidental rights in the shore, and till lately even above high-water mark. There are two points to be attended to: what sort of fishings are public; and what are the incidental rights of the public in the foreshore.

Floating white fish.

Floating White Fish.—The members of the public, as such, have no right to salmon-fishings[48] in sea or river. They have an inalienable right to fish for and appropriate white floating-fish in the sea. As put by Lord Chancellor Cairns:[49] 'Beyond all doubt, the 'law of Scotland is, that white-fishing in the sea round the whole 'coast of Scotland is perfectly free; and not only is it perfectly 'free, but there is a title on the part of the subjects to use the shore 'for the purpose of conducting white-fishing in a proper mode.' In the case which gave rise to this expression of opinion, the Court of Session had denied to a seaboard proprietor, in a question with the Crown, the right of salmon-fishing founded on a barony title and possession, on the ground that the sort of possession mainly relied on was permission granted by him to his tenants and others to fish in the sea *ex adverso* of his lands for all sorts of fish in general with draught-nets, and the fact that occasionally salmon were caught in so fishing. The House of Lords differed on the evidence; but both Courts were of opinion that, as to white-fishing, such a permission was out of place and unnecessary.[50] Stair draws a distinction.

the taking of ballast—Home *v.* Allan, 8th Jan. 1868, 6 Macph. 189; Carswell *v.* Nith Comrs., 23d Oct. 1878, 6 Ret. 60.

[46] Agnew *v.* L. Adv., 21st Jan. 1873, 11 Macph. 309, 330. See as to the English law, Blundell *v.* Catterall, 5 B. and Ald. 268, 280, 294.

[47] Colquhoun *v.* D. Montrose, 1793, M. 12827, 14281, 4 Pat. 221, M. 14283; Grant *v.* D. Gordon, 1776, 3 Pat. 679, M. 14297, 12820, 2 Pat. 582; Gann *v.* Whitstable Free Fishers, 11 H.L. Ca. 192; Whitstable Free Fishers *v.* Foreman, L.R. 2 C.P. 688, L.R. 4 H.L. 266, 283.

[48] *Infra*, chap. 18.

[49] In M'Douall *v.* L. Adv., 16th April 1875, 2 Ret. H.L. 49, 55, revg. C.S. 13th June 1873, 11 Macph. 688.

[50] See also 1705, c. 2, 29 Geo. II. c. 23, sects. 1, 17; L.J.-C. Patton, in Ds. Sutherland *v.* Watson, 10th Jan. 1868, 6 Macph. 199, 215, referring to L.J.-C. Hope in Hall *v.* Whillis, 14th Jan. 1852, 14 D. 324. Anderson *v.* Anderson, 7th Dec. 1867, H.C. 6 Macph. 117; Nicol *v.* L. Adv., 1st July 1868, 6 Macph. 972, *per* L. Barcaple; Gilbertson *v.* Mackenzie, 2d Feb. 1878, 5 Ret. 610. As to peculiar rights in the Solway, see the last case, and Coulthard *v.* Mackenzie, 18th July 1879, 6 Ret. 1322; Mackenzie *v.* Murray, 1st December 1881, 9 Ret. 186.

The 'vast ocean,' he says, is common to all mankind as to navigation and fishing; 'but where the sea is enclosed in bays, creeks, 'or otherwise is capable of any bounds or meiths, as within the 'points of such lands or within the view of such shores, there it 'may become *proper*, but with the reservation of passage for com- 'merce, as on the land. So fishing without these bounds is com- 'mon to all, and within them also, except as to certain kinds of 'fishes, such as herrings, &c.'[51] This exception, which is found nowhere else, may be connected with the fact, noted in last century, that there are many instances of grants of white-fishings *in mari* from the Crown, particularly in Banffshire—a district whose wealth consists greatly in its herring-fishings.[52] The validity of such grants is questioned by the judges, by the reporter, and by Mr Bell;[53] and, after what has just been quoted, may now be denied (except as to the ground-fish to be presently mentioned), on the *ratio* that the Crown's right to white-fishings is not patrimonial, but only in trust for the public.[54] The 'proper modes' of fishing referred to by Lord Cairns will not include stationary engines, such as stake-nets, placed on the shore,[55] except in the waters of the Solway; and even there they must be so placed, and be of such a description, as not to interfere with the 'more potential' right of salmon-fishing.[56]

As to non-floating fish. Minor shell-fish.

Concerning non-floating fish, it may be regarded as settled that the right to take limpets, cockles, and other small shell-fish, either on the foreshore or beyond it, is open to all the lieges, and cannot be appropriated,[57] always assuming that the public can reach them in a legal manner. Oysters and mussels are in a different position. If the scalps on which they lie are situated within the three-mile limit, the Crown has an exclusive right, as part of the

Oysters and mussels.

[51] St. 2.1.5. See Bankt. 2.3.3.

[52] Ramsay *v.* Kellies, 1775, 5 B.S. 445; Hailes, 722.

[53] B. Pr. 646. The only contrary *dictum* is that of L. Corehouse in D. Portland *v.* Gray, 15th Nov. 1832, 11 Sh. 14. See the authorities there quoted, esp. Wight, p. 199; Bell's Election Law, 52-4, where a list of sasines containing a clause of white-fishings is given.

[54] Lord Stair's distinction and the Banffshire charters find an analogy in the English law of *several*, or private, fishery—a very technical institute, of no assistance to Scotch lawyers. It is sufficient to say that it has no analogue in Scotch practice. See the authorities in Hall, pp. 47-76; Woolrych on Waters, 80 *et seq.*

[55] 1563, c. 3; Thoms. Acts, 2, 537.

[56] Gilbertson *v.* Mackenzie,[50].

[57] Balf. Prac. p. 626, 5 B.S. 556; B. Pr. 646; Hall *v.* Whillis, 14th Jan. 1852, 14 D. 324. The decision only negatived the right of a barony proprietor with fishings, whose lands were *de facto* bounded by the sea, to prevent the public from taking these animals, in virtue of his bare titles; but the opinions went much further. Clam and other bait beds may be secured against injury by beam-trawling, under 44 Vict. c. 11. In England, shell-fish, like other fish, may be included under a several fishery—Bagott *v.* Orr, 2 Bos. & Pull. 472, Hall, 186 *et seq.*

hereditary revenue,[58] on one of two theories, either to the fish themselves as *partes soli*, in which case the Crown must be regarded as having a right to the *ipsa corpora* of the fish[59]—or to the incorporeal right of fishing for them, on the analogy of salmon-fishing.[60] The reasons for originally distinguishing between these and other shell-fish seem to have been their greater value and adaptability, not for bait only, but for human food, and the importance of preserving them from indiscriminate fishing.[61] The public have no right, except to fish oyster-scalps beyond the three-mile limit, and perhaps to take oysters found elsewhere than on well-defined scalps within it.[62] The Crown's right may pass to an individual, as a *separatum tenementum* apart from or along with lands by express grant;[63] by his proving prescriptive possession on a barony title *cum piscationibus*;[64] probably also on a non-barony title similarly fortified;[65] but in no case without the mention of 'fishings' in the dispositive clause, and therefore not merely by conveyance of the shore.[66] But until such a right is established in a subject, and so long as the Crown does not choose to interfere, it is lawful for members of the public to take oysters or mussels; and the seaboard heritor cannot prevent them, if they reach the foreshore in a lawful way.[67] The doubt expressed in the *Duke of Argyll's* case, as to whether scalps below low-water mark could be acquired by a general grant, explained by possession, is resolved in favour of the grantee by the later case of the *Duchess of Sutherland*. Where a private individual can show a general title, sufficient for prescription, and backed up by averments of exclusive possession, partly supported by documents, he will be entitled to interim interdict against members of the public infringing the

At common law.

[58] Ds. Sutherland, *infra*, [59]; following Grant *v.* Rose, 1764, M. 12801, affd. 1769, 6 Pat. 779; D. Portland *v.* Gray, *supra*, [53]; Bell. Pr. 646; Lindsay *v.* Robertson, *infra*, [59]; and Act 10 & 11 Vict. c. 92.

[59] The view of L. Neaves in Ds. Sutherland *v.* Watson, 10th Jan. 1868, 6 Macph. 199, 213; and L. Benholme, in Lindsay *v.* Robertson, 13th June 1867, 5 Macph. 864.

[60] See L. Cowan and L.J.-C. Patton, 6 Macph. 208, 215. The English view agrees—Bagott *v.* Orr, [57].

[61] Grant *v.* Rose, *supra*, [58].

[62] Balf. Pract. p. 626, has been repudiated except to this extent in the cases already cited.

[63] Grant *v.* Rose, *supra*, [58]; case cited in Ramsay *v.* Kellies, *supra*, [52]; Maitland *v.* M'Clelland, 21st Dec. 1860, 23 D. 216, and succeeding case, p. 224; Mags. of St Andrews *v.* Wilson, 20th July 1869, 7 Macph. 1105.

[64] Ds. Sutherland, *supra*, [59]; Lindsay *v.* Robertson, *supra*, [59]; and case of Dempster, 1863, n.r. referred to in both.

[65] Erskine *v.* Mags. of Montrose, 7th Dec. 1819, Hume, 558.

[66] This seems to be the present state of the law—Ramsay *v.* Kellies, *supra*, [49]; Agnew *v.* Mags. of Stranraer, 27th Nov. 1822, 2 S. 42 (N.E. 36).

[67] D. Argyll *v.* Robertson, 17th Dec. 1859, 22 D. 261; Lindsay *v.* Robertson, 11th Dec. 1868, 7 Macph. 239.

alleged right.[68] The boundaries of each grant will depend upon its terms; and if left undefined, will be determined by the extent of possession.[69] An express grant to the magistrates, citizens, and burgesses of a royal burgh of certain mussel-scalps makes these part of the common good, to be administered as such—having regard, however, to the customary rights of fisherman belonging to the town to obtain an adequate supply for bait, at rates giving effect to this preference.[70] Though the same rules apply to both sorts of fishing,[71] these are not interchangeable either in title or possession. A serious diminution in the supply of oysters and mussels prompted legislative remedies—first in the direction of declaring the unlawful taking of these animals *from beds or scalps* to be theft, and attempt to do so to be attempt to commit theft.[72] All oysters grown on sufficiently marked-out and known beds were next declared to be for all purposes, civil and criminal, the property of the owner of the bed, whether still *in situ* or removed:[73] he is entitled to protect them from injury by unauthorised persons fishing with ground-tackle, dredging, depositing ballast, &c., placing on the bed any implement except for purposes of navigation, or otherwise disturbing the fish, for which offences penalties are imposed.[74] The next step[75] was to authorise the Board of Trade to grant orders at its discretion, after public inquiry by an inspector, 'for the establishment or improvement, and for the maintenance and regulation, of an oyster or mussel fishery,' to any persons (including bodies corporate), to be called promoters. The order has to be confirmed by Parliament, may be amended from time to time, and gives the exclusive right within the local limits of the fishery to make (or, if already in existence, to manage) oyster and mussel beds, or either of them; to collect, remove, or deposit these fish; and to levy tolls on fishers.[76] The order can in no case extend beyond a period of sixty years; may be deter-

By statute.

[68] Lindsay *v.* Robertson, *supra*, [59], [67]. The alleged owners agreed to sell the mussels, *pendente lite*, at a low rate to the fishermen of the locality for bait.

[69] See Maitland *v.* M'Clelland, *supra*, [63]; D. Buccleuch *v.* Mags. of Edinburgh, 7th March 1843, 5 D. 846.

[70] Mags. of St Andrews *v.* Wilson, [63]. See Goodman *v.* Saltash, 7 App. Cas. 633.

[71] *Per* L. Cowan in Ds. of Sutherland, *supra*, [59].

[72] As to oysters in 1840, by 3 & 4 Vict. c. 74; as to mussels in 1847, by 10 & 11 Vict. c. 92. The 5th sect. of the latter Act was repealed by the revision Act of 1875. See L. Adv. *v.* Thomson, 1 Broun, 475.

[73] Sea Fisheries Act of 1868, 31 & 32 Vict. c. 45, sects. 51, 52, 54.

[74] Sect. 53. Proceedings in sects. 57 *et seq.*; L. Adv. *v.* Garrett, 4th June 1866, 5 Irv. 259.

[75] By 29 & 30 Vict. c. 85, and 30 & 31 Vict. c. 18; repealed, and other provisions substituted, by the above Act of 1868.

[76] See Act of 1868, sects. 5 and 28, for interpretation of terms, and sects. 29-41; and for proof of limits, sect. 42.

mined by a Board of Trade certificate of failure to cultivate the beds or to enforce the regulations;[77] is not to be granted in abridgment of fishing rights vested by statute, grant, or prescription; and is only to be granted on compensation to landowners.[78] The rules of the Act for the protection of private oyster-fisheries[79] are extended *both* to oyster and mussel fisheries under a statutory order. The most recent reports of the Board of Trade[80] show that these fisheries have not been so successful as might have been desired. The fault cannot be laid at the door of the Legislature.

Lobsters. Lobsters hold an intermediate position between these sedentary molluscs and floating-fish; and much research was expended to little purpose, by the counsel who argued the only reported case, in an attempt to settle to which class they most incline,[81]—for the question was decided on the want of possession. A charter, from the Prince, of seaboard lands, contained a clause *cum piscationibus salmonum aliorumque piscium.* It was held that the bare title gave no exclusive right of lobster-fishing *ex adverso* of the lands; and there was no proof of exclusive prescriptive possession. The point was expressly reserved, whether such possession would have set up the right. The weight of opinion seems to favour freedom.[82] A close time for lobsters—1st June to 1st September—is fixed in an Act which is otherwise concerned with foreign fish.[83]

Use of foreshore for the above purposes. The use of the foreshore is common to all, for purposes directly connected with or necessary to the prosecution of the public sea-fishery, such as landing and drying nets, and beaching boats, but not to make any permanent erection on the shore,[84] as that would be inconsistent with the rights of the seaboard heritor, and of the rest of the public. No distinction is made between oyster and other white fishers.[85] By an Act of 1756,[86] every person engaged in the white-fishery obtained right to the free use of waste ground for the space of 100 yards inland from high-water mark, for cer-

[77] Sects. 44, 45.

[78] Sects. 47, 48.

[79] Sect. 51 *et seq.*, and *supra*, text to notes [73], [74].

[80] Provided for by sect. 50.

[81] D. Portland *v.* Gray, 15th Nov. 1832, 11 S. 14; B. Pr. 646.

[82] See authorities appended to the case 11 S. 18, and Stewart on Fishing, p. 69.

[83] 9 Geo. II. c. 33 sect. 4. See Ramsay *v.* Kellies, *supra*, [52].

[84] Macdonald *v.* Chisholm, 16th May 1860, 22 D. 1075. See Irvine *v.* Robertson, 18th Jan. 1873, 11 Macph. 298; Nicol *v.* Blaikie, 23d Dec. 1859, 22 D. 335.

[85] E. Stair *v.* Austin, 2d Dec. 1880, 8 Ret. 183.

[86] 29 Geo. II. c. 23, sect. 2, elucidated in Cameron *v.* Ainslie, 21st Jan. 1848, 10 D. 446; Hoyle *v.* M'Cunn, 10th Dec. 1858, 21 D. 96. See Aiton *v.* Stephen, 27th February 1875, 2 Ret. 470, affd. 28th Feb. 1876, 3 Ret. H.L. 4; L. Adv. *v.* Raynes, 11th March 1859, 21 D. 717; M'Callum *v.* Patrick, 21st Nov. 1868, 7 Macph. 163.

tain temporary purposes connected with their business; but this right has been taken away without indemnity by the Fisheries Act of 1868.[87]

(*c*) *Other public uses.*—To the inquiry whether there are any other public uses to which the foreshore may be legally applied, it must be replied that none such have been judicially established. The shore has been compared to a great highway,[88] where there can be no trespass in the prosecution of navigation and fishery; it is for some purposes at least a 'public place;'[89] and to distinguish the seaman or fisher from the ordinary traveller would not be easy. Taking all these matters into consideration, it is not surprising to find, on the one hand, that the shore is made use of in practice, and is recognised judicially to be a medium of public communication between ports, a place of recreation,[90] and, if such is the custom, of army drill; nor, on the other hand, to find an expression of opinion that immunity from such subordinate public uses might be acquired by the seaboard heritor through immemorial usage.[91] The only recorded dispute as to recreation occurred half a century ago in England, the result of which was, that the King's Bench held, by a majority of three to one,[92] that there was no common-law right of bathing in the sea, and, as incident thereto, of crossing the foreshore on foot, or with bathing-machines for that purpose. This decision proceeded on the assumption that the foreshore in the particular case belonged to the adjacent landowner. 'Where 'the soil remains the King's, and where no mischief or injury is 'likely to arise from the enjoyment or exercise of such a public 'right, it is not to be supposed that an unnecessary and injurious 'restraint upon the subjects would in that respect be enforced 'by the King, the *parens patriæ*.'[93] The judgment was rested on the plea that such a right would be inconsistent with private property, and supported by arguments which would go to deny public rights in the shore incident to navigation and fishing;[94] while it was resisted on the score of public advantage,[95] which might be consulted in perfect accordance with private rights.[96]

Other public uses?

Bathing?

[87] 31 & 32 Vict. c. 45, sect. 71, and Sched. 2.

[88] L. Medwyn in Off. of State *v.* Smith, 11th March 1846, 8 D. 711, 720. Best J. in Blundell *v.* Catterall, 5 B. and Ald. 268, 275.

[89] But not a 'street' under the General Police Act, see 251, Heatherton *v.* Watson, 30th Oct. 1879, 7 Ret. (Just.) 5.

[90] L.J.-C. Hope in Off. of State *v.* Smith, 11th March 1846, 8 D. 711, 719. L. Medwyn at p. 720.

[91] L. J.-C. Hope in Off. of State *v.* Smith, 8 D. 718.

[92] Abbot C.J., Bayley and Holroyd JJ., against Best J. (afterwards Lord Wynford) in Blundell *v.* Catterall, 1821, 5 B. & Ald. 268.

[93] *Per* Holroyd J., p. 300.

[94] Pp. 302, 312.

[95] P. 284, Best J.

[96] By regulations, as to spot, time, &c., p. 287. See Woolrych on Waters, p. 6; General Police Act of 1862, sect. 335.

If the judgment may be doubted, on a review of the arguments used in support of it, there will be the less disinclination in Scotland to regard the point as an open one, seeing that in England it does not seem to have been regarded as authoritative,[97] and has been impugned by writers of merit.[98] The seaboard proprietor cannot enclose or build upon a stretch of foreshore, naturally open and available for these public uses, and may be prevented from doing so at the instance of the Crown.[99] If, without obtaining permission from the Crown, he builds a pier on the foreshore, he cannot exclude fishermen from using it, and cannot demand dues except as in right of a grant of harbour.[100] It has been decided that members of the public have no title to sue in such a case;[101] but this doctrine may well be doubted.[102]

Uses denied to the public.

Whatever be the right of the public in respect to recreation, there are certain acts which they are undoubtedly not entitled to perform on the foreshore in a question with the seaboard heritor, the Crown not intervening. They cannot take away anything from the shore, except it be something required for navigation or fishing. This was first found with regard to a bank of shelly sand useful for manure, lying between the shore and certain islands situated a long ear-shot therefrom, the bank being without the foreshore, as now understood. It was found to be a pertinent of the lands opposite to which it lay, and therefore at the exclusive disposal of their proprietor, on the general ground apparently that property adjacent to a heritor's shore is a pertinent of his estate, subject to the rights of navigation. The Court may, however, have been influenced by the fact that the bank was at certain states of the tide landlocked by the islands and other rocks, the ownership of which was not disputed.[103] It is the same with seaweed on the foreshore. The occupant of lands lying near but not adjacent to the sea-shore, claimed right to gather ware on the

[97] *Per* Erle C.J. in Mace *v.* Philcox, 1864, 15 C.B.N.S. 611, after Blundell's case had been cited: 'If you can lawfully 'get to the sea-shore, I apprehend you 'may lawfully bathe there.'

[98] Hall, p. 156 *et seq.*; Angell on Tide Waters, p. 28; Phear on Water, 47, note,

[99] Off. of State *v.* Smith, 11th March 1846, 8 D. 711, affd. 13th July 1849, 6 B. Ap. 487; D. Roxburghe *v.* Mags. of Dunbar, 1713, M. 10883. See as to depositing earth on the foreshore, Hastings Corp. *v.* Ivall, L.R. 19 Eq. 558.

[100] E. Stair *v.* Austin, 2d Dec. 1880, 8 Ret. 183; Colquhoun *v.* Paton, 17th June 1859, 21 D. 996; and chap. xvi. *infra*.

[101] Cameron *v.* Ainslie, [86]. See Colquhoun *v.* Paton, 17th June 1859, 21 D. 996. The case of Paterson *v.* Ms. Ailsa, 11th March 1846, 8 D. 752, cited by L. Cowan, 21 D. 1002, is not to the point, as the right there claimed was patrimonial.

[102] See Hagart *v.* Fyfe, 15th Nov. 1870, 9 Macph. 127; L. Adv. *v.* Raynes, [86]; Cuthbertson *v.* Young, 25th Jan. 1850, 12 D. 521.

[103] Innes *v.* Downie, 27th May 1807, Hume, 552.

shore *ex adverso* of the lands of a proprietor held under Crown titles of regality with clause of parts and pertinents, which lands were *de facto* bounded by the sea, although there was not a sea boundary expressed in the titles. No prescriptive use of the right claimed was averred, but only occasional acts of gathering the ware on his own part and on that of others of the public. It was held that, although the defender had no express grant of the sea-shore, nor of wreck and ware, he had a sufficient title to resist the pursuer's claim,[104] at least so far as to get into proof of exclusive possession. In the next case, the seaboard heritor—proprietor of a barony similarly bounded—was pursuer; and certain parties, who had no stronger title than as members of the public, defenders. It was found, apart from any proof of possession on either side, that the pursuer, in virtue of his titles, had an exclusive right of taking sea-ware, shell-sand, &c., from the sea-shore *ex adverso* of his own property, it being unnecessary to determine whether the sole right and property in the shore was his or not.[105] The barony title was regarded as equivalent to a simple Crown title with a clause of wreck and ware. The question whether a non-barony title without such a clause would be sufficient, would depend on the determination of the question so reserved. If the landowner has not acquired—as shown in the following section—the ownership of the foreshore, the public may use it, as far as necessary for navigation and fishing, in virtue of their radical right; if to any extent beyond that, then in virtue only of the Crown's neglecting to interfere to protect its patrimonial interest, as was alleged in regard to the *St Andrews* mussels.[106] Other uses of the shore of this latter sort will appear in discussing the kind of possession necessary to prescribe property in the foreshore.

Questions between landowners and the Crown.

3. *As between Seaboard Proprietors and the Crown.*—The first half of the present century had nearly passed before the Crown thought it necessary to do anything for the protection of public rights in the foreshore,[107] and about fifteen years more before it attempted to vindicate its alleged right of property in the foreshore, so far as not alienated. The department then in charge of the shores of the kingdom was the Commission of Woods and Forests, which collects and administers the hereditary revenue; but in 1867 the Board of Trade took its place.[108] The preten-

[104] Paterson *v.* Ms. Ailsa, 11th March 1846, 8 D. 752 (see L.O. Wood's review of previous cases); Macalister *v.* Campbell, 7th Feb. 1837, 15 Sh. 490.

[105] L. Saltoun *v.* Park, 24th November 1857, 20 D. 89.

[106] *Supra*, p. 226; Lindsay *v.* Robertson, 11th Dec. 1868, 7 Macph. 239.

[107] Off. of State *v.* Smith, *supra*, [99].

[108] 29 & 30 Vict. c. 62, sects. 7 *et seq.*

sions of the Crown have so far been successfully resisted by individual seaboard landowners, with a Foreshore Association at their back. After a dispute with the Duke of Argyll, which did not reach the Court, and after a decision of Lord Jerviswoode, as Lord Ordinary, which was acquiesced in by the Crown,[109] the question of the Crown's ownership of the foreshores around Scotland was raised in a case which was selected as, and admitted to be, a test case.[110] The pursuer's estates of Lochnaw and others, in Wigtownshire, were to a large extent bounded on one side by the sea (Loch Ryan, the Irish Channel, and the Solway Firth), and were held by him, the greater part under barony titles, the rest under simple Crown titles. None of his titles contained any express grant of the foreshore, nor was there any mention of the boundary of any of the lands lying on the seaboard. The pursuer claimed the property of the foreshores *ex adverso* of his lands, either in virtue of his bare titles, or of these as possessed on for more than forty years. The Crown traversed both pleas. A proof of possession was taken; which brought out the following facts:[111] That from time immemorial the pursuer, his predecessors, and his and their tenants, had been in the habit of gathering sea-ware for manure, and for kelp so long as its manufacture was kept up, and of quarrying and removing boulder-stones for building and repairing houses and dykes on the estate; that strangers were prevented from doing any of these acts; and that sand and gravel were taken by the tenants in the same way: on the other hand, that sand for mortar, and sea-weed for manuring crofts, were taken in small quantities by the public, and that vessels carrying coal and lime for the farmers were sometimes beached, and ballast taken. In this state of the facts, the Lord Justice-Clerk, Lord Moncreiff, with the substantial concurrence of his brethren of the Second Division, stated his opinion: (1) That the foreshore was capable of being transferred from the Crown by such titles as those on which the pursuer founded. This implies that it was originally in the Crown; but it was so just in the same way as all other land in the realm, according to the feudal theory, and transferable, not as one of the *regalia minora*, but by the same forms as any other land.[112] (2) That as these titles

Agnew v. *Lord Advocate.*

[109] L. Adv. *v.* Maclean (Ardgour), 23d May 1866, 38 Scot. Jur. 584, 2 Sc. L.R. 25.

[110] Agnew *v.* L. Adv., 21st Jan. 1873, 11 Macph. 309, followed in L. Blantyre *v.* L. Adv., 19th Dec. 1877, 15 Sc. L.R. 382.

[111] *Per* L. Cowan, p. 329.

[112] *E.g.*, that a boundary by the sea goes right down to low-water mark is settled law, *supra*, p. 95. Mags. of Culross *v.* E. Dundonald, 1769, M. 12810; Campbell *v.* Brown, 18th Nov. 1813, F.C. (L. Glenlee); Kerr *v.* Dickson, 28th Nov.

contained no specific description of the component parts of the lands conveyed, and as no specific boundary of the barony or lands was expressed, the extent of the barony and lands could only be determined by the state of possession. This rule was the more important, since in Scotland the Crown has never, in practice, taken any beneficial use of the shore, and could not do so in many cases; since, in the second place, it has never given an express grant of the shore except to the proprietor of land contiguous;[113] and since, thirdly, in general the seaboard land all round the island had been granted out in large baronies or to seaport burghs. And that (3) the immemorial possession established that the foreshore was possessed as part of the pursuer's estate. The argument of the Crown here was that the uses above detailed were to be taken separately, and each ascribed to the lower right of servitude;[114] but this construction of the possession was held by all the judges to be decisively redargued by the manufacture of kelp from sea-ware. The Lord Justice-Clerk went further, thinking 'that where land has been occupied without challenge 'in every way in which it can be beneficially used by the vas-'sal, and not used at all by the superior or by any one else, the 'presumption is against servitude and in favour of a right of 'property.[115] Lord Cowan approved of Sir Matthew Hale's[116] 'evidences to prove the fact of property: constant and usual 'fetching gravel and sea-weed and sea-sand, and licensing others 'so to do, enclosing and embanking against the sea and enjoyment 'of what is so inned; enjoyment of wrecks,' &c.[117] It thus appears that the Court did not give effect to the highest contentions of either party. The pursuer contended that every foreshore belonged to the proprietor of the lands along which it lay, whether

1840, 3 D. 154 (L. Medwyn, p. 160); Nicol *v.* Blaikie, 23d Dec. 1859, 22 D. 335 (L.J.-C. Hope, 342); Smart *v.* Mags. of Dundee, 23d Nov. 1797, 3 Pat. 606.

[113] Even that very seldom. A few have been discovered. Ratification to Duke of Lennox, 1612, 4 Thoms. Acts, 510; grant to E. Kellie, 1643, Thoms. Abbreviates, Fife, 642; to L. Ochiltree, ibid. 928; to E. Hamilton, ibid. 1073. Salt Act, 1696, 10 Thoms. Acts, 80.

[114] E. Fife's Trs. *v.* Cuming, 16th Jan. 1830, 8 S. 326, 328, Menz. Lect. p. 547 (3d ed.), St. 2.7.5, Ersk. 2.9.14.16.17; Leslie *v.* Cumming, 1793, M. 14542; Brown *v.* Kinloch, 1775, ibid.; Garden *v.* E. Aboyne, 1734, M. 14517; Laird *v.* Feuars of Meldrum, 1716, M. 12152; Aikman *v.* D. Hamilton, 17th June 1830, 8 S. 943, revd. 6 W.S. 64; Murray *v.* Mags. of Peebles, 8th Dec. 1808, F.C.; Hall on the Sea-shore, pp. 34-36; Phear on Water, p. 87.

[115] See the case of E. Morton *v.* Covingtree, cited by L. Neaves, p. 332; and *supra*, [27].

[116] In Hargrave's Tracts, p. 27.

[117] Phear, p. 89, gives 'mining, dig-'ging, and taking sand, marl, coprolites, 'sea-weed, &c.; taking salvage for ground-'ing of ships; embanking and enclosing; 'punishing purprestures or intrusions;' a climax of acts of ownership.

expressly given or not.[118] The Crown succeeded in getting that doctrine repelled;[119] but its victory was a barren one, as was hinted at by the Lord Justice-Clerk in illustrating his second proposition, since similar titles and similar possession could be produced for almost every yard of foreshore in Scotland. No distinction was drawn between barony titles and other titles with indefinite boundaries, and this view is now understood to be settled, having been more recently restated in the Court of Session, and not repudiated in the House of Lords.[120] There have been since the case of Agnew two further illustrations of the kind of possession which is available for vindication of ownership in the foreshore. They have already been noticed in illustration of the law of positive prescription. In the one case, the Clyde Trustees and the Crown seem to have all along assumed that land reclaimed from the river—there tidal—became part of the adjoining barony.[121] In the other case, the use taken by the public, so far as open and avowed, was ascribable to public right, and, so far as not of public right, was occasional and clandestine, while the great body of evidence was clear for appropriation, seeing that there had been as to one of the subjects reclamation, exclusive use for pasturage, fencing down to low-water mark, compensation for compulsory taking, and frequent permits to

[118] His authorities were (besides those contained in note [112]) Innes *v.* Downie, 1807, Hume, Dec. 552 (*per* L.P. Campbell); Campbell *v.* Brown, 18th Nov. 1813, F.C. (*per* L. Meadowbank); Boucher *v.* Crawford, 30th Nov. 1814, F.C. [The threatened reversal of this case (2 Bell, Ill. 1) is discussed by L. Wood in Paterson *v.* Ms. Ailsa, *infra*, and may have had something to do with the right of harbour.] Macalister *v.* Campbell, 7th Feb. 1837, 15 S. 490 (L. Gillies, p. 493); Kerr *v.* Dickson, 28th Nov. 1840, 3 D. 154 (L. Moncreiff's note, p. 160); Woods and Forests *v.* Gammell, 6th Mar. 1851, 13 D. 854 (L.J.-C. pp. 868-9); Paterson *v.* Ms. Ailsa, 11th March 1846, 8 D. 752 (L. Wood's note, and L. Moncreiff, pp. 769-70); L. Saltoun *v.* Park, 24th Nov. 1857, 20 D. 89 (L. Ardmillan's note); Nicol *v.* Blaikie, 23d Mar. 1859, 22 D. 335 (L.J.-C. 342); Baird *v.* Fortune, H.L. 25th April 1861, 4 Macq. 127 (L. Wensleydale at p. 147); Ds. Sutherland *v.* Watson, 10th Jan. 1868, 6 Macph. 199. Of text writers, Cr. 1.15.13.15.17; St. 2.1.5, 2.3.60-1; Ersk. 2.1.5-6, 2.6.17; B. Pr. (4th ed.) 641-43. In English law, Hale de J.M., in Hargrave's Tracts, pp. 25-28.

[119] Besides the authorities on servitudes cited *supra*, note [114], the Crown cited Berry *v.* Holden, 10th Dec. 1840, 3 D. 205 (L. Jeffrey's note, p. 210, and L. Moncreiff, ibid.); Off. of State *v.* Smith, 11th March 1846, 7 D. 711 (L.J.-C. 715), affd. 6 B. Ap. 487 (*per* L. Campbell, 498); Woods and Forests *v.* Gammell, *supra*,[118]; L. Saltoun *v.* Park, *supra*, [118] (*per* Ls. Cowan and Benholme); Nicol *v.* Blaikie, *supra* [118], *per* L.O. Kinloch; Scrabster Trs. *v.* Sinclair, 19th March 1864, 2 Macph. 884 (L. Curriehill, 889); Balf. p. 626; Stair, 2.1.5, 2.3.45.67.69; B. Pr. (1st ed.), 641 *et seq.*; Duff, Feud. Conv. p. 65. Of foreign authorities—Bract. 2.12.4-5; Davies' Reports, 152-53; Kent. Com. 3. 560; Wheaton, Internat. Law. p. 335; Hall, pp. 2-5; Callis, 65-6; Att.-Gen. *v.* Burridge, 10 Price, 350; D. Beaufort *v.* Mayor of Swansea, 3 W.H. & G. 413, 415, 422.

[120] L. Adv. *v.* L. Blantyre, 19th June 1879, 6 Ret. H.L. 72.

[121] Ibid.

persons of respectability to take grass and sand; and, as to the other subject, letting, use of an island on the foreshore, permission to volunteers to practise shooting; and in both cases clear corroboration of this view in the titles of the riparian land.[122]

Sea-greens.

It is involved in what has been said in regard to the boundaries of the foreshore and the disputed interests connected with it, that land above the high-water mark of ordinary tides must be presumed to be private property, exempt at once from public uses,[123] and from being claimed as a reservation to the Crown as owner. This is the case, though the ground is occasionally or even periodically inundated by high tides, as happens to tracts of salt-marsh in some parts of the coast, called sea-greens.[124]

II.—Navigable Rivers.

Classes thereof.

There will be another opportunity of examining the law of water-courses in general, and of private streams in particular. Much of the doctrine which is applicable thus generally must here be postulated, and attention fixed on the points of distinction between private and navigable streams, and of these latter in different parts of their course. Navigability is a question of fact, requiring at the mouth of a river nothing more than proof of the influence of the tide (tidal navigable river); while, beyond the point where the ebb and flow are perceptible, actual capability of serving for navigation must be proved (non-tidal navigable river). In some legal respects these two parts of the river differ; in others they agree.

Tidal and non-tidal.

Tidal—how limited.

Tidal Navigable River.—Here actual navigability does not require to be proved; it is presumed, but may be redargued.[125] The river or estuary is regarded as part and parcel of the sea, and is subject to the same public rights of navigation and fishing, and therefore nothing turns, except in cases of salmon-fishing,[126] on the ascertainment of the point where the river comes to an end seaward. The upper reach of the tide is of more consequence; but no rule has been laid down for its determination. It may be gathered from

[122] Buchanan *v.* L. Adv.; Geils *v.* L. Adv., 20th July 1882, 9 Ret. 1218.

[123] Now that the fishermen's right by the statute of 1756 exists no longer, *supra*, p. 228.

[124] Bruce *v.* Rashiehill, 1714, M. 9342; Ersk. 2.6.17; B. Pr. 644.

[125] Miles *v.* Rose, 5 Taunt. 705; R. *v.* Montague, 4 B. and C. 589. See Cr. 1.16.11; Ersk. 2.6.17; B. Pr. 648.

[126] *Infra*, chap. 18. D. Atholl *v.* Maule, 7th March 1812, F.C. affd. 5 Dow, 282; E. Kintore *v.* Forbes, 31st May 1826, 4 S. 641 (N.E. 648), affd. 3. W.S. 261; Mackenzie *v.* Horne, 28th March 1837, 15 S. 894, 16 S. 1286, revd. M'L. & Rob. 977; D. Sutherland *v.* Ross, 29th Feb. 1843, 6 D. 425, affd. 3 B. Ap. 315.

a collation of the salmon-fishing cases just noted, with the rule for determining the landward boundary of the foreshore,[127] that it will be left to a jury to fix how far the flux of the sea is perceptible at ordinary tides between the springs and the neaps.[128] Within this line seawards the *solum* of the river, as of the sea, belongs to the Crown;[129] the foreshore, or bank, so far as affected by the ordinary tide, is also regarded merely as a continuation of the sea-shore proper, and subject to the same rules of law;[130] and the banks beyond the foreshore are presumed to be private property.[131] Consequently the Crown, and perhaps members of the public without the Crown's interference, may deepen the channel, or make other alterations favourable to navigation.[132]

Ownership.

Non-tidal—how proved.

Non-tidal Navigable Rivers.—Above the reach of the tide actual navigability must be proved. It is doubtful whether the only sort of proof is public use, and whether the use available to the public at any point of time is limited to the nature and extent of the previous prescriptive possession. Probably this would be taken as only one, but an important, element of proof,[133] for the river may deepen from causes with which riparian proprietors would have no right to interfere. Here the ownership of the soil is exactly the same as in a private stream:[134] there is no foreshore; and the banks are also, of course, private property. But just as the opposite and successive proprietors on a stream have a common interest in the water, so here the Crown or public have a common interest in it for the purposes of free navigation, but for no other: there is no public right of fishing.[135] It is quite sufficient for the creation of this public interest that country pro-

Ownership.

[127] Att.-Gen. *v.* Chambers, *supra*, p. 217.

[128] Some *dicta* rather tend to drawing the line at the utmost point reached by any tide. See Colquhoun's Trs. *v.* Ewing & Co., *infra*, [129].

[129] L. Adv. *v.* Hamilton, 1 Macq. 46. 49 (*per* L. St Leonards); Colquhoun's Trs. *v.* Ewing & Co., 26th Jan. 1877, 4 Ret. 344, revd. 30th July 1877, 4 Ret. H.L. 116; Cr. 1.16.11; Ersk. 2.6.17. Exceptional cases are mentioned—*e.g.*, the Severn, in Hale, i. c. 3; Angell on Watercourses, § 548; see Miles *v.* Rose, [125].

[130] Smart *v.* Mags., 1797, 3 Pat. 606, 8 Br. Ca. in Parl. 119; Kerr *v.* Dickson, 28th Nov. 1840, 3 D. 154, affd. 1 B. Ap. 499; Berry *v.* Holden, 10th Dec. 1840, 3 D. 205; Hunter *v.* L. Adv., 25th June 1869, 7 Macph. 899; Hagart *v.* Fyfe, 15th Nov. 1870, 9 Macph. 127. As to accessions from the estuary, see *supra*, p. 100.

[131] St. 2.1.5; Ersk. 2.6.17; B. Pr. 650.

[132] Colquhoun's Trs., [129], *per* L. P. Inglis; L. Meadowbank in Todd *v.* Clyde Trs., 23d Jan. 1830, 2 D. 357, 374.

[133] L. P. Inglis and L. Shand in Colquhoun's Trs., [129]; *contra*, L. Deas.

[134] Colquhoun's Trs., [129], where see L. P. Inglis's correction of his charge in D. Buccleuch *v.* Cowan, 21st Dec. 1866, 5 Macph. 214, 215. L. Selborne in Lyon *v.* Fishmongers' Co., L.R. 1 App. Ca. 662. It is different in some of the United States—Angell, §§ 548-9; Ramsay *v.* Keokuk, 4 Otto, U.S. 324.

[135] Hargreaves *v.* Diddams, L.R. 10 Q.B. 582; Pearce *v.* Scotcher, 9 Q.B.D. 162.

duce—such as logs of wood [136] and light goods in small boats [137]—should have been regularly sent down the stream when in flood, though no attempt was ever made to take produce up.

Public right of navigation.

The result to the public in the matter of its rights of navigation is very much the same in both situations, though attained by different routes; in the one case as benefiting from the trust vested for the public in the Crown; in the other as holding an incorporeal right or privilege of the nature of a right of way by water.[138] In one important respect (the erection of buildings or other obstructions *in alveo*), it has been attempted to assimilate the right of the public to the sort of control, resulting from common interest in the water, which one riparian owner has over another.[139] The result would be that nothing could be constructed in the bed of a navigable river except for the obvious improvement of the navigation;[140] that no injury would need to be shown by the public as existing or obviously imminent, since the action of water cannot be anticipated with certainty;[141] and that the public, by any of its members or through the Crown, might step in to prevent such erections.[142] But the House of Lords in the case of *Colquhoun's Trustees* rejected the analogy. The right of the riparian owner in a non-tidal river is one of property; that of the public a mere right of way. In the one case a comparatively slight interference with the *alveus* may be a positive *injuria* to the neighbour's proprietary right, if it be impossible to predicate that it may not produce serious changes in future; while the incorporeal right of the public entitles them only to prevent actual interference therewith, or such acts as will necessarily produce effects that will interfere

Similar to right of way.

Not ownership. Interference with public right.

[136] Grant *v.* D. Gordon, 1776, 3 Pat. 679, 1786, M. 14297, 12820, affd. 2 Pat. 582.

[137] Colquhoun *v.* D. Montrose, 1793, M. 12827, 14281, rem. 4 Pat. 221, S.C. 1804, M. 14283; Colquhoun's Trs. *v.* Ewing & Co., [129]. See the rules in America, a country of navigable streams—in Canada, Bell *v.* Corp. of Quebec, 5 App. Ca. 84; in U.S., the Daniel Ball, 10 Wallace, U.S., 557; Weise *v.* Smith, 8 Amer. R. 621; Hickok *v.* Hine, 13 ibid. 255. The right in the text seems in America to demand prescriptive user, Hubbard *v.* Bell, 5 Amer. R. 98.

[138] *Per* L.P. Inglis and Lords Hatherley and Blackburn in Colquhoun's Trs., [129]; Angell on Water-courses, § 536.

[139] Morris *v.* Bicket, 20th May 1864, 2 Macph. 1082, affd. 4 Macph. H.L. 44, was relied on in Att.-Gen. *v.* E. Lonsdale, L.R. 7 Eq. 377; Att.-Gen. *v.* Terry, L.R. 9 Ch. 423; and Colquhoun's Trs., [129], in the Court of Session.

[140] Cheapening of commodities is no excuse for an interference with navigation—R. *v.* Russell, 6 B. & C. 566, criticised by Jessel M.R. in Att.-Gen. *v.* Terry, *supra*, [139]; see R. *v.* Ward, 4 A. & E. 384.

[141] Cases in note [139]. Proof of injury was formerly required in England—Dobson *v.* Blackmore, 9 Q.B. 991; Rose *v.* Groves, 5 M. & G. 613; Reg. *v.* Betts, 16 Q.B. 1022.

[142] The doubt, whether the Crown alone in a tidal river could interfere, seems obviated by Hagart *v.* Fyfe, 15th Nov. 1870, 9 Macph. 127; but see Cameron *v.* Ainslie, 21st Jan. 1848, 10 D. 446; Colquhoun *v.* Paton, 17th June 1859, 21 D. 996.

with the right.[143] The same will hold of purpresture by diversion of the stream.[144] In the earliest Scotch case the Duke of Gordon had established his right of salmon-fishing in the Spey by means of cruives; while the upper proprietors on the river had been from time immemorial in the habit of floating rafts of logs down the stream when in flood, and objected to the permanent obstruction caused by the cruives. It was found that the two rights were both made out, and were not inconsistent; and rules were laid down for the harmonious working of both.[145] But where no right of cruive-fishing existed, it was one argument against fishing for salmon with nets stretched in a river, on stakes closely set, that these obstructed navigation,[146] which is the higher right.[147] On the same river—the Leven in Dumbartonshire—and at a point above the utmost reach of the tide, the owner of the land on both sides (who was therefore owner of the *alveus*), in erecting a railway bridge, diverted to some extent the towing-path, which had been immemorially used by the public; and also built the twin piers of the bridge on a spot where the water was frequently deep enough for navigation. Objection was taken by a superior heritor pursuing as member of the public; and it was found by the First Division that the defenders had no right to execute any works which would in any way interfere with or obstruct the navigation or the free use of the banks and of the towing-path along the bank of the river; and that the piers recently erected were an obstruction. As already stated, the opinions of some of the judges went further; so far, in fact, as to require no proof of actual or prospective injury to the public right.[148] The House of Lords, in reversing, rejected these extreme views, and repelled the right of the public to interfere, on the ground that no actual or necessary damage had been proved. There will also be cases, moreover, of erections *in alveo*, whose obstructive effects are and must remain so trivial as not to justify action for abatement of the nuisance.[149] In all the Scotch cases the *locus* of the obstruction was in a non-tidal part of the river. It follows, however, from the difference of interest which the riparian proprietor has in the bed of a tidal river, that he will be restrained *a fortiori* from interfering with

[143] 4 Ret. H.L. 116, 121, 126; Mississippi R. R. Co. *v.* Ward, 2 Black, U.S. 485, where and in Pennsylvania *v.* Wheeling Bridge Co., 19 Curtis, U.S. 621, see as to obstruction from height of bridges.

[144] Reg. Maj. 2.74.1; Ersk. 2.6.17.

[145] Grant *v.* D. Gordon, [136].

[146] Colquhoun *v.* D. Montrose (Leven), [137]. Claim for damage by stakes against Conservancy Board irrelevant in Forbes *v.* Lea Conservancy, 4 Exch. D. 116.

[147] Mayor of Colchester *v.* Brooke, 7 Q.B. 339.

[148] Colquhoun's Trs. *v.* Ewing, *supra*, [129].

[149] Reg. *v.* Russell, 3 E. & B. 942.

the public rights therein. He has been found, accordingly, in England to have no right to erect a jetty in the *alveus;*[150] not even to encroach for the space of three feet on a river which was sixty feet wide.[151] This is in entire consistency with the law of foreshore, as already expounded.[152] But a structure, which would when originally erected be illegal, may be legalised by long possession, as, for instance, catch-water walls or weirs, which may obstruct but not stop navigation.[153]

Tow-path.

The banks of a river above the foreshore, whatever may be the case with the latter, are the private property of the riparian owner. It has been settled in England,[154] and an opinion to the same effect delivered in Scotland,[155] that the public has no common-law right to set up a towing-path along a navigable river. But prescriptive possession by the public of this privilege of roadway along a public waterway is sufficient to establish the right. In the case of such a river as the Spey,[156] no path was required, as the prescriptive right was only one of floatage seawards. In the *Leven*[157] and *Carron*[158] cases it was different. In the latter case, it was held that a towing-path along the Carron was established by prescriptive possession, except as to part of one bank where there had been interruption acquiesced in by the public; that the tow-path right involved a right to erect convenient mooring-posts; and that where damage was caused, by the tracking of barges, to dykes built along the river by the proprietor for his own protection, the public were not liable.

Owner's exclusive right to the bank.

Unless a public right of way has been so acquired, the riparian owner, both in tidal and non-tidal rivers, has the exclusive right of using the bank for access or otherwise; and neither a member of the public, nor an adjoining proprietor, can encroach on or violate this private right without exposing himself to interdict and an action of damages.[159] 'A riparian 'owner on a navigable river has, of course, superadded to his 'riparian rights, the right of navigation over every part of the

[150] Att.-Gen. *v.* E. Lonsdale, [139].

[151] Att.-Gen. *v.* Terry, [139].

[152] *Supra*, p. 230.

[153] Williams *v.* Wilcox, 8 A. & E. 314; Anon. in 1 Campb. 517 n.; Rolle *v.* Whyte, L.R. 3 Q.B. 286; Leconfield *v.* Lonsdale, L.R. 5 C.P. 657; and Colquhoun's Trs., *supra*, [129].

[154] Ball *v.* Herbert, 3 T.R. 253, approved in Blundell *v.* Catterall, 5 B. & Ald. 291.

[155] *Per* L. Deas in Colquhoun's Trs., *supra*, [129].

[156] Grant *v.* D. Gordon, *supra*, [136].

[157] Colquhoun *v.* D. Montrose, and Colquhoun's Trs. *v.* Ewing & Co., [137].

[158] Carron Co. *v.* Ogilvie, 1801, n.r. var. 1806, 5 Pat. 61. The riparian owner is liable for *culpa* in erecting dangerous structures on the bank—White *v.* Philips, 33 L.J.C.P. 33.

[159] Lyon *v.* Fishmongers' Co., L.R. 1 App. Ca. 662. Yates *v.* Milwaukee (1870) 10 Wallace U.S. 497. See, in Canadian law, effect of a bridge across tidal river on riparian owners' rights, Bell *v.* Corp. of Quebec, 5 App. Ca. 84.

'river; and on the other hand, his riparian rights must be con-
'trolled in this respect, that whereas in a non-navigable river, all
'the riparian owners might combine to divert, pollute, or diminish
'the stream, in a navigable river the public right of navigation
'would intervene, and would prevent this being done. But the
'doctrine would be a serious and alarming one that a riparian
'owner on a public river, and even on a tidal public river, had
'none of the ordinary rights of a riparian owner, as such, to pre-
'serve the stream in its natural condition for all the purposes of
'the land; but that he must stand upon his right as one of the
'public to complain only of a nuisance or an interruption to the
'navigation.'[160] These riparian rights do not depend in any respect on ownership of the bed of the river, 'because the word 'riparian is relative to the bank, and not the bed of the 'stream.'[161] An example of the rights which depend on the ownership of the *alveus* is the Crown's right to accessions within that space, either by alluvion, avulsion, or artificial adjunction.[162]

[160] L.R. 1 App. Cas. 673, *per* L. Chan. Cairns.

[161] Ibid. p. 683, *per* L. Selborne. A similar distinction is recognised between the right of access to a highway belonging as a private right to an adjacent proprietor, and his right to use it as a member of the public—ibid. p. 684, and cases cited there.

[162] Todd *v.* Clyde Trs., 23d Jan. 1830, 2 D. 357, affd. 8th June 1841, 2 Rob. 333, following Smart *v.* Mags. of Dundee, 1797, 3 Pat. 606, 8 Br. Ca. in Parl. 119. Other Clyde cases turned on Act of Parliament—L. Blantyre *v.* Clyde Trs., 1st March 1867, 5 Macph. 508, affd. 9 Macph. H.L. 6; *Id.* v. *Eosd.*, 5th March 1880, 7 Ret. 659.

CHAPTER XVI.

PORTS AND HARBOURS.

Private piers.

It is an easy transition to pass from the law relating to the foreshore to the law of ports and harbours, in so far as these find a place among the subjects of heritable property; but the passage is further facilitated, and a distinction necessary to clearness drawn, by first fixing attention on a decision which illustrates the doctrines applicable to a large number of subjects, situated especially in the west of Scotland—viz., private piers. A seaboard proprietor who had, with the consent of the Admiralty,[1] erected piers stretching from *terra firma* on his lands, across the foreshore and into deep water, and levied dues unchallenged, brought an action of suspension and interdict against the owners of a steamboat landing passengers there on Sunday. He admitted that he could not appeal to the statutes anent Sabbath-breaking; but he relied on the following facts as proving his never having surrendered his rights of ownership in the piers: that he was proprietor of the land from which they jutted out; that their landward extremities were built upon ground of which he was the undoubted owner; that gates, furnished with locks, stood at the access to the piers from his land; that the gates were locked when he pleased, and opened only on payment of the dues; and that they were always kept locked on Sundays. After the note had been passed, but interim interdict refused,[2] the case was heard in the Court of Session, where the averments were held relevant;[3] and, on their being substantially admitted, suspension and interdict were granted on the ground that the piers in question were not free ports, but the

[1] 46 Geo. III. c. 153; see 10 & 11 Vict. c. 27, sect. 12. Now the Board of Trade, 25 & 26 Vict. c. 69, sect. 15. The piers were erected in the Clyde, a river 'immediately communicating with a public 'harbour.'

[2] Colquhoun *v.* Paton, 15th Dec. 1853, 16 D 206.

[3] 27th Nov. 1855, 18 D. 108.

private property of the complainer, at least so far as to give him a title to vindicate the actual state of possession in a possessory action.[4] In the first stage of the case, the opinion of the Court was expressly reserved as to the right of a seaboard landowner, even with the sanction of the Crown, to build a pier across the foreshore, and thereby exclude the public from the shore to that extent, and as to the legality of levying dues. But in the final decision, this latter point was put on its proper footing—that the payment of dues was the condition on which the complainer published his willingness to allow third parties to make use of his private property. If they did not wish to pay, they might stay away; while in a free port the public have a right of entry on payment of dues permitted in the grant, or sanctioned by prescription. The other point—the right of enclosing part of the foreshore, with consent of the Crown—did not arise, but only the question of title to sue a possessory action with reference to erections, which had never been objected to by way of declarator. But the authorities quoted with approval go to affirm the matter of right, this being a case in which the Crown only, and not members of the public, is held entitled to object to enclosure,[5] and passages were cited from the civil law,[6] Craig, Stair, and Erskine[7]—which recognise such erections as private property. In a case where a rude pier was built across the foreshore by the proprietor thereof, the opinion was expressed, it would appear soundly, that any such erection was as much his property as any other part of the shore, but no more. It was further justly said in the same case that he could not, therefore, prevent use of the pier by fishermen, nor enforce payment by them of harbour dues.[8] The objection to enclosure may be eluded by forming the pier of open pile-work, and may be obviated by prescriptive possession.[9] Piers cannot be erected within a free port without permission from the grantees or payment of harbour-dues used and wont;[10] and the

[4] 17th June 1859, 21 D. 996. Lord Cowan's observations on the title necessary for a possessory action have already been quoted, *supra*, p. 12. See an English case of a pier on an inland lake open to public navigation, Marshall *v.* Ulleswater Steam Nav. Co., L.R. 7 Q. B. 166.

[5] Cameron *v.* Ainslie, 21st Jan. 1848, 10 D. 446. The authority of this case on the present point is doubted, *supra*, p. 230.

[6] 3 D. (43.8). To this may be added—2 §, 8 D. *eod. tit.*; 30 § 4, 50 D. (41.1); but in all except the penultimate passage the public right is saved, and the right to enclose is regarded as itself a public one.

[7] Cr. 1.15.15; St. 2.1.5; Ersk. 2.6.17.

[8] E. Stair *v.* Austin, 2d Dec. 1880, 8 Ret. 183.

[9] See L.J.-C. Hope in Off. of State *v.* Smith, 11th March 1846, 8 D. 711, 718. The equivalent in a tideless lake to low-water mark in the sea is the limit of navigability—Dutton *v.* Strong, 1 Black U.S. 23.

[10] Mags. of Edinburgh *v.* Scot, 10th June 1836, 14 S. 922; see M'Farlane *v.* Mags. of Edinburgh, 16th May 1827, 5 S. 665 (N.E. 620), affd. 4 W.S. 76.

licence of the grantees is not assignable without their consent.[11] In many parts of the coast now frequented by coasting steamboats, a pier mainly for their accommodation is made by the owner, not only of the adjacent land, but also of a right of ferry. In so far as the pier serves for ferry purposes, it cannot be closed without putting some other safe mode of landing in its place. In other respects it is under full control of the owner, so long as suitable and safe.[12]

Origin of right of port.

While the right to use natural creeks for purposes of navigation or fishing is open to all, the obvious necessity for more secure harbourage, the vast expense of erecting and maintaining the artificial structures required for the safety of a flourishing maritime trade, and the exaction of customs, gave rise to the complicated rights of free port or harbour—rights which bring Crown, laird, burgh, and seaman into a curious fellowship. The present chapter, however, is only concerned with a part of harbour law—the title, rights, and liabilities of the holder of a grant of free port.[13]

Nature of the right.

The interests of Crown and people clearly pointed to an inclusion of the right to erect and possess ports and harbours among the *regalia*.[14] The right resembles that of salmon-fishing in being a *jus incorporale*, which need not be exercised unless the grantee so choose,[15] and in being separable from the ownership of the lands, some use of which is necessary for its exercise. It differs, however, in respect of the public rights which are involved. In this respect the right of free port is similar to the right of property in the foreshore, but differs in being incorporeal, and therefore possibly never emergent, and in the circumstance that the public use is not gratuitous. The right of the public, held in trust for them by the Crown is inalienable; and from this point of view the right of free port is one of the greater *regalia*. But the exercise of the full right of free port involves not only 'the natural access 'which makes a safe landing-place,' but 'artificial operations by 'which it is improved for the convenience or safety of navigation,'[16] though anchorage-dues may be exacted without the latter element

[11] Leith Dock Comrs. *v.* Colonial Life Ass. Co., 22d Nov. 1861, 24 D. 64.

[12] As to repair, see the first stage of Colquhoun *v.* Paton, *supra*, [2].

[13] The leading authority is Sir M. Hale. De Jure Maris, c. 6; and De Portu Maris, *passim*, in Hargrave's Tracts.

[14] Cr. 1.15.15; St. 2.1.5, 2.3.61; Ersk. 2.2.5, 2.6.17; Bankt. 1.3.4; B. Pr. 654-8, 755; opinions in Mags. of Edinburgh *v.* Scot, [10].

[15] Mags. of Renfrew *v.* Hoby, 18th Jan. 1854, 16 D. 348, affd. on a technical ground 12th June 1856, 2 Macq. 478, 19 D. H.L. 2.

[16] B. Pr. 654; Off. of State *v.* Christie, 2d Feb. 1854, 16 D. 454, 461. The distinction between ports which are industrial, and shores or creeks which are natural, is twice made by Stair—2.1.5, 2.3.61. The intermediate 'stations made 'by art or fortified for security,' and not

within an area erected into a free port by the Crown.[17] The supervision and expense implied in making and maintaining these useful works were, in early times even more than now, beyond the powers of the Crown, which was accordingly, from a very early period, in the habit of making grants of 'free port,' of 'free sea-port,' of 'king's port'—all expressions having the meaning which will presently be described.

Title required

These grants were mainly made to royal burghs on the sea-coast, and to the grantees of seaboard baronies. When the right is expressly included in a charter proceeding from a subject superior, prescriptive possession within the limits will be sufficient to establish it, by raising a presumption that the superior had a Crown grant inclusive of the right he conveyed.[18] A charter of royal burgh is a habile title for prescription of a right of free port.[19] Whether prescription be potent enough to explain a bare barony title to land into a charter with right of free port has never been decided; but the affirmative may be presumed till a valid distinction in principle between ports and ferries is established.[20] In the case of ferry just cited, it was even regarded as an open question whether a simple non-barony title might not be sufficient for prescription.[21] In these cases, prescriptive possession will not only establish the right but determine its local limits. In express grants there are always certain boundaries or precincts assigned,[22] the meaning of which, if doubtful, is determined by the same means.[23] The title to port and harbour does not include in it or imply any right of property in the soil of the sea, foreshore, or adjacent land within these limits, any more than a right of salmon-fishing does. In the case of many burghs the limits of the harbour extend far beyond the burgh lands,[24] as a precaution against the grant of a rival port in the immediate neighbourhood, which would otherwise have been in the power of the Crown authorities,[25] and

subject to dues, have not been recognised in practice. Hale de P.M. c. 2.

[17] Foreman *v.* Whitstable, L.R. 4 H.L. 266.

[18] Dundee Harbour Trs. *v.* Dougall, 14th Nov. 1848, 11 D. 6; 18th July 1849, 11 D. 1464, var. 22d March 1852, 1 Macq. 317, 15 D. H.L. 3.

[19] Macpherson *v.* Mackenzie, 21st May 1881, 8 Ret. 706.

[20] D. Montrose *v.* Macintyre, 10th March 1848, 10 D. 896; Ersk. 2.6.18; B. Pr. 755. St. 2.3.60 would go even further. See Hale de P.M. c. 4, in Hargr. p. 59 *et seq.*

[21] See *infra*, p. 255.

[22] Cr. 1.15.15; Mags. of Edinburgh *v.* Scot., 10th June 1836, 14 S. 922, 931 *per* L. Balgray, 935 *per* L. Pres. Hope; Hale de P.M. c. 3.

[23] Mags. of Campbeltown, [24].

[24] *E.g.*, Agnew *v.* Mags. of Stranraer, 27th Nov. 1822, 2 S. 42 (N.E. 36); Mags. of Campbeltown *v.* Galbreath, 14th Dec. 1844, 7 D. 220, 255, 482; and cases of Edinburgh, [22], and Dundee, [18].

[25] Mags. of Edinburgh, *supra*, [22], 14 S. 922, 934; Off. of State *v.* Christie, *supra*, [16], 16 D. 454, 465; Hale de P.M. c. 5, in Hargr. p. 59

as an encouragement to the growth of the community. There is a similar separation between the ownership of the land and the right of harbour in the case of trustees being appointed under an Act of Parliament or Provisional Order for the management of a port made or to be made.[26]

Rights to levy dues.

It being supposed, then, that a valid grant of free port has been established, the next question is, what are the rights which are thereby vested in the grantee?[27] The leading right is that of levying dues, 'a reasonable satisfaction of anchorage, portage, or 'shore dues.'[28] The amount leviable on each vessel which makes use of the harbour, or on different sorts of cargo, is not left to the grantee's discretion, but is determined, in rare cases, by the express terms of his charter; more usually by prescriptive possession.[29] It is held that in this latter way a fair test may be found of the 'satisfaction' which shall be a just counterpart of the expense of erecting and maintaining the requisite works. In many old grants the dues at Leith were referred to as a model or measure of the exactions to be allowed.[30] The limitation is strictly enforced. Thus, a burgh, with right to customs and duties used and wont, and all others pertaining to a free royal burgh or free port, was found not to be entitled to levy export dues which were sanctioned neither by immemorial usage nor by a private Act which it had obtained, and repetition of the illegal exactions was ordered, notwithstanding a plea of *bonâ fide* consumption, the impost having been falsely advertised as 'conform to Act of Parliament.'[31] But the limitation must also be construed reasonably. In the same way as the burden of a public road is enhanced on the general introduction of new modes of travelling, so here new sorts of craft will not be allowed to escape free of a general exaction of harbour-dues. Thus steamboats carrying only passengers and their luggage

[26] Scrabster Harb. Trs. *v.* Sinclair, 19th March 1864, 2 Macph. 884; Home *v.* Allan, 8th Jan. 1868, 6 Macph. 189; Ayr Harb. Trs. *v.* Weir, 7th Nov. 1876, 4 Ret. 79; see Mags. of Arbroath *v.* Strachan's Trs., 28th Jan. 1842, 4 D. 538.

[27] Hale de P.M. cc. 6.7.8.

[28] St. 2.1.5; B. Pr. 655 is unusually full on this obscure subject, but requires to be corrected by later decisions.

[29] Christie *v.* Landale, 16th May 1828, 6 S. 813; Mags. of Renfrew *v.* Hoby, [15] (*per* L. J.-C. Hope, 16 D. 353); Colquhoun *v.* Paton, [4] (*per* L. Cowan, 21 D. 1003).

[30] *Per* L.J.-C. Hope, 16 D. 353.

[31] Mags. of Dunbar *v.* Kelly, 26th Nov. 1829, 8 S. 128. Illustrations of the illegality of usurping or enhancing the levy of other customary dues in burgh, are to be found in Mor. at pp. 1972, 1987, 1991, 1993, 1997 (1999, 2003), and Burgh-Royal, Appx. Nos. 6, 8, 11, and 13; Reid *v.* Boyd, 6th Dec. 1810, F.C.; Fleshers *v.* Mags. of Kirkcaldy, 2 Sh. 96; Cowan *v.* Mags. of Edinburgh, 6 S. 586; Hill *v.* Mags. of Edinburgh, 8 S. 449; Mags. of Edinburgh *v.* Shipowners of Leith, 16 S. 1171; Campbell & Co. *v.* Mags. of Edinburgh, 1 D. 1174; Maxwell *v.* Mags. of Dumfries, 4 Macph, 764. They are all usually let from year to year—Hunter, i. 329.

were reached by a levy on 'all ships, barges, lighters, and boats,' brought to certain quays; and the owners were bound to pay the sum fixed for each visit, though made more than once a-day.[32] And, where certain dues were in last century statutorily fixed for 'passage-boats, ferry-boats, and pinnaces,' and other dues for other vessels, it was held that steamboats of the description mentioned above fell under the former class, and that they were liable, though the passengers were landed by means of boats, or at a private pier within the port, and though they were prevented from discharging at the ordinary piers.[33]

Restrictions on landowners within the bounds.

A later case from the same locality (Trinity, near Edinburgh), for the first time settled what were the respective rights of the grantees of a harbour which extended over a large district of coast, and of the owners of seaboard lands within these limits and beyond the actual enclosed port. It was held that neither such an owner nor any one in his right was entitled to make a harbour, pier, or dock, or to load or unload goods belonging to themselves or for their own use, of any description, from or upon his property, without payment of the shore, harbour, or other dues exigible by the Crown grantees; and that he had no right whatever to land or receive goods of others thereon, except under the grant of free port belonging to these grantees, and as authorised by them, and subject to payment and to the conditions of their right of dock and harbour.[34] In this case, dereliction, amounting to abandonment of the exaction, was alleged, but insufficiently.

Loss by dereliction.

In the next case, proof of dereliction was rebutted by evidence of the burgh's occasionally levying dues at a pier which was built within the limits of the free port, but beyond its own quays, not so much in the way of exercise of its right as in assertion thereof; but the burgh failed to prove such continuous use of levying at this pier duties higher than those exacted at their own as to legalise an excess.[35] It is settled by these two decisions that a right of free port does not prevent 'other parties from erecting quays upon 'their own ground, or from landing goods within the bounds of the 'grant, but only that they must pay the dues leviable under the 'grant.'[36] The dues which are there exigible are the anchorage or shore dues; not the customary rent or quayage dues for the

[32] Napier *v.* Mags. of Glasgow, 24th Nov. 1821, 1 S. 165 (N.E. 157).

[33] Macfarlane *v.* Mags. of Edinburgh, and Bruce *v.* Sandeman, 16th May 1827, 5 S. 665, 668 (N.E. 620, 624), affd. 30th March 1830, 4 W.S. 76. Muller *v.* Baldwin, L.R. 9 Q. B. 457 (coals exported); Harvey *v.* Lyme Regis, L.R. 4 Exch. 260 (goods landed).

[34] Mags. of Edinburgh *v.* Scot, 10th June 1836, 14 S. 922.

[35] Mags. of Campbeltown *v.* Galbreath, 1844 and 1845, 7 D. 220, 255, 482.

[36] *Per* L.J.-C. Hope, p. 225; see p. 495.

use of the quay.[37] In contrast to these cases is the case of *Ferry-Port-on-Craig*, where dereliction of exaction at a spot undoubtedly within the free port was made out.[38] There a burgh holding a grant of 'port and harberie' admitted that for forty years, or from time immemorial, the harbours of Ferry-Port-on-Craig had been used for receiving ships and vessels, and for loading and unloading of cargoes, without its levying any dues on the said ships or cargoes. This happened at a spot where there was daily communication with the burgh. Lord Chancellor St Leonards saw in this conduct such dereliction of the burgh's right to dues at this part of the port as to amount to the negative prescription,[39] and Lord Brougham laid down what was necessary to prove such abandonment. 'It is not sufficient to show that at a particular 'place no dues have been levied. It must also appear that the 'non-claim and non-levy has been such as to be wholly incon-'sistent with the right attempted to be established. If there had 'been no harbour, no landing of goods, or no shipping and un-'shipping; if the party claiming the right of harbour had not the 'means of levying dues, the case would not be one of negative 'prescription, because negative prescription proceeds upon a dere-'liction of right under circumstances in which the party claim-'ing the right might have exercised it.'[40] This is very similar to what the first Lord Mackenzie called 'a constant and universal 'use to land or to ship goods and passengers at some place within 'the precincts, and in defiance of the right granted to the other 'party.'[41]

Dues not ascribable to harbour.

Where it was proved that certain dues exacted by a burgh were levied, not under its clause of free port, but in respect of the use of a canal made within the port, the burgh was not entitled to demand these dues from parties who landed goods on their own lands, which, though within the port, were not approached by the canal.[42] The difficulty was to trace the impost back to the *opus manufactum*, as distinguished from the general maintenance of the harbour, especially when, as happened in this case, the increased exaction went back for more than forty years. Claims for harbour-dues may be enforced by arrestment of vessels,[43] as well as by the ordinary remedies.

Enforcement.

[37] Ibid. last report.

[38] Dundee Harb. Trs. *v.* Dougall, 14th Nov. 1848, 11 D. 6, 1464, var. 1 Macq. 317, 15 D. H.L. 3.

[39] 1 Macq. 320.

[40] 1 Macq. 325. The same view is taken by L.J.-C. Hope in Mags. of Renfrew *v.* Hoby, [42].

[41] In 14 S. 932.

[42] Mags. of Renfrew *v.* Hoby, 18th Jan. 1854, 16 D. 348, affd. on a technical point 2 Macq. 478, 19 D. H.L. 2.

[43] Mags. of Campbeltown, *supra*, [35].

Incident rights in *solum*.

As requisite to the earning and levying of these dues, there must be vested in the grantee at common law certain rights in the soil. What these are, and how far they extend, are questions which have still to be determined. An obvious distinction has been drawn between the rights of one who owns not only the right of port, but the land over which it extends, and one who holds the former right, but not the latter. An example of the broader right is shown in a case where a barony proprietor, on the narrative of powers from the Crown, granted to the bailies, council, feuars, and inhabitants of a burgh of barony, 'all and 'haill our foresaid haven and harbour of St M.' and its privileges; and this was found a sufficient title to an open space of ground adjoining the harbour. This grant—one of a corporeal subject, the shore or beach—was expressly distinguished from the incorporeal right of free port;[44] and, if distinguishable, was obviously capable of being construed into including the ground in question. It is a very different proposition, and one for which there is no other authority, to hold, as has been recently done by two judges of the Second Division, that the incorporeal right of port and harbour may enable the grantee to acquire by prescriptive possession, and as parts and pertinents of the right, the ownership of land, such as quays or embankments, within the limits of the grant.[45] This doctrine was delivered as *obiter dictum* in a case where harbour trustees, acting under statutes which empowered them to make, alter, and extend piers and quays, and vested in them certain old erections, obtained a declarator that they had a right to construct and maintain a continuous quay along one side of the harbour, and that the owner of a ship-building yard adjoining to the harbour had no right to form or maintain a launching-slip through the same. The defender could not rely on his possession, for that had been precarious; and the statutes were quite sufficient for the determination of the case, which raised no question of ownership. It may be observed that Lord Gifford confined this acquisition of ownership by prescription to rights of harbour which extend over a small well-defined area, not to extensive rights stretching over a large and often vague coast-line. But the only distinction of this sort which has yet been recognised has been already referred to —viz., that quayage-dues are not exigible where they are not earned.[46] It is thought that such prescriptive acquisition will in

Can the right found prescription of ownership?

[44] Mags. of St Monance *v.* Mackie, 5th March 1845, 7 D. 582, 587. The distinction is pointed out by Hale de J.M. c. 6, in Harg. p. 32, and Hall, p. 143.

[45] *Per* LL. Ormidale and Gifford in Ayr Harb. Trs., 7th Nov. 1876, 4 Ret. 79, 84-6.

[46] Mags. of Campbeltown, *supra*, [35].

all cases require for its title a charter to lands, or the erection of a burgh; and that in the absence of prescriptive possession or Act of Parliament, the grantee of a right of harbour will not be entitled to make any erections or perform any operations on land to which he can show no other title—unless, indeed, it be on the foreshore, the use, at least, of which may be regarded as conveyed by the Crown within the limits of the free port for the purposes thereof, since in that way the interests of the public are best consulted.[47]

Duties of grantee and their limits.

The duties or obligations incumbent on the grantee, which are the counterpart of the right of levying dues, have been the subject of considerable discussion. The dues are only justified by the enhanced convenience to the public consequent on the erection and maintenance of artificial works, and they were originally fixed in some fair relation to the outlay entailed, and cannot be arbitrarily raised. A tacit contract has thus been made between the grantee and the public: on the one hand, that the works shall be maintained in their original efficiency; and on the other, that the dues shall be treated as sufficient for their maintenance. These principles have been given effect to in the following way: Where a harbour, consisting of a creek furnished with a quay, had been for many years little frequented, and had become in a great measure obstructed by sand—owing, it was alleged, not only to the grantee's neglecting to cleanse it, as had been the custom, by means of water issuing from a sluice emptied twice a-day, but also to embankments and fences raised by him across the creek—it was found, in an action at the instance of the sole trader to the port, that the grantee was not bound to expend [annually] more on the repair thereof than the annual amount of the shore-dues, nor to assign over these dues to the pursuer for that purpose; that the grantee was not entitled, by any *opus manufactum*, to injure or deteriorate the natural means for cleansing the harbour; and that, in so far as the obstruction of the harbour had been occasioned by any operation of his, or by his neglect to employ the bygone shore-dues towards the repair thereof, he was still bound to remove the obstruction.[48] It has been already stated that the scale of dues cannot be raised, even on the pretext that this is necessary to indemnify the grantee for

[47] See Boucher *v.* Crawford, 30th Nov. 1814, F.C., 2 Bell Ill. 2, and L. Wood's note in Paterson *v.* Ms. of Ailsa, 11th March 1846, 8 D. 752, 757, 760; L.J.-C. Moncreiff in Agnew *v.* L. Adv., 21st Jan. 1873, 11 Macph. 309, 324; Ayr Harb. Trs. *supra*, [45]. (There were here two burghs facing each other across the river, but only one of them had the right of harbour.)

[48] Stein *v.* Stirling, 1814, Hume, 557, 15th Nov. 1825, 4 S. 178 (N.E. 180). After proof, removal of the stakes only was ordered, neglect to cleanse, and to employ bygone dues in repair, not being made out.

improvements on the harbour.[49] This was the first *Leven* case. The second lawsuit respecting the same port illustrated the converse principle. The Crown there sued its grantee, to have it declared that the harbour was insufficient for the accommodation of the public, and needed repair, extension, and improvement, and that he was bound to apply the dues for these purposes, so as to put it into a condition to meet the wants of the lieges. This was afterwards restricted to a demand for so employing the surplus dues in years subsequent to that in which the question was first raised. It was held that the grantee was not bound, out of the dues or otherwise, to extend the port, but only to keep it and its appurtenances, out of the dues, in a proper state of repair, and to furnish all such accommodation as was proper and suitable to the nature and extent of the port in its then state.[50] In applying this judgment, it was held that prolongation of a quay was an extension, and that the grantee was not bound to provide cranes, nor to remove sand accumulated, as was alleged, by piles driven into the fairway, since these piles were a real improvement to the harbour.[51] The reasons adduced by the judges for denying any obligation to extend were, that extension implies an existing fund and a proportionate rise in the dues, for the purpose of keeping the increased works in repair, both of which were inconsistent with the grant at common law, and would further be impracticable without a statute, where the *solum* did not belong to the grantee. It was held as settled that the annual amount of the dues was the maximum limit of the annual outlay which the public could demand; that the grantee had a right to pocket any surplus which might remain after performing all his obligations; and that in the absence of any previous neglect on his part, he was under no liability to refund. It appears,[52] however, that he will be bound to institute improvements, as distinguished from extensions, if there be a surplus—such, that is, as 'are necessary 'for the accommodation of the shipping,'[53] or 'as are met with 'in ports of a similar nature,' keeping 'pace with the improve-'ment of the day.'[54] Any private outlay for this purpose would be a first charge on the revenue of the port.[55] The penalty

Not to extend.

But to improve.

[49] Christie *v.* Landale, [29].

[50] Off. of State *v.* Christie, 2d Feb. 1854, 16 D. 454.

[51] 4th March 1856, 18 D. 727.

[52] Both in the opinions of the judges, and in those of counsel consulted, in a memorial from Dundee—16 D. 465, note.

[53] P. 466, note.

[54] *Per* L.J.-C. Hope, p. 461. How does this consist with the (apparent) denial of an obligation to erect cranes?

[55] *Per eund.* p. 462. See Ministers *v.* Mags. of Edinburgh, 27th Jan. 1838, 16 S. 400.

incurred by the grantee's refusal or neglect to perform his obligations may be forfeiture of his right.[56]

Statutes.

The demands of a growing maritime trade began in the middle of last century to outstrip the narrow powers allowed by the common law to grantees of free port, who were hampered by the inelastic nature of the dues and by the rights of landowners. A plentiful crop of private and local Acts,[57] from that period to the present, and the consequent erection of public harbours, properly so called, have been the result. The provisions usually contained in these Acts were gathered together in the 'Harbours, Docks, and Piers Clauses Act, 1847,'[58] and authorised to be incorporated by reference, except so far as expressly varied or excepted, in any Act to be passed thereafter (sects. 1 and 5). Compulsory powers to take land, if granted by the special Act, are to be subject to the provisions of this Act and the Lands Clauses Act (sect. 6). Omissions, misstatements, or wrong descriptions in the plans or books of reference, may be corrected by the sheriff after ten days' notice to the parties affected, and these must be deposited with the sheriff-clerks of counties, schoolmasters of parishes, and town-clerks of burghs in which the lands therein described are situated (sect. 7), and the works cannot be commenced till these forms are complied with (sect. 8). Before any harbour, dock, or pier, or any works connected therewith, on the shore of the sea or of any navigable river, so far as the sea flows and reflows, can be constructed, permission must be obtained from the Commissioners of Woods and Forests and from the Board of Trade, and then only according to plans approved by them, or altered or deviated from with their approval (sects. 12 and 13).[59] Minute regulations are enacted as to the rates leviable and their collection (sects. 25-50), and as to management and by-laws (sects. 51-96); and the rights of the Crown, of the Commissioners of

Harbours Clauses Act, 1847.

[56] Off. of State *v.* Christie, *supra*, [50].

[57] The mode of interpreting these may be studied in Mags. of Dumbarton *v.* Mags. of Glasgow, 1771, M. 14769 (Public statute); see *Iid.* v. *Eosd.*, 1666, M. 10909; Girdwood & Co. *v.* Campbell, 24th Nov. 1827, 6 S. 124, 7 S. 840, 9 S. 170; Mags. of Dunbar *v.* Kelly, 26th Nov. 1829, 8 S. 128; Strachan *v.* Thomson, 6th Dec. 1850, 13 D. 272; Risk *v.* Muir, 15th Feb. 1844, 6 D. 677, affd. 5 B. Ap. 14; Wright *v.* Scott, 16th July 1855, 18 D. H.L. 45; Stephen *v.* Aiton, 27th Feb. 1875, 2 Ret. 470, affd. 3 Ret. H.L. 4. The distinction between Crown grantee and Harbour Trustees is pointed out by L.P. Inglis in Oswald *v.* Ayr Harbour Trs., 24th Jan. 1883, 10 Ret. 472, 481.

[58] 10 & 11 Vict. c. 27. Section 74 is merely a procedure clause, and does not extend liability for damage done to works—River Wear Comrs. *v.* Adamson, 2 App. Cas. 743.

[59] B. of Trade substituted for the Admiralty, 25 and 26 Vict. c. 69, sect. 5.

Burgh Harbours Act, 1853.

Northern Lights, and of lords of the manor are saved (sects. 99-102). Facilities were provided for the maintenance, extension, and improvements of such harbours of royal burghs as were not the subject of any Act of Parliament, by the Burgh Harbours Act of 1853,[60] which proceeded on a preamble of the inadequacy of the dues legally leviable, by reason of the change in the value of money and other causes. The Act incorporated the agreement clauses of the Lands Clauses Act, and with some reservations the Harbours Act of 1847 (sects. 4 and 5). On the adoption of the Act (sects. 7-11), a schedule of rates, not exceeding those specified in a schedule annexed to the Act, must be drawn up within a month, distributed among the electors, advertised, by the town council adjusted (sect. 12), and finally certified by the Board of Trade (sec. 14). Every five years there may be further adjustment (sects. 21 and 22). The harbour accounts, after audit by the town-clerk, must be transmitted annually to the sheriff-clerk (sect. 16). The whole harbour revenue, after the adoption of the Act, must be expended in the maintenance, improvement, and extension of the harbour, and for no other purpose, after setting aside the average annual revenue for three years prior to the adoption for payment of the existing debt, principal and interest (sect. 17). Money may be borrowed by the burgh on bond and assignation of the rates (sect. 18-20). The plans of extensions and improvements must be approved by the Admiralty (sects. 23, 24), and the rights of the Crown to the soil are saved (sect. 27).

General Pier and Harbour Act, 1861.

The General Pier and Harbour Act, 1861,[61] has a wider scope. It enables any person, including companies, corporations, &c., to apply, after certain advertisements and deposition of documents,[62] to the Board of Trade for a provisional order for the construction of any pier, harbour, quay, wharf, jetty, or excavation, provided the estimated expenditure does not exceed £100,000 (sects. 2 and 3). The plans have to be deposited with the sheriff-clerk, and the deposition advertised (sect. 5).[63] A schedule of rates having been published in a similar way becomes operative by provisional order from the Board of Trade empowering the promoters to levy and recover (sect. 9).[64] Where the order goes beyond this, it must be approved by the Commissioners of Woods and Forests (sect.

[60] 16 & 17 Vict. c. 93.

[61] 24 & 25 Vict. c. 45; amended, 25 Vict. c. 19.

[62] 25 Vict. c. 19, sects. 3, 4, and Sched. B.

[63] Sects. 6, 7, 8, 15 repealed or amended by 25 and 26 Vict. c. 69, sect. 11.

[64] It may be revised by the Board, if the profits exceed 10 p.c.—25 Vict. c. 19, sect. 14.

10). The powers which may be so conferred are very extensive (sect. 15), but are limited by the rights of the Crown, the Clyde Trustees, and other parties (sects. 11-14). The port is then free to all persons on payment of the rates.[65] In the same year was passed the Harbours and Passing Tolls, &c., Act, 1861,[66] which provides for loans from the Public Works Loan Commissioners for the purpose of constructing, improving, maintaining, or lighting any public harbour,[67] on the approval of the Board of Trade being obtained; and facilitates the transfer of the dues from town corporations to harbour authorities. Public money is advanced for these purposes under other Acts,[68] and now public bodies proceeding under the General Pier and Harbour Act, 1861, may, on obtaining a provisional order and complying with certain conditions, obtain similar aid.[69]

Harbours and Passing Tolls Act, 1861.

[65] 25 Vict. c. 19, sect. 13.

[66] 24 & 25 Vict. c. 47; amended by 26 & 27 Vict. c. 81; 29 & 30 Vict. cc. 30 and 72.

[67] Whether the harbour authority has power to borrow or not, and in defiance of any limitation of amount—25 & 26 Vict. c. 69, sects. 20, 21.

[68] *E.g.*, 24 & 25 Vict. c. 80; 25 & 26 Vict. c. 30; repealed by the Public Works Loan Act, 1875, 38 & 39 Vict. c. 89, which consolidates previous statutes, and is amended by 39 & 40 Vict. c. 31; 41 Vict. c. 18; 42 & 43 Vict. c. 77; 44 & 45 Vict. c. 38.

[69] 45 & 46 Vict. c. 62, sect. 7.

CHAPTER XVII.

FERRIES.

Private and public.

MOST of what has been said of right of port is also true of the cognate right of ferry. The two monopolies—if such they may be termed—have had a similar historical development. In early times right of ferry was granted to individuals and burghs—primarily for the public convenience, secondarily for private profit. Then many, old and new, became part and parcel of well-defined roads, instead of links in a chain of ill-marked tracks, and fell into the hands of the road authorities. Finally, many were superseded by bridges. Thus arose the distinction—equally observable in regard to harbours—between private and public ferries. The main differences are, that the former must be traced to express or implied grant from the Crown, and are a source of private emolument; while the latter spring from Act of Parliament, and sometimes from mere possession by local authorities[1] (a Crown grant being implied), and the profits are employed for the purposes of the Act or Road Trust. In other respects the two sorts of ferry are exactly similar. Pursuing the plan followed in last chapter, these matters fall to be discussed in order—the title, the rights, and the obligations of the grantee of a right of ferry.

Definition and title.

The right is a *jus incorporale*, classed among the *regalia* in the same sense as a right of port,[2] and imports the exclusive privilege of conveying passengers and their baggage—but not ordinary goods traffic[3]—between a district abutting on one side of a narrow sea or of a river or loch, and a district on the other side, either in one direction or in both.[4] The title to a public ferry,

[1] *Per* L.J.-C. Hope in D. Montrose *v.* Macintyre, 10th March 1848, 10 D. 896, 900.

[2] Ersk. 2.6.17; B. Pr. 652-3; D. Montrose, *supra*, [1], *passim*.

[3] *Per* L. Glenlee in Fergusson *v.* Dowall, 18th Jan. 1815, F.C.; see Walker *v.* Jackson, 10 M. & W. 161.

[4] An example of the one is reported in Moir *v.* Hunter, 16th Nov. 1832, 11 S. 32; of the other in Baillie *v.* Hay, 20th March 1866, 4 Macph. 625; see Pim *v.* Curell, 6 M. & W. 234.

in the narrower sense of the term, has given rise to no controversy. The title to a private ferry may be either express, in a charter from the Crown,[5] or be spelt out of a barony title,[6] or a charter of royal burgh,[7] by the aid of prescription. Some of the judges by whom this last point was settled would have gone so far as not to require prescription, and to hold a barony title enough;[8] and there was even a tendency to regard an ordinary charter as a valid title on which to prescribe the right.[9]

Limits of the right. In scope.

The contents of the right may be shortly stated. It does not warrant interference with ordinary navigation, but only with such traffic as is carried on in evasion of the grant. It has been held not to be evasion for steamboat owners[10] or the owner of land whose seaboard lay within the limits of a ferry-right to convey passengers between the shore and coasting steamboats, 'provided 'they were not carried across the firth in prejudice of the de- 'fender's right of ferry.'[11] It is, moreover, no evasion for one resident within the bounds to carry gratuitously any members of his family, servants, visitors, and persons in his employment; but even a gratuitous transport of any others would be in prejudice of the ferrier's right, and therefore illegal.[12] On the other hand, the Crown is not entitled to grant,[13] nor any one to set up, another right of ferry which shall be wholly within a space formed by the coast or river-bank which bounds the old ferry on each side, and by lines drawn between the corresponding extremities thereof across the river or narrow sea.[14] It will be always a matter of fact, to be proved by production of titles and by immemorial use, what are the bounds on each side of the water. It will then be open to any member of the public to pass, either wholly without this space, or to or from a landing-place without it from or to

In space.

[5] Or in a charter from a subject, followed by possession; see Dundee Harb. Trs. *v.* Dougall, *supra*, p. 247, and Tarbat *v.* Bogle, 1731, M. 4167, 10 D. 903.

[6] D. Montrose, *supra*, [1].

[7] Greig *v.* Mags. of Kirkcaldy, 21st May 1851, 13 D. 975.

[8] L.J.-C. Hope, Wood, and perhaps Robertson, Cockburn, and Moncreiff; *contra*, Ivory.

[9] L.J.-C. Hope and L. Cunninghame.

[10] Hunter *v.* Napier, 27th Nov. 1830, 9 S. 86.

[11] Moir *v.* Hunter, 16th Nov. 1832, 11 S. 32, 34.

[12] Tarbat *v.* Bogle, [5]; Martin *v.* Thomson, 16th June 1818, F.C.; Weir *v.* Aiton, 25th May 1858, 20 D. 968; see Mearns *v.* Myers, 17th June 1872, 2 Couper, 296. The leading authority in America is Conway *v.* Taylor, 1 Black U.S. 603. See also Lippincott *v.* Allander, 1 Amer. R. 299; Hudson *v.* Cicero Land Co., 26 Amer. R. 289. The rules are very similar to our own.

[13] Hale de J.M. c. 6, in Harg. p. 32.

[14] This seems to be the result of the authorities—Campbell *v.* Campbell, 18th Jan. 1815, F.C. affd. 6 Pat. 417; Fergusson *v.* Dowall, 18th Jan. 1815, F.C.; Kinghorn Ferry Trs. *v.* Crichton, 18th Dec. 1821, 1 S. 220 (N.E. 209); Mags. of Kirkcaldy *v.* Greig, 18th July 1846, 8 D. 1247. In England—Newton *v.* Cubitt, 5 C.B.N.S. 627, 12 C.B.N.S. 32, 13 C.B.N.S. 864; Tripp *v.* Frank, 4 T.R. 666; cf. Huzzey *v.* Field, 2 C.M. & R. 432.

In enforcement.

another within it. The right of the grantee to obtain the summary remedy of interdict, which will not be escaped by a merely evasive change of landing-place,[15] may, however, be lost through allowing ferry-boats to be established and plied for months by parties who allege a title and possession peaceable, open, and of that duration.[16] The right is not indivisible; part of the monopoly may be kept up, and part lost by disuse, or rather by contrary usage.[17] It gives no ownership in the *solum* of the coast-lands whether above or below high-water mark, even though the true owner has allowed landing-stages to be erected.[18] Provided the ferrier can lawfully land the passengers at both ends of the ferry (or at one end, as the case may be), he has no concern with what then becomes of them, even though it be plain that they cannot get to a public place after landing without trespass.[19] These rules limit and protect the leading right—that of levying fair and reasonable rates. The amount exigible may date from a remote period, and can be altered only with the sanction of the Justices and Commissioners of Supply, their duty being to allow a moderate profit, and to raise the fares only in case of additional apparatus or other extraordinary outlay being required.[20] They are entitled to sanction the substitution of a bridge for a ferry, provided the bridge is more convenient for the public and the tolls levied on it are not higher than the former ferry-dues.[21]

In emolument.

Obligations.

To the Justices and Commissioners are also intrusted the supervision and regulation of ferries and the enforcement of the obligations which lie on the grantee.[22] These are, to provide suitable boats and experienced ferrymen in sufficient numbers, and to transport passengers and luggage—and, if such has been the custom or the regulation of the authorities, carriages also—within such hours as these authorities deem right, on tender of the appointed fares. The concurrence of the procurator-fiscal is not required for a complaint of breach of duty.[23]

[15] Mags. of Kirkcaldy *v.* Greig, *supra*, [14].

[16] Fife Ferry Trs. *v.* Mags. of Dysart, 20th Dec. 1827, 6 S. 265.

[17] Giles *v.* Grooves, 12 Q.B. 721, is consistent with the Scotch doctrine of harbours (*supra*, p. 246), if it did not wholly turn on matter of pleading.

[18] Baillie *v.* Hay, [4]; Newton *v.* Cubitt, 12 C.B.N.S. 32.

[19] Crawfurd *v.* Clyde Trs., 22d June 1881, 8 Ret. 826.

[20] Mags. of Montrose *v.* Scott, 1755, M. 4167; Martin *v.* Easton, 18th June, 1830, 8 S. 952.

[21] Cumming *v.* Smollett, 18th June 1852, 14 D. 885.

[22] Ersk. 1.4.14; Bankt. 2.7.22-3; B. Pr. 653; Campbell *v.* Campbell, [14]; Martin *v.* Easton, [20]; 1669, c. 16; 1686, c. 8; 5 Geo. I. c. 30, sect. 5; J.P.s of Fife *v.* Mags. of Kinghorn, 1762, M. 1988, 7617; J.P.s of Mid-Lothian *v.* Galloway, 1775, M. 7620.

[23] Martin *v.* Easton, [20].

CHAPTER XVIII.

SALMON-FISHING.[1]

One of the *regalia minora*.

WHETHER on account of the great value of the salmon as an article of food and commerce,[2] or of its close connection with the sea, which was in a peculiar degree under the king's control, or of the ruinous complexity of interests which must otherwise have arisen, the right of salmon-fishing—as distinguished from the ownership of individual salmon captured[3]—has in Scotland from early times,[4] but not so far back as the thirteenth century,[5] been regarded as one of the *regalia minora*;[6] in other words, a right, separate from the ownership of land, and presumed to be retained by the Crown in granting feus of land adjacent to sea or river. The 'common weill' which served as the justification of most of the old Scots statutes relating to salmon may have entered indi-

[1] This extensive subject will be treated as briefly as is consistent with accuracy, partly for the purpose of keeping this work within moderate limits, partly because the taking and sale of salmon have become in great measure a department of trade, and chiefly on account of the existence of the recent excellent treatises by Mr Paterson of the English Bar (Fishery Laws, 2d ed., 1873) and Mr C. Stewart (Rights of Fishing, 1869). For these reasons, and also because the plan adopted in other parts of this work is believed to be the only satisfactory mode of setting forth legislative enactments, the recent statutes are printed and annotated in the Appendix, with a brief introduction only in the text.

[2] Hinted at by L. Ch. Chelmsford in Gammell *v.* Woods and Forests, 3 Macq. 419, 455, following the consulted judges in Scotland, 13 D. 860.

[3] Ersk. 2.1.10; cf. St. 2.1.5. The salmon is not a royal fish in the same sense as is a whale; see forfeitures in the statutes.

[4] The notice given in Quon. Attach. c. 31, 1 Thoms. Acts, 652, of Alexander's time, *seems*, on the analogy of parks and warrens, to exclude the public only from salmon-fishing in rivers, but is unsupported by any other evidence. Salmon-fishing in the sea was not systematically prosecuted till this century.

[5] *Per* L. Blackburn in L. Adv. *v.* L. Lovat, 12th July 1880, 7 Ret. H.L. 122, 159.

[6] Cr. 1.15.13, 1.16.8 and 38, 2.8.15; St. 2.1.5, 2.3.69; Ersk. 2.1.6 and 10; 2. 6.15 and 17; 2 Ross's Lect. 173; B. Pr. 646, 671, 754, 1112. These authorities overrule the exception early maintained in Leslie *v.* Ayton, 1593, M. 14249; Gairlies *v.* Torhouse, 1605, ibid.; see L. Medwyn's remarks in D. Sutherland *v.* Ross, 11th June 1836, 14 S. 960.

rectly into the formation of this rule; but directly, the public were excluded equally with the holders of land from this right of fishing, which belonged to the Crown, not as trustee for the lieges, but in its own patrimonial right.[7] It followed that the right to fish for salmon in any locality could be alienated by the Crown, without curtailing any public privilege; and since, in point of fact, the king was unable to exercise his prerogative right, and in early times it never occurred to him to lease out the fishings

Granted out. temporarily, the result was, that express rights of salmon-fishing became very usual, either as separate grants, or, more commonly, in connection with lands adjoining the fisheries. There has been some expression of opinion that a Crown grant is not necessary for a right of angling for salmon, and that riverain or seaboard ownership is sufficient.[8] This certainly is not the case in places where the ordinary mode of capture by net and coble is practicable,[9] for the lesser is included in, and cannot be exercised in

Rod-fishing. antagonism to, the greater right. Where the ordinary mode of fishing is impracticable, and rod-fishing, instead of being the result of tolerance or neighbourliness, may be fairly regarded as an assertion of right, it will probably be taken, not as an incident of riparian ownership, but as explanatory of the ordinary clause of 'fishings.'[10] The Crown's original right, which is thus general as to the mode of fishing, is equally so as to the place; for the only possible localities are within the three-mile limit, already noticed,[11] and are in fact close to the river-bank or sea-shore.

Title—express. The patrimonial right of the Crown to the salmon-fishings in any locality may be granted out expressly, either alone (*e.g.*, the salmon-fishings in a river or loch named), or by a clause *cum piscationibus salmonum* in the dispositive clause[12] of a charter of lands. It was held, in last century, that a grant of salmon-fishing 'by currachs' did not prevent the Crown granting out a cruive-

[7] St. Ersk. and Bell, *ut supra*, [6]; Woods and Forests *v.* Gammell, 6th March 1851, 13 D. 854, 860; cf. L.J.-C. Hope's op. p. 866 *et seq.*, and L. Ch. Chelmsford's op., 3 Macq. 463; Anderson *v.* Anderson, 25th Nov. 1867, 5 Irv. 499, 6 Macph. 117.

[8] Bell. Pr. 671, 1112; More, Lect. I. 509; Paterson, pp. 174, 223.

[9] Anderson *v.* Anderson, *supra*, [7], explaining D. Sutherland *v.* Ross, 11th June 1836, 14 S. 960. Guthrie *v.* Dunbar, 27th June 1855, 17 D. 1002, was merely possessory, and rod-fishing was a novel mode. As to the construction of a reservation of rod-fishing, see Gammell *v.* Riddell, 16th Feb. 1847, 9 D. 727.

[10] D. Richmond *v.* E. Seafield, 16th Feb. 1870, 8 Macph. 530, *per* L.J.-C. Moncreiff, p. 541; Stuart *v.* M'Barnet, 23d Nov. 1866, 5 Macph. 753, var. 21st July 1868, 6 Macph. H.L. 123, 139, 140.

[11] *Supra*, p. 214.

[12] That mention in the *tenendas* would not be enough may be argued from E. Aboyne *v.* Farquharson, 16th Nov. 1814, F.C. affd. 6 Pat. 380 (already noticed, *supra*, p. 132), *a fortiori*, since salmon-fishing is a separate holding.

fishing in the same locality to a third party.[13] The same question is not likely again to arise. Whether by analogy the Crown would be entitled to grant separately rod and net fishing at the same spot may be doubted.[14] Evidence of possession may, along with other proof of the meaning of local names, be used to determine the limits of the grant. When these have been ascertained, no proof of prescriptive possession is needed to give the grantee right, to the full extent of the boundaries. He can be arrested only by a similar express grant of fishings in the neighbourhood, or by a general grant with prescription. Less than this is ineffectual to denude him of his right, the exercise of which is as much *res meræ facultatis* as is the working of coal.[15] He cannot be ousted by a Crown grant of salmon-fishings within his bounds, especially if he has had all available possession, though he has not actually fished at the part thus encroached on by reason of the nature of the ground.[16]

How bounded.

The alternative proof of a grant of salmon-fishings is by prescriptive possession on a barony title, or on an ordinary charter *cum piscationibus*. It is then held that the general title to fishings has been duly explained to include salmon-fishings. A barony title is held to include, and does not require expressly to contain, a general clause of fishings; in other respects, and particularly in this matter of prescriptive possession, it does not differ from an ordinary charter.[17] Early cases[18] which seem to deny the necessity for this explicatory prescription have been either explained away or repudiated.[19] The phrases *cum privilegio piscandi*,[20] *cum piscariis*,[21] and probably also *cum piscibus*,[22] are equivalent to the more usual clause. A clause 'with pertinents,' while insuf-

General, with prescription.

[13] Grant *v.* D. Gordon, 1727-76, M. 14297, 3 Pat. 679, M. 12820, 2 Pat. 582.

[14] D. Sutherland *v.* Ross, [9].

[15] Mackenzie *v.* Davidson, 27th Feb. 1841, 3 D. 646.

[16] Bs. Gray *v.* Richardson, 14th July 1876, 3 Ret. 1031, affd. 29th June 1877, L.R. 3 App. Ca. 1.

[17] Mackenzie, 2.6.3, and Stair, 2.3.61. 69.76, are overruled or explained in this sense by Ersk. 2.6.18; B. Pr. 754; Nicol *v.* L. Adv., 1st July 1868, 6 Macph. 972 (where the only reference to fishings was an express grant of white-fishings); D. Richmond *v.* E. Seafield, 16th Feb. 1870, 8 Macph. 530; L. Adv. *v.* Cathcart, 19th May 1871, 9 Macph. 744; L. Adv. *v.* M'Douall, 13th June 1873, 11 Macph. 688, revd. 16th April 1875, 2 Ret. H.L. 49; L. Adv. *v.* M'Culloch, 20th Oct. 1874, 2 Ret. 27. See remarks of L. Curriehill in L. Adv. *v.* Sinclair, 14th June 1865, 3 Macph. 981, 997.

[18] Campbell *v.* Campbell, 1610, M. 14250; Forbes *v.* Udney, 1701, ibid., and 7812.

[19] L. Adv. *v.* Northern Lights Comrs., 27th May 1874, 1 Ret. 950.

[20] E. Southesk *v.* Ly. Earlshall, 1667, M. 10842.

[21] Forbes *v.* Udney,[18]; L. Chan. Cairns in Stuart *v.* M'Barnet, 23d Nov. 1866, 5 Macph. 753, var. 21st July 1868, 6 Macph. H.L. 123, 131:

[22] Fotheringhame *v.* Graham, 1687, 3 B.S. 639.

ficient to found prescription of itself, may carry back to earlier titles, containing an express grant of salmon-fishings, or a general clause of fishings, if it connect with these earlier titles by a progress either inhabile [23] or presumably not intended [24] to make any alteration in the right. If the general clause in such a case be once interpreted by possession to include salmon-fishings, the clause of pertinents—perhaps even a bare conveyance of land—is habile to carry them on; and that in a question either with the Crown or with a subject superior. A clause of 'fishings' appearing only in the *tenendas* of a Crown charter will be of no avail as the foundation of prescription; [25] but the opposite appears to be the case if the charter proceeds from a subject superior, and the Crown is barred from interfering.[26] The effect of a special clause or of a general 'fishings' clause in a charter proceeding from a subject superior has not been clearly settled, but has been illustrated by

Base title.

two cases. The first arose between subjects, owners of the opposite banks of a salmon-river, which was so narrow that its whole breadth was swept in fishing from either bank. The pursuer held a Crown grant of his land *cum piscationibus*, explained by possession into salmon-fishing *ex adverso* thereof. The defender held a conveyance, in a base title, of 'the half of the salmon-fishing' in the river, with prescriptive possession by rod and line, and occasionally by net and coble. The Court of Session, though it held that the defender could not connect with the Crown, found his title aided by prescription sufficient to entitle him to the salmon-fishing from his own bank. The House of Lords came to the same result by a different route. It found that the defender had connected his progress with the Crown,[27] Had it not been so, the Lord Chancellor (Cairns) was of opinion that possession on the base title had not been sufficiently made out, and that the pursuer would have had a right to prevent his fishing. Lord Cranworth was of an opposite opinion. The other case arose be-

[23] On the principle of the cases of Graham *v.* D. Hamilton, 27th Jan. 1842, 4 D. 482; Thriepland *v.* Rutherford, 30th May 1848, 10 D. 1062 and 1079; Hutton *v.* Macfarlane, 11th Nov. 1863, 2 Macph. 79; Boyd *v.* Bruce, 20th Dec. 1872, 11 Macph. 243. See L.O. Mure's remarks in E. Dalhousie *v.* M'Inroy, 3d March 1865, 3 Macph. 1168; E. Mar *v.* Alexander, 7th June 1827, 5 S. 776.

[24] D. Queensberry *v.* V. Stormont, 1773, M. 14251, Hailes, 543. (Though there was here a charter of *novodamus*, it was taken as not being intended to *restrict* the right.) L. Adv. *v.* Sinclair, 14th June 1865, 3 Macph. 981, 994, affd. 7th June 1867, 5 Macph. H.L. 97. (The argument was scarcely helped by 'fishings' appearing in the *tenendas* of the Crown charter of resignation, but this charter was presumed to give back as much as was resigned.)

[25] L. Adv. *v.* Sinclair, [24].

[26] L. Adv. *v.* M'Culloch, [17].

[27] Stuart *v.* M'Barnet, [21].

tween the Crown and a subject. It was held that a charter of barony, with or without a clause of 'fishings,' was sufficient to exclude the Crown from claiming 'salmon-fishings' when there had been prescriptive possession of the same, not by the barony proprietor, but by a feuar of part of the barony, whose charter contained the clause *cum piscationibus* only in the *tenendas*—it being *jus tertii* in the Crown thus divested to found on this alleged blot.[28] It may be gathered that in no case will the Crown be excluded except by its own express grant, or by prescription following (1) on a barony title; or (2) on its own general grant of fishings; or (3) on an express grant of salmon-fishings in a base title; or (4) on a general grant of fishings in the same. But these last two points have not been fixed by decision.

Rules as to possession.

The general rules as to the sort of possession required for the positive prescription have been already pretty fully detailed, and illustrated to some extent by cases concerning salmon-fishings.[29] It only remains to notice a peculiarity which finds a more suitable place here.[30] The general rule, that the possession must be clear and unequivocal, debars the claimant from taking any advantage by rod-fishing, at least in places where the more extensive modes are not impracticable.[31] Such possession is regarded as an insufficient vindication of right, and as more easily explicable by tolerance or neighbourliness on the part of the fishery-owner. It is incapable of setting up a separate prescriptive right of rod-fishing,[32] much less the full right of salmon-fishing. Where net and coble fishing is impracticable, the balance of opinion, though there has been no decision, seems to be in favour of prescription being admitted,[33] at least when the rod-fishing has been openly prosecuted, or let out to tenants, or carried on in a portion only of a stretch of water elsewhere fished with net and coble by the same owner.[34] Probably also, if rod-fishing, as frequently happens, be the more profitable of the two modes, though both be practicable, the result would be

Rod-fishing.

[28] L. Adv. *v.* M'Culloch, 20th Oct. 1874, 2 Ret. 27. It was remarked that the *tenendas* is of more weight in a base than in a Crown charter. See also a competition of titles in Gordon *v.* Wolrige, 4th Dec. 1868, 41 Sc. Jur. 108.

[29] These may be found at p. 33 *et seq.*

[30] As to prescription by use of illegal modes of fishing, see *supra*, p. 43.

[31] Forbes *v.* Udney, 1701, [18]; Smollett *v.* Colquhoun, 1779, 14 S. 963, in note to D. Sutherland *v.* Ross, 11th June 1836, 14 S. 960; Milne *v.* Smith, 23d Nov. 1850, 13 D. 112; Stuart *v.* M'Barnet, [21]; D. Richmond *v.* E. Seafield, [17].

[32] D. Sutherland *v.* Ross, [31].

[33] L. Abercromby *v.* Ms. Breadalbane, 18th July 1843, 5 D. 1389, is evenly balanced; E. Dalhousie *v.* M'Inroy, 3d March 1865, 3 Macph. 1168.

[34] D. Richmond *v.* E. Seafield, 16th Feb. 1870, 8 Macph. 530, 541, *per* L.J.-C. Moncreiff; L. Adv. *v.* L. Lovat, 7 Ret. H.L. 135, *per eund.*; D. Roxburghe *v.* Waldie's Trs., 18th Feb. 1879, 6 Ret. 663, *per* L.O. Curriehill (2), at p. 667.

the same.[35] If these two sorts of water are intermixed, it will be sufficient that the mode best adapted to the locality shall be used.[36] For a cognate reason, it imports no intermission of user, that fishing-stations are changed, provided the whole right is maintained and other fishers excluded;[37] while, even in a barony, it is not enough, for the vindication of the universal right, to fish only in a small part of the water.[38]

Boundaries.

It has been already said that proof by possession or otherwise may be required to determine the bounds of a fishery in the sea.[39] In river-fishings there is no difficulty where the grantee is also owner of both banks of the stream, for he usually in that case either holds *per expressum*, or acquires by prescription the whole fishings within his boundaries. His right of fishing is then presumed to extend no further than his lands,[40] and can only be enlarged by prescription. The presumption was thus redargued in a case between opposite proprietors, each holding titles *cum piscationibus* at a point where the river was divided by an island into two reaches, the northern being the larger of the two and alone available for salmon-fishing. The proprietor to the north had for the prescriptive period fished for salmon by rod and line; his opposite neighbour had similar possession, and also possession by cairn nets so long as these were legal, and by taking his boats through the north channel, when fishing below and above, though the channel was north of the thread of the stream. It was acknowledged that at that point net and coble fishing was impracticable. It was held that the latter proprietor was entitled to continue this possession in all respects, since for fishing purposes the north channel was regarded in practice as the sole *alveus* of the river.[41] The presumption of right to the whole fishings holds also in the case of a grantee of salmon-fishings in a river or part thereof, who does not own any portion of the banks, unless some adverse right emerges.[42] There is more difficulty where the opposite banks belong to different owners, each pretending to a right of salmon-fishing *ex adverso* of his lands. If the terms of a riparian owner's title be such as

Opposite rights.

[35] L. Adv. *v.* Lovat, *loc. cit.* in last note.

[36] Stuart *v.* M'Barnet, [21].

[37] E. Zetland *v.* Tennent's Trs., 26th Feb. 1873, 11 Macph. 469.

[38] L. Adv. *v.* Cathcart, 19th May 1871, 9 Macph. 744 (possession in rivers not extended to the sea *ex adverso* of the barony). It will be different if the most advantageous mode of securing the salmon of a whole river and its tributaries be to fish part only and preserve the rest—L. Adv. *v.* L. Lovat, 27th Feb. 1880, 7 Ret. H.L. 122, and *supra*, p. 45.

[39] Mackenzie *v.* Davidson, [15].

[40] L. Abercromby *v.* Ms. Breadalbane, [33]; M'Inroy *v.* D. Atholl, 11th June 1858, 20 D. 1106.

[41] D. Roxburghe *v.* Waldie's Trs., 18th Feb. 1879, 6 Ret. 663.

[42] L. Monimusk *v.* Forbes, 1623, M. 10840, 14264, *obiter*.

expressly to carry the whole fishing *ex adverso* of his land, or if his possession of the whole on a title capable of founding prescription is unopposed by any sufficient adverse possession, he can exclude the Crown and any third party.[43] If, on the other hand, the terms of the title point to a fishery extending no further than to one half of the stream[44]—as through an express boundary by the *medium filum*, or a grant of salmon-fishings with power to draw the nets on the fisher's own bank[45]—the law of bounding charters would, if applicable, prevent prescriptive acquisition of any right beyond. It has, no doubt, been held not to be applicable to the effect of confining a right of fishing—which is merely an incorporeal right—within the parish in which the lands to which they pertained were said to lie.[46] But if there be an opposite fishery proprietor, with express right to salmon-fishings, and to the use of the adjacent bank, even though he never exercised the right, no amount of possession will enable the other to encroach beyond the *medium filum*.[47] The same, by a parity of reasoning, will be the case if the Crown has never given out these last fishings. So that in this respect the rule of bounding charters must be held to apply; and the owner of salmon-fishings so limited is not entitled, by proving possession, to fish beyond his bounds till met by a better right.[48] The rules which apply to the case of an island emerging in the bed of a river have been already stated.[49]

The title, when established in any of these ways, conveys the exclusive right of fishing for and taking salmon[50] within its bounds. But minor rights of salmon-fishing may be granted out, capable of being feudalised, and, like servitudes, of being kept up by possession, though unmentioned in the servient title, being ex- Minor rights.

[43] D. Richmond *v.* E. Seafield, 17. Such a habile title was a conveyance of 'salmon-fishings in the water of Spey' found to be by Lds. Benholme and Cowan, diss. L.J.-C. Moncreiff, who would not have excluded a new Crown grant of half the fishings.

[44] Stuart *v.* M'Barnet, 21. In such a case, where the stream was small, L. Chan. Cairns and Lord Deas were of opinion that the grantee of fishings on one half would have a right to prevent trespassers fishing from the opposite bank.

[45] See L. Kilkerran's remarks in Mags. of Perth *v.* L. Gray, 1750, M. 12792.

[46] E. Zetland *v.* Tennent's Trs., 37, following Fraser *v.* Grant, 16th March 1866, 4 Macph. 596 (loch); cf. E. Dalhousie *v.* M'Inroy, 3d March 1865, 3 Macph. 1168.

[47] Milne *v.* Smith, 23d Nov. 1850, 13 D. 112. The same result followed where the fishings granted were those 'pertaining to and surrounding' a river-island —Mags. of Perth *v.* L. Gray, 1750, M. 12792, revd. 1 Pat. 645. The only contrary decision is L. Monimusk *v.* Forbes, 1623, M. 10840, 14264. See St. 2.3.69.

[48] Richardson *v.* Hay, 12th March 1862, 24 D. 775; cf. Mackenzie *v.* Davidson, 27th Feb. 1841, 3 D. 646.

[49] *Supra*, p. 101.

[50] Whatever may have been the original meaning of the word, it is now made to include 'salmon, grilse, sea-trout, bull-trout, smolts, parr, and other migratory fish of the salmon kind'—Act 1862, sect. 2, *infra*, Appx. No. 10.

amples of the heritages assured by the positive prescription. This was held of a right and privilege, contained in a barony charter, of one tide's fishing of salmon yearly, whenever the grantee or his heirs should please to make their option, of the whole boats and nets within a fishery, conform to use and wont. It was also held that the choice had to be made either before or immediately after a tide's fishing, and that a custom of commutation into a money payment did not alter the nature of the right into a permanent (fixed or variable) money charge.[51]

The exercise of the right of salmon-fishing is restricted in two ways—by the law of neighbourhood and by statutory prohibitions.

Restrictions through neighbourhood. Upper and lower.

Opposite.

I. *The Rights of Neighbourhood.*—These apply in three different cases: (1) As between a fishery owner and superior or inferior riparian or fishery owners. In this case the former is bound by the same rules as obtain between upper and lower riparian owners,[52] and, apart from statute, by these alone. (2) As between opposite fishery owners. In large rivers, the only rule is that neither neighbour shall pass the *medium filum*, either in a boat, or by shooting his nets, erecting a watch-stance,[53] interfering with the *alveus*,[54] as by the erection or retention of a new catch-water, though it extend only across the half of the stream which belongs to the builder,[55] or by blasting out boulders, though mostly within the same area, for the purpose of improving a shot of the net,[56] or in any other way, unless by agreement. Neither can interfere with the other restoring the *alveus* on his own side of the middle line to its normal condition, after being disturbed by an extraordinary flood, especially if such has been the immemorial practice.[57] In smaller streams, where the net cannot be efficiently used without sweeping the whole width, it is usual for the opposite parties to arrange for alternate shots of the net,[58] or alternate hours of fishing,[59] without thereby making any alteration, however long the agreement may endure, in the rights of ownership. If no arrangement can be made, it is doubtful whether the Court would interpose with a

[51] Murray *v.* Peddie, 25th May 1880, 7 Ret. 804, and case of Scott *v.* Murray, 1763, there reported.

[52] *Infra*, chap. 29.

[53] Macbraire *v.* Mather, 29th June 1871, 9 Macph. 913.

[54] Mather *v.* Macbraire, 14th March 1873, 11 Macph. 522. This is the import of the decision, though the opinions are general enough to allow of *encroachment* for the purpose of restoring the *alveus* to its normal state. See Trotter *v.* Hume, 1757, M. 12798.

[55] D. Roxburghe *v.* Waldie's Trs., *supra*, [41].

[56] Robertson *v.* Foote & Co., 16th July 1879, 6 Ret. 1290. A custom in favour of such operations would be illegal; and no actual injury has to be alleged.

[57] Mather *v.* Macbraire, [54].

[58] Milne *v.* Smith, 23d Nov. 1850, 13 D. 112.

[59] Brown *v.* Town of Kirkcudbright, 1678, M. 10844, was a case of alleged intermixed fishing limited by the number of boats allowed to each party.

scheme for working the fishery, on the application of either of the parties. Though the most efficient mode of fishing is a matter of public interest, as well as of private concern, there is no instance of such an interference with the use of what is not common but several property. The usual arrangement in rod-fishings is by so many days in the week, or by so many rods. (3) As between a fishery owner and the owner of the bank or banks which the former has a right to use for the prosecution of his fishing. The case here contemplated is that in which the fishing and the ownership of the banks *ex adverso* thereof are in different hands. The use of the bank or banks is necessary to the fishing; the use of both banks is presumed, if the grant extends over the whole river —of one only, if over the half.[60] The use must be taken in a manner as little detrimental to the riparian owners as is consistent with the full beneficial use of the right of fishing;[61] whether the use be regarded as the exercise of a right of ownership[62] or of servitude.[63] It extends to the free use of at least one cart-road as access to the fishery,[64] to liberty of drawing nets, mooring boats, mending and drying nets, and even, it would seem, fixing posts for these purposes[65]—in short, to every act required in the ordinary course of fishing, but not to extraordinary operations, such as forming a stone towing-path on the bank and into the stream, and making sighting shallows therein.[66] For the purpose of conserving his right of user, the fishery owner is entitled to prevent the riparian proprietor from doing anything to the banks which may retard or deteriorate the fishing, as by building an embankment[67] or pier,[68] and to have buildings already erected removed; but he may lose this right by acquiescence in the erection sufficient to raise a personal bar.[69]

Land and fishery owner different.

II. *Statutory Prohibitions.*—Among the earliest and most frequent subjects of Scotch legislation was the protection of salmon, then as now an important article of food. The Scotch Acts[70]

Scope of old statutes.

[60] *Supra*, p. 262.

[61] Miller *v.* Blair, 22d Nov. 1825, 4 S. 214 (N.E. 217); Berry *v.* Wilson, 1st Dec. 1841, 4 D. 139, 149, *per* L. Moncreiff.

[62] *Per* L. Craigie in Miller *v.* Blair, [61], and L.J.-C. Hope in Berry *v.* Wilson, [61].

[63] *Per* L. Moncreiff in Berry *v.* Wilson, [61].

[64] Miller *v.* Blair, [61].

[65] Matthew *v.* Blair, 1612, M. 14263; L. Monimusk *v.* Forbes, [47].

[66] Forbes *v.* Smyth, 19th Feb. 1824, 2 S. 721 (N.E. 602), rem. 1 W.S. 583.

[67] Ibid. (even though to prevent inundation); Berry *v.* Wilson, [61]; see E. Wemyss *v.* Mags. of Perth, 31st May 1867, 39 Sc. Jur. 429.

[68] Berry *v.* Stewart, 1815, 6 Pat. 102. As to legitimate and illegitimate operations on the seaboard, see note [77].

[69] E. Kinnoull *v.* Keir, 18th Jan. 1814, F.C. (acquiescence for sixteen years, and fishing impossible without alteration in the *alveus*).

[70] They are here collected—Ass. Will. c. 10; 1318, c. 11; Qu. At. c. 31; Ass. Toll. c. 6; It. Cam. c. 11; Ord. Just. c. 4; 1424, cc. 11, 12, and 19; 1426, c. 1; 1428, c. 6; 1430, c. 22; 1431, c. 2; 1436, cc. 7 and 10; 1449, cc. 1 and 6; 1457 cc.

were short, often ambiguous, and but ill obeyed. Their general purpose is thus authoritatively stated by Lord Westbury: 'They 'are directed to three objects,—the first, to ensure to the salmon 'a free and unimpeded access to the upper fresh waters which are 'the natural spawning-grounds of the fish; the second, to secure 'the unimpeded return to the sea of the smolt or young fry of 'the salmon; the third, to prohibit the killing of unclean fish 'during the fenced months, as we call them in England—that is, 'when the fish are out of season.'[71] His lordship was also of opinion that the object of the whole legislation 'was the good of 'the community, not the benefit of the co-rival proprietors in the 'river.'[72] It was found to be impossible for the Legislature to anticipate or penalise the protean ingenuity of fishers eager to evade the letter of the statutes. Thence arose a system of liberally interpreting the old Acts in accordance with their plain equity, —'a mode of interpretation very common with regard to our 'earlier statutes, and very consistent with the principle and the 'manner according to which Acts of Parliament were at that time 'framed.'[73] Without going into the history of these old statutes —none of which have been expressly repealed—the general result of these and their modern successors will occupy what remains of this chapter.

Prohibition does not apply to sea-coast.

1. *Stationary Engines.*—An elaborate inquiry into the meaning of the old Scotch statutes established that the prohibitions they contained against the erection of stationary engines for the purpose of salmon-fishing did not apply to the shore of the open sea.[74] It consequently became important to ascertain where in any particular river the estuary and the sea met. After much doubt as to the possibility of fixing a hard and fast rule, the question was decided to be one for a jury to settle, looking to the whole facts of each case;[75] and now the Commissioners of salmon-

Extent thereof.

33 and 34; 1469, c. 13; 1478, cc. 6 and 9; 1483, c. 10; 1487, c. 16; 1489, cc. 3 and 16; 1493, c. 23; 1496, c. 23; 1503, c. 16; 1535, cc. 16 and 17; 1540, c. 28; 1563, c. 3; 1567, c. 38; 1573, c. 4; 1579, c. 27; 1581, cc. 15 and 51; 1584, c. 19; 1587, c. 28; 1594, c. 34; 1597, c. 32; 1600, c. 20; 1606, c. 4; 1617, c. 7; 1621, c. 78; 1640, c. 11; 1641, c. 73; 1661, cc. 245, 272, 281, 320, and 338; 1685, c. 24; 1693, c. 12; 1696, c. 36.—Thomson's Acts.

[71] In Hay *v.* Mags. of Perth, 12th May 1863, 1 Macph. H.L. 41, 43, 4 Macq. 535, revg. C.S. 20th Dec. 1861, 24 D. 230.

[72] 1 Macph. H.L. 44, approving the observations of Lords Gillies and Meadowbank, reported in Buchanan's Rem. Ca. p. 254.

[73] Ibid. See also L. Corehouse in Grant *v.* M'William, 1846, note to 10 D. 666. Lord Eldon grumbled, but acquiesced, Johnstone *v.* Stotts, 1802, 4 Pat. 274, 285.

[74] E. Kintore *v.* Forbes, 31st May 1826, 4 S. 641 (N.E. 648), affd. 11th July 1828, 3 W.S. 261.

[75] D. Atholl *v.* Maule, 7th March 1812, F.C. Buchanan's Rem. Ca. 254, affd. 5 Dow, 282; 4th Feb. 1817, F.C., 28th

fisheries, under the powers conferred on them by the Salmon Fisheries Act, 1862 (sect. 6 (1)) have 'fixed and defined the natural 'limits which divide each river in Scotland (including the estu- 'aries thereof) from the sea, in so far as the same were not 'already fixed by statute or by judicial decision.'[76] The only restrictions, therefore, on fishing on the open sea-shore, are in the interests of the seaboard proprietor.[77] Though stake-nets or other stationary engines are thus legal, there may be possession of salmon-fishings in the sea by net and coble sufficiently ample and exclusive for prescription of the full right.[78]

Nature of the prohibitions.

In rivers and estuaries, fishing by means of stationary engines (except cruives) is absolutely prohibited by the statutes as interpreted by the Court, and this prohibition is left untouched by recent legislation. Lord Westbury's conclusion[79] from the statutes and decisions was, 'that it was not legal to fish with a net 'unless when the net continued in the hand of the fisherman. 'The net must not quit the hand, and the net must be in motion 'during the operation of fishing.' The ordinary method which satisfies these requirements is fishing by net and coble, as practised in Scotland for centuries, or by net alone in imitation thereof, in localities where a boat is of no assistance. So long as the requisites here indicated are maintained, there is no drag on the ingenuity of fishers;[80] but an embargo, not to be got over by any amount of possession,[81] is placed upon all such instruments as

June 1823, 2 S. 442 (N.E. 393), revd. 1 W.S. 590; Carnegie *v.* Brand, 6th July 1826, 4 S. 802 (N.E. 809); Carnegie *v.* Ross's Trs., 17th Jan. 1829, 7 S. 284; Mackenzie *v.* Horne (Cromarty), 28th March 1837, 15 S. 894, 16 S. 1286, revd. M'L. and Rob. 977, where L. Chan. Cottenham suggested the point where the river reaches the level of the sea at low tides; D. Sutherland *v.* Ross, 9th Feb. 1843, 6 D. 425, affd. 3 B. Ap. 315, esp. L. J.-C. Hope's opinion, 6 D. 436 *et seq.* See also D. Gordon *v.* E. Murray, 1728, 1 Pat. 8, 2 Pat. 78. The prohibition does not extend to the Solway—Johnston *v.* Mackenzie, 1869, 6 Sc. L.R. 727.

[76] Bye-law B, appended to Act of 1868. The fishery districts of the division between upper and lower proprietors in each are fixed by Bye-law A. The river Havmore and island of S. Uist were added in 1871, Orkney in 1882, and Shetland in 1883.

[77] Nicol *v.* Blaikie, 23d Dec. 1859, 22 D. 335; L. Adv. *v.* Sharp, 30th Oct. 1878, 6 Ret. 108, L. Adv. *v.* Cathcart, Winter Session 1883, n.r. As to how it consists with a public right of white-fishing by stake-nets, see Gilbertson *v.* Mackenzie, 2d Feb. 1878, 5 Ret. 610, Coulthard *v.* Mackenzie, 18th July 1879, 6 Ret. 1322, Mackenzie *v.* Murray, 1st Dec. 1881, 9 Ret. 186.

[78] L. Adv. *v.* M'Douall, 13th June 1873, 11 Macph. 688, revd. 16th April 1875, 2 Ret. H.L. 49.

[79] In Hay *v.* Mags. of Perth, *supra*, [71].

[80] Ibid. See there a description of the ordinary fishing by net and coble, and of fishing by Bermoney boat, which latter was found by the House of Lords to be an allowable variation; and in Allan's Mortification *v.* Thomson, 14th Nov. 1879, 7 Ret. 221, a description of the hang or drift net, which (not necessarily held in the hand) drops down an estuary with the tide, gradually sweeping round at the end of a three hours' cast.

[81] Cases in [83], *infra*, and E. Fife *v.*

stake-nets and bag-nets,[82] yairs,[83] stent-nets or hang-nets,[84] stoop-nets,[85] loot-nets,[86] and other less familiar forms.[87] All these modes are regarded by the law as unduly obstructive to the passage of the fish up and down the stream, but their immediate purpose is capture. There are other means, however, less directly intended for capture but just as obstructive and therefore illegal—such as instruments for scaring the fish.[88] In regard to erections or other operations executed *in alveo*, the law may be said to be in an unsettled state. It has been held that a fishery owner who is not also owner of any part of the *alveus*, is not entitled to make shallows, called 'sights,' for the purpose of facilitating the fishing higher up the stream; but this was at the instance of the owner of the *alveus*, who complained of the hindrance caused to the passage of the water, not of the fish.[89] Again, the grantee of a right of fishing one half of the stream was held to have no right to erect a ladder, for the same purpose of viewing the fish, on any part of the other half, in an action at the instance of the fishery owner in the latter; but this was a clear case of trespass upon the neighbouring fishery.[90] A question about which there is much dubiety would have arisen had the erection been made within the bounds of the builder's own fishery. In such a case, brought at the instance of upper against lower fishery owners, it has been held,

Aids in fishing.

Gordon, 1707, M. Appx. Salmon-fishing, No. 2.

[82] E. Kinnoull *v.* Hunter, 1802, M. 14301, affd. 4 Pat. 561—see also 4 Pat. 671; D. Atholl *v.* Maule,[75]; Colquhoun *v.* D. Montrose, 1793, M. 12827, rem. 4 Pat. 221; 1804, M. 14283; Mags. of Dumbarton *v.* Graham, 16th Jan. 1813, F.C. affd. 6 Pat. 163; Carnegie *v.* Ross's Trs., 17th Jan. 1829, 7 S. 284; Mackenzie *v.* Murray, 1st Dec. 1881, 9 Ret. 186 (paidle nets ostensibly for white-fishing).

[83] Except for white fish — Mags. of Dumbarton *v.* Graham, [82], explained in Fraser *v.* Duff, 13th Nov. 1829, 8 S. 14, affd. 5 W.S. 57; Mackenzie *v.* Renton, 12th June 1840, 2 D. 1078. It seems the sounder opinion that right of fishing by yairs gives no right of fishing beyond existing yairs in the river *ex adverso* of the lands to which the right is annexed. L. Adv. *v.* L. Lovat, 12th July 1880, 7 Ret. H.L. 122, at pp. 133, 143, 164.

[84] Don Fishers, 1693, M. 14287; D. Queensberry *v.* Ms. Annandale, 1771, M. 14279; Dirom *v.* Littles, 1797, M. 14282; Mackenzie *v.* Houston, 25th May 1830, 8 S. 796.

[85] Erskine *v.* Mags. of Stirling, 1763, M. 14268.

[86] D. Atholl *v.* Wedderburn, 16th Dec. 1826, 5 S. 153 (N.E. 139).

[87] E. Fife *v.* Gordon, 1807, M. Appx. Salmon-fishing, No. 2 (dyke and basket); L. Gray *v.* Sime, 9th July 1835, 13 S. 1089 (sole or poke nets drawn once in a tide). Cairn-nets, once legal only in the Tweed (Ramsay *v.* D. Roxburghe, 9th Feb. 1848, 10 D. 661, affd. 7 B. Ap. 248), are prohibited by 20 & 21 Vict. c. 148, sect. 58. They were legal only when affixed to a bank, not to an island, D. Roxburghe *v.* Waldie's Trs. *supra*, [41], and were not exclusive of right to rod-fishing, *ibid.* In England, see as to stop-nets and putchers, Gore *v.* E. Fishery Comrs., L.R. 6, Q.B. 561; Holford *v.* George, L.R. 3, Q.B. 639.

[88] D. Queensberry *v.* Ms. Annandale, 1771, M. 14279—stretching a rope adorned with horses' bones across the water.

[89] Forbes *v.* Smyth, 19th Feb. 1824, 2 S. 721 (N.E. 602), rem. 1 W.S. 583.

[90] Macbraire *v.* Mather, 29th June 1871, 9 Macph. 913, and *supra*, p. 264.

on the one hand, that placing stones in the bed of a river on the edge of a natural pool, for the purpose of facilitating the drawing of nets, but in no other way obstructing the passage of fish, is illegal.[91] On the other hand, in a case[92] which was decided on specialties, Lord President Inglis said: 'It is no legal obstruction 'if the lower heritor catches double what he did before, provided 'there is nothing objectionable in the mode by which he does so. 'There must be an obstruction that will prevent the passage of the 'fish that escape the lower heritor.' The latter seems the better doctrine, and is supported by a more recent case, where, in a question between an upper and a lower fishery owner, it was decided, on the one hand, that the latter was not entitled to set up or maintain an embankment across one of two channels of a river, erected within the prescriptive period, so as totally to prevent the passage of salmon except at high water; and, on the other hand, that he was entitled to set up and maintain at what was practically its original height an embankment on the foreshore of an island which divided the two channels, seeing that it had no effect in obstructing the passage of the fish, though it served to protect the lower proprietor's channel from injury, and gave him increased facilities for fishing.[93] It was therefore neither an obstruction nor a stationary engine for fishing.

Weirs.

Necessary and partially remediable obstructions to the passage of salmon are mill-dam dykes or weirs. Till 1862 the remedy was the very general enactment[94] that there should be a constant slope in mid-stream, 'as big as conveniently can be allowed' without 'prejudicing the going of the mills.' It is not wonderful that the 'height of mill-dams,' of which the statute complains, remained a grievance with which fishery owners were loath to meddle. It was not fixed till 1831 that they were entitled to attack illegally made weirs piecemeal, and were not obliged to proceed against all such on a river in the lump.[95] The pressure of vested interests[96] and of a necessary trade,[97] confined the regulative

[91] Copland *v.* Maxwell, 13th June 1810, F.C.

[92] West *v.* Aberdeen Harbour Comrs., 8th Dec. 1876, 4 Ret. 207. A fishery was deteriorated by the steepness of the bank of an artificially altered channel. After three years the owners reduced the slope by putting gravel in the channel, and were held entitled to do so.

[93] D. Sutherland *v.* Ross, 26th May 1877, 4 Ret. 765, affd. 15th April 1878, 5 Ret. H.L. 137. As to protection of the channel, see Mather *v.* Macbraire, [54], and Trotter *v.* Home, [54].

[94] 1696, c. 33 (36), *ad fin.*

[95] Forbes *v.* Leys, Masson, & Co., 11th March 1831, 9 S. 933, affd. 5 W.S. 384, where are printed the opinions of the Scotch judges; cf. the similar decision as to pollution, *infra*, chap. 29.

[96] See Mags. of Dumfries *v.* Nith Heritors, 1705, M. 12776; and Ms. Ailsa *v.* Paterson, 1867, 5 Sc. L.R. 5.

[97] Carnegy *v.* Mags. of Brechin, 1704, M. 14288.

powers of the commissioners under the Act of 1862[98] to the construction and alteration of dams, lades, and water-wheels, and this was read as referring to new dams and to old dams requiring to be repaired, and the bye-law was framed accordingly.[99] Moreover, powers are now given to district boards to purchase weirs and cruives.[100] The same old Act prohibited fishing *at* such dykes. This has been construed as meaning, not near,[101] but making use of the weir.[102]

Cruives.

The only legal stationary engines for fishing salmon are cruives, if expressly granted by the Crown,[103] or acquired by prescription on a general[104] or special clause of fishings.[105] A grant of cruive-fishing is distinct from a general grant and separable from it.[106] Being an anomalous mode of fishing, its extent is confined within the limits of what has been prescriptively possessed.[107] It is only legal in that part of a stream where the tide is not perceptible.[108] Cruives are now regulated by bye-law F. issued by the Salmon Commissioners.[109] They may be acquired by district boards for the purpose of demolition,[110] and may be expected slowly—too slowly—to disappear.

Close time: Annual.

2. *Close time: Annual.*—The general Act of 1862, by conferring powers on the commissioners to determine for every district at what dates the annual close time should commence and terminate, under the proviso that in every case it should continue for 168 days,[111] and to vary these dates, differed from the old uniform close time,[112] which was not equally suitable for all rivers. In fairness to upper proprietors, rod-fishing is allowed for a period, also to be fixed by the commissioners, within the net close time. A bye-law was accordingly issued in 1864.[113]

Weekly.

Weekly.—This is now fixed as to net-fishing by the Act of 1862, subject to variation by the com-

[98] Act 1862, sect 6 (6).

[99] Schedule G, printed in Appx. No. 11, *infra*, dated in 1865.

[100] Act 1868, sect 13.

[101] Copland *v.* Maxwell, 13th June 1810, F.C.

[102] Cunningham *v.* Taylor, 1804, Hume 715 (practically a yair); Robertson *v.* M'Kenzie, 1750, M. 14290, is bad law; see Grant *v.* M'William, 1846, in note to 10 D. 666.

[103] St. 2.3.70; Ersk. 2.6.15; Bankt. 2.3.111; B. Pr. 1118.

[104] Don Heritors *v.* Aberdeen, 1665, M. 10840.

[105] Mags. of Inverness *v.* Duff, 1775, M. 14257.

[106] Grant *v.* D. Gordon, M. 14297, 3 Pat. 679, M. 12820, 2 Pat. 582. Does it include rod-fishing? Forbes *v.* E. Kintore, 31st May 1826, 4 S. 650 (N.E. 656).

[107] Don Heritors,[104], and St. 2.3.70.

[108] 1488, c. 16 (2 Thoms. Acts, 211), is preceded by many statutes, which it ratifies, and followed by many by which it is re-enacted.

[109] Appx. No. 11. The old rules are to be found in Mor. 14286 *et seq.*, 4 Pat. 274, 337, 5 Pat. 119, 750.

[110] Act 1868, sect. 13.

[111] Act 1862, sects. 6 (5), 7, *infra*, Appx. No. 10. A lively account of the attempt at legislation in this century is given in Russel on the Salmon, c. iv.

[112] 1424, c. 11 (12), 9 Geo. IV. c. 39.

[113] See Act 1862 in Appx. No. 10.

missioners,[114] and as to rod-fishing by the Act of 1868;[115] and the operations which have to be performed on cruives and stake-nets, for the proper observance of the law, are set out in bye-laws.[116] The penalties for breach of close-time regulations are contained in the statute of 1868, sects. 15 and 21; and similar penalties are incurred by taking or having in one's possession, or selling, &c., any unclean or unseasonable salmon (sect. 20).

The powers of the commissioners are now transferred to the Fishery Board, assisted by an Inspector of Salmon Fisheries for Scotland.[117]

Other statutory provisions.

3. There are various other contraventions of the modern statutes, for which, as well as for the rules concerning the enforcement of the law, and concerning the sale and exportation of salmon, reference can only here be made to the Acts themselves.[118]

Against poaching.

The Home Drummond Act of 1828, and its amendment of 1844,[119] superseded by more recent statutes in other respects, still form the existing law directed against salmon-poaching. The offence is described in the later Act, the procedure in the earlier.[120]

Tweed and Solway.

The Tweed and the Solway being waters long common to the Scotch and to their 'auld enemies,' have had a history different from that of the other rivers and estuaries of Scotland. The Tweed is still regulated by separate Acts.[121] The Solway, though subject to the general Acts, holds an exceptional position with regard to fixed engines.[122]

Title to sue, arising from common interest.

The migratory habits of the salmon, it was obvious from a very early period, gave all and each of the fishery owners on a river a common interest in seeing that nothing was done illegally to obstruct the passage of the fish,[123] whether above or below the complainer's fishery,[124] and whether there were other offenders on the river or not.[125] But this common interest does not give a title

[114] Sect. 7. See Act in Appx. No. 10.

[115] Sect. 15, Appx. No. 11.

[116] D. and F., *infra*, Appx. 11.

[117] 45 & 46 Vict. c. 78. See note to Act 1862, sect. 5, *infra*, Appx. No. 10.

[118] See Acts in Appx. 9-11.

[119] 9 Geo. IV. c. 39, 7 & 8 Vict. c. 95. Of the former, sects. 2, 4, 5, 6, 8, and part of sect. 1, are repealed by the Rev. Act of 1873.

[120] The two Acts, so far as applicable to this matter, are printed in the Appx. No. 9.

[121] 20 & 21 Vict. c. 148, 22 & 23 Vict. c. 70, with some sections of the General Acts 1862 and 1868, and 26 & 27 Vict. c. 50, sect. 4; Stewart, c. xvi.

[122] See Acts in Stewart, c. xvii., and 30 & 31 Vict. c. ccxl. It would be out of place in a general treatise to follow these peculiarities, but see cases in notes [75], [77].

[123] L. Forbes *v.* Leys, Masson, & Co., 13th Jan. 1824, 2 S. 603 (N.E. 515); Mackenzie *v.* Mags. of Dingwall, 19th Dec. 1834, 13 S. 218. Act 1868, sect. 37.

[124] Colquhoun *v.* D. Montrose, 1804, M. 14283.

[125] Forbes *v.* Leys, Masson, & Co., 11th March 1831, 9 S. 933, affd. 5 W.S. 384.

to sue an action for the purpose of prohibiting any one fishing by legal modes in a fishery, to which the complainer avers the fisher has no right, without himself alleging any right to it.[126] It is *jus tertii*. This common interest is probably extended as far seawards as is necessary by the ample estuary boundaries fixed by the commissioners; for the owners of sea-fisheries have no concern with the river in law, whatever may be the actual state of the fact.[127] In the present century, what was always seen to be a common has slowly come to be recognised as an identical interest, fitly represented by district boards, elected by the fishery owners of the district.[128] The only real diversity of interest among these owners, arising from the modes of fishing suited to different parts of a river, is recognised in the distinction drawn in the statutes between upper and lower proprietors.

[126] D. Hamilton *v.* M'Callum, 1724, M. 7824; M'Kenzie *v.* Houston, 16th Jan. 1828, 6 S. 359, 7 S. 298 n., 8 S. 117, affd. 5 W.S. 422; M'Kenzie *v.* Gilchrist, 20th Jan. 1829, 7 S. 297. The remedy by interdict in questions of disputed *right*, and the incidental account kept of fish taken, are noted *supra*, p. 14.

[127] Munro *v.* Munro, 31st Jan. 1845, 7 D. 358, 8 D. 1029.

[128] Act 1828, sect. 10, superseded by Act 1862, sects. 4, 18 *et seq.*; Act 1868, sects. 3-8; see Appx. Nos. 9-11.

CHAPTER XIX.

HIGHWAYS.

'A HIGHWAY is a right of passage in general to all the king's 'subjects, without distinction.' This definition, nowhere to be found in Scotch legal learning, is that of the English law,[1] which has been authoritatively declared to be in this respect the same as the Scotch.[2] It is therefore an incorporeal right. There can be no doubt that this statement of the law is opposed not only to popular nomenclature, but also to the Roman law,[3] to the views of many Scotch lawyers, both before[4] and after[5] it was laid down by the House of Lords, and to the phraseology of some Acts of Parliament.[6] All these agree in regarding a highway as a corporeal heritable subject, the soil trodden by the public, and all below as well as above its surface. But there is also no doubt that the English doctrine is equally applicable in Scotland,[7] and that the ownership of the soil is not affected by its being devoted to the purposes of a public road, except in those cases referred to by Lord Brougham,[8] where the soil has been expressly purchased by

Nature of the right. Incorporeal.

Not ownership of *solum*.

[1] See Ms. Salisbury *v.* G. Northern Ry., 28 L.J.C.P. 40.

[2] *Per* Lds. Campbell and Brougham in Galbreath *v.* Armour, 11th July 1845, 4 B. Ap. 374, 381, 389, citing 1 Inst. 56 a, where the definition is more implied than expressed; Ms. Breadalbane *v.* M'Gregor, 3d Dec. 1846, 9 D. 210, revd. 7 B. Ap. 43; Waddell *v.* E. Buchan, 26th March 1868, 6 Macph. 690.

[3] 2, § 21 D. (43.8).

[4] Especially Craig, 1.16.10; Bankt. 1.3.4, 2.3.108, 2.7.27; and Bell, 638, 659 (St. 2.1.5, 2.7.10; Ersk. 2.1.5, 2.6.17, are ambiguous); L. Glenlee in Forbes *v.* Forbes, 20th Feb. 1829, F.C., and 7 S. 441. See Mackenzie *v.* Bankes, 19th June 1868, 6 Macph. 936; Urie *v.* Stewart, 1747, M. 14524.

[5] L. Mackenzie in Moir *v.* Alloa Coal Co., 15th Nov. 1849, 12 D. 77; and in Torrie *v.* D. Atholl, 12th Dec. 1849, 12 D. 328, 336.

[6] Gen. Turnpike Act, 1 & 2 Will. IV. c. 43, sects. 67, 71. In England, 13 Geo. III. c. 78, sect. 17; 55 Geo. III. c. 68, sect. 4.

[7] Thomson *v.* Murdoch, 21st May 1862, 24 D. 975, *per* L. Curriehill; Campbell *v.* Walker, 29th May 1863, 1 Macph. 825, *per* L. Pres.; Sutherland *v.* Thomson, 29th Feb. 1876, 3 Ret. 485, 491.

[8] 4 B. Ap. 391; see Davison *v.* Gill, 1 East. 64, *per* Kenyon C.J., and other cases in 2 Burn's J.P. 986, 30th ed.

the road authorities. The presumption is that the *solum* of a public road belongs to the owner of the lands through which it runs. If the road forms the march between two estates, each estate is presumed to extend *ad medium filum*. 'This may be 'rebutted by circumstances; but if not rebutted, it is the legal 'presumption.'[9] It is based on the supposition that when the road was originally formed, the proprietors on either side each contributed a portion of his land for the purpose.[10] But there the resemblance to a river-march ends, for a boundary 'by' a road or street is held to exclude the road or street.[11] The theory of ownership in the Crown, retained by it for the purpose of supporting the public right of use, is no longer, if it ever was, a contribution from the Roman to the Scotch jurisprudence. The owner may exercise all rights of ownership which are not inconsistent with the public right of passage. Therefore he will be entitled to substitute a proper carriage access to his premises in town, if he so desires, for the ordinary foot pavement.[12] What has been said concerning the ownership of the soil actually used by the public applies *a fortiori* to waste pieces of land left at the sides of roads.[13] It must be confessed that the doctrine of the private ownership of the soil of public roads has been followed out to its logical results with more strictness in England than in this country. According to both systems of law, the minerals beneath a road are private, not public or Crown property. The difference alluded to lies in the extent of the public right of use. Under the English statute,[14] which corresponds to our Day Trespass Act, and penalises 'trespass by entering or being in the day-'time upon any land in search of or pursuit of game,' it was held that there might be such trespass, though, at the time, the accused was upon a highway.[15] As stated by the judges in the later of the cases here cited, 'it is quite clear that a person using a high-'way otherwise than for the purpose of passing and repassing over 'and along it is a trespasser.'[16] 'By using the highway for an 'unlawful purpose—for destroying game, for instance—the party

Minerals.

English law of trespass.

[9] *Per* L. Chan. Cranworth in Wishart *v.* Wyllie, 14th April 1853, 1 Macq. 389, Beckett *v.* Corp. of Leeds, L.R. 7 Ch. 421; query *ibid.*, whether the presumption applies to a street in a town.

[10] Holmes *v.* Bellingham, 29 L.J.M.C. 132, *per* Cockburn C.J.

[11] *Supra*, p. 98.

[12] St Mary, Newington *v.* Jacobs, L.R. 7 Q.B. 47.

[13] The origin of these is traced by Abbot L.C.-J. in Steel *v.* Prickett, 2 Starkie R. 469, to the straggling necessitated by the road itself being in bad repair. See other cases in 2 Burn's J.P. 986.

[14] 1 & 2 Will. IV. c. 32, sect. 30.

[15] Reg. *v.* Pratt, 4 E. and B. 860; from the highway sending a dog into a neighbouring cover, and firing at a pheasant flying across the road; Mayhew *v.* Wardley, 14 C.B.N.S. 550.

[16] *Per* Willis J., 14 C.B.N.S. 552.

'clearly is guilty of a trespass.'[17] In Scotland, on the other hand, it has been laid down that 'it is impossible that any one can *un-* 'lawfully enter upon the public road or the outlets, or gates at the 'side of it, for the purpose of killing game, or for any other pur- 'pose;'[18] and this is recognised and acted upon as clear law in all cases of poaching. Scotch.

The public right of passage, called a highway, is to be here regarded solely as a limitation or restriction on the landowner's use of his property. In this respect it resembles the rights which have formed the subject of the immediately preceding chapters. It will be found, however, to differ in some important respects from these and all other real rights known to the law. It differs from the predial servitude—of way, for instance—in the title required, which has nothing to do with ownership of a dominant tenement; in the parties affected; in the jurisdiction competent to fix the matter of right; in the powers of the Court with reference to alterations; in the character of the termini; in the user which must be proved; and in the expansibility of the legal use.[19] Though regarded by all our institutional authors[20] as one of the *regalia*, it cannot be numbered among these in the same sense as harbours or ferries, which are transferable to individuals, subject to certain public rights; nor as the sea-shore, in parting with which the Crown is supposed to retain something of its original ownership for the benefit of the public; nor as the sea and navigable rivers, the ownership of which is, as a rule, inalienable. For the Crown, except it may be in regard to the streets of royal burghs,[21] in granting out land above the foreshore, is presumed to retain, and does in fact retain, nothing except the superiority. This fact has accordingly been recognised in practice; for while the Crown has more than once interfered to defend public rights in the foreshore and harbours, there is no instance of its interposing to protect a public highway, and no doubt has ever been expressed of the right *cujuslibet ex populo* to defend the rights of the lieges without the concurrence of the Crown authorities. A highway may come into existence in several ways (to be adverted to immediately), with which the Crown has nothing to do; and it

Regarded as a restriction on private ownership.

Differentiation of the right.

[17] *Per* Erle C.J., ibid. p. 553.

[18] *Per* L.J.-C. Inglis, and acquiesced in by the other judges, in Mains *v.* M'Lullich, 6th Feb. 1860, 3 Irv. 533, 537; see Colquhoun *v.* Liddell, 16th Nov. 1876, 4 Ret. Just. 3; and see *supra*, p. 137.

[19] *Per* Ls. Curriehill and Deas in Thomson *v.* Murdoch, 21st May 1862, 24 D. 975, 981, 982. The two may coexist on the same *solum*—M'Gavin *v.* M'Intyre, 12th June 1874, 1 Ret. 1016; Brownlow *v.* Tomlinson, 1 Man., and Gr. 484, 486.

[20] See note [4].

[21] Miller *v.* Swinton, 1740, M. 13527.

requires no support from any fictitious reservation of guardianship or ownership in the Crown. The unique right[22] thus differentiated has been called an easement or servitude by a high authority;[23] but this is either an erroneous or a dangerously wide use of the words. Another Lord Chancellor put the distinction thus: 'A 'servitude is one thing, but a general right upon a dedication to 'the public is another thing. This is a road with a right to the 'whole world to traverse it; and therefore it has nothing to do 'with a dominant tenement or a servient tenement, and there is 'no question of servitude.'[24]

Division. According to amount of legal use.

There are many terms, partly technical, partly popular, used to designate different sorts of road, either according to the amount of use which may be legally taken by the lieges, or according to the mode of management. The amount or character of legal use is an element of the utmost importance in questions relating to servitude rights of way where the quantity of prescriptive possession is an exact measure of the right acquired. But this is only true in regard to public roads with some limitation. A road which had been used for public passage on foot and on horseback for the prescriptive period, and by carts ever since these had been introduced into the district—a date which was within that period—was found to be a public road for all purposes;[25] provided, however, that it could be so used from one end to the other without being subjected to engineering operations at any part, so as to fit it for the more extensive use.[26] The landowner is not bound to suffer the interference with his land which such alterations would involve, and this seems to be the only check upon the expansion of the public right.

According to management.

The term 'highway'—equivalent to 'public road'—is the general name for many sorts of public passages which used to be distinguished, according to their origin or the management to which they were subject, as public rights of way; statute labour, commutation, or parish roads; turnpike roads, military roads, and parliamentary roads. A public right of way, in the narrow sense usually conferred on the phrase, differs from all the others (sometimes called Queen's highways) in not being set up or maintained

[22] The nearest analogue in the Roman law to highways in Scotch law is to be found, not in the public road, but in the banks of navigable rivers, which were the property of individuals, subject to certain public uses—4 I. (2.1); 5 D. (1.8).

[23] L. Campbell in Galbreath *v.* Armour, *supra*, [2].

[24] L. St Leonards in Torrie *v.* D. Atholl, 1 Macq. 65, 77.

[25] Forbes *v.* Forbes, 20th Feb. 1829, F.C., and 7 S. 441.

[26] Mackenzie *v.* Bankes, 19th June 1868, 6 Macph. 936—widening required for a cart-way; Mitchell *v.* Brown, 30th Nov. 1826, 5 S. 56 (N.E. 52)—stairs.

by any public fund. This distinction led to others, and was all along the only one which was worth attending to in the present relation. Now that the management and maintenance of all roads of the latter class are intrusted to substantially the same body, it is the only distinction possible.[27]

I.—Public Right of Way.

Described.

This is the ordinary name given to such a public passage as was not originally created, has not been adopted, and is not maintained or repaired, by any statutory authority. It is scarcely conceivable that a landowner should, by express dedication,[28] throw open to the public irrevocably a passage which neither the public nor any local authority is bound to repair. Accordingly, as matter of fact, all such rights of way have been acquired through prescription, which presumes an informal grant.[29] In supplement to what has been already said in general concerning prescription, it is proper, though at the risk of some repetition, to add here some account of the special features which are to be found in right of way cases. In doing so, the order adopted in the chapter on Prescription will be, as much as possible, adhered to. The books are rich in illustrations of this matter, for no actions have been more obstinately fought out than cases of right of way.

Prescriptive possession in this matter. As of right, not by tolerance.

1. *The Character of the Possession required for prescribing a Public Right of Way—(a) It must be had as Matter of Right.*— 'It is quite plain that if a proprietor has on his property an 'approach or a path which he requires for his own purposes,[30] 'and if he allows the public to go on it for any length of time by 'mere tolerance, that gives them no right. If there be challenges 'now and then, and people persist in going nevertheless, that is 'very much against the supposition of tolerance. Or if, as in 'Harvey's case,[31] the proprietor puts up walls and obstructions 'from time to time to stop the people, and they knock them down 'and continue to go, it is very difficult to reconcile that with the 'notion of tolerance. Something depends on the nature of the 'road, and the kind of uses allowed to be made of it. It would 'be more difficult to suppose that a man was tolerating people

[27] Roads and Bridges (Scotland) Act, 41 & 42 Vict. c. 51, and local Acts there saved.

[28] See D. Roxburghe *v.* Mags. of Dunbar, 1713, M. 10883.

[29] Napier's Trs. *v.* Morrison, 19th July 1851, 13 D. 1404, 1405.

[30] *E.g.*, last case—an inchoate avenue; cf. Meldrum *v.* Horsburgh, 28th June 1870, 8 Macph. 912; Duncan *v.* Scott, 22d Feb. 1876, 3 Ret. H.L. 69.

[31] Harvey *v.* Lindsay, *infra*, 41.

'driving carts and carriages upon his private road, than to sup-'pose that he was allowing them to walk upon it.'[32] The road claimed in the case which gave rise to these observations was a footpath made by the proprietor's dependants for their own use in crossing a common. There were other circumstances, to be noticed immediately, which pointed in the same direction, and the claim of public right was negatived. Lord Deas reiterated the same doctrine, in all points, in a later case,[33] where he also remarked that this tolerance on the part of landowners was 'most lucky for 'the public; because, otherwise, no member of the public would 'be allowed to go anywhere, unless where there was a known and 'regular and established right.' It has been remarked by the same judge, in course of argument by counsel, with the entire approval of his brethren of the First Division, that there can be no course more dangerous to the interest of a proprietor than to set up a warning against trespassers at the *terminus* of a by-path. The threat of prosecution is harmless except as conclusive proof of the absence of tolerance, in case the public are able to prove prescriptive use. The use of a road by the servants or dependants of the proprietor, or by the occupier of the adjacent lands or of lands within the same estate and his dependants,[34] or by persons visiting or trading with any of these, cannot avail the public. Their possession is not as members of the public, but only derivative from the landowner. Possession by neighbouring landowners or occupiers and their servants, will, if nothing to the contrary appear, be ascribed to the humbler right of servitude.[35] There are also certain privileged persons, such as clergymen, medical men, constables, post-runners, and even invalids,[36] and rod-fishers,[37] whose use of a road is also unavailable to the public, on the ground of public duty or customary tolerance.

Sufficient.

(*b*) *Sufficient to indicate the Right claimed.*—The last illustrations make it evident that it is not enough to prove use of a road by a certain class of the public, and by that class alone. On the other hand, it will be sufficient to prove resort by the public generally, for a particular purpose, and for that alone,[38] provided

[32] *Per* L. Deas in Jenkins *v.* Murray, 12th July 1866, 4 Macph. 1046, 1054.

[33] Mackintosh *v.* Moir, 28th Feb. 1871, 9 Macph. 574, 576.

[34] Jenkins *v.* Murray, [32], 4 Macph. 1048, *per* L.P. M'Neill.

[35] See M'Ghie *v.* M'Kirdy, 2d Jan. 1850, 12 D. 442; Thomson *v.* Murdoch, 21st May 1862, 24 D. 975; Macfie *v.* Stewart, 24th Jan. 1872, 10 Macph. 408; M'Gavin *v.* M'Intyre, 12th June 1874, 1 Ret. 1016, for the relation of the two rights.

[36] Jenkins *v.* Murray, [32].

[37] Ibid.; Sheriff *v.* Ferguson, 26th Jan. 1844, 6 D. 530. As to sea-fishers driven on shore by stress of weather—D. Roxburghe *v.* Mags. of Dunbar, [28].

[38] Geils *v.* Thompson, 12th Jan. 1872, 10 Macph. 327.

it be a definite and intelligible purpose.[39] The only purpose concerning which there has been some doubt is that of public recreation; and it has been held to be no objection to the claim of public right that the road was resorted to for this object, and not for business.[40] But there is no such right as a *jus spatiandi*—a privilege of using the surface of a private landowner's ground without express grant for strolling about, games, access for curling, &c.,[41] and a right of way cannot be founded on any of these practices. Where ground is unenclosed, and members of the public have been in the habit of straggling all over it, their user points to anything but a right of way.[42] The mere fact that the ground is waste and unenclosed is a strong presumption—in lowland innerly districts at least—against its being traversed by any public passage.[43] The presumption is vastly strengthened if no definite track is proved, if the public straggled over the whole of the waste, pastured, bleached, and quarried stone in it, erroneously believing it to be a public common. Yet these presumptions may be and have been overcome,[44] by proof, not of the public strolling about on the moor, but of their pursuing a definite course across it, though with deviations caused by the state of the weather, depth of ruts, or alteration of gradients.[45] Other illustrations of this matter will be found in the doctrine of 'public place.' Lastly, prescription of a right of way over or near the line of an old road closed by the proper authority will not be easily made out.[46]

Jus spatiandi?

There are some other circumstances which have been taken into consideration in deciding on the sufficiency of the public possession, none of them conclusive either way, but useful as make-weights. Thus, it is distinctly adverse to the public that the alleged way is no shorter than an undoubted public road, or is a roundabout.[47] It is a more favourable case for the public if the

Short cut.

Cul de sac.

[39] *Per* L.P. Inglis in Duncan *v.* Lees, 20th June 1871, 9 Macph. 855, 856, with special reference to 'a public place.'

[40] Rodgers *v.* Harvie, 13th Jan. 1826, 4 Murr. 25, 5 S. 917 (N.E. 851), affd. 3 W.S. 251; sequel, 7 S. 287, 8 S. 611; Jenkins *v.* Murray, [32], *per* L. Deas; Darrie *v.* Drummond, 10th Feb. 1865, 3 Macph. 496; Duncan *v.* Lees, 13th Dec. 1870, 9 Macph. 274, 855.

[41] Harvey *v.* Lindsay, 23d June 1853, 15 D. 768; Dyce *v.* Hay, 10th July 1849, 11 D. 1266, affd. 28th May 1852, 1 Macq. 305, and other cases *infra*, chap. 20.

[42] Burt *v.* Barclay, 17th Dec. 1861, 24 D. 218.

[43] Mackintosh *v.* Moir, 28th Feb. 1871, 9 Macph. 574. In the Highlands it is different, ibid., p. 577.

[44] S.C., 2d March 1872, 10 Macph. 517.

[45] Ibid. As to fixing down the line of road, see *infra*, p. 290.

[46] Napier's Trs. *v.* Morrison, 19th July 1851, 13 D. 1404, 1406, per L.J.-C. Hope; M'Kerron *v.* Gordon, 15th Feb. 1876, 3 Ret. 429.

[47] Rodgers *v.* Harvie, [40], 4 Murr. 25, 30, *per* L.C. Comr. Adam; Jenkins *v.* Murray, [32], *per* L.P. M'Neill.

way is a thoroughfare, than if it were a *cul de sac*, out of which there is no exit but by returning.[48] If stiles have been erected, and have existed for a long period on fences crossing a track, there is little need for further evidence of actual passage along it,[49] provided what is proved is passage by the public, and not use of the road by those connected with the land. Gates, sufficient when shut to obstruct the passage of cattle or sheep, may be legally erected across rights of way, provided they are so made as to be easily opened by any traveller of ordinary intelligence.[50] On footpaths the ordinary gate is a turnstile or wicket;[51] on cart-tracks a swing-gate. It will therefore be more difficult to set up a public right where the track is traversed by fences, unfurnished with stiles, or furnished with locked gates, or with gates of the socket and spar pattern. It may be added here, that when a public footpath has been established, the owner of the lands through which it runs, or the tenant with his leave, is entitled for grazing purposes to put swing wicket-gates across the footpath, provided they are so constructed as not to be in any material degree injurious or obstructive to the public in the free use of the path. This right being one *meræ facultatis*, cannot be lost *non utendo*.[52] In many cases the only alternative, the fencing of the whole path, would be ruinous to the landowner and annoying to a country-loving public. The same is true *mutatis mutandis* of cart-roads. If, however, the public acquiesce in obstructions to an alleged passage which are 'in a material degree injurious' to them, there is a strong presumption against the sufficiency of their possession to set up a prescriptive right.[53] Thus, a through-going close in a burgh, which had about fifty-five years before the raising of any question been formed by the proprietor of the *solum* for the use of his tenants, but had been used by the public for the prescriptive period as a thoroughfare, was held to have been kept

Stiles.

Gates.

[48] Cuthbertson *v.* Young, *infra*, [63], per L. Chan. Cranworth, 1 Macq. 455, 456; Rugby Charity *v.* Merryweather, 11 East. 375 n.; Bateman *v.* Bluck, 21 L.J.Q.B. 406; Sheafe *v.* The People, 29 Amer. R. 49.

[49] Rodgers *v.* Harvie, [40], 4 Murr. 25.

[50] Sutherland *v.* Thomson, 29th Feb. 1876, 3 Ret. 485; Hay *v.* E. Morton's Trs., 5th Dec. 1861, 24 D. 116.

[51] Rodgers *v.* Harvie, [40], 7 S. 289.

[52] Sutherland *v.* Thomson, and Hay *v.* E. Morton's Trs., *supra*, [50]. The same is true of servitude roads—Wood *v.* Robertson, 9th March 1809, F.C.; and see Borthwick *v.* Strang, 1799, Hume, 513; Wilson *v.* Jamieson, 1827, 4 Murr. 364; Oliver *v.* Robertson, 10th Nov. 1869, 8 Macph. 137.

[53] Mags. of Elgin *v.* Robertson, 17th Jan. 1862, 24 D. 301, 788, sequel, Jenkins *v.* Robertson, 9th June 1864, 2 Macph. 1162, revd. 5 Macph. H.L. 27, 6 Macph. 951, 7 Macph. 739; Macfarlane *v.* Morrison, 19th Dec. 1865, 4 Macph. 257; see also Graham *v.* Sharpe, 29th Nov. 1823, 2 S. 540 (N.E. 471); Glasgow and Carlisle Rd. Trs. *v.* Whyte, 10th Dec. 1825, 4 S. 303 (N.E. 306), 7 S. 115; Macdonald *v.* Watson, 23d Feb. 1830, 8 S. 584.

private, chiefly from the circumstance that the owner had, till within a few years, retained at one end a gate which was locked frequently at night and occasionally by day for the purpose of excluding strangers.[54] The presumption backwards, arising from prescriptive possession, was here elided by adverse possession within living memory; in the absence of this presumption, the presumption in favour of the freedom of private property emerged, and could not be redargued by mere resort of the public, added to the fact that repairs and lighting were provided by the burgh authorities, for places to which the public are in the habit of resorting, must be kept passable and safe. Lastly, in regard to the extent of prescriptive possession, the existence of two flights of stairs on a steep road yields a strong presumption in favour of a foot-road as against a cart-road.[55] Stairs.

(*c*) *Longi temporis.*—The duration of the prescriptive period, and the relation thereto of immemorial possession, have been already illustrated from the present subject.[56] Length of possession.

(*d*) *Uninterrupted.*—There may be interruptions or obstructions to public passage along a certain track, which are quite ineffectual to prevent the public from continuing to use the road.[57] Such petty annoyances as these are no hindrance to the course of prescription;[58] they are rather a distinct disproof of tolerance. If their ineffective nature is apparent, and the proprietor means to put a final stop to the public use, his remedy is to bring the matter into Court. If he neglect this, his true remedy, he has himself to blame. On the other hand, if the interruption be effectual, physically by the actual exclusion of the public, and morally by their acquiescence in being excluded, it does not matter for how short a time this vindication of the freedom of private property has lasted. Mere symbolical interruption would not be enough; but actual stoppage, though for a single day in a year or in a series of years, suffered by the public for a well-understood reason, as well as in order to retain the privileges of tolerance, would be amply sufficient.[59] In this sense the possession of the Uninterrupted.

[54] Wallace *v.* Police Comrs. of Dundee, 9th March 1875, 2 Ret. 565.

[55] Mitchell *v.* Brown, 30th Nov. 1826, 5 S. 56 (N.E. 52).

[56] *Supra*, p. 48.

[57] A custom of ploughing across it may not infer interruption but only a dedication limited to that extent—Mercer *v.* Woodgate, L.R. 5, Q.B. 26; and therefore the road authorities would not be entitled to causeway the path so as to prevent ploughing—Arnold *v.* Blaker, L.R. 6, Q.B. 433. Though passage is rendered difficult by the ploughing, the public are not entitled to deviate—Arnold *v.* Holbrook, L.R. 8, Q.B. 96.

[58] Fardell *v.* Wemyss, 1673, M. 10880.

[59] There is no Scotch case. In England it is common to close private grounds and paths, and even private rivers, in this fashion. The nightly closing of parks to which the public are admitted may be

public must be peaceable and uninterrupted,[60] where it is founded upon as prescribing in their favour a right of way which is disputed by the landowner. Similar rules obtain in the converse case, where the public is admitted or proved to have by prescriptive or immemorial possession vindicated a right of passage, and the proprietor of the soil seeks to oust them. There is no doubt that disuse by the public for the space of forty years is an implicit surrender of their right and a reacquisition by the landowner of his unburdened ownership. Where it was found by a special verdict that the public had employed a road for all purposes from time immemorial down to 1806, and from that date to 1864 for passage on foot only, it was held that they had lost the higher and retained only the lower right.[61] The general rule of which this is a good illustration was thus laid down by Lord Eldon:[62] 'If the [public] right be once established by clear and distinct 'evidence of enjoyment, it can be defeated only by distinct evi-'dence of interruptions acquiesced in.' In the case which gave rise to this observation, it was proved that there had been no interruption on the part of the landowner till a very recent date, and that it had not put a stop to the public enjoyment. In a later case,[63] it was held no sufficient averment of acquiescence by the public that walls had been built across the track, and that no public use had been made of it for twenty-two years. In the House of Lords the surrender of the public right was regarded as a question of degree; and the period here mentioned was held insufficient, and as going rather to indicate that no public right ever existed. The deduction, which may, with some confidence, be spelt out of the *dicta*, is that where no other elements except mere disuse by the public, lapse of time, and the ordinary obstructions, such as fences without stiles, placed across the track,[64] are averred as proving acquiescence, nothing short of forty years will suffice for the restoration to the proprietor of his exclusive right. But if the soil have undergone before the eyes of the public changes—such as being built upon or turned into garden-ground—which are obviously inconsistent with a public right of passage, a shorter time will suffice; and the public may then lose any claim to a

Where right of way has, and has not, been established.

either a vindication of private ownership or a police provision, according to circumstances. See Wallace *v.* Comrs. of Dundee, [54].

[60] Burt *v.* Barclay, [42]; Mags. of Elgin *v.* Robertson, [53].

[61] Macfarlane *v.* Morrison, 19th Dec. 1865, 4 Macph. 257.

[62] In Rodgers *v.* Harvie, [40], 3 W.S. 251, 260.

[63] Cuthbertson *v.* Young, 7th Feb. 1852, 14 D. 465, affd. 1 Macq. 455. The earlier stages of the case are reported in 12 D. 521, 13 D. 1308, 14 D. 300, 375.

[64] Or ploughing up the track—Scott *v.* Drummond, 17th May 1867, 5 Macph. 771.

substitute. In a very special case,[65] decided later than either of the two last cited, a majority of the judges of the Second Division gave expression to opinions which at first sight seem opposed to the rules which have been thus evolved from the *dicta* of the Court of Appeal, but the law is very clearly brought out in the issue which was finally approved. A piece of ground was in 1756 admittedly both *de jure* and *de facto* subject to public passage over it. At the date when the question arose—in 1858—it as admittedly had been free of such a burden *de facto* for more than the possessory period. Members of the public who were the pursuers of an action of right of way asked an issue, whether in these circumstances the proprietors had wrongfully encroached on and finally shut up the alleged road. In very properly refusing this issue, the Lord Justice-Clerk—now Lord President Inglis—with the concurrence of Lord Cowan and Lord Neaves, was of opinion that 'forty 'years' possession was the only fact which would form a good 'ground for a judgment in favour of the pursuers.' Lord Benholme, on the other hand, contended that where a public road was admitted to have existed at one time, the *onus* lay upon the defenders to prove forty years' disuse by the public. The issue finally adjusted laid it on the pursuers to prove the original nature of the road (which was admitted), and its public use within forty years prior to 1858, and that it had been wrongfully shut up. This was practically an adoption of Lord Benholme's view, so far as the shape of the action admitted. Some *onus* unquestionably lay on the public, for they could not allege a possessory right; but that *onus* was sufficiently lifted off by such proof of possession within the prescriptive period as to redargue that disuse, which it was the defenders' part to make out.[66]

2. *Public Place.*—In order that the public user, thus described, may set up a right of way, the track used must lead from one public place to another.[67] A 'public place' has been defined as 'a place to 'which the public resort for some definite and intelligible purpose,'[68] as an undoubted public road,[69] a harbour,[70] &c. It need not be a place of much resort, provided the resort proved be not occasional

From and to a public place.

Quid?

[65] Davidson *v.* E. Fife, 5th June 1863, 1 Macph. 874.

[66] As to the mode of computing the prescriptive period, see Rodgers *v.* Harvie,[40]; Cuthbertson *v.* Young,[62]; Mercer *v.* Reid, 1st Feb. 1840, 2 D. 520; and *supra*, p. 46 *et seq.* As to deduction of a proprietor's minority, see Craufurd *v.* Menzies, 12th June 1649, 11 D. 1127; Black *v.* Mason, 18th Feb. 1881, 8 Ret. 497; and *supra*, p. 61.

[67] Rodgers *v.* Harvie,[40], 4 Murr. 25; Burt *v.* Barclay, [42].

[68] *Per* L.P. Inglis in Duncan *v.* Lees, 20th June 1871, 9 Macph. 855, 856.

[69] Jenkins *v.* Murray,[32].

[70] Moncreiffe *v.* Perth Harbour Trs., 13th Dec. 1842, 5 D. 298.

A creek.

or casual. The observance of this rule in practice has given rise to very fine distinctions. Thus in the case of *Pettycurwick*, where one of the alleged *termini* was a creek in the sea-shore, it was first held that the sea-shore might in such questions be brought up to a 'public place' by averring public use even for recreation; but that where nothing was alleged except use for boats by certain neighbouring feuars, there was something more like servitude than public right.[71] Some averments of use to which this criticism could not apply having been made, the whole question of right of way and 'public place' was sent to a jury,[72] which found by implication in favour of the public in the latter respect; and their verdict was upheld and justified by the Court on the ground that it was used chiefly by fishermen, but also by the public generally. No opinion was given as to what would have been the result if it had been used by fishermen only.[73] A similar but more complicated question arose in the *Kinkell* case. There was here no difficulty in determining that a peculiarly-shaped rock on the sea-shore, reached but not covered by the tide (and therefore private property), was not such a public place as is required for the *terminus* of a public way, though frequently visited by means of the path claimed, which was above high-water mark, by pleasure-seekers, geologists, and the public generally, as a natural curiosity.

Or harbour.

More difficulty was found in respect to a natural creek, popularly termed a harbour; but it also was at first determined not to be a 'public place,' on the ground that the only user proved was that it was occasionally run into for shelter in rough weather, or for gathering wilks for bait.[74] But additional evidence of public use being produced at a new trial, chiefly from old maps, a county history, and Court records, the Court found there was sufficient evidence to go to the jury, especially of use in ancient times, and applied the verdict which was in favour of the public.[75] The question, whether the *terminus* of an alleged public way within an individual proprietor's estate is a public place, does not arise when the allegation is, and it has to be proved, that the way goes further, over another's land, to a public place. In the first case of this sort, the House of Lords held the English and Scotch law as to 'public place' to be identical, but that 'the abstract question 'whether the confluence of two rivers can be a *terminus a quo*

Confluence of two rivers.

[71] Darrie *v.* Drummond, 10th Feb. 1865, 3 Macph. 496.

[72] Scott *v.* Drummond, 12th June 1866, 4 Macph. 819.

[73] S.C., 17th May 1867, 5 Macph. 771.

[74] Duncan *v.* Lees, 13th Dec. 1870, 9 Macph. 274.

[75] S.C., 20th June 1871, 9 Macph. 855.

'or a *terminus ad quem* of a public right of way did not arise. 'The question was as to a public right of way, up to and which 'might extend beyond the confluence—a right to go further on, 'so as ultimately to reach a good *terminus ad quem*.'[76] The alleged terminus was not shut out or affected by a local and personal Act, which directed the erection of a fence between the proprietor's policy and the towing-path which skirted one of the rivers.[77] In the *Burntisland* case, decided a year later, the action was brought by certain inhabitants of a burgh at one end of the road alleged; and the issue adjusted traced its course thence as 'leading westwards through the defender's lands to the western 'extremity thereof, and thence proceeding to S. and A.;' of which places S. was not, while A. was admitted to be, public.[78] The matter of law raised by such an issue was by the Court of Session, with the approval of the House of Lords,[79] determined thus: It was not necessary to prove a footpath 'thence proceeding;' it was enough to prove a right of way to S., and that the right of way went beyond it, though S. was not in itself a public place. It was enough if the public got legally away from it anyhow, whether by public path or made road. The Lord Chancellor remarked that a public way might terminate in a *cul de sac*. The point of the case was that A., not S., was the *terminus ad quem*. 'If S. 'had been a mere private house to which the public had been in 'the habit of going from Burntisland and returning back again,'[80] there would have been no public way. Even if the same habit was indulged in by the inhabitants of A. at the other end of the road claimed, evidence of this would be irrelevant, for it could only prove the existence of two tracks with a common private *terminus*. And so it was held in a case where the path was used not as a thoroughfare between two public places, but as conducting from these to a private waste on which the public were permitted to saunter and stroll.[81] Where it is admitted or proved that one part of an alleged road between two undoubtedly public places is not a public road, the rest of the road cannot be proved

Right to go beyond.

Two paths with common private *terminus*.

[76] Campbell *v.* Lang, 19th June 1851, 13 D. 1179, affd. 6th May 1853, 1 Macq. 451. See opinion by L.C. Comr. Adam, that the margin of a [navigable] river is a point at which a highway may legally end—Oswald *v.* Lawrie, 1828, 5 Mur. 6, 12. Case of right of way along a sea or river wall or embankment—Greenwich District Board *v.* Maudslay, L.R. 5 Q. B. 397.

[77] Campbell *v.* Lang, [76].

[78] Cuthbertson *v.* Young, [63], 12 D. 521, 13 D. 1308.

[79] S.C., 20th Dec. 1851, 14 D. 300, 375, 465, affd. 24th Feb. 1854, 1 Macq. 455; see also Wilson *v.* Jamieson, 1827, 4 Murr. 364—a moor.

[80] *Per* L. Chan. Cranworth, 1 Macq. 458.

[81] Jenkins *v.* Murray, 12th July 1866, 4 Macph. 1046.

to be public, without showing that the intermediate *terminus* is a public place, just as if there had been two roads *tandem* with one common goal.[82] Where it is not obvious on the face of the issue that both *termini* are public places, this ought to be expressly stated.[83]

Remedies.

3. *Remedies.*—There are some peculiarities in the remedies which may be competently employed for or against the public.

Brevi manu.

(*a*) It has been stated, in an earlier part of this work,[84] to be for the public interest that possession, however obtained, should not be innovated upon, except by consent of the parties or by order of law. Among the rare cases in which alterations of possession *brevi manu* have been held to be justified, are those in which members of the public have removed obstructions to their passage along an alleged public way. But this can only be done *de recenti*, within some short period after the obstructions were first set up, so that the act shall be one not of innovation but of restoration of the former state of possession.[85] It does not follow that if a suspension and interdict is brought in consequence of these violent proceedings, the champions of the public right, though they may justify their act, will get expenses.[86] On the other hand, a landowner who had allowed a public road to be made through his lands, and to be used for three years, was not entitled *brevi manu* to shut it up on the plea that the conditions of his permission had been broken.[87]

Parties.

(*b*) When judicial proceedings are resorted to, the first question is as to who are the proper parties. Three sorts of difficulties have

All parties not called.

arisen: (1) The first arose out of the fact that the way claimed ran through the lands of more than one proprietor, and was at once settled by a finding that it was *res inter alios* and therefore incompetent for one of the proprietors to plead in defence to a declarator of right of way directed against him alone, that all parties were not called.[88] If the same or other parties sue the other proprietors or any of them for declarator of the same way, the cases will be conjoined *ob contingentiam*.[89]

Title to sue.

Then (2) there has been much discussion as to who may com-

[82] Duncan *v.* Lees, [74].

[83] Macfie *v.* Stewart, 24th Jan. 1872, 10 Macph. 408—'to the Beattockburn.'

[84] *Supra*, pp. 15, 20.

[85] Macdonald *v.* Watson, 23d Feb. 1830 8 S. 584—within four days; Glasgow and Carlisle Rd. Trs. *v.* Whyte, 10th Dec. 1825, 4 S. 303 (N.E. 306), 2d Dec. 1828, 7 S. 115—the time is not given. See these Rd. Trs. *v.* Tennant, 9th Feb. 1854, 16 D. 521; and Geils *v.* Thompson, 12th Jan. 1872, 10 Macph. 327.

[86] Glasgow and Carlisle Rd. Trs. *v.* Whyte, [85], 7 S. 115.

[87] Graham *v.* Sharpe, 29th Nov. 1823, 2 S. 540 (N.E. 471).

[88] Craufurd *v.* Menzies, 12th June 1849, 11 D. 1127.

[89] Cuthbertson *v.* Young, [78], 13 D. 1308.

petently sue on behalf of and so as to bind the public. The difficulty arises partly from the circumstance that no individual dominant title, as in servitudes, is possible from the nature of the case, partly from the happy flexibility of the Scotch remedy of declarator. In an action of declarator of right of way along the top of a sea-beach from the burgh of B. to the village of A., and of removing of certain obstructions to free passage, the title of certain inhabitants of the burgh to sue was sustained against a plea that the obstructions had been erected before any of the pursuers had come to live in the burgh.[90] In a later action by five inhabitants of A. concerning another part of the same footpath, an action of transference under the old practice becoming necessary through the death of the defender, it was found to be competently brought at the instance of four of the original pursuers, being in vindication not of a joint but of a several public right,[91] and the representatives of deceased pursuers did not require to be made parties.[92] The Court of Session had already confined the title to sue in such cases to householders, such as shopkeepers and tenant farmers, and had excluded servants living in family with their masters, apparently on account of their migratory habits.[93] In the *Glentilt* case[94] the Lord Chancellor expressly reserved his opinion as to the justice of this exclusion; but both the Scotch Court and the Court of Appeal there repudiated the idea of confining the title to sue to persons having special interest, from residing in the immediate neighbourhood or otherwise, by recognising the title of inhabitants of places so far separated from each other and from the road claimed as Edinburgh, Perth, and Aberdeen. These claimed simply as members of the public, having no local connection with the district, nor any especial interest except that they and their fellow-citizens had been in use from time immemorial to travel along the road. There was thus an allegation that the pursuers themselves had used the road; and the mere fact of their bringing the action was a sign that they meant to use it again. In both Courts this was held to be a sufficient interest. The Lord Chancellor, while he was of opinion that the

New-comers.

Transference.

Servants.

Residents not in neighbourhood.

[90] Cuthbertson *v.* Young, [78], 25th Jan. 1850, 12 D. 521; see Rodgers *v.* Harvie, [40], 7 S. 287.

[91] Hay *v.* E. Morton's Trs., 28th Jan. 1859, 21 D. 1055; other stages at 24 D. 116, 1054, affd. 4 Macph. H.L. 53.

[92] S.C., 5th Dec. 1861, 24 D. 116.

[93] Tait *v.* E. Lauderdale, 10th Feb. 1827, 5 S. 330 (N.E. 306).

[94] Torrie *v.* D. Atholl, 12th Dec. 1849, 12 D. 328, affd. 4th June 1852, 1 Macq. 65. See the authorities quoted by the Lord Ordinary, esp. Guild *v.* Scott, 21st Dec. 1809, F.C., where, however, all the pursuers dwelt in the vicinity of the road; and E. Cassillis *v.* Mags. of Wigton, 1750, M. 16122, where that was not the case.

earlier cases had been decided on the rule that 'right to sue is 'commensurate with right to use,' and that a similar liberty must be conceded in calling defenders where the action was at the instance of the landowner, said that extravagant cases on both sides could easily be conceived and would be checked; that he did not decide the abstract question of the right of any one of her Majesty's subjects to intermeddle with any road whatever; but that enough of interest had been averred. No patrimonial or local interest was required.[95] Again, it is not only in the way of entire want of interest that unreasonable litigation may arise and require to be checked. A landowner is bound no more than any other litigant to defend, without obtaining caution for his expenses in case of absolvitor, an action relating to right of way, brought by mere men of straw—such as labouring men subsisting on wages—if he can prove that they are put forward to screen others in a better position in life, and are supported in the litigation by a subscription. These last were the true *domini litis*, or at least as much interested as the nominal pursuers.[96] It will be different if the pursuers, poor working men, are put forward, not by men of means, but by others—and especially by a committee—in the same position in life as themselves. No caution will be required, nor will the members of committee be sisted.[97]

Men of straw.

Lastly (3), the proper parties, for the reasons set forth in the next paragraph, to be called as defenders in an action at the instance of the proprietor, are those, or some of those, who have been in the habit of using the road,[98] who have broken down obstructions,[99] or who reside in the immediate neighbourhood.[100]

Defenders.

(*c*) *Res judicata.*—The rules as to the effect of a decree in absence do not differ in any way from the general rules of process; nor indeed do those which relate to decrees *in foro*. In both cases, however, on account of the wide range and varied intensity of interest residing in the public at large, the Court has to be specially careful lest any landowner succeed in defeating a public right of way by a colourable suit against 'indifferent strangers,' or against insignificant or collusive defenders; or by defending an action raised collusively by members of the public in his interest.

Res judicata.

[95] 1 Macq. 65, 74, 76. See his lordship's reference to the English procedure, p. 73.

[96] Jenkins *v.* Robertson, 20th March 1869, 7 Macph. 739.

[97] Potter *v.* Hamilton, 19th July 1870, 8 Macph. 1064.

[98] *E.g.*, Forbes *v.* Forbes, 20th Dec. 1829, F.C. and 7 S. 441.

[99] Mercer *v.* Reid, 1st Feb. 1840, 2 D. 520.

[100] Campbell *v.* Lang, 19th June 1851, 13 D. 1179, affd. 6th May 1853, 1 Macq. 451.

Lord Chancellor St Leonards in the *Glentilt* case,[101] in holding that a decree obtained against an 'indifferent stranger' would not be *res judicata* against the public, implied that it would be different with a decree properly achieved. This was also the opinion of three judges of the First Division, and of Lord Colonsay in the House of Lords, in a later case,[102] and of Lord Benholme in a case already cited,[103] where he said: 'In such a *popularis actio* 'a carefully considered judgment would be decisive against any 'other parties having the same interest trying to open up the 'question.' Against these authorities are to be placed an opinion of Lord Curriehill (1st) and a doubt of Lord Chancellor Chelmsford in a case which was decided on a specialty.[104] The case was this: An action of declarator of right of way, brought by the magistrates and certain citizens of a burgh as members of the public, resulted in a verdict in favour of the pursuers, which was set aside by the Court as against evidence.[105] No new trial took place, the judgment of the Court was acquiesced in, and decree of absolvitor of consent obtained on modification of expenses. Action was then brought by other inhabitants against the same defenders to establish the same right of way. Without determining the general question, the House of Lords, reversing the judgment of the Court below, held that the decree of absolvitor, having been the result of a compromise and not a *judicium* to which the Court had applied its mind, could not be *res judicata*.[106]

Declaratory or possessory.

(*d*) The form of action suitable to different cases—whether declaratory or possessory—has been already discussed in a general way.[107] Illustrations from the present matter are collected below in a note.[108] The form of issues to be sent to a jury has been discussed in several cases.[109] The raising of a declarator of

Management pending action.

[101] Torrie *v.* D. Atholl, [94].

[102] Jenkins *v.* Robertson, 9th June 1864, 2 Macph. 1162, revd. 5th April 1867, 5 Macph. H.L. 27; see L. Fullerton's obs. in Maule *v.* Maule, 5th July 1831, 9 S. 876, 892, and in Greig *v.* Mags. of Kirkcaldy, 21st May 1851, 13 D. 975, 980.

[103] Potter *v.* Hamilton, [97].

[104] Jenkins *v.* Robertson, as last cited, [102].

[105] Mags. of Elgin *v.* Robertson, 17th Jan. 1862, 24 D. 301, 788.

[106] Jenkins *v.* Robertson, [102]; later stages, 6 Macph. 951, 7 Macph. 739.

[107] *Supra*, p. 12.

[108] Goldie *v.* Oswald, 1814, 2 Dow, 534; Maclean *v.* Donald, 4th Feb. 1840, 2 D. 528; Carson *v.* Miller, 13th March 1863, 1 Macph. 604; Wilson *v.* Gilbert, 18th March 1863, 1 Macph. 663; Calder *v.* Adam, 2d March 1870, 8 Macph. 645; Shearer *v.* Hamilton, 24th Jan. 1871, 9 Macph. 456; M'Kerron *v.* Gordon, 15th Feb. 1876, 3 Ret. 429. The views of the majority in the last case may be doubted.

[109] Mercer *v.* Reid, 1st Feb. 1840, 2 D. 520; Mercer *v.* Rutherford, 18th Feb. 1840, 2 D. 616; Cuthbertson *v.* Young, [62], 13 D. 1308; Davidson *v.* E. Fife, 5th June 1863, 1 Macph. 874; Hay *v.* E. Morton's Trs., 6th June 1862, 24 D. 116, 1054, affd. 4 Macph. H.L. 53;

right of way by the public does not prevent the proprietor from altering the surface and appearance of the alleged line of road; but a plan will be ordered by the Court to be taken, at the expense of the pursuers in the first instance, so as to perpetuate the evidence of its original condition.[110] Nor, on the other hand, does it shut out the proprietor from his possessory right to prevent trespassing on the alleged road, injury to fences, and erection of stiles.[111] A possessory right on the part of the public may be sufficiently protected pending declarator, though a gate is put across the track, provided it be not locked;[112] and this sort of possession may be all that is legalised even by a decree of declarator.[113]

Issues.

(*e*) The issues sent to a jury, and consequently their verdict, are framed either in a very general form—as a road between two places named; along the bank of a river,[114] &c.; or, more specifically, as 'in or near' a line marked on a plan produced in process.[115]

Fixing line of path.

In either case, something more requires to be done in the way of defining the rights of the parties in the event of a right of way in these general terms being proved. This is and always has been in the discretion of the Court, as a Court of equity as well as of law, proceeding not according to technical rules, but according to its judgment of what is just and right.[116] So long as the ish and entry are preserved and the general line followed, deviations[117] from the lines marked will be allowed, as for the purpose of getting better gradients or opening up building-ground. The picturesque is sacrificed to the useful.[118] The Court has even gone so far, in a case where two roads starting from the same ford reached a turnpike about 180 yards apart, as to order a new convenient road to replace both.[119] The ordinary course is to obtain a report from a man of skill. If the track so ascertained is to be fenced, its width will depend on the nature of the road proved; the fencing

Fergusson *v.* Shirreff, 18th July 1844, 6 D. 1363. The Lord Ordinary has a discretion to send the case to proof without a jury, and the Division will not, without strong grounds, interfere with his judgment — Hozier *v.* Hawthorn, 22d May 1883.

[110] Anderson *v.* E. Morton, 9th July 1846, 8 D. 1085.

[111] S.C., 18th July 1846, 8 D. 1249.

[112] Kirkpatrick *v.* Murray, 26th Nov. 1856, 19 D. 91.

[113] Hay *v.* E. Morton's Trs., 5th Dec. 1861, 24 D. 116. See *supra* as to gates, p. 280; Davies *v.* Stephens, 7 C. and P. 570.

[114] Cases in note [109] (except Hay), and in M'Farl. on Issues, 601 *et seq.*

[115] Hay *v.* E. Morton's Trs., *supra*, [109]; Mackintosh *v.* Moir, *infra*, [116].

[116] *Per* L.P. Inglis in Mackintosh *v.* Moir, 2d March 1872, 10 Macph. 517, 518, criticising the views of the House of Lords in Hay (White) *v.* E. Morton's Trs., *supra*, [109].

[117] There of 22 yards at one place.

[118] Ibid. The same under a general decreet arbitral — Mags. of Renfrew *v.* Speirs, 5th July 1823, 2 S. 458 (N.E. 410).

[119] Macdonald *v.* Farquharson, 24th Jan. 1832, 10 S. 236.

being solely in the interest of the proprietor, he has no relief for any part of the expense; the cost of the expert's report will be borne equally; the proprietor is not obliged to repair the track so fenced, though his fences deprive the public of the detours formerly made to avoid damp places;[120] but the public are at liberty to make repairs, provided in doing so they do not encroach on private property.[121] This definition of the track does not apply to the sea-shore.[122] Once the line is fixed, it will not be alterable; nor can the road be closed except by some statutory authority.[123] This was not given by the General Turnpike Act or by the Statute Labour Act; nor is it conferred by the Roads and Bridges Act; nor will it be lightly construed as bestowed in a local Act.[124] A County Road Act provided that all the powers granted to the road trustees, under certain previous Acts, of altering, &c., turnpike roads, should be extended to altering, &c., 'cross roads, and all other roads which are not turnpike.' The previous Acts dealt with 'great, cross, and by roads' alone; and it was held that the later enactment was similarly restricted, and did not apply to a public right of footpath. Certain errors of procedure relieved the Court from deciding whether such a track would have come under a right to suppress 'public roads of every 'description.'[125] Consequently, such rights of way are left very much to casual care and the discipline of use.

How alterable?

II.—Statutory Highways.

It has been already remarked that, for the present purpose, it was unnecessary to enlarge on the subdivisions into which those public roads which were not mere rights of way had to be ranged prior to the Roads and Bridges Act of 1878. They possessed this character in common, that they were the creatures of statute, and were created and managed by some public authority. No department of the law has given rise to so many Acts of Parliament, general and local. Prior to the adoption of the Act of

Sketch of legislation.

[120] This seems contrary to the English obligation to repair *ratione clausuræ*—R. *v.* Ramsden, 27 L.J.M.C. 296, and old case there cited; but the English law of repair differs entirely from the Scotch.

[121] Rodgers *v.* Harvie, 27th Feb. 1830, 8 S. 611, and see 7 S. 287.

[122] Berry *v.* Wilson, 1st Dec. 1841, 4 D. 139; Anderson *v.* E. Morton, 9th July 1846, 8 D. 1085; Cuthbertson *v.* Young, *supra*, [62], 12 D. 521.

[123] Bruce *v.* Wardlaw, 1748, M. 14525, was special; cf. Lords Moncreiff and Meadowbank in Berry *v.* Wilson, [122].

[124] Pollock *v.* Thomson, 18th Dec. 1858, 21 D. 173.

[125] Murray *v.* Arbuthnot, 29th Nov. 1870, 9 Macph. 198.

1878, the County Road system stood partly on local enactments, partly on the old statute service, as converted by a general statute in 1845;[126] the Turnpike or Toll system stood on special statutes and on the general Act of 1831;[127] and certain Military and Parliamentary Roads in the Highlands, at one time partially maintained by the Exchequer, had been thrown on the counties through which they ran by an Act passed in 1862.[128] In certain counties the whole burden of maintaining the roads has by local Acts been thrown on the counties and burghs, and these Acts are not cut down by the operation of the Act of 1878 (unless it be adopted) in counties in which both tolls and statute labour have been abolished.[129] Elsewhere the said Act is now the exclusive code of Road law, superseding all prior enactments.[130]

Parts of Acts affecting landowners.

While there has been, therefore, great diversity in the origin of our roads, in their management, and in the source of the fund requisite for their maintenance and repair, there has been none of any practical moment in the way in which they affect the rights of adjoining landowners. The provisions of the General Turnpike Act relating to this subject are substantially repeated in the Statute Service Conversion Act of 1845, and have been in most part incorporated in the Act of 1878. As this last statute has now come in place of these earlier enactments, it will be sufficient to print in the Appendix the sections of the Act which apply to the present matter and those which have been incorporated in the Act from the General Turnpike Act—pointing out in the notes any alterations which have been made by the Act, and citing the few cases which have been decided in elucidation of the same or similar enactments.[131] It will be observed, on glancing over the side-notes which accompany the sections thus excerpted, that the subjects dealt with are chiefly these,—the adoption and shutting up of existing roads and the formation of new ones, the disposal of toll-houses, the formation of footpaths, the obtaining of materials, drainage, obstructions, hedges and trees adjacent, encroachments, watering, fencing dangerous spots, nuisances in the use of

[126] 1669, c. 16; 8 & 9 Vict. c. 41; cf. 1617, c. 8; 1661, cc. 38, 41; 1685, c. 39.

[127] 1 & 2 Will. IV. c. 43. The most accessible authority on the history of Scottish roads is the Report of the Royal Commission of 1858; see also Barclay on Highways.

[128] 25 & 26 Vict. c. 105. The earlier Acts were all repealed, except parts of 59 Geo. III. c. 135, and of 5 Geo. IV. c. 38.

[129] 41 & 42 Vict. c. 51, sects. 4, 5, 6.

[130] Ibid. The compulsory commencement of the Act is 1st June 1883.

[131] Appx. No. 12, *infra*. The cases which have arisen out of the transition from the old system to the new are beyond the scope of this work. They are to be found at 7 Ret. 686; 6 App. Cas. 881 (8 Ret. H.L. 93), 9 Ret. 1134.

the roads, incautious and unskilful driving, disturbance of the *solum*, fencing of adjacent pits, pasturing, side-ridges, gates, weeds, scaring and noxious trades, and the identification of certain vehicles.

Streets.

The streets of towns and other populous places, if dedicated to public uses, are nothing but highways, managed, where there is no municipal authority, by the county trustees [132] under local Acts or the general Act of 1878; and, where a municipal authority exists, by that authority, according to ancient custom,[133] or under local Acts, or under the General Police Acts of 1850 or 1862.[134] It would be out of place to enter into further detail on a matter which belongs more properly to the domain of local government, and which has been very sparingly elucidated by judicial decisions.

[132] See Threshie *v.* Mags. of Annan, 11th Dec. 1845, 8 D. 276.

[133] See Buchanan *v.* Bell, 1774, M. 13178; Ferguson *v.* Fall, 1776, M. 13181.

[134] Cargill *v.* Mags. of Portobello, 11th Dec. 1863, 2 Macph. 244; Campbell *v.* Leith Police Comrs., 21st June 1866, 4 Macph. 853, revd. 8 Macph. H.L. 31; Millar's Trs. *v. Eosd.*, 19th July 1873, 11 Macph. 932; Hill *v.* Galbraith, 28th May 1874, 1 Ret. (Just.) 13; Dundee Police Comrs. *v.* Mitchell, 2d June 1876, 3 Ret. 762; Edinburgh Mags. *v.* Paterson, 3d Dec. 1880, 8 Ret. 197; Harris *v.* Leith Mags. 11th March 1881, 8 Ret. 613; Reed *v.* Donald, 3d Feb. 1882, 9 Ret. 613.

CHAPTER XX.

MISCELLANEOUS PUBLIC RIGHTS.

Introduction.

ATTEMPTS have been made at various periods to vindicate for the public certain rights of use over the estates of private persons, other than those which have been described in the preceding chapters, mainly on a halting analogy with those predial servitudes which will be discussed in the next Part. The result has been, first, that wherever the alleged right has been based simply on possession as members of the general public, the attempt has failed; secondly, that an express grant in similar circumstances may be effectual; and thirdly, that members of a community, merely as such, may vindicate certain customary uses in questions with persons holding the feudal title to land for the benefit of the community. Of these in order.

Alleged prescriptive public rights.

1. *Based on possession by Members of the Public.*—In no case has such possession given rise to rights over private property. Thus, it has been shown that while prescriptive possession availed to set up a public right of way, it was incapable of constituting a right

Drove-stances.

to drove-stances, and of depasturing therein, as incident to the right of passage.[1] These were not a mere expansion of the road. Nibbling by passing droves was a mere accident, and not the assertion of a right; and the fact that a fixed charge had been levied per night for the use of the stances was of no consequence

Jus spatiandi.

either way.[2] A custom on the part of the public of straying over open uncultivated ground, and pasturing, bleaching, and quarrying therein, under the impression that it was a public common (which it was not), conferred no right, and ran the risk of imperilling

[1] *Per* L. Fullerton, and the House of Lords in M. Breadalbane *v.* M'Gregor, 3d Dec. 1846, 9 D. 210, alt. 7 B. Ap. 43; cf. Murray *v.* Mags. of Peebles, 8th Dec. 1808, F.C.

[2] *Per* L. Campbell. The distinction between a profit *à prendre* and a simple easement does not belong to Scotch law.

the proof of a right of way through the ground.[3] Recreation such as this might be relevant to establish a public footpath;[4] for other purposes it is regarded as the result of mere tolerance. By a similar reasoning, it would seem that there can be no such institution as a public well or pump at common law. Only those directly or derivatively in right of lands abutting on the spring, or on the natural or prescriptive course of the water flowing from it, are entitled to make use of the water,[5] and immemorial use by the public will be of no avail. It is different, of course, where the well belongs to the community; and doubts have been expressed as to the impossibility of the acquisition by the public inhabiting a district—not erected into a burgh of any sort—of right to a well, used by them for the prescriptive period 'by dipping their vessels into the well, in order, by means of such dipping of the vessels, to carry off the water for use at their own homes, or in such other manner as they thought fit.' Lord Blackburn strongly insisted on the inconvenience of ascribing such a public use to the aggregated servitude right effeiring to each cottage in the neighbourhood, or of calling in the aid of any corporation or burgh or landowner for this purpose. The point did not require to be decided, since the only question was whether a well situated on private ground, the water of which had been used for domestic purposes gratuitously by the inhabitants of a district for time immemorial, was a 'public well' under the Public Health Act, sect. 89. It was held to be so, and the local authority of the adjoining police burgh recently formed was found entitled to cover it over and insert a pump.[6] Again, there is no public right of trout-fishing, even when the stream is adjacent to a public path,[7] or it or a loch may be reached by a public access.[8]

Public well.

Trout-fishing.

The subject of these miscellaneous claims on behalf of the public has been elaborately discussed in modern cases. One of these was an interdict against certain feuars and inhabitants of a village using a private loch, which was surrounded on all sides by

Resort to private loch for curling, &c.

[3] Mackintosh *v.* Moir, 28th Feb. 1871, 9 Macph. 574, 10 Macph. 29, 517; see Jenkins *v.* Murray, 12th July 1866, 4 Macph. 1046.

[4] Rodgers *v.* Harvie, 10th July 1827, 5 S. 917, affd. 3 W.S. 251; Jenkins *v.* Murray, *supra*, [3].

[5] Mackenzie *v.* Learmonth, 17th Nov. 1849, 12 D. 132; L. Melville *v.* Dennistoun, 21st May 1842, 4 D. 1231, is not *contra;* nor is Geils *v.* Thomson, 12th Jan. 1872, 10 Macph. 327; and 'inhabitants' in Thorburn *v.* Charters, 4th Dec. 1841, 4 D. 169, must be taken to mean feuars or house-owners.

[6] Smith *v.* Denny Comrs., 19th March 1879, 6 Ret. 858, affd. 7 Ret. H.L. 28, 5 App. Cas. 489; and see the English cases in Harrop *v.* Hirst, L.R. 4 Exch. 43.

[7] Fergusson *v.* Shirreff, 18th July 1844, 6 D. 1363.

[8] Montgomery *v.* Watsons, 28th Feb. 1861, 23 D. 635.

the complainer's lands and unprovided with any public access, for the purpose of curling, skating, and sliding during frost. The Court held that though these pastimes had been exercised by the public from time immemorial, no right had been acquired either by the respondents or the public, and that the usage must be ascribed to tolerance.[9] While the alleged right of the respondents, who were feuars, was no servitude, as being novel and occasional (and, it might have been added, of no direct benefit to their feus), the case against the public was *a fortiori* of a decision of the House of Lords pronounced in the preceding year, in which a higher degree of tolerance was proved.

Dyce v. *Hay.* In that case[10] a person, one of the magistrates of and resident in a burgh, raised a declarator of right to use for the purposes of recreation a piece of ground belonging to the defender, alleging immemorial use by himself and the other inhabitants of the said burgh and of a neighbouring burgh and village, for recreation, air, exercise, walking, and resting. The action was thrown out on the relevancy, both in the Court of Session and in the House of Lords. Lord Justice-Clerk Hope was of opinion that the claim was really on behalf of the public; that walking and resting and taking the air by the public in private ground no more limit the full right of property than does promiscuous pasturage on an estate whose boundaries are well known and fixed, since the use has not the character of assertion of right to use for a specific purpose, and being, therefore, not injurious, does not require to be interrupted. The cases were then passed in review to show that there was no such right known to the law as a prescriptive *jus spatiandi* on private property, and that there was a marked distinction between rights so claimed and the user of land held for a community. Lord Medwyn and Lord Moncreiff[11] took the same view. Lord Cockburn dissented, being of opinion that the conclusion was relevant, and that mere inhabitancy of the neighbouring burgh gave a title to sue. In the Court of Appeal, Lord Chancellor St Leonards remarked, that it would be more injurious than beneficial to the public if their wanderings and strollings out of the line of a footpath could found the claim there made. 'It is a claim so large 'as to be entirely inconsistent with the right of property, for no 'man could be considered to have a right of property worth hold-'ing in a soil over which the whole world has a privilege to walk 'and disport itself at pleasure.'[12] The decision did not affect the

[9] Harvey *v.* Lindsay (Lochwinnoch), 23d June 1853, 15 D. 768.

[10] Dyce *v.* Hay, 10th July 1849, 11 D. 1266, affd. 1. Macq. 305.

[11] L. Moncreiff explained that Rodgers *v.* Harvie, [4], was directly in point.

[12] But see Goodman *v.* Saltash, 7 App. Cas. 633.

law of village-greens and playgrounds. 'It is admitted that the 'Scotch agrees with the English law, that if there be a piece of 'ground unenclosed (not that I mean to say enclosure would 'make any difference unless there was an exercise of adverse 'right)—but I say, if there be a piece of ground unenclosed and 'dedicated from time immemorial to the public, from which a 'custom could be laid for sports generally or for village recrea-'tions, nobody, I trust, will suppose that such rights can at all be 'affected by' the present decision. Village-greens.

In the latest Scotch case[13] on this subject, it was held that a summons brought by parties 'as inhabitants of the town or village 'of L., and as constituent members of the community,' for themselves 'and all others,' was in vindication of an alleged public right; that a conclusion that they and all others were 'entitled 'to the full use and enjoyment' of a piece of ground near the village, 'in the same manner as they were formerly accustomed to 'use it,' was too vague; that a conclusion claiming right to use the ground for holding public markets,[14] supported only by ancient usage, and a statute conferring the right on a neighbouring proprietor, was incompetent, there being no title to sue; that no public right of quarrying stones, taking away clay, feal and divot, of watering and drying lint, or of drying hay, was known to the law—that it would be worthless if it existed—and that it could not be set up by prescription; and finally, that whatever might be the law as to village-greens, a claim for the use of the said ground on behalf of the public in general, 'for public games and exhibi-'tions, and for a playground for their children,' was untenable. *Henderson* v. *E. Minto.*

As was remarked by the Lord Ordinary in the last case, there is no instance in Scotch law, except in that case itself, of a claim for the use of private property as a village-green or playground; so that it does not clearly appear on what was founded the admission of counsel in the case of *Dyce*, that in this respect English and Scotch law agreed. It is true that immemorial use by the public of a footpath has been held to imply dedication,[15] and that dedication proved by custom has been pleaded in support of other claims.[16] No clear guidance can be obtained by the Scotch lawyer from the English cases, since these are complicated by the distinc- English cases.

[13] Henderson *v.* E. Minto, 1st June 1860, 22 D. 1126.

[14] See L. Neaves on market rights, p. 1132.

[15] Torrie *v.* D. Atholl, 1 Macq. 65, *per* L. Chan. 77.

[16] E. Morton *v.* Stuart, 1813, 1 Dow, 91, 5 Pat. 720; and cases of Dyce, [10], Henderson, [13], and Harvey, [9]. L. Deas's remarks in Sanderson *v.* Mags. of Musselburgh, 22 D. 24, 31, contemplate different circumstances, *infra*, p. 299; Aikman *v.* D. Hamilton, [18], *per* L. Wynford, 6 W.S. 77.

tion between easements and profits *à prendre*, and by the customs of copyholds. The principal authorities are cited below.[17]

Express grant of public privilege.

2. *Express Grant in favour of a Community or of the Public.*— Whatever may be prescribed for may be granted; but it is often not true that what may be granted may be prescribed for. A man may make a foolish grant which will bind him and his successors; but it would not be right to presume that he had made such a grant on any evidence short of the grant itself.[18] The grant may take the shape of a reservation submitted to by a disponee and incorporated in his titles. Of this sort was the reservation by the magistrates of St Andrews in selling the links, that 'the 'same shall be reserved entirely as it has been in times past for 'the comfort and amusement of the inhabitants and others who 'shall resort thither for' the purpose of golfing. The Court of Session sustained the title of certain inhabitants and certain members of a golfing society to sue declarator of right to golf and interdict against the owners of the links hindering them, and injuring the links by keeping rabbits or otherwise, and granted decree in their favour. The case was remitted by Lord Eldon for further consideration.[19] The magistrates had sisted themselves as pursuers after the title to sue had been sustained, and his lordship desired the opinion of the Court below whether, if the title to sue *quâ* inhabitants or the public was repelled, it might be sustained as dependent on the acts of the corporation. In any case, 'it was a 'strong thing to say that all who chose to do so might play at golf on 'a man's ground, and for that purpose destroy all the produce which 'it was best calculated to yield.[20] It was a still stronger thing to say that the inhabitants and public had right to kill the rabbits according to what had been the immemorial practice. On this matter the remit desiderated proof of the practice. It was not warranted by the special reservation, and could not, it is thought,

[17] Fitch *v.* Rawling, 2 H. Bl. 393 (games); Abbot *v.* Weekly, 1 Lev. 176 (dancing); Blewett *v.* Tregonning, 3 A. & E. 554 (sand from sea-shore); Tyson *v.* Smith, 6 A. & E. 745, 9 A. & E. 406 (to erect booths at fairs); Mounsey *v.* Ismay, 1 H. & C. 729, 3 H. & C. 486 (horse-racing); Race *v.* Ward, 4 E. & B. 702 (water from spring); Ms. Salisbury *v.* Gladstone, 9 H.L. 692 (taking clay); Hall *v.* Nottingham, L.R. 1 Ex. D. 1. In most of these cases the custom was confined to the inhabitants of a parish for use of land within it—Sowerby *v.* Coleman, L.R. 2 Ex. 96. It must be not unreasonable — Dyce *v.* Hay, [10], Tyson *v.* Smith, and Ms. Salisbury *v.* Gladstone.

[18] *Per* L. Wynford in Aikman *v.* D. Hamilton, 6 W.S. 64, 76, revg. 17th June 1830, 8 S. 943. To the same effect see L. Eldon in Cleghorn *v.* Dempster, 1813, 2 Dow, 40, 62; and L. St Leonards in Dyce *v.* Hay, *supra*, [10], 1 Macq. 312, 315.

[19] Cleghorn *v.* Dempster, 1805, M. 16141, rem. 2 Dow, 40.

[20] 2 Dow, 65.

be set up by prescription. In a later case,[21] where it appeared that in mutual declarators of property nearly 200 years old it had been found that the one party, who was owner of land adjoining the disputed ground, had the sole right of pasturing on the same; and that the other party, the magistrates and inhabitants of an adjoining burgh, had only the privilege of 'walking ' and making parades ' therein without anything being said of the ownership,—it was held that this finding was not *res judicata* against the successor of the first party now bringing a new declarator of property. It was observed that a public right such as here established left no use of the surface open to the owner except pasturage. It was subsequently held[22] that the ownership was in the proprietor of the adjoining land; but that, in consequence of the town's *jus spatiandi*, he had no right, by embanking, quarrying, or interjecting ground between the disputed land and the sea, to interfere with the full and free enjoyment of the said servitude.[23]

Customary use of municipal lands.

3. *Customary Uses of Municipal Lands.*—In the cases which belong to this category, the Court is engaged not in judging of a public right in private property, but in controlling the administration of public officials. An examination of the decisions[24] would lead beyond the scope of this work. They will come up again in treating of servitudes, along with others of a similar type.

[21] Mags. of Dundee *v.* Hunter, 14th Nov. 1843, 6 D. 12.

[22] 4th June 1868, 20 D. 1067.

[23] See 1 Macq. 312, *per* L. St Leonards in Dyce *v.* Hay. The Public Parks (Scotland) Act, 1878, 41 & 42 Vict. c. 8, enables local authorities to provide recreation-grounds, *infra*, chap. 38. The Parks Regulation Act of 1872 (35 Vict. c. 15) only applies in Scotland to Holyrood Park and Linlithgow Peel or Park.

[24] Jaffray *v.* D. Roxburghe (Kelso), 1755, M. 2340, 14517, alt. 1 Pat. 632; Cochran *v.* Fairholm, 1759, M. 14518; Mags. *v.* Inhabs. of Kilmarnock, 1776, 5 B.S. 406; Sinclair *v.* Mags. of Dysart, 1779, M. 14519, affd. 2 Pat. 554; Mags. of Earlsferry *v.* Malcolm, 12th June 1829, 7 S. 755; Home *v.* Young (Eyemouth), 18th Dec. 1846, 9 D. 286; Kelly *v.* Mags. of Burntisland, in note to 9 D. 293; Sanderson *v.* Mags. of Musselburgh, 22d June 1859, 21 D. 1011, 22 D. 24; Goodman *v.* Saltash *supra*,[12]; Paterson *v.* Mags. of St Andrews, 9th Dec. 1879, 7 Ret. 712; Grahame *v.* Mags. of Kirkcaldy, 19th June 1879, 6 Ret. 1066; 19th Jan. 1881, 8 Ret. 395, var. 26th July 1882, 9 Ret. H.L. 91, 7 App. Cas. 547.

CHAPTER XXI.

COMPULSORY SURRENDER OF LANDS—THE LANDS CLAUSES CONSOLIDATION ACT.[1]

Statutory authority required.

ALTHOUGH by the common law both of England and Scotland private ownership of land is sacred from violation even on the plea of the public convenience, and although no tribunal has been intrusted with power to compel a surrender of the same for any purpose whatever,[2] yet the Legislature, in the exercise of the plenitude of its supereminent authority, has long been in the habit of relaxing the rigour of the law, by passing private or special Acts, enabling the promoters of undertakings, proved satisfactorily to be of public utility, to compel individuals to give up their lands for the purposes of these Acts. It is useless to inquire on what theory of land-ownership the Legislature proceeded in granting these compulsory powers, and whether any analogy may be found in other parts of the national polity; for the scope and mode of exercise of these powers are now definitely fixed by a general statute, and illustrated by a huge mass of case law.

Genesis of the Act.

The rapidly increasing prosperity of both countries during the

[1] It would have been satisfactory to escape the labour of preparing this chapter and the relative Appendix, and thereby to reduce the bulk of this work, by a simple reference to the many excellent treatises both in English and Scotch law which illustrate this subject. But these books regard the matter less from the landowner's point of view than from that of the company, more especially the railway company. Moreover, to have omitted this matter would have been to leave unnoticed one of the most characteristic limitations of the private ownership of land. The subject is treated more fully in the following works: Hodges, Shelford, Godefroi and Shortt, Browne and Theobald on Railways, Ingram, Lloyd on Compensation; and in Scotch law, in the careful treatise on Railways by Deas. They are all of use in various ways: but the author has mainly followed the works of Godefroi and Shortt, and of Deas; while, as in other parts of this work, he has adopted the plan of printing the statute with brief notes.

[2] See Lord Watson's criticism of the three Scottish cases in which protection was refused to right of ownership in Grahame *v.* Kirkcaldy Mags. (*supra*, p. 299).

latter half of last century led to the promotion of schemes too vast for the resources of individuals and for the limits of single estates. But for the interposition of Parliament, any of these schemes might have been shattered by the obstinacy or greed of the pettiest yeoman, the use of whose land happened to be essential to its plan. First in date came canal companies;[3] then in 1801 tramway or railway companies; and later still, harbour, water, and gas undertakings. The application of steam to traction on railways produced a crop of private Acts of ever-increasing length,[4] each containing practically the same clauses to a large extent. In order to remedy the evils thence arising—partly from the expense of printing,[5] partly from the want of uniformity which, sometimes by fraudulent design, characterised what should have been merely formal clauses—a series of Acts was passed in 1845 and 1847, for the purpose of 'consolidating in one Act 'certain provisions usually inserted in' these private or special Acts. The only one of these Acts which is of direct concern in this place is the 'Lands Clauses Consolidation (Scotland) Act, '1845,'[6] which follows, both in the statute-book, and substantially also in its terms, the English Act passed for the same end.[7] The only amending Act was passed in 1860.[8] The Scotch Act is printed with notes in the Appendix.[9] It is incorporated in whole or in part with all Acts which authorise works of a public nature requiring for their execution the acquisition of lands in Scotland. It will be convenient to enforce one or two points which should be borne in mind in reading the Act, and then to give a rapid sketch of its contents.

General points in construction.

So far as the Act authorises the exercise of compulsory powers, it derogates from the freedom of private property, and must be construed strictly as against the promoters.[10] These powers can only be exercised for the purposes of the special Act; anything beyond gives rise to an action at law, in some cases to a claim for restoration of the land taken.[11] The Act does not apply to con-

[3] The Act for the Bridgewater Canal is dated in 1759, 32 Geo. II. c. 11. The earliest Scotch canal—the Forth and Clyde—was begun 1768, suspended 1777, completed 1790.

[4] The earliest railway Act—Wandsworth to Croydon Act, 1801—consisted of 95 sections; one of the last self-contained Acts—Lancaster and Carlisle Act, 1844—reached 381.—Shelford, Introduction, xxxvii.

[5] It was stated by Sir F. Kelly that these Clauses Acts had between 1845 and 1856 been applied to 3000 special Acts, and had saved 130,000 pages of print.—Ingram, p. 3.

[6] 8 Vict. c. 19.

[7] 8 Vict. c. 18.

[8] 23 & 24 Vict. c. 106. See sect. 10 of the Scotch Act, and notes in the Appx., No. 13.

[9] Appendix, No. 13.

[10] See esp. sects. 17, 37, notes.

[11] Sects. 48, 120 *et seq.*, notes.

tracts made before the passing of the special Act, nor is it retrospective.[12] It is the scheme of the Act, for facility of incorporation, to be divided into *fasciculi* or bundles of clauses, each division being headed by introductory words. These divisions are not strictly logical or precise; but the head-notes have been held by the Court of last resort to control the whole of the sections which they precede.[13]

Sketch of provisions of Act.

After the introductory clauses, the first division of the Act is taken up with the purchase of lands by agreement, it being necessary to *enable* parties under certain disabilities to sell and convey (sects. 6-14). Sections 15 and 16 and the second part (sects. 17-66) are concerned with the taking of lands otherwise than by agreement—with what is popularly, but not in the Act itself, called compulsory sale. The transaction is in fact no sale, since it lacks the freedom of will necessary to a consensual contract. The phrase 'compulsory taking' suggests the idea that the *promoters* are compelled to take the land. It seems more correct to speak of the transaction as a 'compulsory surrender' of land, not for a price, but in return for compensation. The negotiation begins with a notice to treat sent on the part of the company (sects. 17, 18). Failing agreement (sect. 19), resort must be had to arbitration, or in the last resort to the sheriff, if the disputed claim does not exceed £50 (sects. 20, 22)—to arbitration (sects. 20, 23-35) or jury trial, before a common or a special jury (sects. 36-55), if the claim exceeds that sum. When neither arbitration nor jury trial is feasible, on account of the landowner's absence from the kingdom or from the jury trial, or on account of his not being discovered, the lands are to be valued by a valuator appointed by the sheriff, subject to revisal if the owner so demand (sects. 56-66). While the interests of tenants generally are valued as above, those of tenants for a year or from year to year must be determined by the sheriff (sects. 114, 115); and in all cases of tenancy, provision is made for the apportionment of rent when part only of the lands let is taken (sect. 112). The cases of commoners (sects. 93-98), of the holders of heritable securities (sects. 99-106), and of the holders of annual charges, such as feu-duties, &c. (sects. 107, 111, 126), are treated separately. No proprietor is compelled to surrender a part only of a house, building, or manufactory, if willing and able to convey the whole (sect. 90). Provision is made for compelling the company to take small portions of intersected land which would be useless to the owner (sects. 91, 92);

[12] Sects. 1, 6, notes.

[13] Sects. 5, 48, 120, notes.

and to sell or give up superfluous lands which are ascertained not to be required for the purposes of their undertaking (sects. 120-125). On the other hand, they are enabled to purchase interests, omitted through mistake or inadvertency, even after the expiry of the time fixed for compulsory purchase (sects. 116-119); and to enter the lands, before any right of property has passed, either for the purpose of making a survey, on notice being given, or for permanent occupation, on depositing as security in bank the sum claimed by the landowner, or fixed by a valuator appointed by the Board of Trade, and also, if required, entering into a bond to the landowner for payment of the compensation eventually to be ascertained (sects. 83-90). Forms are provided for the conveyances of the lands purchased (sects. 80-82, Schedules A and B). If conveyances are refused, or cannot be given from inability in the possessor to make out a satisfactory title, the company has to consign the money and complete its title by notarial instrument (sects. 75-78). After conveyances have been executed, the company is, as a rule, no longer concerned with the former proprietor. But in the case of parties having limited interests, and willing to convey, it is only just that the expense of obtaining another permanent investment with the same destination, and of *interim* investment, should fall on the company (sect. 79). If the sum of compensation in such cases is £200 or upwards, it is deposited in bank, to be uplifted and applied to certain specified purposes under authority of the Court of Session (sects. 67, 68); if it exceeds £20, and is less than £200, it may alternatively be paid to two trustees, to be similarly applied, but without such authority (sect. 69). The Act closes with sections—substantially common to it with other Clauses Acts passed in the same year—regarding notices, penalties, and access to the special Act (sects. 128-144).

Incorporation of Act.

The Lands Clauses Act, besides being ingrafted into innumerable special Acts, has been incorporated into a large number of general Acts, in whole or in part.[14] The most important of these

[14] Of these the most notable are: The Railways Clauses Consolidation Act, 8 & 9 Vict. c. 33, see sect. 6, amended 26 & 27 Vict. c. 92; Markets Clauses Act, 10 & 11 Vict. c. 14, see sect. 6; Water Works Clauses Act, 10 & 11 Vict. c. 17, see sect. 6; *not* in Gas Works Clauses Act, 10 & 11 Vict. c. 15; but in 33 & 34 Vict. c. 70, sect. 2; 34 & 35 Vict. c. 41, sect. 10; 39 & 40 Vict. c. 49, sect. 6; Harbours Clauses Act, 10 & 11 Vict. c. 27; Police Act, 25 & 26 Vict. c. 101, sect. 390; Burial Grounds Act, 18 & 19 Vict. c. 68, sect. 13, amended 20 & 21 Vict. c. 42; Public Health Act, 30 & 31 Vict. c. 101, sect. 4; Education Act, 35 & 36 Vict. c. 62, sect. 37; Military Forces Localization Act, 35 & 36 Vict. c. 68, sect. 3; Artizans Dwellings Acts, 31 & 32 Vict. c. 130, 38 & 39 Vict. c. 49, sect. 18, 42 & 43 Vict. c. 64, 45 & 46 Vict. c. 54.

—the Railways Clauses Act—is so mixed up with it in the cases, that it has been impossible in the annotations to be found in the Appendix to keep the two entirely separate. Beyond this, the powers contained in the Railway Acts are more part of railway than of landowners' law, and reference can only be made to the authorities quoted at the head of this chapter. In the same way, it would be out of place to pass in review the statutory powers conferred by each of the Acts noted on the preceding page. Many of them will reappear in other parts of this work.

PART III.

RESTRICTIONS IN FAVOUR OF INDIVIDUALS.

CHAPTER XXII.

INTRODUCTION.

HAVING thus discussed the restrictions imposed on the enjoyment of lands and other heritages for the benefit of the Crown and of the general public, we are led by the plan of this treatise to a consideration of the still more important limitations which exist for the benefit of individuals. I. Some of these are incident to or may be imposed on every sort of land-ownership, limited or unlimited, and resolve themselves into the law of neighbourhood. The restrictions which belong to this class are treated of in the immediately succeeding chapters, as falling under the threefold division of—natural limitations, with the corresponding natural rights; predial servitudes, with their corresponding easements or privileges; and building restrictions. What are called legal servitudes are more properly police regulations. It will be convenient to prefix to the sections which shall treat of these matters a chapter on the doctrine of *culpa* or negligence in the enjoyment of rights of ownership. The natural rights and conventional servitudes cannot well be kept apart in discussing the doctrine of support and of the uses of water; and it will be found convenient to treat of these in separate chapters. II. A totally distinct set of restrictions is superadded when the title of the possessor of land is limited through the coexistence of a title to the same subject in the person of another. This subdivision embraces the doctrine of common property, commonty (with the cognate law of runridge), common interest, fee and liferent, and entails. The powers of an owner are curtailed, in the last place, by the diligence of creditors; but this falls under the law of obligations more than under that of ownership.

Division of this part.

It has been already more than once pointed out[1] that the dominion or control which is involved in the idea of ownership is

Restrictions on exclusiveness and absolute-

[1] *Supra*, pp. 88, 89, 119.

ness of ownership.

exclusive of the interference of any one other than the owner, and absolute with reference to the thing which is the subject of property. The distinction thus drawn [2] cannot be sharply marked, and is, besides, of no practical value. The two characters of exclusiveness and absoluteness are apt to run into each other at every point. In so far as they are distinguishable, the exclusive nature of ownership has been already illustrated by the law of encroachment, trespass, and game,[3] where the right of the landowner comes more into prominence than the limitations to which that right is exposed; while the restrictions laid upon the absoluteness of the owner's dominion over his land, make up a large and important section of every system of jurisprudence. They do so in the law of Scotland; but much assistance in filling up the gaps left in our case law may be obtained from a discriminating use of the materials laid up in the great storehouses of Roman and English law. The former is the foundation of our jurisprudence regarding the subject before us; and no apology is required for frequently referring to the latter, seeing that, however diverse the Scotch and English systems of law may be in respect to questions of conveyancing, they may be regarded, except in one or two minor particulars, as being at one in regard to the uses of real property.[4] Nor is this surprising, since no part of either system has been so free of legislative interference; and the Courts of both countries have thus been left at peace in their attempts to adjust the theoretically despotic dominion of each proprietor over his own premises, so as least to injure every other, and best to promote the welfare of the country at large.

Maxims.

This conflict between liberty and order, between the rights and duties incident to the enjoyment of real property, is expressed by two maxims of general jurisprudence, which seem to have been pieced together by some unknown civilian from several texts of Justinian [5]—*Qui utitur jure suo neminem lædit*, and *Sic utere tuo ut alienum non lædas*, meaning by *alienum* not the property but the rights of another. As will be apparent in the sequel, there may be many cases of damage being done to property without a consequent claim for redress: in technical phrase, there may be *damnum absque injuria*.[6] It is only when loss and wrong con-

[2] See B. Pr. 939.

[3] Chap. 9, p. 119.

[4] See especially the chapters relating to Neighbourhood.

[5] 2 I. (1.8); 3, § 2 D. (43.29); 151.155, D. (50-17); 10, § 1 D. (1.1).

[6] *E.g.*, Andrew *v.* Henderson & Dimmack, in H.L., 10th March 1873, 11 Macph. H.L. 13; Wilsons *v.* Waddell, in H.L., 1st Dec. 1876, 4 Ret. H.L. 29; and cases collected in note at 1 Sm. L.C. (8th ed.), p. 297, to Ashby *v.* White, L. Raym. 938.

cur that a claim for reparation arises; while, on the other hand, *injuria* alone, as has been shown in cases of encroachment and trespass,[7] may give rise to an action, though no patrimonial loss, prospective or present, can be shown.

Real burden.

It was stated at the outset of this introduction that the limitations imposed on the use of land which are contained in the immediately succeeding chapters are all resolvable into the law of neighbourhood. They are imposed for the benefit of an individual, not as such, but as the owner or occupier of adjacent premises. They may or may not take their rise in contract; but, whether or not, they, by virtue of this element, and of it alone, are capable of rising into a different sphere—that of real rights. There is or may be a permanency of relation between the possessors, be they who they may, of two neighbouring tenements, which cannot be established by a mere contract between two men off the street. The doctrines now to be considered are thus distinguished on the one side from the restrictions in favour of Crown and public, which have been already discussed, and on the other side from the obligations which a landowner as an individual may come under to any other rational being, and even from those obligations which a landowner, as such, may accept in favour of a party contracting with him merely as an individual. The only mode in which an obligation of the last kind can be made permanent against the land is by its becoming a real burden in the wider sense of the term.[8] There has been little discussion in Scotland as to the interpretation of such stipulations. The first two cases just cited show that, even if taken as real burdens, they must be construed strictly, if the state of possession offers no assistance; and the third, that though the privilege contracted for, not being a real burden but emanating from a superior, would have been effectual against singular successors in the superiority, it flies off when the relation of superior and vassal ceases.[9]

Neighbourhood not contiguity.

In using the term 'neighbourhood' a misconception must be guarded against. The two tenements, though neighbouring or adjacent do not require to be contiguous. All that is necessary for

[7] *Supra*, pp. 121, 125.

[8] E. Aboyne *v.* Innes, 22d June 1813, F.C., affd. 6 Pat. 444; D. Richmond *v.* Duff, 25th Jan. 1867, 5 Macph. 310; Patrick *v.* Napier, 28th March 1867, 5 Macph. 683.

[9] It will be useful to refer to the distinction in English law between an easement and a licence, which latter is a permission to do an act which without it would be unlawful; but much turns on the mode of constitution — Thomas *v.* Sorrell, Vaughan, 351, cited 5 Bing. N.C. 707; Wood *v.* Leadbitter, 13 M. and W. 838, 844; Gale, and Goddard *sub voce*. There cannot be an easement in gross—Rangeley *v.* Midland Ry., L.R. 3 Ch. 310, *per* L. Cairns L.J.

the creation of the real rights, natural or acquired, which are now to be discussed, is that the owner of the one, as such, should have a demonstrable interest in performing certain acts or maintaining a certain condition of things in the premises of the other; or, again, in compelling the latter to refrain from a certain course of acting within his own estate. Many examples of discontiguity will occur in treating of nuisance to natural rights, and of servitudes.[10] The civil law contains many provisions to the same effect.[11] And the most striking as well as the latest illustration of discontiguity arose in England in a question as to the natural support of land, where the lands of the pursuers and defenders were separated by a strip of ground belonging to a third party. It was there decided that 'the neighbouring owner for this purpose must be the owner of that portion of land (it may be a wider or narrower strip of land) the existence of which in its natural state is necessary for the support of my land.'[12] Of course there are certain servitudes, such as eavesdrop, and the *s. tigni immittendi*, in which discontiguity is scarcely conceivable.

[10] The earliest case is Pennemuir, 1632, M. 14502; and the latest, Edinburgh Water Co. *v.* Waugh, 28th Feb. 1835, 13 S. 584, revd. 2 S. and M'L. 530.

[11] *E.g.*, 1 pr. 38 D. (8.2); 5, § 1, 7, § 1, 31, 38 D. (8.3); 7, § 1 D. (8.4); (but in l. 6 of the last cited title the word '*vicinæ*' appears in its popular sense); 4, § 8 D. (8.5), 17, § 2 D. (39.3).

[12] Corp. of Birmingham *v.* Allen, 1877, 6 Ch. D. 284, *per* Jessel M.R., approved by the L.-JJ. of Appeal.

CHAPTER XXIII.

CULPA OR NEGLIGENCE.

Personal fault.

It would be out of place here to enter upon a discussion of the law of *culpa* or negligence generally. Nothing more will be attempted than, presuming on a knowledge thereof, to set forth the illustrations which have occurred in questions between neighbouring landowners. From one point of view, it may be said that no right accrues to any proprietor to interfere with his neighbour's employment of his own premises without alleging some fault or negligence—that no action arises simply *ex dominio*.[1] It will, however, be found convenient to treat in this chapter (I.) the cases in which personal fault or negligence has come most into prominence, (II.) the cognate doctrine of non-natural use, and (III.) what is known as *æmulatio vicini*.

I. Actual negligence in acting *in suo*.

Fire.

I. There may be negligence in the performance of a lawful operation by the proprietor himself within his own bounds, or by others for whom he is responsible. If damage is thereby caused to a neighbouring[2] property, an action of damages lies. The earliest cases which fall under this category, both in England and in Scotland, are cases of damage by fire. It does not appear that there was ever a period in Scotch, as there was in English law,[3] when one owner was held by force of mere neighbourhood to insure another against the consequences of a conflagration which was purely accidental, or the source of which could not be traced. No such obligation exists. It is otherwise if negligence in the

[1] Campbell *v.* Kennedy, *infra*,[2]; Thomson *v.* Gray, 22d Dec. 1842, 5 D. 377.

[2] Not necessarily contiguous. See p. 309; Blenkiron *v.* Gas Consumers Co., 3 L.T.N.S. 317 (fire spreading across an intervening house); Campbell *v.* Kennedy, 25th Nov. 1864, 3 Macph. 121.

[3] 1 Rolle. Abridg. Action sur case, p. 1, altered 6 An. c. 31; 14 Geo. III. c. 78. sect. 86, which section seems to apply to the whole kingdom; Richards *v.* Easto, 15 M. and W. 244. As to damage caused as the direct but tardy result of a purely accidental fire (fall of wall across march), see Mahoney *v.* Libbey (1877) 25 Amer. R. 6, Sessengut *v.* Posey, (1879), 33 ibid. 98.

use of what is a necessary but also a dangerous natural agent is proved. The whole question of the necessity to prove *culpa*, and of its different degrees, was discussed in a case of reparation for damage done by muirburn crossing the march between two estates.[4] It was held that, as muirburn at the proper season is an act lawful and included in the ordinary administration of a Highland estate, the *onus* lay upon the party claiming damages to prove that it had been carelessly or negligently performed, and not upon the other to prove *vis major;* and that the degree of care requisite was such diligence as a prudent man would observe in his own affairs, and which a prudent and conscientious man would observe as to the interests of his neighbours.[5] That is what is 'reasonable and proper in the circumstances.'[6] The same rule applies to damage done by water, in those cases at least in which it is being employed in modes and for purposes of a usual and ordinary kind. Thus the proprietor of a flat possessed by a tenant was held liable to the occupant of a lower flat for damage caused by leakage from a defective water-pipe; but only on proof of *culpa.*[7] Cases may also occur where the owner of a house, who is under no servitude of support in favour of his neighbour's tenement, may be desirous of pulling down or performing other lawful operations upon his own house of a kind to endanger the stability of the other.[8] It seems to be implied in the only authoritative Scotch decision,[9] and to be good law, that if the operations be carried on in a skilful and reasonably careful manner no action will lie; and two earlier cases in the Jury Court were there explained in consistency with this doctrine.[10] If, on the other hand, negligence is proved, reparation will be due. If the houses be within burgh, it will be a strong circumstance against

Muirburn.

Water.

In altering buildings.

[4] Mackintosh *v.* Mackintosh, 15th July 1864, 2 Macph. 1357; see Higgins *v.* Dewey (1871), 9 Amer. R. 63.

[5] *Culpa levis*, not *lata*. Cf. the leading English case, Vaughan *v.* Menlove, 4 Scott, 244 (spontaneous combustion in a hay-rick); and as to fire lighted by sparks from a locomotive, see Vaughan *v.* Taff Vale Ry., 5 H. and N. 679; Fremantle *v.* L.N.W. Ry., 10 C.B. N.S. 89; Smith *v.* L.S.-W. Ry., L.R. 6, C.P. 14; Murdoch *v.* G.S.W. Ry., 17th May 1870, 8 Macph. 768; in America, Webb *v.* Rome, &c., Ry. (1872), 10 Amer. R. 389.

[6] Nisbett *v.* Dixon & Co., 22d Feb. 1851, 13 D. 776; see Rankin *v.* Dixon & Co., 19th March 1847, 9 D. 1048; Filliter *v.* Phippard, 11 Q.B. 347.

[7] Campbell *v.* Kennedy, 25th Nov. 1864, 3 Macph. 121; Moffat & Co. *v.* Park, 16th Oct. 1877, 5 Ret. 13. In the latter case alleged contributory negligence, which went only to the amount of damage, was held not to be a complete defence. The same rules of liability apply in England, Anderson *v.* Oppenheimer, 5 Q.B.D. 602, and America, Simonton *v.* Loring (1878), 28 Amer. R. 29.

[8] The *cautio damni infecti* of the civil law has not been introduced into Scotland —D. (39.2); Vang. § 678; Hay *v.* Littlejohn, 1666, M. 13974.

[9] M'Intosh *v.* Scott & Co., 1st Feb. 1859, 21 D. 363.

[10] Callendar *v.* Eddington, 4 Mur. 108; Douglas *v.* Monteith, 4 Mur. 130.

the defender that he had not obtained the sanction of the authorities. Damages will be mitigated if the tenement injured can be shown to have been in an infirm state. It would follow that an inevitable sit and draw, caused by the erection, close to the march, of a heavier building than the house adjacent,[11] would warrant neither interdict nor action of damages, since that was a legitimate use of the premises. It was decided by Lord Fullerton as Lord Ordinary, and acquiesced in, that the feuar of a building-stance in a street was not entitled, in a question with the owner of the adjoining feu, on which was built a house without a sunk flat, to excavate to the verge of his feu for the purpose of making a sunk area. The judgment proceeded mainly on acquiescence in the mode of building in use in the street, implied from purchasing a stance therein, but partly also on the impossibility of safely excavating without underfooting the existing building. The Lord President Hope thought the case to be one of great difficulty.[12] The Lord Ordinary seems to have erred on both points: first, in overtaxing the force of acquiescence; and next, in regard to the obligation of underfooting the adjacent tenement. The English law, which he appears to have consulted, throws the burden of shoring-up on the owner of the neighbouring house himself for his own security.[13] The last of the cases just cited also settles a point which has not been decided in Scotland —that no duty lies on the innovator to give notice to his neighbour of his intended operations. Again, however infirm the wall belonging to the latter may be, he will be entitled to reparation for damage traceable to negligence in these operations. 'A man 'has no right to accelerate the fall of his neighbour's house.'[14] If goods in a shop are materially damaged by dust and steam or otherwise during the progress of alterations in a neighbouring tenement, in a way and to an extent which, with due care, might have been avoided, the owner of the altered premises will be liable in damages on the ground of *culpa*, though he had employed a contractor.[15] As put by Lord Young: 'This may be taken as 'a safe principle of law, that when a party executes operations

[11] Case put by L. Deas, 21 D. 367; see Pierce *v.* Dyer (1872), 12 Amer. R. 716; Gray *v.* Boston Co. (1873), 19 Amer. R. 324 (telegraph-wire on house).

[12] Murray *v.* Johnston, 4th Dec. 1834, 13 Sh. 119; see Brown *v.* Windsor, 1 Cr. and J. 20.

[13] Walters *v.* Pfeil, Moo. and Malk. 362, *per* L. Tenterden C.J.; Peyton *v.* Mayor of London, 9 B. and C. 734; Chadwick *v.* Trower, 6 Bing. N.C. 1, in Exch. Ch.

[14] Dodd *v.* Holme, 1 A. and E. 493; see further on this subject—support to land, *infra*, chap. 28, where the limitation of the excavator's liberty, arising from a servitude of support, is discussed.

[15] Cameron *v.* Fraser, 21st Oct. 1881, 9 Ret. 26. As to specialty of the employment of a contractor, see the remarks of L. Watson in Angus *v.* Dalton, 6 App. Cas. 831.

'on a property (probably the observation may be made generally, 'but I may be taken as now limiting it to the case of property in 'towns where most frequent examples of it are found), however 'lawful and reasonable these operations may be, he must take 'care in conducting them to do as little damage as possible to his 'neighbour. I should have been disposed to think—but it is 'unnecessary to decide it—that he must make good by reparation 'any special damage caused to another by his operations.' But 'the party next door or near to the operations which are carried 'on is not entitled to complain of every little inconvenience to 'which he is put;'[16] and a mere licence or permission to use a subject does not involve an obligation to repair it so as to make its use safe.[17]

Defences—1. Servants unauthorised.

Before leaving the subject of specific negligence, it will be well to refer to two defences which are frequently relied on. The first is, that the acts or operations which occasioned the damage alleged, though performed by the defender's servants or those for whom he was ordinarily responsible,[18] were not authorised by him, and did not fall within the sphere of their duty. This plea was at one time repelled in a case of fire spreading from heaps of burning brushwood and heath,[19] admitted in a case of homicide through the fall of a tree,[20] and recognised as valid in the later case of muirburn already cited.[21]

2. *Damnum fatale.*

The other reply is an allegation of inevitable accident, *damnum fatale, vis major*, or act of God. All the cases in which it has been pleaded have been actions of damages for loss caused by floods. It is impossible to lay down rules where each case depends on its own circumstances. But this may be said—that the Court will be very chary of admitting a plea which tends to paralyse human energy and foresight. Thus a *damnum fatale* has been described as a 'miracle of nature,' in contradistinction to her ordinary operations;[22] as an occurrence 'unprecedented, and such 'as could not have been reasonably anticipated and expected 'occasionally to occur;'[23] as a circumstance 'which no human 'foresight can provide against, and of which human prudence is not

[16] At 9 Ret. p. 29.

[17] Ivay *v.* Hedges, 9 Q.B.D. 80.

[18] *E.g.*, Contractors—Rankin *v.* Dixon & Co., [6]; Cleghorn *v.* Taylor, 27th Feb. 1856, 18 D. 664. Analogous are cases of landlord and tenant—2 Hunt. 4th ed., p. 556 *et seqq.*

[19] Keith *v.* Keir, 10th June 1812, F.C.

[20] Linwoods *v.* Hathorn, 14th May 1817, F.C., affd. 1 Sh. Ap. 20.

[21] Mackintosh *v.* Mackintosh, [4]. In England — Williams *v.* Jones, 33 L.J. Exch. 297; M'Kenzie *v.* M'Leod, 10 Bing. 385.

[22] *Per* L. Cockburn in Samuel *v.* E. and G. Ry., 12th Dec. 1850, 13 D. 312, 314.

[23] Potter *v.* Hamilton, &c., Ry., 25th Nov. 1864, 3 Macph. 83, 87.

'bound to recognise the possibility.'[24] The case of *Tennant* marks a distinction which will be found important in the next section. During a fall of rain unprecedented or at least unparalleled within human memory, a burn left its course at a natural bend therein, and sent part of its water down to a wall one-third of a mile distant, through which the accumulated water burst and damaged the adjoining lands. *Damnum fatale* was found proved, and it was held that no duty lay on the proprietor of the wall to pierce it with holes. The House of Lords was, however, of opinion, that the case would have been very different if the immediate cause of the accumulation had been an *opus manufactum* on the course of the stream, such as a culvert or a diversion. This case actually arose some years later. Damage was done to adjacent lands by the overflow, during an unprecedented flood, of a stream which had been converted into a town-sewer. The obstruction to the flood-water arose from the choking up of a heck stretched across the mouth of a tunnel which had been placed in the course of the stream by a railway company; but the mouth and heck were situated on ground belonging to the town. In an action brought against the magistrates, the defenders were assoilzied in respect of negligence on their part not being made out. The Lord Ordinary and the majority of the Court were of opinion that if any party was liable for negligence, it was the railway company which had erected and maintained the tunnel. Lord Justice-Clerk Moncrieff alone went so far as to found on *damnum fatale*.[25] The true view seems to be, that even in case of an unprecedented disaster the person who constructs an *opus manufactum* on the course of a stream or diverts its flow will be liable in damages, provided the injured proprietor can show—(1) that the *opus* has not been fortified by prescription; and (2) that but for it the phenomena would have passed him scathless. If he fail in either point, the doctrine of *vis major* will apply, just as if things had been left to nature.

Specific fault not required.

II. *Cases where specific* culpa *does not require to be proved.* —These remarks lead naturally to a discussion of those cases where negligence or fault does not appear so prominently, or rather

[24] *Per* L. Chan. Westbury in Tennant *v.* E. Glasgow, 3d March 1864, 2 Macph. H.L. 22, 27, affg. C.S. 12th Dec. 1862, 1 Macph. 133. See English definitions in regard to sea risks in Nugent *v.* Smith, 1 C.P.D. 19, 423, and cases there; Nichols *v.* Marsland, L.R., 10 Exch. 255, 2 Ex. D. 1, is similar to some of the cases in the text. In America, Washburn *v.* Gilman (1874), 18 Amer. R. 246.

[25] Pirie *v.* Mags. of Aberdeen, 18th Jan. 1871, 9 Macph. 412. See a case of construction of a private Act which safeguarded a landowner against loss from flooding, Cs. Rothes *v.* Kirkcaldy Comrs., 5th June 1879, 6 Ret. 974, rev., 7 App. Cas. 694, 9 Ret. H.L. 108.

is gathered as matter of legal deduction from the fact of damage having been incurred. A series of recent Scotch and English cases has invented a novel nomenclature for an ancient legal doctrine. The earliest decision of the series was Scotch. A dam erected across a stream burst under pressure of a heavy but not unprecedented flood, and carried away a mill occupied by its owner further down the stream. Damages were found due on the principle 'that if a person chooses, upon a stream, to make a 'great operation for collecting and damming up the water, for 'whatever purpose, he is bound, as the necessary condition of 'such an operation, to accomplish his object in such a way as to 'protect all persons lower down the stream from all danger—he 'must secure them against danger. It is no defence in such a 'case to allege the dam would have stood against all ordinary 'rains. The dam must be made perfect against all extraordinary 'falls of rain. The condition on which alone that can be allowed 'which causes such risk is complete protection. The fact that 'it (the dam) gives way is a proof that the protection was not 'afforded which the maker was bound to provide.'[26] *Damnum fatale* was not in the case. Then followed a well-known English decision.[27] A mining lessee worked up to a spot where there were certain old passages of disused mines, connected with the surface by vertical shafts long disused and filled up with marl and earth. The defender, by permission of the owner of the soil pierced by these shafts, had constructed a reservoir for the use of his mill, employing therein a competent engineer and contractor; but these persons did not take proper care to guard the shafts against the pressure of the water in the reservoir when full. The water broke through some of the shafts, and flooded the adjacent lessee's mine. Damages were found due. As put by Lord Cairns, it was admitted that (treating the parties as adjacent landowners) if, 'in 'the natural user of the land, there had been any accumulation 'of water, either on the surface or under ground, and if, by the 'operation of the laws of nature, that accumulation had passed 'off into the close occupied by the plaintiff, the plaintiff could

Accumulation of water.

Kerr v. *E. Orkney.*

Fletcher v. *Rylands.*

[26] *Per* L.J.-C. Hope in Kerr *v.* E. Orkney, 17th Dec. 1857, 20 D. 298, 302. The same in a similar American case, Gray *v.* Harris (1871), 9 Amer. R. 61.

[27] Fletcher *v.* Rylands, L.R. 3 H.L. 330. See the same case, with the variation that the reservoir was made on land purchased from the plaintiff for the purpose, in Wilson *v.* New Bedford (1871), 11 Amer. R. 352, and the exact converse case in Cahill *v.* Eastman (1871) 10 Amer. R. 184. In New York and some other States the rule of Fletcher *v.* Rylands is not followed. Thus, if one build a mill-dam upon a proper model, and the work is well and substantially done, he is not liable in an action if it break away. Losee *v.* Buchanan (1873), 10 Amer. R. 623.

'not have complained.'[28] 'On the other hand, if the defendants, 'not stopping at the natural use of their close, had desired to use 'it for any purpose which I may term a non-natural use, for the 'purpose of introducing into the close that which, in its natural 'condition, was not in or upon it; for the purpose of introducing 'water either above or below ground, in quantities and in a man-'ner not the result of any work or operation on or under the 'land; and if, in consequence of their doing so, or in consequence 'of any imperfection in the mode of their doing so, the water 'came to escape and pass off into the close of the plaintiff, then 'it appears to me that that which the defendants were doing they 'were doing at their peril.'[29] Lord (then Justice) Blackburn, with the approval of the Lord Chancellor,[30] stated the rule thus: 'That the person who, for his own purposes, brings on his land, 'and collects and keeps there, anything likely to do mischief if it 'escapes, must keep it in at his peril; and, if he does not do so, is '*primâ facie* answerable for all the damage which is the natural 'consequence of its escape. He can excuse himself by showing 'that the escape was owing to the plaintiff's default, or, perhaps, 'that the escape was the consequence of *vis major* or the act of 'God.'[31] And upon authority this is established to be the law, 'whether the things so brought be beasts, or water, or filth, or 'stenches.'[32] It is *damnum sine injuria* if loss arises from *vis major;* it is *injuria sine damno* if a mine is flooded through the opening of a canal-sluice, where that was necessary for the safety of the canal during an extraordinary flood, and the flooding was inevitable sooner or later through the bursting of the banks.[33]

In mining operations.

The principles laid down in *Fletcher* v. *Rylands*—which are identical with those given effect to in *Kerr* v. *Earl of Orkney*—have been recognised in two later Scotch decisions. In the first of these,[34] according to the view taken by Lords Curriehill (2d) and Gifford and the House of Lords, mine-owners on the rise are entitled to send towards a mine on the dip not only the natural drainage of their mine, but also water collected on and diverted from the surface in consequence of the dislocation of drains and the subsidence of portions of

[28] *Per* L. Chan. Cairns, ibid. p. 338, following Smith *v.* Kenrick, 7 C.B. 515.

[29] *Per cund.* p. 339, following Baird *v.* Williamson, 15 C.B.N.S. 376.

[30] P. 339.

[31] See a case of this in Madras Ry. Co. *v.* Zemindar of Carvatenagarum, L.R. 1 Ind. Ap. 364, 385.

[32] For beasts, see Fences, chap. 32; for water, see chap. 29; for nuisances, see chap. 24; for blasting, see Tiffin *v.* M'Cormack (1878), 32 Amer. R. 408, and see the limitations to which the rule is subject in Wood on Nuisances, p. 134.

[33] Thomas *v.* Birmingham Canal Co., 49 L.J.Q.B. 851.

[34] Wilsons *v.* Waddell, 8th Jan. 1876, 3 Ret. 288, affd. L.R. 2 App. Ca. 95, 4 Ret. H.L. 29. *Contra*, Horner *v.* Watson (1876), 21 Amer. R. 55.

the surface, through their mining operations; for this reason, that these were performed in the usual and proper course of working the coal, and that the right to take away the whole is in the natural course of user of minerals. The other judges of the Second Division, while inclined to regard the latter source of the water as non-natural, rested their judgment on contributory negligence. The other case referred to,[35] though concerned with a different sort of damage, was on all-fours with the case of *Rylands*, since, though specific fault on the part of the defenders' employees was made out, the law was laid down by the Court apart from that element. A large heap of mineral refuse accumulated on ground belonging to the mine-owners, being naturally of a combustible nature, took fire, damaged a neighbouring farm, and caused great discomfort to the tenant and his family. Its liability to take fire ought to have been known to the mine-owners; and they made no attempt to extinguish the fire for some months. It was found that they were liable in damages to the tenant. Lord Justice-Clerk Moncreiff and Lords Neaves and Ormidale adopted the Lord Chancellor's distinction between natural and non-natural uses of heritable property in determining whether specific fault must be proved. Of the former category, the case of muirburn was cited as an illustration.[36] The Lord Justice-Clerk traced the latter source of liability also to *culpa:* 'If a man puts on his land a 'new combination of materials which he knows, or ought to know, 'are of a dangerous nature, then either due care will prevent in-'jury—in which case he is liable if injury occurs, for not taking 'that due care—or else no precautions will prevent injury, in 'which case he is liable for his original act in placing the ma-'terials upon the ground.' 'Such *opera manufacta* are only law-'ful when injury does not happen to the neighbours.'[37] Lord Gifford seemed to prefer the older term *opera manufacta* to the new-fangled nomenclature of natural and non-natural, ordinary and extraordinary uses.[38]

Fire.

Non-natural use. *Opus manufactum.*

There is no doubt that this novel terminology is more comprehensive, since it may include all the cases mentioned by Lord Blackburn above,[39] and is better descriptive of a very real distinction. It may, however, lead to much curious speculation. The

[35] Chalmers *v.* Dixon, 18th Feb. 1876, 3 Ret. 461.

[36] Mackintosh *v.* Mackintosh, [4].

[37] 3 Ret. 464.

[38] See Box *v.* Jubb, 4 Exch. D. 76, where liability of owners of reservoir for damage by overflow was negatived, the fault being that of a third party, and the obstruction one over which defender had no control, defender's walls being sufficient in ordinary circumstances.

[39] Last page.

natural use of land is for cultivation;[40] yet a mill-pond may be as necessary to farming as a furrow. The natural use of minerals is to win them,[41] yet much damage may be done to surrounding air and water in the process. The distinctions between lawful and unlawful uses of buildings, of fire, air, and water, will be discussed in the sequel.

Though neither the formal *nuntiatio novi operis*[42] nor the *cautio damni infecti*[43] of the civil law has been adopted in Scotland, it may be safely laid down, on general reasoning and by analogy with other cases of interdict,[44] that one proprietor may prevent his neighbour from rearing any *opus manufactum* in such a manner, or putting his land to such non-natural uses, as must obviously in the natural course of things endanger his adjacent estate. It may at the same time be argued, that this right of interference is so limited as not to constitute the contrary possession of the *opus* into such adverse possession as sets up prescriptive right. Forty years' safe possession might in some cases favour at the most a plea of *damnum fatale;* in others it might suggest the judiciousness of renewal or repair. Remedies.

III. *Æmulatio vicini.*[45]—A landowner is said to act *in (ad) æmulationem vicini* when within his own premises he does anything, otherwise lawful, in mere spite or malice against his neighbour, for the purpose of injuring him, and not of benefiting his own property. The phrase is not Roman,[46] but the prohibition which it expresses is traceable in several parts of the Corpus.[47] It is to be found in the Prussian Code;[48] but has no place in French, English,[49] or American[50] jurisprudence, which appear to regard only the external legality of an act, not the internal motive which prompts it. While Erskine and Bell[51] represent the Scotch as following the Civil Law, they are unable to cite any case in which the plea has been given effect to. Erskine's *Æmulatio?*

[40] See L. Gifford, 3 Ret. 467.

[41] *Per* L. Blackburn in Wilsons *v.* Waddell, L.R. 2 App. Ca. 99, 4 Ret. H.L. 30, 31.

[42] D. (39.1); C. (8.11); Vangerow, § 676; Hesse, Nachbar-recht, 2, 79.

[43] D. (39.2); Vang. § 678; Hesse, 1.1.

[44] *Supra*, p. 14; B. Pr. 964.

[45] Pufendorf, iv. 263; Carpsov, 3.131. 13; Vangerow, 1, § 297; Weiske, ix. 147; Hesse, 2, 226.

[46] The nearest approach to it in the Corpus Juris Civilis is contained in 3 pr. D. (50.10), '*ad æmulationem alterius civitatis.*'

[47] 1 § 12, D. (39.3). Sinking a well is lawful, '*si non animo vicino nocendi.*' (C. J. Tindal's approval of this text does not seem intended to extend to this part of it—Acton *v.* Blundell, 12 M. and W. 324, 353.) 2 § 9, D. *eod. tit.;* Novel. 63, c. 1, '*propter vicini læsionem.*'

[48] Pr. L.R. 1.8.27 and 28.

[49] L. Wensleydale in Chasemore *v.* Richards, 7 H.L. 349, 388; Martin B. in Rawstron *v.* Taylor, 11 Exch. 378.

[50] Washburne on Easements, 3.7.4a and 16; Phelps *v.* Nowlen (1878), 28 Amer. R. 93; Wood on Nuisance, p. 10.

[51] B. Pr. 964, 966.

illustration,[52] of the release of a greater collection of water than was necessary for draining, can be sufficiently explained by the doctrine of the foregoing paragraphs without a search for motives of action. Of the cases in which the plea or the phrase has been used, one related to anchoring and disloading ballast on salmon-stells by members of the public;[53] others related to the mutual obligations of neighbouring mine-owners,[54] of parties to servitudes of aqueduct[55] and *non luminibus officiendi*;[56] and in others a plea of emulation was repelled, both where a separate plea of nuisance was rejected[57] and where it was sustained.[58] Mr Bell's illustration[59] of the negative operation of the rule in restraining opposition to innocuous alterations on a subject of common interest, does not support his doctrine, since the person who objected to the slapping out of a door in the staircase had only a servitude right of ish and entry by the stair, and not common interest. There is no such exception to the rule '*in communi causâ melior est jus prohibentis*,' since the plea of emulation, if indeed it be parcel of the law of Scotland, can only apply 'to active uses on the part of the 'proprietor to whom it is objected, and has nothing to do with his 'resistance of usurped uses by one who is not a proprietor. The 'law allows no inquiry into the motives of such resistance. It 'is enough that the party is sole owner and does not choose to 'submit or consent.'[60] The same rule would be applicable to resistance to usurpations by a co-proprietor. In any case, the doctrine is of little practical moment, for it must seldom happen that an act of enjoyment of property should be actuated solely by malice, by a desire to injure a neighbour. For that is what the rule requires. Mere caprice is not enough; and the slightest patrimonial interest, present or anticipated, will suffice to overcome the plea.[61] Thus, the owner of a garden in town was held entitled to erect a screen of wood within it, close to the windows of an adjoining house, so as to preserve the privacy of the garden.[62] This was a stronger case than an earlier decision, in which a heightened garden-wall obscuring windows about three

[52] Ersk. 2.1.2. It is probably drawn from Sir Geo. Mackenzie's argument (Pleadings, p. 24) in Mayor of Berwick *v.* Hayning, M. 12772, where he cites the *wrong* civil law text. See also Bankt. 2.7.15, 4.45.112; Mags. of Glasgow *v.* Bell, 1776, 5 B.S. 598.

[53] Brodie *v.* Cadel, 1707, 4 B.S. 660.

[54] Irving *v.* Leadhills Mining Co., 11th March 1856, 18 D. 833.

[55] Gray *v.* Maxwell, 1762, M. 12800.

[56] Ross *v.* Baird, 3d Feb. 1829, 7 S. 361.

[57] Dewar *v.* Fraser, 1767, M. 12803.

[58] Ralston *v.* Pettigrew, 1768, M. 12808.

[59] Ritchie *v.* Purdie, 21st June 1833, 11 S. 771.

[60] *Per* L. Jeffrey in Graham *v.* Greig, 6th Dec. 1838, 1 D. 171, 177.

[61] Somerville *v.* Somerville, 1613, M. 12769.

[62] Glassford *v.* Astley, 1808; M. Appx. *v.* Property, No. 7, Hume, 516.

feet off was justified.[63] 'It is one article, and no mean one, of 'the value of property in land, that it enables the owner to 'gratify his own taste or notions of convenience, though peculiar 'or whimsical even, in the employment of his portion of ground. '. . . It is fair, in these circumstances, to ascribe his pro-'ceedings to the desire of his own advantage, though minute in 'the general estimation, and not to the gratification of spleen or 'enmity to his neighbour.'[64] It is of course quite different where one proprietor seeks to prevent his neighbour from doing something *in suo*, or claims an active right within his neighbour's tenement. An intelligible and not too shadowy interest is involved in the notion of the rights of neighbourhood, and lies, in fact, at the root of the definition given above.[65]

[63] Dunlop *v.* Robertson 1803, Hume, 515.

[64] Baron Hume, Dec. p. 516.

[65] P. 309.

CHAPTER XXIV.

NATURAL RIGHTS—NUISANCE.

Terminology.

ATTENTION was directed in the outset of this Part to the distinction between natural and acquired (derivative) rights incident to the enjoyment of real property. From the point of view of the proprietor, who in respect of these has a certain control over his neighbour's use of his estate, or has himself a limited use thereof,

Natural rights. (Natural easements.)

the former are termed natural rights of property—or adopting, as has been latterly done on occasion, an English phrase, natural easements; the latter, conventional easements or privileges. Viewed from the standpoint of the proprietor thus restrained in

(Natural servitudes.) (Conventional servitudes.)

his enjoyment, they are termed natural servitudes and conventional servitudes respectively. For this last phrase it has been the custom, following the Roman law, to use the term 'servitude' simply, or 'predial servitude.' The custom is useful, and will be adhered to in the present work; and this will necessitate a substitution of the phrase 'natural restriction' for 'natural servitude,'

Natural restrictions.

a misleading term which has never found acceptance in our law.[1] With regard to the other terms, descriptive of the active side of the relation of neighbourhood, the phrase 'natural rights'[2] will be

Servitude—property.

found equally useful with its converse; while the foreign word 'easement' will succumb to its native rival, since it has become quite as common to speak of one tenement having a servitude over, as of being under a servitude to, another.

Natural rights of property, *quid.*

Servitudes proper, as will appear in the next chapter, are certain rights or duties which are acquired or imposed by some agreement expressed or implied. Natural rights of property, or natural restrictions on the use of property, are such as are inherent in the idea of ownership in a civilised community, accrue simultaneously

[1] The servitude arises, in fact, only on a negation of the so-called natural servitude.

[2] Robertson *v.* Stewarts, 6th Dec. 1872, 11 Macph. 189.

with the acquisition of real property, and are regarded as necessary for the peaceful enjoyment of social life. Servitudes are not so regarded; yet no law prevents one owner from acquiring privileges from another which shall enhance the value of his own estate. The two sorts of rights differ thus in origin. Again, both may, as we shall see, be lost and reappear: but the natural rights, which are incident to ownership in its natural state, are only suspended, and on reappearance simply revive; while servitudes, being merely adjected to the ordinary rights of ownership, are extinguished, and require to be reconstituted *de novo*.[3] Further, when a natural right is disturbed for a certain length of time, a new—derivative—right is created; when a right of servitude is so disturbed, the right is extinguished, or merged in ownership. It may be added that a subtle but important distinction[4] exists between the natural rights now under discussion and the right of exclusive enjoyment.[5] The latter relates to the direct possession of the soil and buildings, the former do not.[6]

Distinguished from servitudes.

The term 'nuisance' is used both in Scotland and England, in a popular sense, to mean any employment of property which is noisome or disagreeable to the senses. It seems to signify two very different things in the General Police Act of 1862, sect. 251, and in the Public Health Act of 1867, sect. 16. Apart from statute, it is used to signify, in one sense, an infringement of any right of enjoyment of real property, whether the right be natural or acquired; in another, only an infringement of a natural right.[7] It is in this last signification that the word shall be employed for the sake of perspicuity in the sequel; while interference with a servitude shall be termed indifferently disturbance or infringement. The foregoing paragraph shows the necessity for carefully distinguishing the two. There is no distinction in the common law of Scotland between public and private nuisance; but one of the main features of a public nuisance in England—its incapability of being legalised by prescription[8]—is secured in Scotland by the rule that there can be no prescriptive possession in the face of a public law.[9] The only useful distinction in Scotch law is between nuisance at common law, and nuisance by statute, local or general. Nuisances of the latter sort have been one of the main results of much sani-

Nuisance.

Public and private.

N. at common law.
N. by statute.

[3] See as to confusion, chap. 25.

[4] Its practical result is shown, p. 330.

[5] *Supra*, p. 119.

[6] See the importance of this in the old English law—Shepherd *v.* Scott, 1 Smith, Leading Ca. 477.

[7] Bell, Pr. 974.

[8] Cases in Burn's Justice *voce* Nuisance, § 1; and Rolle *v.* Whyte, L.R. 3 Q.B. 286; Leconfield *v.* Lonsdale, L.R. 5 C.P. 657.

[9] *Supra*, p. 43.

Public Health Act.

tary legislation during the last thirty years. The leading statute is now the Public Health Act of 1867,[10] which entitles the local authority to inspect premises, and to apply by summary petition for the removal of any nuisance found to exist therein, and for interdict against its recurrence. Penalties are enacted for contravention of decrees following thereon (sects. 17-20). Statutory nuisances are defined (sect. 16); special regulations are enacted for the case of water-courses (sects. 24, 25, 27-29); and certain offensive trades in particular, and all trades which are injurious to health are subjected to regulation by the local authority, subject to appeal to the Board of Supervision. These and similar enactments[11] do not affect the common-law rights of neighbouring landowners. Thus, where a petition by householders in Leith against the use of certain premises as a slaughter-house was met by a plea that the magistrates, proceeding under a local Act, had sanctioned the use, and that the petitioners had not applied for a recall of their licence as provided by the Act, it was held that the licence of the local authority could not warrant the commission of a nuisance at common law, nor bar an application for abatement thereof.[12] The regulations of these Acts belong more naturally to a discussion of local government than to this treatise. We pass on to nuisances at common law.

Cognate Acts.

Acts do not derogate from common law.

Subjects of natural rights.

The natural rights of property, and the natural restrictions on its use, which here concern us, relate to these four matters—to support of land, to water, to air, and to comfortable enjoyment in general. In the case of support and water, natural rights and servitudes, nuisance and disturbance, are so inextricably commingled that they will be most conveniently treated in separate chapters, after discussing the general doctrine of servitudes. It remains to set forth here certain general rules relating to nuisance, and the special rules applicable to air and to comfortable enjoyment.

Nature of nuisance.

I. *Nuisance generally.*—The natural rights incident to ownership may be described with sufficient exactness as resolving into a right to comfortable enjoyment. Conversely, the natural restrictions thereby entailed are imposed by law for the purpose of

[10] 30 & 31 Vict. c. 101, which consolidates and amends earlier Acts, and is itself amended in minor details by 34 & 35 Vict. c. 38; 38 & 39 Vict. c. 74; 42 & 43 Vict. c. 15; and 45 Vict. c. 11.

[11] *E.g.*, the Factory Acts, as to cleanliness; the Smoke Acts, 20 & 21 Vict. c. 73, 24 & 25 Vict. c. 17, 28 & 29 Vict. c. 102, under which aggrieved owners may sue as well as the local authorities; the Alkali Act, 44 & 45 Vict. c. 37; see also the General Police Act of 1862 as to sewers, water-closets, ventilation, slaughter-houses, &c., and cases cited *infra*, p. 339.

[12] Pentland *v.* Henderson, 2d March 1855, 17 D. 542.

preventing any interference with this right. They are purely negative or prohibitory, and do not entitle any one actively to interfere with his neighbour's premises, except by way of remedy. Thus it is necessary to comfortable enjoyment of land that it should be furnished with subjacent and adjacent support; to the comfortable enjoyment of water, that it should be allowed its natural outlet, be capable of use in certain ways on its passage through or past riverain lands, and be transmitted unimpaired in quantity and undeteriorated in quality; and to the enjoyment of air and light, that they should have an ascertainable though variable degree of purity. The infringement of these rights and of the relative restrictions is called nuisance, and gives rise to actions—first, of interdict, to prevent the threatened inception or further continuance of the illegal acts; and secondly, of restitution and damages, to repair the wrong already committed. Numerous examples of each of these actions will be cited as we proceed. Meanwhile it is necessary to examine certain general pleas which have been set up in defence of all actions founded upon alleged nuisance.

Pleas in defence.

1. Coming to the nuisance.

1. *Coming to the Nuisance.*—The plea, when stated most broadly, comes to this—that if, at the commencement of a nuisance, no person was in a situation to be injured, or being in such a situation did not get it abated, no one coming to acquire premises in a situation to be so injured, either by succession or singular titles, has a right to complain, however short a time the nuisance has existed before his acquisition. He came to the nuisance, not it to him. Before discussing this extraordinary doctrine, it will be well to refer to the authorities both in Scotch and English law.

Scotch cases.

Most of the Scotch cases in which the plea was set up occurred in the two first decades of the present century.[13] A work for the preparation of blood, in the manufacture of Prussian blue, erected near Portobello, was complained of as polluting the air by certain proprietors in the village, most of whom had acquired their subjects after the commencement of the work. A minority of the whole Court, besides being of opinion that no nuisance existed in the circumstances of the case, thought that these complainers, having come to the nuisance, could not object to it. A majority, however, found the nuisance proved, observing that the proprietors in the neighbourhood, when it was first erected, had a clear right to have it removed.[14] Thus no effect was given to the plea now under discussion. In the next case, the collection of the contents

[13] The point is put but not pressed in an earlier case of pollution of stream—Miller *v.* Stein, 1791, M. 12823, Bell, Oct. Ca. 334.

[14] Jameson *v.* Hilcoats, 1800, M. App. *v.* Property, No. 4.

of a town-sewer in pits or ponds for the purpose of gathering the manure it deposited, was complained of by a proprietor who had acquired neighbouring premises long after the commencement of this user: but the Court held that impounding the filth was less pernicious to health than using it for irrigation; that the use alleged had lasted for more than fifty years; and that 'the pursuers, 'who came to the nuisance, and not it to them, must take the 'consequences.'[15] Lastly, a salt-work was erected on a small feu near a mansion-house in 1794, and not complained of as a nuisance till 1815, two years after the house was purchased by the pursuer, who had himself four salt-works on his own property, in the near neighbourhood of the work in question. The Court held him precluded from objecting in respect of the acquiescence of the former proprietors, of the local situation of the work at a distance from any large town and in the neighbourhood of his own works, 'and that the pursuer made the purchase in the state of matters 'now referred to.'[16] In neither of these two cases was the doctrine of coming to the nuisance necessary for the decision. In the first, a plea of prescription was clearly established. In the second, the Court probably rested their judgment on the stronger pleas of acquiescence and convenient place, and may have remembered the parable of the one ewe-lamb, or the story of Naboth's vineyard. Relying on these authorities, Mr Bell[17] allows the plea as a complete personal exception, while Lord Ivory[18] merely says that where a proprietor comes to the nuisance, 'the case 'becomes still more unfavourable.' The plea was mentioned, but did not properly arise, in a recent case of nuisance from a burning 'blaes' heap in the neighbourhood of a town.[19]

English *dicta.* The course of English decisions may be briefly stated.[20] In some early cases and in a *nisi prius* case in the present century,[21] the plea was sustained, and the law is so stated by Blackstone;[22] but the general current of authority, both ancient[23] and modern, is said to be distinctly unfavourable to it, and the matter is set

[15] Duncan *v.* E. Moray, 9th June 1809, F.C.

[16] Colville *v.* Middleton, 27th May 1817, F.C. The case of Thomson *v.* Gray, 22d Dec. 1842, 5 D. 377, was one not of nuisance, but of alleged specific *culpa*, *supra*, chap. 23. See Ewen *v.* Turnbull's Trs., 21st Feb. 1857, 19 D. 513; Cooper and Wood *v.* N.B. Ry., 28th Feb. 1863, 1 Macph. 499, 2 Macph. 116.

[17] B. Pr. 978.

[18] Note[2] to Ersk. 2.1.2.

[19] Hislop *v.* Kelvinside Trs., 22d Dec. 1882, 10 Ret. 426.

[20] Gale on Easements, p. 485 *et seq.* The rule in America is similar, Campbell *v.* Seaman (1876), 20 Amer. R. 567.

[21] Lawrence *v.* Obee, *per* L. Ellenborough, 3 Camp. 514.

[22] II. p. 402, 10th ed.

[23] See especially Penruddock's case, 5 Coke, Rep. 100 b, and Rolf *v.* Rolf there cited.

at rest by two recent decisions. In the earlier, the plea was repelled on the ground that 'when a man purchases a lease, he 'takes it with all the rights incident to it,' and that prescription should have been alleged.[24] In the other, Tindal, C.-J., said: 'It 'may be that the defendant [the author of the nuisance] was the 'first occupier, but the plaintiff came to his house clothed with all 'the rights appurtenant to it,' unless there were prescriptive use, which presumes a grant.[25] The same rules apply when the nuisance is first made sensible, not by the acquisition of new premises, but by building on a new part of the old.[26]

Result.

On the ground of principle, it seems clear that the *dicta* of the English judges go to the root of the matter. It is monstrous to maintain that the mere fact of change of ownership of the injured premises by succession from father to son, or even by purchase, should bar a complaint against the pollution of water flowing through an estate or of air immitted into it. The plea was repelled about seven years ago in the Outer House in one at least of the *Almond Pollution* cases. The action in most cases of nuisance is laid, not so much on the inception as on the continuance of the nuisance.[27] The most favourable case for sustaining the plea would be that of land, to which no nuisance was caused by an adjoining manufactory so long as it was not built upon, coming to be covered with houses. Even then, the plea would probably fail, unless fortified by the further circumstance that the manufactory had been conveyed as it stood by the complainer himself. In such a case, to object to the factory being used for the purpose for which he disponed it would be to derogate from his own grant.[28]

2. Contribution by third parties.

2. *That others are committing Nuisance.*—This plea has always been repelled. In the *Esk Pollution* case, which was an action brought by several riparian proprietors jointly against paper-manufacturers on the stream, the Lord Justice-Clerk (Inglis) thus stated the law to the jury: 'It is not indispensable for each of 'the pursuers to prove that any one of the mills would of itself, 'if all the other mills were stopped, be sufficient to pollute the

[24] Elliotson *v.* Feetham, 2 Bing. N.C. 134, 2 Scott, 174.

[25] Bliss *v.* Hall, 4 Bing. N.C. 183; see also Crump *v.* Lambert, L.R. 3 Eq. 409, 413, *per* L. Romilly, M.R.; Tipping *v.* St Helen's Smelting Co., L.R. 1. Ch. 66, 67, *per* Wood, V.-C.

[26] Sturges *v.* Bridgman, 11 Ch. D. 852.

[27] Cf. Broder *v.* Saillard, 2 Ch. D. 692—the converse case of nuisance continued but not begun by defendant; Conhocton Road *v.* Buffalo Ry. (1873), 10 Amer. R. 646, Slight *v.* Gutzlaff (1874), 17 Amer. R. 476. For this reason time and warning should be given to a successor of the original author of a nuisance to abate before action is raised. Penruddock's Ca., 5 Coke's Rep. 100 b.

[28] *Per* Wood, V.-C., in *loc. cit.*, [25].

'river to the effect of creating a nuisance to him. It is sufficient, 'to entitle each of the pursuers to a verdict on any one of the 'issues, to prove that the river is polluted by the mills belonging 'to the defenders generally, to the effect of producing a nuisance 'to him, and that the defenders in that particular issue materi- 'ally contribute to the production of the nuisance to him.'[29] It is the same in England,[30] and the principle applies to any sort of injury to riparian rights. It is the same with the pollution of air. Even if in some way a certain amount of nuisance has been legalised, no one is entitled materially to increase the same; and the aggrieved landowner may, if he chooses, attack the authors of the nuisance either piecemeal or in the lump.[31]

3. Public benefit.

3. *The benefit of the Public.*—It has been pleaded that public interests are so intimately bound up with the exploitation of works which develop the national wealth, and with the disposal of the sewage of towns, that private interests must yield. This is not so. The supposed public interest succumbs before the private right, provided this be materially affected.[32] As matter of fact, the antagonism is only apparent; it is for the public interest that private rights should be respected in every case.[33]

4. Recrimination.

4. *That the Complainer is himself committing a similar Nuisance.*—This was one of the pleas sustained in a case noticed already,[34] on the principle doubtless that a suitor must come into Court with clean hands, and that he himself *versans in illicito* is contributing to the damage he seeks to abate. The point was avoided in the *Esk Pollution* case by the reply that the complainer in question was not responsible for the illegal acts of his mill-tenant.[35] It seems, however, certain that the plea is not valid

[29] D. Buccleuch *v.* Cowan, 21st Dec. 1866, 5 Macph. 214, 216, 218, 228, 235, affd. 30th Nov. 1876, 4 Ret. H.L. 14; Ewen *v.* Turnbull's Trs., 21st Feb. 1857, 19 D. 513. See an analogous case of salmon-fishing—Forbes *v.* Leys, Masson, & Co., 11th March 1831, 9 S. 933, affd. 5 W.S. 384.

[30] Crossley *v.* Lightowler, L.R. 3 Eq. 279, 289, L.R. 2 Ch. 478, 481. See Wood *v.* Sutcliffe, 2 Sim. N.S. 163, 166; Wood *v.* Waud, 3 Exch. 748, 772.

[31] Cases in [29], [30]. The obs. of Jessel M.R. in Salvin *v.* N. Brancepeth Co., L.R. 9 Ch. 705, are not *contra*. A rough way of apportioning damages through sewage pollution is according to the rental of the contributing houses; Chipman *v.* Palmer (1879), 33 Amer. R. 566.

[32] D. Buccleuch *v.* Cowan, [29], 5 Macph. 229, 237; Bamford *v.* Turnley, 3 B. and S. 62; Tipping *v.* St Helen's Smelting Co., 4 B. and S. 608, 615; Att.-Gen. *v.* Corp. of Kingston, 11 Jur. N.S. 596; Lillywhite *v.* Trimmer, 36 L.J. Ch. 525; Goldsmid *v.* Tunbridge Wells, L.R. 1 Eq. 161, 169, and L.R. 1 Ch. 349; Att.-Gen. *v.* Colney Hatch, L.R. 4 Ch. 147; Att.-Gen. *v.* Leeds, L.R. 5 Ch. 583.

[33] *Per* L. Romilly in Goldsmid, [32].

[34] Colville *v.* Middleton, 27th May 1817, F.C. *supra*, p. 326.

[35] D. Buccleuch *v.* Cowan, [29], 5 Macph. 219; cf. a true case of contribution in Wilsons *v.* Waddell, 8th Jan. 1876, 3 Ret. 288, affd. on another point, 4 Ret. H.L. 29. Braid *v.* Douglas, 1800, M. App. *v.* Property, No. 2, did not raise

in any case.[36] There is no reason why a proprietor should be prevented from protecting his rights of ownership (to have a new or increased nuisance abated), simply because he himself is liable to be similiarly restrained by the respondent or by other owners. If the respondent be injured by nuisance committed by the complainer, his remedy is by a counter-action. If not so injured, it would be *jus tertii* in him to plead nuisance done to others.

5. *Acquiescence.*—Nuisances may be legalised, or, in other words, right to object to an infringement of a natural right of property may be lost, by express consent—which seldom occurs—or by consent gathered from acquiescence, or from mere lapse of time. It is always a matter of discretion for the Court, sitting as a Court of Equity, to determine whether a certain course of conduct comes up to consent implied from acquiescence; and there has been considerable diversity in the tenor of judicial opinion. The following rules, however, have been very generally observed: Acquiescence must be brought up to implied consent, and be explicable in no other way.[37] Therefore there must be full knowledge on the part of the person against whom the plea of acquiescence is used,[38] or on the part of those who act for him, of what is going on. He, like every one, is presumed to know his own rights, provided the facts are within his knowledge.[39] Mere silence, looking on without objection, is not enough.[40] A case in which acquiescence in the diversion of water for the use of a mill was deduced from want of objection for seventeen years, and from the fact that the mill was used by the objector's tenants,[41] has not been followed, and has been stigmatised as a stretch of the doctrine.[42] There must be something more positively inferring consent—such as assisting in setting up the nuisance;[43] or such *rei interventus* as

5. Legalisation —by agreement; by acquiescence.

the question, since the first weir was protected by prescription.

[36] Mackay *v.* Greenhill, 14th July 1858, 20 D. 1251; St Helen's Chemical Co. *v.* St Helen's Corp., 1 Ex. D. 196; and see obs. in Wood on Nuisance, p. 634; Swindon Waterworks Co. *v.* Wilts Canal Co., L.R. 7 H.L. 697.

[37] Hill *v.* Dixon, 28th Feb. 1850, 12 D. 808, *per* L.J.-C.; Cowan *v.* Kinnaird, 15th Dec. 1865, 4 Macph. 236, *per* L. J.-C. p. 241; see Hellon *v.* Hellon, 14th Jan. 1873, 11 Macph. 290, and Brisbane's Trs. *v.* Lead, 26th Nov. 1828, 7 S. 69.

[38] Hill *v.* Wood, 30th Jan. 1863, 1 Macph. 360; Morris *v.* Bicket, in H.L. 4 Macph. H.L. 44, 49; M'Gibbon *v.* Rankin, 19th Jan. 1871, 9 Macph. 423. If the person aggrieved is a corporation, the knowledge must come to it as such, not to individual members—City of Edinburgh *v.* Paton & Ritchie, 3d March 1858, 20 D. 731.

[39] M. Abercorn *v.* Langmuir, 20th May 1820, F.C.

[40] E. Kinnoull *v.* Keir, 18th Jan. 1814, F.C.; Cowan *v.* L. Kinnaird, *per* L.J.-C. *loc. cit.*, [37].

[41] Aytoun *v.* Melville, 1801, M. App. Property, No. 6.

[42] L. Melville *v.* Douglas's Trs., 12th Dec. 1828, 7 S. 186; 29th May 1830, 8 S. 841.

[43] Aytoun *v.* Douglas, 1800, M. App. Property, No. 5; Rochdale Canal Co. *v.* King, 2 Sim. N.S. 78.

is thus described by Mr Bell—'where great cost is incurred by 'operations carried on under the eye of one having a right to stop 'them;[44] or where, under the eye and with the knowledge of 'him who has the adverse right, something is allowed to be done 'which manifestly cannot be undone.'[45] The rule of *rei interventus* by the incurring of great cost must be taken with this qualification, that it only implies assent to such injury as will necessarily follow on the ordinary use of the *opus manufactum*. Thus, to refrain from objecting to the erection of a neighbouring factory is not to renounce objection in all time coming to damage from unnecessary smoke. It may be impossible for the neighbour, and it cannot be required of him, to anticipate anything more than the natural and obvious risk of damage to himself.[46] As to anything beyond this, there can be no acquiescence till the injury sets in.[47] For a similar reason, acquiescence in a certain amount of nuisance does not import consent to its being materially increased;[48] and if acquiescence is disproved, the whole nuisance must be abated, though complaint was not made till it became particularly offensive.[49] Acquiescence may be proved in defence to an action founding on nuisance, on a general counter-issue, if relevantly averred on record.[50] The effect of acquiescence is transmissible against successors in the estate, whether heirs or purchasers.[51]

Distinction therein between natural rights and exclusive rights.

It is here necessary to bear in mind a distinction in this respect between the natural rights incident to the enjoyment of property which are now under discussion, and the right of exclusive ownership—to resist physical encroachment. The rule regarding the latter is, that nothing short of formal grant to or positive prescription by the party encroaching will suffice to establish his right. The distinction was well brought out in a

[44] Cf. Muirhead *v.* Glasgow Highland Soc., 15th Jan. 1864, 2 Macph. 420, with M'Gibbon *v.* Rankin, *supra*, [38].

[45] B. Pr. 946, approved by L. Ch. Chelmsford in Bargaddie Coal Co. *v.* Wark, 3 Macq. 479, and L. Cowan in Cowan *v.* L. Kinnaird, [37], 4 Macph. 243.

[46] See Trotter *v.* Farnie, 7th Dec. 1830, 9 S. 144, affd. 5 W.S. 649; Swinton *v.* Pedie, 9th March 1837, 15 S. 775, rem. M'L. and Rob. 1018; Arnott *v.* Brown, 16th Jan. 1847, 9 D. 497; 17th Nov. 1847, 10 D. 95, affd. 1 Stu. 694, 1 Macq. 229.

[47] Johnston *v.* Scott, 26th Feb. 1834, 12 S. 492; D. Buccleuch *v.* Cowan, *supra*, [29], 5 Macph. 217; see Morris *v.* Bicket, 20th May 1864, 2 Macph. 1082, affd. 4. Macph. H.L. 44; M'Keon *v.* See (1873), 10 Amer. R. 659.

[48] Stirling *v.* Haldane, 26th Nov. 1829, 8 S. 131 (see L. Cringletie's definition of acquiescence); Ewen *v.* Turnbull's Trs., 21st Feb. 1857, 19 D. 513; Robertson *v.* Stewarts, 6th Dec. 1872, 11 Macph. 189; Bankart *v.* Houghton, 27 Beav. 425; Tipping *v.* St Helen's Smelting Co., L.R. 1 Ch. 66.

[49] Arrot *v.* Whyte, 1826, 4 Mur. 149, 5 S. 517 (N.E. 486).

[50] Ewen *v.* Turnbull's Trs., [48]; D. Buccleuch *v.* Cowan, [29]; Millar *v.* Marshall, 1828, 5 Mur. 28.

[51] Colville *v.* Middleton, 27th May 1817, F.C.

case where a public water-pipe had for thirty-five years been allowed to rest in and jut out from the pursuer's house, and had, on his complaining thereof, been removed into the street before his door. His acquiescence for such a long period, though incapable of legalising the encroachment on his property, was held sufficient to bar him from objecting to the nuisance in its new form.[52] The same rule is applied to an encroaching sign-board,[53] and to buildings erected *in bonâ fide* on another's soil. 'Acquiescence as to 'heritable property is a *modus acquirendi* which is an absolute 'novelty.'[54] It seems to have been at one time held that if the acquiescence be of the sort last mentioned by Mr Bell—involving a practical impossibility of *restitutio in integrum*—the same rule applies to nuisance and to physical encroachment. Of the one, an example is shown in a case of acquiescence of 15-20 years in an (accidental) change of river-channel, the old course being much blocked up in the interval;[55] of the other, in a case of prolonged non-interference (which did not, however, involve acquiescence, since the true owner was au absentee and in ignorance) while one who was not the true owner was converting a garden into building-ground. There the Court permitted the encroacher to remain in possession as owner on paying full compensation.[56] But this latter decision has been gravely questioned in the House of Lords, and involves an interference by the Court of Session which is beyond the power either of law or equity in England.[57] In cases of physical encroachment, damages may be due, though interdict or claim for restoration may be barred by acquiescence.[58] No similar case has occurred as to nuisances in Scotland.[59]

6. *Prescription.*—Right to object to a nuisance is lost by failing to object for forty years, the period of the negative prescription, during which the nuisance was actionable.[60] The nuisance

6. Legalisation by prescription.

[52] Allan *v.* Swan, 31st Jan. 1827, 5 S. 261 (N.E. 243).

[53] Buchanan *v.* Carmichael, 25th Nov. 1823, 2 S. 526 (N.E. 460), *supra*, p. 120.

[54] L. Melville *v.* Douglas's Trs., 12th Dec. 1828, 7 S. 186, 8 S. 841, *per* L. Gillies; see Sim *v.* Stewart, 26th June 1827, 5 S. 841 (N.E. 780), and Ramsden *v.* Dyson, L.R. 1 H.L. 129, 140.

[55] Mags. of Aberdeen *v.* Menzies, 1748, M. 12787. The same principle would apply to intentional deviation. See a similar American case in Washburne on Easements, 3.4.26; and contrast D. Gordon *v.* Duff, 1735, M. 12778.

[56] Macnair *v.* L. Cathcart, 1802, M. 12832. As to Sanderson *v.* Geddes, 17th July 1874, 1 Ret. 1198, see *infra*, chap. 32.

[57] In Grahame *v.* Kirkcaldy Mags., 26th July 1882, 9 Ret. H.L. 91.92.99, *per* L. Watson and L. Blackburn.

[58] Macnair, [56]; Shand *v.* Henderson, 1814, 2 Dow, 519; Goldie *v.* Oswald, 1814, 2 Dow, 534.

[59] As to England, see Goddard, p. 297, 2d ed.; Gale, p. 686, note, 5th ed.; and 21 & 22 Vict. c. 27.

[60] Ivory's note to Ersk. 2.1.2; Mags. *v.* Skinners of Inverness, 1804, M. 13191; Duncan *v.* E. Moray, 9th June 1809,

is legalised in that sense, rather than in the sense of a right having been vested in any one to commit it.[61] The consent thereby implied extends, however, only to the amount of inconvenience which can be traced back through the whole prescriptive period, not to any increase arising within it.[62]

Loss of right to commit nuisance.

The right, thus obtained by grant express or implied, to commit what but for the grant would be a nuisance, may be lost by express relinquishment, or by such a course of conduct as will be held fairly to imply abandonment. The presumption in favour of the normal state of rights of ownership, the elasticity of ownership when relieved of the pressure of acquired limitations, will readily infer the extinction of a legalised nuisance from cessation of user, for a time—greatly short, it may be, of the prescriptive period, but —sufficient in the circumstances to import definite abandonment,[63] the material question being in each case the intention of the party. 'The authorities on the question of abandonment have decided 'that the mere suspension of the exercise of a right [here of fouling a stream] is not sufficient to prove an intention to abandon 'it. But a long-continued suspension may render it necessary for 'the person claiming the right to show that some indication was 'given during the period that he ceased to use the right of his 'intention to preserve it. The question of abandonment of a 'right is one of intention, to be decided on the facts of each particular case.'[64]

Particular nuisances. 1. To air.

II. *Particular Nuisances*—1. *To Air.*—There is no such thing as a natural right to a lateral passage for air across the estate of a neighbour, any more than there is to an access for light. Every proprietor may have his premises surrounded by erections reaching to the zenith, and his neighbour has no common-law right to object.[65] But every landowner has a natural right that the air which naturally reaches his property shall be free from undue pollution and undue vibration, and has therefore a right to restrain his neighbour from immitting into his premises either noise or impure air beyond certain limits. What are these limits is really a jury question, to be determined according to all the circumstances of each case. But certain rules have been gathered by experience

F.C.; D. Buccleuch *v.* Cowan, [29], Sturges *v.* Bridgman, 11 Ch. D. 852.

[61] Rigby and Beardmore *v.* Downie, 8th March 1872, 10 Macph. 568, 573.

[62] Cases in notes [46-48].

[63] Rigby and Beardmore *v.* Downie, [61].

[64] *Per* Chelmsford L. Chan. in Crossley *v.* Lightowler, L.R. 2 Ch. 478, 482; see obs. of Wood V.-C. in the same case, L.R. 3 Eq. 279, and *dicta* in R. *v.* Chorley, 12 Q.B. 515, and Moore *v.* Rawson, 3 B. & C. 332, 338.

[65] See the English cases of windmills cited in Webb *v.* Bird, 10 C.B.N.S. 268; and *infra*, chap. 26, on servitudes of light, &c.

to aid in attaining a consistent and equitable reconciliation between the seemingly conflicting and really identical interests of neighbouring landholders.

Causing injury to property or health.

The leading distinction is that which is most authoritatively pointed out by Lord Westbury in an English case[66]—between nuisance to air which produces material injury to property or health, and that, on the other hand, which causes mere personal discomfort. The distinction was given effect to by the Scotch judges in the middle of last century, when a brick-kiln, 30 feet from the march, the use of which destroyed a hedge and scorched trees in an adjacent estate, was ordered to be removed;[67] while a lime-kiln whose fumes were offensive to the neighbouring landholder only when the wind blew in certain directions, was allowed to stand.[68] If material injury to property, actual or obviously imminent — as danger from fire arising from certain trades[69]—or destruction of health, can be proved, and there is no proof of acquiescence or prescription, the nuisance is unquestionable, and must be abated. Substantial damage to property will not be inferred unless it be 'visible,' in the sense that if it is necessary 'to start with scientific evidence, such as the microscope 'of the naturalist or the tests of the chemist, for the purpose of 'establishing the damage itself, that evidence will not suffice: the 'damage must be such as can be shown by a plain witness to a 'plain common juryman.'[70] Few cases have occurred in which these grounds have been pleaded by themselves; they have been mainly thrown in as makeweights along with averments of discomfort. On both sides of the Tweed, a hospital for infectious disorders has been decided not to be necessarily destructive to the health of the neighbourhood;[71] but it may be proved to be a nuisance, and if so will not be protected by a statute, unless couched in the clearest terms.[72]

Rendering life uncomfortable.

On the other hand, the questions which have arisen regarding the amount of discomfort which goes to establish a nuisance have been both numerous and delicate. The definition of Lord Mans-

[66] St Helen's Smelting Co. *v.* Tipping, 11 H.L. 642; Huckenstone, 10 Amer. R. 669.

[67] Ralston *v.* Pettigrew, 1768, M. 12808.

[68] Dewar *v.* Fraser, 1767, M. 12803.

[69] Kinloch *v.* Robertson, 1756, M. 13163; Vary *v.* Thomson, 1805, M. *voce* Public Police, No. 4.

[70] Salvin *v.* N. Brancepeth Co., L.R. 9 Ch. 705, 709.

[71] Mutter *v.* Fyfe, 7th and 23d Dec. 1848, 11 D. 211, 303 (cholera hosp.: it was restricted to the wants of the immediate neighbourhood); Baines *v.* Baker, 1 Ambl. 158 (small-pox); see Metrop. Asylum *v.* Gunter, 6 W.N. 128.

[72] Metrop. Asylum *v.* Hill, 6 App. Cas. 193, Haag *v.* Vanderburgh, 28 Amer. R. 655; cf. Colley *v.* L.N.-W. Ry. 5 Ex. D. 277.

field[73] is quite general—that which 'makes the enjoyment of life 'and property uncomfortable.' The standard of comfort has never been expressly, though often by implication, laid down by Scotch judges. It is the same as what has been described in England 'as the ordinary comfort of existence,'[74] 'according to the plain, 'sober, and simple notions among English people, . . . what-'ever their rank or station, or whatever their state of health may 'be.'[75] A hazardous distinction has been attempted between works which are regarded as certain to cause discomfort of the sort so described, if set up in the near neighbourhood of dwelling-houses, and are classed as known nuisances—such as blubber-boiling works,[76] chemical works (such as those involving the preparation of blood),[77] and slaughter-houses;[78] and those works whose offensive character is not presumed, but only accepted after positive proof of nuisance. Of this latter sort are lime-kilns,[79] brick-kilns,[80] glue-works,[81] soap-works,[82] candle-works,[83] steam-engines,[84] establishments for preparing tripe,[85] privies,[86] dung-hills,[87] and churchyards.[88] A tailor's workshop is beneath the

Absolute and provable nuisances.

[73] R. *v.* White, 1 Bur. 337; see Farquhar *v.* Watson, 19th Jan. 1813, F.C.

[74] Crump *v.* Lambert, L.R. 3 Eq. 409.

[75] Walter *v.* Selfe, 4 De G. & Sm. 315; approved in Soltau *v.* De Held, 2 Sim. N.S. 133; commented on in Wood on N. 18.

[76] Dowie *v.* Oliphant, 11th Dec. 1813, F.C.; Trotter *v.* Farnie, 7th Dec. 1830, 9 S. 144, affd. 5 W.S. 649.

[77] Jameson *v.* Hilcoats, 1800, M. *voce* Property, No. 4; see Anderson *v.* Burnet, 17th Nov. 1849, 12 D. 131.

[78] Palmer *v.* Macmillan, 1794, M. 13188; Kelt *v.* Lindsay, 8th July 1814, F.C.; Swinton *v.* Pedie, 9th March 1837, 15 S. 775, rem. M'L. and Rob. 1018; Porteous *v.* Grieve, 23d Feb. 1839, 1 D. 561, Lauder, 16th June 1815, F.C.; Minke *v.* Hofeman (1877), 29 Amer. R. 63; but see Wood on Nuisance, pp. 650, 657; and see note of *primâ facie* nuisances there, p. 681.

[79] Dewar *v.* Fraser, 1767, M. 12803.

[80] Ralston *v.* Pettigrew, 1768, M. 12808; Donald *v.* Humphrey, 9th July 1839, 1 D. 1184. There are many English cases: Walter *v.* Selfe, 4 De G. & Sm. 315; Hole *v.* Barlow, 4 C.B.N.S. 334, overruled by Bamford *v.* Turnley, 3 B. & S. 62, Cavey *v.* Ledbitter, 13 C.B.N.S. 470. In America, Huckenstone (1872), 10 Amer. R. 669; Campbell *v.* Seaman (1876), 20 Amer. R. 567.

[81] Charity *v.* Riddell, 1808, M. App. *voce* Public Police, No. 6; Glasgow Waterworks *v.* Airds, 20th Dec. 1814, F.C.

[82] Balleny *v.* Comb, 3d Feb. 1813, F.C.; Skene *v.* Maberly, 2d March 1822, 1 S. 369 (N.E. 347).

[83] Arnott *v.* Brown, 1847, 9 D. 497, 10 D. 95, affd. 1 Stu. 694, 1 Macq. 229.

[84] Rae *v.* Marshall, 3d March 1809, F.C.; Raeburn *v.* Kedslie, 1816, 1 Mur. 1; Johnston *v.* Constable, 17th July 1841, 3 D. 1263; Frame *v.* Cameron, 21st Dec. 1864, 3 Macph. 290; Dillman *v.* Repp. (1879), 33 Amer. R. 325; Sampson *v.* Smith, 8 Sim. 272.

[85] Farquhar *v.* Watson, 19th Jan. 1813, F.C.

[86] Clark *v.* Gordon, 1760, M. 13172; Scott *v.* Leith Comrs., 29th May 1830, 8 S. 845, 13 S. 646; Vernon *v.* St James's Vestry, 16 Ch. D. 449.

[87] Scott, [86], and Pentland *v.* Henderson, 2d March 1855, 17 D. 542.

[88] Swan *v.* Haliburton, 4th March 1830, 8 S. 637. See case of Martyrs' Monument—Paterson *v.* Beattie, 4th March 1845, 7 D. 561.

notice of the Court of Session,[89] and neither a butcher's shop[90] nor a national school[91] is a nuisance at common law if properly kept. An iron-factory is out of place in a burgh.[92] Nuisance from undue noise or vibration has been caused by a smith's forge in a flatted house;[93] by a fencing-school in an upper storey;[94] by a printing-press in a flat;[95] by blasting;[96] by use of a steam-hammer;[97] by musical entertainments;[98] by pigeon-shooting from traps;[99] and even by church-bells.[100] Nuisance from excessive smoke is struck at both by the common law[101] and by recent statutes,[102] which enforce on all furnaces the consumption of their own smoke. Charring coals and calcining ironstone may very readily create nuisance.[103] If the degree of discomfort be proved which comes up to the standard above laid down, as understood by a jury, it is no answer that the operations complained of are of great public advantage,[104] and are conducted in that part of his property which is most convenient to the owner. If nuisance be not established, on the other hand, the complainer will not be heard in a demand that the work should be transferred to another part equally suitable for the purpose.[105] If the operations complained of be such as are not hopelessly noxious, the Court will take care not to shut the door against amendment. Thus, where injury to plantations through calcining on a neighbouring estate was proved, the form

[89] Neilson *v.* Waterstone, 1st March 1323, 2 S. 259 (N.E. 228).

[90] Palmer *v.* Macmillan, 1794, M. 13188.

[91] Harrison *v.* Good, L.R. 11 Eq. 338.

[92] Thomson, 1807, M. App. Public Police, No. 5.

[93] Kinloch *v.* Robertson, 1756, M. 13163; see Elliotson *v.* Feetham, 2 Bing. N.C. 134, and cases of engines, note [84].

[94] Fleming *v.* Ure, 1750, M. 13159.

[95] Robertson *v.* Campbell, 1802, M. Public Police, No. 3; see Frame *v.* Cameron, 21st Dec. 1864, 3 Macph. 290.

[96] Tiffin *v.* M'Cormack (1878), 32 Amer. R. 408; Hunter *v.* Farren (1879), 34 ibid. 423 (measure of damages); Wyman *v.* Leavitt (1880), 36 ibid., 303 (do.)

[97] Eaden *v.* Firth, 1 H. and M. 573; Roskell *v.* Whitworth, 19 W.R. 804.

[98] Inchbald *v.* Barrington, L.R. 4, Ch. 388; Walker *v.* Brewster, L.R. 5 Eq. 25.

[99] Howe *v.* Druce, Q.B., 4th July 1883.

[100] Ecclefechan Ca. n. r.; Soltau *v.* De Held, 2 Sim. N.S. 133; and case in Wood, p. 697.

[101] Laing *v.* Muirhead, 7th Dec. 1822, 2 S. 73 (N.E. 67); Cooper and Wood *v.* N.B. Ry., 28th Feb. 1863, 1 Macph. 499, 2 Macph. 116; Crump *v.* Lambert, L.R. 3 Eq. 409. Wood on Nuisance, pp. 576 *et seqq.*, esp. list of cases noted on pp. 591, 592.

[102] 20 & 21 Vict. c. 73; 24 & 25 Vict. c. 17; 28 & 29 Vict. c. 102; Monteith & Co. *v.* Lang, 17th March 1865, 3 Macph. 726. The word factory in sect. 1 of the leading statute includes a chemical work —Ward & Co. *v.* Lang, 21st March 1863, 1 Macph. 724. See under a local Act, Tod *v.* Burnet, 1853, 16 D. 126, 794; Young *v.* Laing, 18th Feb. 1864, 2 Macph. 667.

[103] Herriot *v.* Faulds, 1804, M. 15255; M'Callum *v.* Forth Iron Co., 15th March 1861, 23 D. 729; cf. Galbraith's Tr. *v.* Eglinton Iron Co., 25th Nov. 1868, 7 Macph. 167.

[104] Jameson *v.* Hilcoats, 1800, M. App. Property, No. 4, and see *supra*, p. 328.

[105] Dewar *v.* Fraser, 1767, M. 12803.

of the order as adjusted in the House of Lords was interdict against calcining within one mile of the pursuer's lands 'in the 'manner hitherto practised by them [the defenders], or in any 'other manner whereby noxious vapour may be caused to pass 'over the pursuer's lands, or any other part thereof, to the damage 'or injury of the pursuer's plantations or estate.'[106] Where the alleged injury is more personal than patrimonial (though the two are really inseparable), the form of the interdict, in a case which came repeatedly before the Court, was against manufacturing artificial manure 'in such way and manner as to cause injury 'to the pursuers, their property, tenants, and others residing in the 'vicinity of said manure-works or other premises, in their health, 'comfort, or otherwise, or so as to create a nuisance.'[107] Proof in defence that the health of the person or the nature of the thing affected was unusually delicate and susceptible of injury is irrelevant.[108]

Variation in standard.

It must not, however, be supposed that the standard of purity and tranquillity of the atmosphere is constant, or can be determined by scientific analysis irrespective of considerations of locality. It would be folly to expect the fresh breezes of Ben-y-Gloe in the slums of the Cowgate. 'If a man lives in a town it is necessary 'that he should subject himself to the consequences of those 'operations of trade which may be carried on in his immediate 'locality which are actually necessary for trade and commerce, 'and also for the enjoyment of property, and for the benefit of the 'inhabitants of the town and of the public at large.'[109] But where, in a suburban estate, partly feued out for dwelling-houses, there were ten 'blaes' heaps, containing in all 260,000 tons, thrown up during the working of coal and ironstone underneath, and one was intentionally set on fire by the mineral tenants, with consent of the proprietors, who proposed to ignite the rest *seriatim*, interdict was granted at the instance of feuars against further ignition, since that, however managed, would necessarily be 'productive of a considerable amount of discomfort and annoy-'ance,' though not of proved danger to health. It was no bar to this result that burning was the only practicable way of ridding the neighbourhood of a menace, which was liable to be roused at any moment by accident or design.[110] A certain amount of

[106] Inglis *v.* Shotts Iron Co., 26th July 1882, 9 Ret. H.L. 78, 7 App. Cas. 518.

[107] Fraser's Trs. *v.* Cran, 7th Jan. 1879, 6 Ret. 451.

[108] Cooke *v.* Forbes, L.R. 5 Eq. 166; Gullick *v.* Tremlett, 20 W.R. 358.

[109] St Helen's Smelting Co. *v.* Tipping, 11 H.L. 642, 650, *per* L. Ch. Westbury. This does not apply to 'sensible injury 'to the value of property,' p. 651.

[110] Hislop *v.* Kelvinside Trs., 22d Dec. 1882, 10 Ret. 426.

smoke, stench, and noise is a normal phenomena in town life; and country places, devoted to agriculture, are sometimes necessarily far from savoury.[111]

Increase of nuisance.

It does not, however follow, that because pollution to a certain extent already exists, and has been legalised by prescription or acquiescence, it may be increased at the will of any of the owners in the district. Material increase will be prohibited,[112] whatever the locality. Thus it happened in a case which arose from additions being made to an already existing glue-work, though situated in the Bridgegate of Glasgow—a district from time immemorial occupied by tan-pits, glue-works, and other nauseous manufactories. Some of the judges thought the addition lawful in respect of acquiescence in the original work, and of the district being 'appropriated to manufactures;' but a large majority were of an opposite opinion, thinking that neither circumstance warranted the introduction of new or the material extension of old nuisances, or their removal nearer to the complainer's dwelling.[113] The finding in a later case,[114] that the neighbourhood in question was already appropriated to works of a very offensive nature, and that therefore the defenders' grounds were 'well adapted' to the erection of their works, was unnecessary for the decision of the dispute (since damage to property was disproved, and actual discomfort not alleged), and may be explained consistently with the case of *Charity*, on the *ratio* of acquiescence and no increase. If not so reconcilable, it is contrary to general principle, to Scotch precedent, and to the later views of English lawyers, by whom the phrase 'a convenient and proper place'[115] for the exercise of a lawful trade has been either repudiated altogether,[116] or explained to mean simply a place where a nuisance would not be caused.[117] In a recent case of injury to trees by the vapour evolved in calcining, this plea of convenience, while supported by Lord Young, was rejected by all the other judges both in the Court of Session and in the House of Lords.[118] 'The affairs of life in a dense

[111] See Scott *v.* Leith Comrs., 29th May 1830, 8 S. 845, 13 S. 646; Huckenstone, 10 Amer. R. 669.

[112] Balleny *v.* Comb, 3 Feb. 1813, F.C.

[113] Charity *v.* Riddell, 1808, M. App. Public Police, No. 6; Dowie *v.* Oliphant, 11th Dec. 1813, F.C.; Trotter *v.* Farnie, 7th Dec. 1830, 9 S. 144, affd. 5 W.S. 649, *per* L.O. Cringletie at 5 W.S. 650.

[114] Glasgow Water-works *v.* Airds, 20th Dec. 1814, F.C.; see Colville *v.* Middleton, 27th May 1817, F.C.; Trotter *v.* Farnie, [113], *per* L. Cringletie—'Every 'nuisance depends on locality and degree,' —and L.J.-C. 9 S. 146.

[115] Used by Byles J. in Hole *v.* Barlow, 4 C.B.N.S. 334, and approved by the Court of Common Pleas.

[116] *Per* L. C.-J. Cockburn in Tipping *v.* St Helen's Smelting Co., 4 B. & S. 608, 615.

[117] By a majority in Bamford *v.* Turnley, 3 B. & S. 62; St Helen's Smelting Co. *v.* Tipping, 11 H.L. 642, 651, *per* L. Ch. Westbury.

[118] Inglis *v.* Shotts Iron Co., 5th July

'neighbourhood cannot be carried on without mutual sacrifices of 'comfort: and in all actions for discomfort, the law must regard 'the principle of mutual adjustment; and the notion that the 'degree of discomfort which might sustain an action under some 'circumstances must therefore do so under all circumstances, is as 'untenable as the notion that if the act complained of was done 'in a convenient time and place, it must therefore be justified 'whatever was the degree of annoyance that was occasioned 'thereby.'[119]

Threatened nuisance.

It has been already said that interdict will be granted against an obviously threatening nuisance, such as the erection of works intended for operations which are a known nuisance. This power of the Scotch Courts has been traced by a high authority to the *cautio damni infecti* of the Civil Law.[120] If the buildings can be equally well used for other purposes, the erection may proceed, though the noxious use be prohibited.[121] Both in these cases of proposed noxious use, and (on the analogy of water-pollution) even when the operations causing nuisance are going on, the Court, before issuing an interdict, may allow the authors of the nuisance time to ascertain by experiment whether abatement is practicable, consistently with the continuance of their manufacture; and may remit the whole matter to a man of skill.[122] The Court, before allowing experiments, may, if it think right, order a specification of the apparatus and processes proposed for abatement.[123] In this way means have been found to render a blubber-boiling[124] and a candle-making work[125] innocuous. In no case will interdict be granted against anticipated abuse.[126] The *onus* of proof lies on the party who alleges nuisance, on the principle of freedom of ownership; but it will probably be held to be shifted if any known nuisance is alleged.[127] The state of a nuisance-causing subject after the date of the summons may be proved.[128]

The mode in which the remedy of interdict is administered by

1881, 8 Ret. 1006, affd. 26th July 1882, 9 Ret. H.L. 78, 7 App. Cas. 518.

[119] *Per* Erle C.J. in Cavey *v.* Ledbitter, 13 C.B.N.E. 470, 476.

[120] *Supra*, p. 319. *Per* L. Chan. in Trotter *v.* Farnie, 7th Dec. 1830, 9 S. 144, affd. 5 W.S. 649.

[121] Swinton *v.* Pedie, 9th March 1837, 15 S. 775, rem. M'L. & Rob. 1018.

[122] Johnston *v.* Constable, 17th July 1841, 3 D. 1263; Fraser's Trs. *v.* Cran, *infra*, [130].

[123] Arnott *v.* Brown, 26th Jan. 1847, 9 D. 497, 10 D. 95, affd. 1 Stu. 694, 24 Sc. Jur. 421.

[124] Result of Trotter *v.* Farnie, [120], *supra*, *per* L. Chan. in Swinton *v.* Pedie, [121].

[125] Arnott *v.* Brown, [123].

[126] Scott *v.* Leith Comrs., [111]; Arnott *v.* Brown, [123].

[127] Frame *v.* Cameron, 21st Dec. 1864, 3 Macph. 290.

[128] Arrot *v.* Whyte, [49], 4 Mur. 149; see Gardner *v.* Fraser, 20th July 1860, 22 D. 1501.

the Court, in order to the abatement of nuisances, is best illustrated by the cases of pollution of water,[129] and by one long-contested case of nuisance to air, in which it was found impossible to abate the nuisance without stopping the works.[130] Remedy by interdict.

2. *Comfortable enjoyment in general—Miscellaneous Nuisances.*— These, which refer neither to support, air, nor water, are of little consequence. Examples, given by Bell,[131] are the keeping of a brothel, or of pigeon-shooting premises. Others are to be found in the General Police Act,[132] the Public Health Act,[133] and local municipal Acts or provisional orders. 2. Miscellaneous nuisances.

3. *Conventional Nuisances.*—It is sometimes deemed advisable to add, to the security against nuisance afforded by the common law and statute, the further safeguard of special stipulations in feu-contracts and deeds of a like description. These obligations are not concerned with nuisance at all, in the strict sense of infringement of natural rights. They belong to the same category as building restrictions,[134] or servitudes in the wider sense,[135] follow the rules which distinguish real from personal burdens, are construed according to the intention of parties—with a bias, in case of doubt, in favour of the freedom of ownership[136]—and are discussed here rather than in later chapters, partly because they frequently depend on the common law of nuisance for their interpretation, and mainly because there is a distinct benefit in keeping separate the restrictions which are conventionally attached to the erection, repair, or alteration of buildings, and those which relate to their use. It is now authoritatively determined, however, that the same rules apply to both sorts of restrictions,[137] and reference is made to a later chapter for an examination of these rules. A few illustrations only of restrictions on use are here adduced. Thus, a slaughter-house was interdicted 'in respect of the clause' 3. Conventional nuisances.

[129] *Infra*, chap. 29, and *supra*, chap. 2; and esp. D. Buccleuch *v.* Cowan, 2 Macph. 653, 4 Macph. 475, 5 Macph. 214, 1054, 11 Macph. 675, affd. 4 Ret. H.L. 14; Milne Home *v.* Dunse Comrs., 10th June 1882, 9 Ret. 924.

[130] Fraser's Trs. *v.* Cran, 31st May 1877, 4 Ret. 794, 1st Dec. 1877, 5 Ret. 290; sequel, 7th Jan. 1879, 6 Ret. 451.

[131] B. Pr. 974.

[132] See Ledgerwood *v.* M'Kenna, 18th Dec. 1868, 7 Macph. 261; Vert *v.* Richardson, 20th Feb. 1869, ibid. 552; Pullar *v.* Perth Comrs., 20th July 1876, 3 Ret. 1176.

[133] Dunbar *v.* Levack, 10th Feb. 1858, 20 D. 538; M'Creadie *v.* M'Broom, 19th Jan. 1860, 22 D. 405 (cf. Banbury Authority *v.* Page, 8 Q.B.D. 97); Steel *v.* Gourock Comrs., 11th July 1872, 10 Macph. 954.

[134] See chap. 27. In *Coutts's* case, cited there *in initio*, as in many others, the two sorts of restorations are mixed up together.

[135] Urquhart *v.* Halden, 29th June 1833, 11 S. 854, 2d June 1835, 13 S. 844.

[136] Frame *v.* Cameron, [127].

[137] E. Zetland *v.* Hislop, *infra*, [149].

—a clause which prohibited 'any works that can be reasonably 'considered as nuisances by the public;'[138] and again, where the feuars were forbidden 'to erect or carry on any brewery, tan-work, 'brick-work, soap-work, distillery, or any kind of manufacture 'whatever, or chemical process, whereby a nuisance can be created,' 'without prejudice to their building coach-houses, stables, or other 'offices behind the dwelling-houses.'[139] A prohibition against 'carrying on any nauseous chemical operations, noxious or noisy 'manufactures, or anything that may be a nuisance or may occa-'sion disturbance to any of the neighbouring feuars or proprietors,' was held not to strike at the use of a feu as site of a hall for cattle-shows and cattle-sales. The general words had to be read as *ejusdem generis* with what preceded them; so that it was unnecessary to consider whether anything done out of doors—on the public accesses—could be reached by the clause.[140] A cholera hospital did not contravene a clause against 'carrying on any 'business which may be considered to be nauseous or hurtful or 'occasion disturbance to the neighbouring feuars.'[141] A prohibition against the erection of 'steam-engines, or any other busi-'ness which may be nauseous,' &c., does not strike at all steam-engines—nor are steam-engines necessarily nuisances at common law; so that the complainer, having renounced probation, had failed to make out his case.[142] A feu-charter which contained a prohibition against the vassal allowing to be kept on the feu 'any 'public-house or tavern,' has been held to strike at an inn or hotel containing sleeping apartments for the accommodation of travellers, and a hydropathic establishment, even though the latter was not licensed for the sale of excisable liquors;[143] but a place for the sale of liquor to be consumed off the premises is neither a public-house, nor a beer-house, while it is a beer-shop.[144] A real condition, that buildings erected upon ground feued out as a terrace in a town shall be 'used as private dwelling-houses only 'in all time coming,' is prohibitive of a large school for girls, intended to accommodate about twelve boarders and fifty day-scholars, and may be enforced by the other resident feuars in the

[138] Lauder, 16th June 1815, F.C.

[139] Porteous *v.* Grieve, 23d Feb. 1839, 1 D. 561.

[140] Anderson *v.* Aberdeen Agricultural Hall Co., 16th May 1879, 6 Ret. 901.

[141] Mutter *v.* Fyfe, 7th and 23d Dec. 1848, 11 D. 211, 303.

[142] Frame *v.* Cameron,[127]; cf. in water pollution, Ewen *v.* Turnbull's Trs., 21st Feb. 1857, 19 D. 513.

[143] Ewing *v.* Campbell, 23d Nov. 1877, 5 Ret. 230, *sed quære* as to the comprehension of the terms. See a case of long lease, Gold *v.* Houldsworth, *infra*, [153].

[144] Pease *v.* Coats, L.R., 2 Eq. 688; L.N.-W. Ry. *v.* Garnett, L.R., 9 Eq. 26; St Albans *v.* Battersby, 3 Q.B. D. 359; London Building Co. *v.* Field, 16 Ch. D. 645; Holt & Co. *v.* Collyer, 16 Ch. D. 718.

terrace.[145] Where buildings not above a certain height were allowed to be erected on ground behind a dwelling-house in a town, as offices for additional convenience, a prohibition against their being occupied as dwelling-houses, but only as a stable, washing-house, or other offices, was held to strike only at occupation as a separate dwelling-house, and not to prevent the erection and use of a billiard-room and its appurtenances.[146] A prohibition against carrying on any 'business' may be contravened by opening a hospital where small payments are made by the patients according to their means;'[147] and an 'outward mark or show of 'business' may be displayed by inscribing a sign on and exhibiting a brass plate and window-blinds.[148] In a very recent case, which was appealed,[149] these conditions were elaborately discussed. There was a condition in the feu-contracts of land, which eventually came to be covered by a town (*Grangemouth*) of 5000 inhabitants, to the following effect: 'Neither shall it be lawful for the feuar, 'his heirs or assignees, or any tenant or possessor of the said 'houses [to be erected], to sell or retail any kind of malt or spirit-'uous liquors, or to keep victualling or eating houses, unless they 'shall obtain permission in writing to that effect from the superior.' This was the last of a long series of prohibited trades. In questions which arose between singular successors, &c., of the original feuars and the superior, who desired to enforce the restriction, it was admitted, that either by permission or without objection, fourteen establishments, in which the prohibited liquors were sold, were in operation, and that any permission which had been given was expressly revocable. There was much diversity of opinion in the Court of Session. Lord Rutherfurd Clark, the Lord Ordinary, who decided the case on an imperfect statement of facts, dismissed the action—which was at the superior's instance—on the ground of his want of interest, anxiety for social reform being none. Lord Young, while recognising an interest (seeing that a discharge of the condition would be a saleable subject), denied a legitimate interest in what was repugnant to ownership in fee. Lord Craighill sought in vain for a proper patrimonial interest, and ignored a prohibition which was inconsistent with public policy. And the Lord Justice-Clerk, Lord Moncreiff, while viewing such a condi-

[145] Ewing *v.* Hasties, 12th Jan. 1878, 5 Ret. 439; cf. Colville *v.* Carrick, 19th July 1883, 20 Sc. L.R. 839; German *v.* Chapman, 7 Ch. D. 271 (charity school for 100 girls).

[146] Murison *v.* Wharrie, 17th July 1883, 20 Sc. L. R. 820; Colville *v.* Carrick, [145] (hall for school-room).

[147] Bramwell *v.* Lacy, 10 Ch. D. 691.

[148] Evans *v.* Davis, 10 Ch. D. 747.

[149] E. Zetland *v.* Hislop, 18th March 1881, 8 Ret. 675, rev. 9 Ret. H.L. 40, 7 App. Cas. 427.

tion as valid in respect to a single feu, regarded it as inapplicable to a whole town, since the superior's patrimonial interest then disappeared, and was displaced by individual opinions, philanthropic and social. The House of Lords, in reversing, held that the condition, being neither inconsistent with the ownership of the vassals nor adverse to public policy, was a valid condition of the feu; that the superior had set forth a sufficient interest to enforce it in his possession of superiorities, with the possible reversion, and in his ownership of many of the houses in the town, of a large lot of building ground in the neighbourhood still vacant, and of his mansion-house and policies, which were hard by, the value, comfort, and amenity of all these being alleged to be diminished by the prevalence of drunkenness in the town; but that the right to enforce the condition might have been lost by long acquiescence in contraventions. The case was remitted to the Court below for further procedure, and was eventually abandoned by the pursuer. Many of the topics discussed in the House of Lords fall more conveniently within the chapters below relating to servitudes and building restrictions. It is only necessary to notice here the following points. The original validity of such conditions must be judged of as at their date. The result of the superior's option is to enable him, on observing detriment to his property, to enforce the obligation against such feuars as he may choose, without attempting to apportion the precise amount of damage due to each feu.[150] The doctrine of acquiescence was well illustrated by a neglected restriction against use of houses in a street for shops;[151] acquiescence must come up to definitive abandonment of the control in a particular locality. The existence of a whole street of public-houses in one part of the burgh, would not disable the superior from enforcing the prohibition in a street of villa dwellings in another quarter of the town.[152] Lastly, it was held to be good law that, where, to a prohibition against keeping a public-house without a special yearly licence from the landlord (it was an analogous case of long lease), was tacked the clause 'otherways to pay £10 sterling of additional rent for each time 'they [the tenants] shall be found guilty,' this was a penalty, not a licence to infringe subject to advance of rent.'[153]

[150] *Per* L. Chan. at 9 Ret. 44, 45.

[151] Browns *v.* Burns, 14th May 1823, 2 Sh. 298 (N.E. 261), *infra*, chap. 27.

[152] *Per* Lord Watson, 9 Ret. H.L. 51.

[153] Gold *v.* Houldsworth, 16th July 1870, 8 Macph. 1006.

CHAPTER XXV.

SERVITUDES.[1]

REAL or predial servitudes, or servitudes simply, are certain conventional rights known to the law, in virtue of which the owner, as such, of one tenement possesses certain privileges as against the owner, as such, of a neighbouring tenement; or, altering the stand-point, they are certain conventional real burdens known to the law, in virtue of which the latter owner is subjected to certain restraints in favour of the former. The first-mentioned tenement is termed the dominant, the other the servient, tenement; and their owners are called, for shortness, the dominant and servient owner respectively. The term predial is derived from the Roman law.[2] The use of the naked term 'servitude' has been already vindicated in treating of natural rights,[3] and will be further noticed in relation to liferents.[4] The idea expressed by the word 'conventional'—otherwise, acquired or derivative—carries both back to natural rights and forward to the doctrine of the constitution of servitudes, which will be explained below. The convenient though sorely misused term 'privilege' has long formed part of the English definition of easement,[5] and has now crept into the Scotch nomenclature.[6] The force of the word 'neighbouring' has been already pointed out. It relates more to

Definition.

[1] Cr. 2.8.43; Dirleton, 276; Hope, Min. Pract. 10.17; Spottis. p. 307; Forbes, 2.4.1; St. 2.7; Bankt. 2.7; Bayne, p. 72 *et seq.*; Ersk. 2.9; Mack. Inst. 2.9; B. Pr. 979 *et seq.*; Duff, 136 *et seq.*; 1 Jur. Styles, 47; Napier, 343 *et seq.*, 581 *et seq.*

[2] I. (2.3); D. 8 (1-4); C. (3.34); 198 D. (50.16); Stair, 2.7.9, confuses 'predial' and 'rural.'

[3] *Supra*, p. 322.

[4] *Infra*, chap. 35.

[5] Termes de la Ley, p. 284; Hewlins *v.* Shippam, 5 B. and C. 229; Gale on Easements, p. 5; Goddard on Easements, p. 2. For recent modes of using the word 'servitude,' see Ops. of L. Young, L. J.-C. Moncreiff, and L. Watson in M'Ritchie's Trs. *v.* Hislop, 7 Ret. 392, 395, 8 Ret. H.L. 102. And 'easement' is used both for natural right and servitude by L. Chan. Selborne and L. Watson in Dalton *v.* Angus, 6 App. Cas. 792, 830.

[6] B. Pr. 979. It is common in Scotch charters.

interest than to locality.[7] After these explanations of the terminology of the definition, we now proceed to unfold the general rules which it involves.

Real right or burden.

1. *Real Right or Real Burden.*—In addition to what has been already said of real rights,[8] it is necessary to recall for a moment the broad legal distinction between these and personal rights. Personal rights (or obligations, in the active sense) invest one individual, the creditor, with a legal claim to demand of another, the debtor, that he shall do or refrain from doing something. What is characteristic here is the right to demand performance by another of a certain act. A real right gives no such claim; it only entitles its holder to do something himself, or to restrain others in a certain way. Take, for instance, the case of a heritable creditor. His right to demand payment of his claim rests solely on the obligation contained in his bond: his real right—to appropriate the rent, and to proceed to poinding of the ground or to sale of the subjects—calls for no action on the part of the debtor; and this is expressed by saying that it is available against the land itself. Ownership, as has been shown, is not a right, but a relation—a relation, however, which involves an indefinite number of special rights. When any of these passes into the hands of one who is not the owner, it becomes a *jus in re aliená*, limiting the ownership. Of rights of this kind, servitudes form an important class. Moreover, they derive their character of real rights or burdens, not from the agreement, express or implied, out of which they spring, but from the operation of law. Their peculiarity, as we shall see presently, is that they rest, not, like other real burdens, real conditions, or heritable securities, on the records, but on their being well known to the law. Three results follow from their character of real rights:—

Through the operation of law.

Not *in faciendo.*

(*a*) *Servitus in faciendo consistere nequit.*[9]—The several rights which accrue from the relation of person and thing called ownership, are divisible into two kinds—the right of an owner to do an indefinite number of acts himself, and the right to prevent others meddling with his property. There is no third category—no *jus non faciendi*—involved in the idea of property. The landowner's right to leave his house uninhabited and his crops unreaped, to let his buildings go to wreck and ruin and his lands be inundated, is not a right of property, but the birthright of every man to let things alone, so long as he breaks no law.[10] Now a real right or

[7] *Supra*, p. 309.

[8] See *supra*, pp. 88, 309.

[9] Paraphrased from 15, § 1 D. (8.1); Ersk. 2.9.1; B. Pr. 984.

[10] See Vangerow, I. p. 693; Molitor, Serv. § 9.

burden is a limitation on these rights of property; in other words, it is said, less accurately, to be a restriction imposed on the property, not on the liberty of the proprietor. The *jus faciendi* of the proprietor is limited by a burden *non faciendi*—a right in another to prevent his doing certain things within his estate; and the right to prevent the interference of others is limited by a burden *patiendi*—of suffering another to do certain things within the same. Both of these limitations are purely negative on the part of the servient owner: from the stand-point of the dominant owner the first is also negative; the second, which entitles him to active interference, is positive or affirmative. This distinction, when applied to the real rights, with which we are dealing, presents the leading division of negative and positive (affirmative) servitudes.[11]

(Positive—negative.)

The brocard now under discussion may be illustrated in various ways.[12] Thus the dominant and not the servient owner is liable for the repair of a mill-lade, both as being for his own advantage, and seeing that he is liable for damage done by means of it to the adjacent lands.[13] The obligation, which was laid upon the servient owner, in an early case, to repair a dam-dyke demolished during a spate, can be justified only on the supposition that he violently 'impeded' its reconstruction by the millowner.[14] Any such express obligation to repair, if it slips out of the titles of the singular successors of the original servient proprietor, will probably be held to have been originally a mere personal obligation, and so not binding on them.[15] The rule is sufficient to exclude thirlage from the category of servitudes. It is a service, a relic of the feudal *corvées*.[16] This rule of repair is universal in all the best-known systems of law.[17] The sole exception, which is borrowed from the Roman law regarding the *servitus oneris ferendi*, and has formed the subject of much learned disputation, is eluded in our law by the doctrine of common interest.[18] If that doctrine is excluded

E.g., incidence of repairs.

[11] St. 2.7.5; Ersk. 2.9.1; Bankt. 2.7.7 and 14; Bayne, p. 72; B. Pr. 981-2.

[12] See Civil Law texts in notes [17], [18], *infra*.

[13] Parson of Dundee *v.* Inglish, 1687, M. 14521; Pringle *v.* D. Roxburghe, 1767, 2 Pat. 134; Carlile *v.* Douglas, 1731, M. 14524; see Gray *v.* Maxwell, 1762, M. 12800. The real objection to the decision in Carlile was, that the silting-up was ascribable directly to the erection of the weir.

[14] Gairlton *v.* Stevenson, 1677, M. 14535.

[15] Argument in Nicolson *v.* Melvill, 1708, M. 14516; Cooper & M'Leod *v.* Edinburgh Impr. Comrs., 18th July 1876, 3 Ret. 1106.

[16] B. Pr. 1017; Harris *v.* Mags. of Dundee, 23d May 1863, 1 Macph. 833, 844, *per* L. Deas; but see L. Curriehill, p. 842.

[17] 6 § 2, 8 D. (8.5); Code Nap. 698; Pardessus, § 19; Preuss. L.R. 1.22.30; Gale, p. 528.

[18] *Infra*, chap. 33. See 33 D. (8.2); 6 §§ 2.5 and 7, 8 pr. and § 2 D. (8.5). It was probably a customary right connected

by the circumstances of the case, so is the obligation to repair.[19] The servient owner, however, has a right to execute repairs, which shall render his own condition less onerous without deteriorating that of the dominant proprietor.[20]

Strictly construed:

(*b*) *The presumption is for freedom.*[21]—Servitudes, like all real rights, are restraints on the freedom of property. This freedom, like the liberty of the subject, is dear to the law, and strict proof is required of any limitation of it. The presumption acts in three ways: first, by demanding certain known modes of constitution;

in constitution;

degree;

next, after proof of the existence of some right of servitude, by presuming in favour of that degree thereof which shall be least burdensome to the servient tenement; and lastly, when the servitude and its degree have been made out, by directing that it shall be exercised *civiliter*. The different modes of constitution will be noticed anon.[22] The presumption for the least onerous degree of subjection is best observed in those servitudes, such as way,[23] and the pseudo-servitude of thirlage,[24] in which there are well-defined gradations of restraint. The third application of the rule must always be borne in mind in determining the proper exercise of a right of servitude. It must be exercised in the mode least disadvantageous to the servient tenement, consistently with full enjoyment.[25] Thus a servitude of watering cattle does not entitle the dominant to prevent the servient owner from watering his own stock,[26] or from covering over his water-course so long as he leaves sufficient watering-places open and accessible.[27] The landowner through whose estate a servitude right of footpath runs may erect stiles, turn-stiles, or swing-gates across it,[28] but may not lock the gates, even though he offer to provide the dominant owner with keys.[29] If the way be a cart, cattle, or carriage road, he may put

and exercise—*civiliter*.

with the *cautio damni infecti*, and was got rid of by relinquishing the tenement —6 § 2 D. (8.5); Vangerow, § 342; Molitor, § 9; St. 2.7.6; Ersk. 2.9.7-8; Bankt. 2.7.6; B. Pr. 1003; Code Nap. 655-6; Pardessus, § 165 *et seq.*; Preuss. L.R. 1.22.56; Gale, p. 530 *et seq.*, where are quoted L. Stair and two American cases.

[19] Murray *v.* Brownhill, 1715, M. 14521.

[20] 2 § 6 D. (49.3); Carlile *v.* Douglas, [13]; Gray *v.* Maxwell, [13].

[21] Ersk. 2.9.33; B. Pr. 987; Duff, 136; Ross *v.* Cuthbertson, 3d March 1854, 16 D. 732; Keith *v.* Stonehaven Harbour Comrs, 12th Feb. 1829, 7 S. 405, affd. 5 W.S. 234.

[22] *Infra*, p. 353 *et seq.*

[23] *Infra*, chap. 26.

[24] Dawson *v.* Mags. of Glasgow, 15th June 1824, 3 S. 136 (N.E. 91), rem. 2 W.S. 230, alt. 14th Nov. 1827, 6 S. 19, rev. 4 W.S. 81, 92, *per* L. Wynford.

[25] *Civiliter modo*, 9 D. (8.1); see also 20, § 1 D. (8.2); 4, § 1; 5, § 1 D. (43.19); Ersk. 2.9.34.

[26] B. Pr. 987.

[27] Beveridge *v.* Marshall, 18th Nov. 1808, F.C.

[28] Sutherland *v.* Thomson, 29th Feb. 1876, 3 Ret. 485 (public road).

[29] Borthwick *v.* Strang 1799, Hume, 513; Oliver *v.* Robertson, 10th Nov.

up swing-gates.[30] He may object to its being used for any other purpose than passage, as for loading carts.[31] The dominant owner cannot object to its course being altered, on cause shown, provided he get a road equally convenient;[32] nor to its route being defined, where formerly indefinite;[33] nor even in certain circumstances to its being covered over.[34] And in rights of pasturage and fuel, the servient owner, provided he leave sufficient grass and peat for the lawful requirements of the burdener, may plough up the rest of his moor;[35] or break it up, to reach the minerals beneath it;[36] or pasture his own stock; or grant out new servitudes.[37]

(*c*) *Servitudes affect the Lands.*—This is the prime characteristic of all real rights. It is a short and not quite logical statement of the rule that servitudes, when once properly constituted, are due by every owner of the servient tenement, so long as he holds the same and no longer, whether he has acquired by succession or by singular titles. The predial servitudes are, indeed, doubly real rights, since they are constituted for the benefit of the dominant tenement, and for that only; but this must be noticed further on. Affecting the lands.

Proceeding with the terms of the definition, it is to be remarked that, mainly on account of certain peculiarities in the mode of constituting them—

2. *Servitudes are such Limitations of Ownership only as are well known to the Law.*—Servitudes properly constituted are good against creditors and purchasers; and they do not require for their validity to appear upon the record. It is therefore only just that they should include no burdens which a purchaser could not detect on an inspection of the tenement, or about which he would not naturally be put on his inquiry. Many rights of servitude there are, chiefly taken from the Roman law, of which no doubt has ever been mooted. The law relating to some of these will occupy the following chapter. Concerning some other Known to the law.

1869, 8 Macph. 137. This overrules Mags. of Glasgow *v.* Bell, 1776, 5 B.S. 598.

[30] Wood *v.* Robertson, 9th March 1809, F.C.; if not interfering with the dominant owner's reasonable and convenient use, Baker *v.* Friak, 24 Amer. R. 506.

[31] Baird *v.* Ross, 17th June 1829, 7 S. 766, revd. 6 W.S. 127; Thorpe *v.* Brumfitt, L.R. 8 Ch. 650; Cannon *v.* Villars, 8 Ch. D. 415; Fritz *v.* Hobson, 14 Ch. D. 542.

[32] Bruce *v.* Wardlaw, 1748, M. 14525; Ross *v.* Ross, 1751, M. 14531.

[33] See the analogous case of public paths, *supra*, p. 290.

[34] Allans *v.* Mags. of Rutherglen, 1801, 4 Pat. 269 (public footpaths).

[35] Watson *v.* Dunkennan Feuars, 1667, M. 14529, 1 B.S. 615; E. Southesk *v.* Melgum, 1680, M. 14531. As to golfing, see Mags. of Earlsferry *v.* Malcolm, 12th June 1829, 7 S. 755; 23d Nov. 1832, 11 S. 74.

[36] Ersk. 2.9.34.

[37] Watson *v.* Dunkennan Feuars, [35].

rights there has been much discussion, and the law can scarcely be said to be in a satisfactory state.

But not fixed in number.

Lord Stair says:[38] 'To descend now to the kinds of servitudes: 'there may be as many as there are ways whereby the liberty of 'a house or tenement may be restrained in favour of another 'tenement; for liberty and servitude are contraries, and the abate-'ment of the one is the being or enlargement of the other.' Erskine is of the same opinion.[39] There can be no doubt of the accuracy of the remark, if it be meant as denying that the Scotch law at any period of its history recognised only a definite number of servitude rights, and that this number could not be added to in response to the needs of neighbourhood. Expansibility or elasticity has been characteristic of the law in this respect from the earliest times.[40] 'There is no rule in the law of Scotland which 'prevents modern inventions and new operations from being 'governed by old and settled legal principles.'[41] But if it be meant that any restriction on the use of property, however grotesque or unreasonable, may be clothed with the privileges of servitude—particularly of running with the land without entering the register of sasines—the doctrine is false. Something more is required. The distinction between positive and negative is here of value. Negative servitudes, which admit of no possession on the part of the dominant owner, and work no apparent change on the servient tenement, belong to certain well-known categories, the number of which is little likely to be augmented. They are an anomaly in the law;[42] and the law takes care that the anomaly shall not be enhanced. But positive servitudes are usually apparent on inspection, and always require possession or sasine; so that there is little danger of surprise to an ordinarily wary purchaser.[43] It has been in reference to rights of this sort that questions have arisen.[44]

In case of positive servitudes.

Bleaching.

Thus a prescriptive right of bleaching *in fundo alieno* was denied by the Court of Session in the beginning of last century,[45] admitted by it in the middle,[46] and recognised by the House of Lords near

[38] 2.7.5 and 9.

[39] Ersk. 2.9.2.

[40] *Per* L. Ivory in Harvey *v.* Lindsay, 23d June 1853, 15 D. 768, 775; *per* L.J.-C. Hope in Dyce *v.* Hay, 10th July 1849, 11 D. 1266, 1270, criticising the remarks of L.O. Cunninghame in Home *v.* Young, 18th Dec. 1846, 9 D. 286.

[41] *Per* L. Chan. St Leonards in Dyce *v.* Hay, 1 Macq. 312.

[42] Sivright *v.* Wilson, 19th Dec. 1828, 7 S. 210.

[43] B. Pr. 990.

[44] There seems to have been a similar distinction between the principal rural servitudes of the Roman law—way and aqueduct—and minor rights, such as watering, pasture, and taking sand,—2 I. (2.3).

[45] Falkland *v.* Carmichael, 1708, M. 10916.

[46] Jaffray *v.* D. Roxburghe, 1755, M. 2340, revd. (apparently on a different ratio)

the end, of the same period[47]—the modern art of bleaching having in the interval been learnt from Holland.[48] Incident to the servitude is the right to use the necessary water. A later case of bleaching being claimed was decided on the ratio that the spot used by the inhabitants of a burgh of barony was within the bounds of the burgh, and that the immemorial user was one of its privileges, which the baron was bound to protect.[49] It is thought that a right to cut timber (other at least than *silva cædua*) in a neighbouring estate could not be elevated into a servitude, as involving action on the part of the servient owner to make it permanent.[50] The same objection does not apply to drift wreck and ware cast on the sea-shore, for these products of the sea are replaced without industry; accordingly, they have been recognised as proper subjects of servitude.[51] It is hard to see why the same should not be true of growing sea-tangle, if used for manure, on the analogy of pasturage. The usage of cutting kelp for manufacture, however, has been regarded rather as proof of ownership of the foreshore than of servitude, since it is not employed for the benefit of any dominant tenement.[52] A servitude of quarrying stone and slate for the use of a dominant tenement has been recognised;[53] as also a servitude of taking sand and gravel.[54] There can be no such thing as a servitude of golfing, benefit to a dominant tenement being out of the question. A customary right to golf has been, however, recognised in burgh property,[55] or on ground alienated by a burgh with express reservation of the right.[56] Much less is there a servitude of strolling, though an express but not a customary *jus spatiandi* may be established.[57] Nor can

Cutting timber.

Taking seaware,

and kelp.

Stone and slate; sand and gravel.

Golfing.

Jus spatiandi.

1 Pat. 632. See L.J.-C. Hope in Dyce *v.* Hay, [40], 11 D. 1271.

[47] Sinclair *v.* Mags. of Dysart, 1779, M. 14519, affd. 2 Pat. 554.

[48] Ure, Dict. of Arts, *sub voce.*

[49] Home *v.* Young (Eyemouth), 18th Dec. 1846, 9 D. 286; See Cooke *v.* Chilcott, 3 Ch. D. 694.

[50] On the principle of 28 D. (8.2); Vang. § 340, 3 a; More's Notes, p. 224; but see Garden *v.* E. Aboyne, 1734, M. 14517. In England it is an estover.

[51] E. Morton *v.* Covingtree, 1760, M. 13528, 11 Macph. 332; Baird *v.* Fortune, 25th May 1859, 21 D. 848, revd. 4 Macq. 127.

[52] E. Morton *v.* Covingtree, [51]; L. Reay *v.* Falconer, 1781, M. 5151; M'Taggart *v.* M'Douall, 1st March 1867, 5 Macph. 534; Agnew *v.* L. Adv., 21st Jan. 1873, 11 Macph. 309.

[53] Murray *v.* Mags. of Peebles, 8th Dec. 1808, F.C.; Keith *v.* Stonehaven Harbour Comrs., 12th Feb. 1829, 7 S. 405, affd. 5 W.S. 234.

[54] Aikman *v.* D. Hamilton, 17th June 1830, 8 S. 943, alt. 6 W.S. 64; Sharp *v.* *Eund.*, 28th May 1829, 7 S. 679.

[55] Kelly *v.* Mags. of Burntisland, 1812, note to 9 D. 293; Sanderson *v.* Mags. of Musselburgh, 22d June, 25th Nov. 1859, 21 D. 1011, 22 D. 24. This was apparently the fact also in Mags. of Earlsferry *v.* Malcolm, [35]. See L. Medwyn in Dyce *v.* Hay, 11 D. 1279. Cochran *v.* Fairholm, 1759, M. 14517, turned on jurisdiction.

[56] Cleghorn *v.* Dempster, 1805, M. 16141, rem. 2 Dow, 40. See *supra*, p. 298.

[57] Cases, *supra*, pp. 296, 299.

there be a servitude of trout-fishing in river or loch,[58] or of a privilege of one tide's salmon-fishing in a season,[59] or of hunting or shooting.[60]

Two tenements.

3. *There must be two distinct Tenements.*—This rule is otherwise expressed in the words of the Roman law, '*Nulli res sua* '*servit.*'[61] It is of practical importance in questions of extinction by confusion, and will be examined in that relation.[62]

For benefit of dominant tenement.

4. *For the benefit of the Dominant Owner as such.*[63]—In less precise but more convenient phrase, a servitude cannot exist except for the benefit of a dominant tenement. It is very difficult to determine to what subjects the term *prædium* may or may not extend,—whether it includes anything more than the ordinary corporeal subjects of ownership, land and houses. The question has never been settled whether the dominant tenement —in a servitude of way, for instance—may be an incorporeal right, such as a right of salmon-fishing or port.[64] It is difficult to see why it should not; or why in such a matter there should be all the difference in the world between a right of property in certain minerals—which is a corporeal right—and a right to take the same out of the estate of another, which is an incorporeal right.[65] In many cases, no doubt—in those, namely, in which the burdened tenement and the incorporeal right can be traced back to the same person as owner and granter—the existence of a right in the nature of a servitude may be explained by implied grant as part and pertinent. But other cases are conceivable; and it seems to be the better opinion that such accessorial privileges as are plainly of advantage to an incorporeal heritable right would be entitled to the status of servitudes.[66] It has been decided in a case of high authority that a burgh of barony cannot be the dominant tenement for a servitude of pasturage claimed by all the inhabitants over lands *extra fines burgi*;[67] and on the

Quære, if incorporeal.

Burghs royal and of barony.

[58] *Dicta* in Patrick *v.* Napier, 28th March 1867, 5 Macph. 683, 693, 699, 706 (diss. Deas), as to fishing in a loch.

[59] Murray *v.* Peddie, 25th May 1880, 7 Ret. 804.

[60] E. Aboyne *v.* Innes, 22d June 1813, F.C., affd. 6 Pat. 444.

[61] 26 D. (8.2).

[62] *Infra*, p. 368.

[63] Ersk. 2.9.33.

[64] Berry *v.* Wilson, 1838, M'Farl. Rep. 91, 97.

[65] Graham *v.* D. Hamilton, 5th July 1869, 7 Macph. 976, revd. 9 Macph. H.L. 98, *per* L. Chan. Hatherley, p. 102; and Proud *v.* Bates, 34 L.J. Ch. 406, there cited.

[66] The rule—*servitus servitutis esse non potest*, 1 D. (33.2); and see 33 § 1 D. (8.3.)—refers to a wholly different matter.

[67] Feuars of Dunse *v.* Hay, 1732, M. 1824. The title of a 'feuar' is sufficient —Sharp *v.* D. Hamilton, 28th May 1829, 7 S. 679; but he cannot plead the possession of others in a similar position—Aikman *v.* D. Hamilton, 17th June 1830, 8 S. 943, alt. 6 W.S. 64. If *intra fines*, different principles hold, *supra*, p. 299.

other hand, in a case[68] which has been somewhat overlooked,[69] 'that it is neither anomalous nor unusual for the magistrates of a 'burgh [meaning a royal burgh] to be the dominant heritors of a 'rural servitude for the use of the inhabitants of the community.' If this be so, it may be argued that the only difference is one of form, and that the baron himself, as protector of a burgh of barony, would be entitled, or even bound, to maintain its extra-territorial rights.[70] Burghs of both sorts are equally corporations, with a definite territory. The decision in the *Dunse* case may have been founded on the unsuitable and indefinite character of a pasturage right in favour of a town. Yet it is thought that even if the Court felt bound by authority to follow the case of *Peebles*, in circumstances exactly similar, it would be loath to extend by analogy the sphere of *quasi* public rights, which possess none of the definiteness of the ordinary servitude. The only other peculiarity in respect to the *prædium dominans* which requires to be noticed arises out of the union of lands brought about by erection into a barony. User of a servitude on behalf of part only of the lands may, it is said, keep it up in favour of the whole barony.[71]

Barony lands.

The rule that a servitude exists only for the benefit of a *prædium* or tenement acts in various ways. It excludes what are called personal servitudes, such as liferents; and personal privileges, such as licences to fish or shoot;[72] and all leasehold rights. It reduces to the level of mere contracts all agreements to take profit from another's land for the purpose of sale.[73] 'The 'extent of the servitude must in general be regulated by the 'uses proper to the dominant tenement;[74] meaning by that, not merely such purposes as are barely necessary for it, but such as are reasonably useful to it.[75] Some of these uses conduce only to amenity, such as a servitude of prospect;[76] but all go to enhance the market value of the dominant estate.[77] All attempts to communicate the benefit of a servitude to persons who are not

Effect of the rule.

Personal servitudes.

Sale.

[68] Murray *v.* Mags. of Peebles, 8th Dec. 1808, F.C.; see L. Brougham in last case.

[69] Home *v.* Young, 18th Dec. 1846, 9 D. 286; see L. Pres., p. 296.

[70] *Per* Ls. Fullerton and Jeffrey in last case.

[71] Cheap *v.* Ferguson, 1785, M. 14520; cf. L. Adv. *v.* Cathcart, 19th May 1871, 9 Macph. 744; and Munro *v.* Mackenzie, 1760, M. 14533, *sed quære*. See *supra*, p. 44.

[72] Cases, *supra*, p. 350. Also as to kelp, golf, and strolling, p. 349.

[73] Murdoch *v.* Carstairs, 25th Jan. 1823, 2 S. 159 (N.E. 145), 7 S. 607; Murray *v.* Mags. of Peebles, 8th Dec. 1808, F.C.

[74] Leslie *v.* Cumming, 1793, M. 14542.

[75] L. Breadalbane *v.* Menzies, 1741, 5 B.S. 710, 724.

[76] It is the same in Roman law — 3. 15. 16 D. (8.2), 8 § 1 D. (8.5), 3 D. (43.20).

[77] Boswell *v.* Inglis, 9th March 1848, 10 D. 888, affd. 6 B. App. 427.

in possession of this estate or part of it transgress against this, the leading principle of predial servitudes.[78] It is in conformity with the principle of strict interpretation, already noticed,[79] and may be otherwise stated as prohibiting the dominant from increasing the burden laid on the servient owner without the consent of the latter. Thus, a party who held a servitude of road in favour of part of his property was held not entitled to make use of it for the benefit of another part, a purchase of intermediate land having made this physically practicable.[80] But this rule must be taken reasonably. Thus, where of three fields in the same ownership and possession, one only had attached to it a servitude of way over adjoining land, hay grown on all three and stacked on this one might be carted thence along the way without committing excess of user.[81] It does not matter whether the titles of the two parts are separate or not.[82] It is the same with aqueduct.[83] The reason of the rule is still stronger in the case of exhaustible rights, such as servitudes of pasturage and fuel.[84] In fact, a distinction in this respect has been hinted at on the bench. If the holder of a servitude of fuel feus or leases out a part of the dominant tenement, and attempts, while retaining the privilege for his remaining portion, to communicate it to his feuar or lessee, he manifestly seeks materially to increase the burden. This is not so obvious in the case of a servitude of way. Some sort of communication—to tenants, servants, and visitors—is necessary to the beneficial use of the road; it is of the nature and essence of the privilege that it must be shared.[85] The question whether the communication can be extended by multiplying residents, if not determined by the nature of the right, as in pasturage, or by the nature of the dominant tenement, such as a house expressly mentioned, may have to be determined by the scope of possession. It must be remembered that mere alteration of the dominant subject —as from a lint-mill to a forge-mill[86]—is immaterial, so long

Burden cannot be increased.

Especially if exhausting.

[78] Murray *v.* Mags. of Peebles, 8th Dec. 1808, F.C.

[79] *Supra*, p. 346.

[80] Scotts *v.* Bogles, 6th July 1809, F.C.; Skull *v.* Glenister, 16 C.B.N.S. 81, noticed in Finch *v.* G.-W. Ry., 5 Exch. D. 254.

[81] Williams *v.* James, L.R. 2 C.P. 577.

[82] Anstruther *v.* Caird, 7th Dec. 1861, 24 D. 149. The close of the rubric is not justified by the decision.

[83] Scouller *v.* Robertson, 29th Jan. 1829, 7 S. 344; Mags. of Dunbar *v.* Sawers, 28th May 1829, 7 S. 672.

[84] Stewart *v.* Caithness, and Stewart *v.* Smart, 1788, Hume, 731; Brown *v.* Kinloch, 1775, M. 14542; cf. Wood *v.* Saunders, L.R. 10 Ch. 582; Wimbledon, &c., Conservators *v.* Dixon, 1 Ch. D. 362.

[85] Murdoch *v.* Carstairs, [73], *per* L. Pitmilly, 7 S. 610.

[86] Hay *v.* Robertson, 4th Feb. 1845, 17 Sc. Jur. 186; cf. Boswell *v.* Inglis, [77].

as the burden is not enhanced.[87] Operations are lawful which are necessary to keep up the burden, unlawful if they tend to increase it.[88]

Rights accessory to servitudes.

These are the leading general rules applicable to predial servitudes. Certain accessorial rights—chiefly of access and repair—will be noticed in discussing the particular rights of servitude in next chapter. While keeping mainly in view the rights of the dominant owner, it must not be lost sight of that the servient owner has his rights also, being only limited in the use of his property so far as the servitude requires.[89]

Causa perpetua.

The rule of Roman law that a servitude must have a *causa perpetua*[90]—*i.e.*, that the state of things on which it rests for its existence must be permanent, though its exercise may be subject to terms and conditions[91]—will apply in Scotland so far as to exclude from the category of servitudes such rights as depend on the continued or recurrent activity of the servient owner,[92] or on the transient, easily exhaustible character of the servient tenement,[93] such as *stagnum*.

Constitution of Servitudes.

Conventional or derivative.

Servitudes differ from natural rights in being conventional, acquired, or derivative—in arising not out of the disposition of nature, but out of the provision of man. They take their origin in, though they do not owe all their characteristics to, agreement or grant express or implied. The grant may take the form of a writing *inter vivos*, of a settlement *mortis causa*,[94] or of an Act of Parliament.[95] In respect to constitution, there is so marked a distinction between negative and positive servitudes that separate treatment is necessary.

[87] Robertson *v.* Scouller, 13th Dec. 1825, 1 F.C. 126, 29th Jan. 1829, 7 S. 344.

[88] Gairlton *v.* Stevenson, and Bruce *v.* Dalrymple, noticed *supra*, p. 45. Where nothing is said as to the extent of the burden, the limit beyond which it cannot be increased may be gathered from the actual use originally—Onthank *v.* Lake Shore Ry. (1877), 27 Amer. R. 35.

[89] Ersk. 2.9.34; B. Pr. 987; More's Notes, p. 222; *supra*, pp. 345, 346.

[90] 28 D. (8.2).

[91] 4 D. (8.1).

[92] Garden *v.* E. Aboyne, 1734, M. 14517, probably referred to natural wood, cut so as to revive.

[93] See Cowan *v.* L. Kinnaird, 20th June 1863, 1 Macph. 972, 4 Macph. 236; cf. Magor *v.* Chadwick, 11 A. and E. 571; Wood *v.* Waud, 3 Exch. 748.

[94] There is no Scotch case; but the illustration is common in the Corpus. The latest English cases are Pheysey *v.* Vicary, 16 M. and W. 484; Polden *v.* Bastard, L.R. 1 Q.B. 156.

[95] Caledonian Ry. *v.* Sprot, 15th Feb. 1854, 16 D. 559, 955, revd. 2 Macq. 449; do. *v.* Belhaven, 5th June 1857, 3 Macq. 56; M'Culloch *v.* Dumfries Water Comrs., 29th Jan. 1863, 1 Macph. 334. See obs. of Cairns L.J. in Rangley *v.* Midland Ry., L.R. 3 Ch. 310.

Negative.

A. *Of Negative Servitudes.*—Beginning with the simpler of the two, a negative servitude can only be constituted in Scotch law[96] by express grant or agreement.[97] Stair adds 'prescription by 'hindering the owner of the servient tenement to use his free-'dom, . . . by reiterated acts during the time of prescrip-'tion.'[98] This sort of prescription has never been recognised in practice, and would, even if recognised, be of no value; for it would require that the abstention of the servient owner should be clearly traced at every moment to the violent acts of his neighbour, and not to his own good pleasure. Lord Stair himself, in the same passage, shows that mere enjoyment of a state of things existent on a neighbour's estate for the prescriptive period does not give a right to demand its continuance or to prohibit its being altered. It is the result of the neighbour's choice; to retain it or alter it is *res meræ facultatis.* Nor will this fixed rule of law be controlled by local custom.[99]

By grant.

The grant or agreement must be by writing, holograph or tested, as in the transmission of other heritable rights. Any sort of writ, so authenticated, is enough; such as the titles of the dominant[100] or servient tenement, or a missive which does not form part of the ordinary titles of either.[101] One case,[102] which allowed a servitude of light to be constituted by a missive, neither holograph nor tested, entered into during unity of possession, and another,[103] in which, in respect of peculiar circumstances, a proof before answer was allowed, although no writing at all was produced, must be rejected, as transgressing a leading rule in heritable conveyancing, and as not justified by later cases of implied grant.[104] Not only must the import of the alleged grant be clear;[105] it must also be intended as a definitive and binding conveyance of the servitude. Thus, it was held that a servitude *non ædificandi*, in favour of a purchaser, contained in a minute of sale but omitted in the charter following thereon, must be presumed to have been departed from, more especially as it never appeared in the titles of the servient tene-

[96] It is different in England. See esp. as to light—Lord Tenterden's Act, 2 & 3 Will. IV. c. 71, sect. 3; and Gale, *sub voce* Light.

[97] Ersk. 2.9.35; B. Pr. 994; Duff, 138; 1 Jur. Styles, 47; but see Heron *v.* Gray, 27th Nov. 1880, 8 Ret. 155, noticed *infra*, p. 365.

[98] St. 2.7.9.

[99] Morris *v.* M'Kean, 19th Feb. 1830, 3 S. 564.

[100] Gray *v.* Fergusson, 1792, M. 14513, 7 S. 212, n.

[101] Mearns *v.* Massie, 1800, Hume, 736; M'Gown *v.* Kidd, 1808, Hume, 740; Cowan *v.* Stewart, 24th May 1872, 10 Macph. 735.

[102] Mutrie, 26th June 1810, F.C.

[103] Johnstone *v.* Aitken, 10th June 1829, 7 S. 732.

[104] See these, *infra*, p. 359.

[105] Ross *v.* Cuthbertson, 3d March 1854, 16 D. 732.

ment. 'The rule as to negative servitudes is an anomaly in our 'law, and ought not to be extended.'[106] The Lord President doubted whether such a servitude incurred by one not infeft would be good against his singular successor. It may be answered that the whole drift of this part of the law is to leave infeftment out of account. Even the defective title of one infeft but not entered on an *a me* holding is sufficient;[107] and the constitutive writ itself does not require to appear on the record.[108] Therefore a negative servitude which was originally contained in the titles of the servient tenement was in no wise impaired by having disappeared from them for forty years, there having been no contrary possession, and therefore no prescription of immunity.[109]

B. *Of Positive Servitudes.*—Positive servitudes may be acquired or imposed in three different ways: by express grant or agreement; by grant presumed from the positive prescription; and by grant implied from certain special circumstances. Of these in order. Positive.

1. *Express Grant.*[110]—The same rules here apply as in the case of grants of negative servitudes. The constitution must be by writ. It may appear in the titles of the dominant or of the servient tenement, or may take the shape of a separate minute or missive, provided it be holograph or tested. Like other heritable rights, 'a servitude cannot be constituted by verbal agreement to be 'proved by witnesses; nay, though a verbal agreement were ad- 'mitted, there is *locus pœnitentiæ* till writ be adhibited,' unless eked out by such *rei interventus* as will operate a personal bar.[111] Here, too, the constitutive writ does not require to enter the record.[112] If it does, it is effectual against singular successors, according to the general rule of real rights. If it does not, there must for that purpose be such use or exercise of the right on the one hand, and such submission to the burden on the other, as the nature of the right admits of.[113] It is in virtue of this use, which is called *quasi* possession,[114] that the servitude becomes a real right. 1. Express grant. Recorded or not.

[106] Sivright *v.* Wilson, 19th Dec. 1828, 7 S. 210—followed in Cowan *v.* Stewart, [101]; cf. Free St Mark's *v.* Taylor's Trs., 26th Jan. 1869, 7 Macph. 415.

[107] M'Gown *v.* Kidd, [101].

[108] Edinburgh *v.* Leith, 1630, M. 14500; Wilkie *v.* Scot, 1688, M. 11189; Gray *v.* Fergusson, [100]; Banks & Co. *v.* Walker, 5th June 1874, 1 Ret. 981.

[109] Boswell *v.* Inglis, 9th March 1848, 10 D. 888, affd. 6 B. Ap. 427; Clelland *v.* Mackenzie, 1739, M. 14506.

[110] St. 2.7.1; Mack. 2.9.11; Ersk. 2.9.3; Bankt. 2.7.1; B. Pr. 992; Duff, 137; 1 Jur. Styles, 47; Hope, Min. Pract. 10, 17.

[111] Kincaid *v.* Stirling, 1750, M. 8403; Stirling *v.* Haldane, 26th Nov. 1829, 8 S. 131. See *supra*, p. 329, as to acquiescence, and authorities there. It is the same in England—Gale, p. 76 *et seq.*

[112] Penniemuir, 1632, M. 14502.

[113] Blair *v.* Rigg's Creds., 1686, M. 14505; Garden *v.* E. Aboyne, 1734, M. 14517.

[114] 10 pr. D. (8.5); 20 D. (8.1); Savigny on Possession, § 44 *et seq.*; Ersk. 2.9.3; *supra*, p. 3.

Possession as badge.

In the absence of seisin, 'it is in servitudes what seisin is in a 'right of lands.'[115] It has been called the badge, not the measure of the right.[116] It is either traceable on inspection of the state of the servient tenement, as in aqueduct, or may be detected on the most cursory inquiry in the neighbourhood. The existence of this double source of information has probably been the reason why the law of Scotland has preferred the division of servitudes into positive and negative, to the more rigid distinction of the French law between servitudes apparent and non-apparent—servitudes which do and do not announce themselves by external works.[117] In Scotland, a singular successor is put on his inquiry as to certain well-defined burdens. If the corresponding rights are capable of visible exercise—in other words, are positive, not negative servitudes—he is entitled to disregard those which have not been so enjoyed, provided they do not enter the record. He is safe against latent burdens in this sense of the term. The *quasi* possession operates in another way—it redargues abandonment. It has been seen that a negative servitude contained in a preliminary writing, but omitted from the formal charter following thereon, is presumed to be derelinquished. It was decided, in the earliest recorded case,[118] that possession in similar circumstances on a servitude of pasturage kept up the right. In one case only is seisin or possession unnecessary. Where, at the date of an action founded on an alleged positive servitude, the parties deduced from a common author and the titles of both remained personal, it was held that the title to the dominant tenement, containing the alleged right, being first in date, prevailed over the title to the servient tenement which contained no reference to the servitude, although there had been no possession.[119] Lastly, the rule of strict construction is here also applicable. The few cases of positive servitude which have turned on the wording of the constitutive writ will be noticed in the following chapter.

(Apparent and non-apparent.)

2. Positive prescription.

2. *Positive Prescription.*—The rules relating to the operation of the positive prescription have been so fully discussed,[120] that nothing more is here necessary than a short *résumé* of some of the points which have been illustrated by the law of servitudes.[121] It is needless to inquire whether positive prescription as to servitudes sprang from or was older than the first part of 1617, c.

[115] Ersk. *loc. cit.* 114.

[116] B. Pr. 992.

[117] Code Nap. 689.

[118] Turnbull *v.* Blanerne, 1622, M. 14499.

[119] Greig *v.* Brown, 16th Jan. 1829, 7 S. 274.

[120] *Supra*, chap. 3.

[121] St. 2.7.2; Ersk. 2.9.3; Bankt. 2.7.2; Forbes, 2.4.1.2; Duff, 136; 1 Jur. Styles, 47; B. Pr. 993; Napier, 343 *et seq.*, 374 *et seq.*

12,[122] for the rules of that Act are strictly followed. The only title required is infeftment in the dominant tenement.[123] Neither *bond fides*[124] nor a clause of part and pertinent is necessary; and a servitude may be prescribed for beyond the limits of a bounding charter.[125] The period of possession has always been, and, in virtue of an exception in the clause[126] curtailing the period of the positive prescription, will still remain, forty years. Its currency is suspended by the minority of the owner of the servient tenement.[127] The possession must be as in exercise of a right,[128] and uninterrupted[129] either *vi et facti*, or by confusion of ownership and servitude.[130] It is both the measure and the badge of the right—*tantum prescriptum quantum possessum*;[131] while an express grant is measured by its terms alone. Erskine's modifications of the strict maxim have been already noticed, and further illustrated by the expansion of a public right of way through the use of improved modes of transit.[132] But the doctrine of expansibility seems to be inapplicable in cases of servitude.[133] Another distinction between the effect of grant and prescription in constituting servitudes is, that the former does not bind the servient owner's superior, unless he has consented to it; while the latter binds him, as he had a good title to interrupt.[134]

Title.

Period.

Minority.

Measure of the right.

As against superior.

3. *Implied Grant.*—Attempts[135] have been made to set up servitudes *rebus ipsis et factis*—*i.e.*, by such actings of the parties as fairly imply and recognise their existence; but this mode of constitution has been authoritatively held to form no part of the law either of England or Scotland.[136] A grant of a servitude is in both countries implied only in two cases, both of which arise in similar circumstances. The circumstances are—that the owner of two neighbouring tenements conveys away one while retaining the other, or conveys or bequeaths both to different grantees. And

3. Implied grant.

[122] St. 2.7.2; Napier, p. 357, and authorities there.

[123] St. 2.3.73, 2.7.2; Ersk. 2.9.3; B. Pr. 993.

[124] St. 2.7.2.

[125] Beaumont *v.* L. Glenlyon, 11th July 1843, 5 D. 1337, and authorities there.

[126] 37 & 38 Vict. c. 94, sect. 34.

[127] Campbell *v.* D. Argyll, 19th May 1836, 14 S. 798; see Craufurd *v.* Menzies, 12th June 1849, 11 D. 1127, and Black *v.* Mason, 18th Feb. 1881, 8 Ret. 497.

[128] Purdie *v.* Steil, 1749, M. 14511.

[129] Nicolson *v.* Bightie, 1662, M. 11291.

[130] *Infra*, p. 368.

[131] Ersk. 2.9.4; B. Pr. 993; *supra*, p. 43.

[132] *Supra*, pp. 45, 276.

[133] Forbes *v.* Forbes, 20th Feb. 1829, F.C., and 7 Sh. 441; Mackenzie *v.* Bankes, 19th June 1868, 6 Macph. 936; see *supra*, p. 346.

[134] Cr. 2.8.43; Forbes, 2.4.1.3; St. 2.7.3; Ersk. 2.9.4; Bankt. 2.7.3; Duff, 136; Dalmorton Tenants *v.* E. Cassilis, 1666, M. 5005; Ms. Breadalbane *v.* Campbell, 12th Feb. 1851, 13 D. 647.

[135] Kincaid *v.* Stirling, 1750, M. 8403, unsuccessful; Preston's Trs. *v.* Preston, 7th March 1844, 22 D. 366, successful.

[136] Cochrane *v.* Ewart, 13th Jan. 1860, 22 D. 358, affd. 4 Macq. 117.

the two cases are—(1) that a servitude over one of the tenements is absolutely necessary to the enjoyment of the other; and (2) that such a servitude is necessary for the convenient and comfortable enjoyment of the latter.

(a) Servitudes of necessity.

(*a*) *Servitudes of Necessity.*—The implied grant of these is only an application of the general rule, '*Cuicunque aliquis quid concedit* '*concedere videtur et id sine quo res ipsa esse non potuit;*'[137] and this principle of construction may perhaps be here aided by motives of public policy, which will not readily admit of part of the realm being excluded from occupancy. It would be to act in derogation of a grant to refuse that without which the subject of the grant could not be enjoyed. Thus a grant or reservation of minerals, or of right to take them, implies those uses of the surface which are reasonably required for the purpose of mining, even though the usual clauses setting forth this accessorial right are omitted.[138] Of this sort are servitudes of support,[139] but the most common illustration is a way of necessity.[140] 'The conveyance of a piece 'of property implies a right of access to it. No one can possess 'a piece of ground without a right of ish and entry; and the way 'that is to be obtained, if the conveyance is silent, is just the 'existing way.'[141] Consequently, if the tenement bequeathed,[142] conveyed, or reserved,[143] does not abut on a public access, but is landlocked on all sides, either by the rest of the estate hitherto held along with it, or by that and the estates of third parties, there is implied a right to a way of necessity through the disjoined property. It has been held, in England, in perfect consistency with the nature of the right, that a way of necessity ceases as soon as the dominant owner has acquired another access.[144] If there be more than one road to the landlocked subject, only one can be demanded as necessary, and the choice falls to him by whose act the way was created,—that is the granter or disponer, whether the severance take place by his granting out,[145] or by his retaining that subject.[146] In either case, the necessity extends only to such uses as were involved in the enjoyment of the subject,

[137] Sheppard's Touchstone, p. 89; Broom's Maxims, 479; Stair, 2.7.6.

[138] Balds *v.* Alloa Colliery Co., 30th May 1854, 16 D. 870; Caledonian Ry. *v.* Sprot, 1856, 2 Macq. 449.

[139] Richards *v.* Rose, 9 Exch. 218.

[140] Ersk. 2.6.9.

[141] Walton Bros. *v.* Mags. of Glasgow, 20th July 1876, 3 Ret. 1130, 1133, *per* L.P. Inglis. The case did not show a way of necessity. Cf. D. Roxburghe *v.* Mags. of Dunbar, 1713, M. 10883; M'Gavin *v.* M'Intyre, 12th June 1874, 1 Ret. 1016.

[142] Pearson *v.* Spencer, 3 B. and S. 761.

[143] 1 Wms. Saund. 323.6; Pinnington *v.* Galland, 9 Exch. 1, 12.

[144] Holmes *v.* Goring, 2 Bing. 76; Pardessus, s. 225; but see Parke B. in Proctor *v.* Hodgson, 10 Exch. 824, 828.

[145] Bolton *v.* Bolton, 11 Ch. D. 968.

[146] Packer *v.* Welsted, 2 Siderfin, 111.

as it stood at the date of the severance,[147] or, it may be argued, such as were then in contemplation. The course of the way, if one does not already exist, will probably be fixed by the Court on report by a man of skill.[148] It will be seen, further on, that right of ish and entry is an ordinary accessory to many rights of servitude, or rather is an integral part of these.[149]

(b) Necessary for comfortable enjoyment.

(*b*) *Necessary for comfortable enjoyment.*—There are cases in the law, both of Scotland and of England, which do not fall under any of the modes of constitution already discussed. The plea of implied grant, where there is no absolute necessity for a servitude, has been recognised as part of the law of Scotland in a few cases — in some of which it was held proved, in others not. In England there has been a chain of decisions in recent times, the links of which do not, however, hang well together. It may be said that the law in this delicate matter has only, in very recent times, attained a satisfactory position.

Scotch cases. *Preston's Trs. v. Preston.*

Beginning with the Scotch cases, it was first held that where, during the occupancy of two adjacent estates by one proprietor, a servitude of taking water for the benefit of one of the two was, without objection on the part of the servient owner, communicated to the other by a continuation of the conduit, the heirs who succeeded to the latter could not, on severance taking place, be deprived of the privilege by those who succeeded to the first-mentioned estate. The decision was rested on the somewhat vague ground of constitution *rebus ipsis et factis*.[150] In a later case,[151] Lord Chancellor Campbell rejected this *ratio*, and explained the decision on the principle of implied grant: 'I think 'when that case is properly examined it will be seen that what 'are there considered the things which are to create a servitude 'are the facts which are to be construed as giving a meaning to 'the grant of servitude.' The case from which these remarks are cited was this: Of two adjacent tenements, one was a tanyard, which showed a natural gradient towards a corner of the other, a garden. Both prior to and during a period when the two were held in ownership together, the drainage of the tanyard found its way by open cut into the garden, and thence percolated through the soil. After separation—which occured through sale of the tanyard—there was substituted a closed drain ending in a cesspool,

Cochrane v. Ewart.

[147] London Corp. *v.* Riggs, 13 Ch. D. 798; Gayford *v.* Moffat, L.R. 4 Ch. 133, 136, *per* L. Cairns.

[148] But see arg. in Pearson *v.* Spencer, *supra*, [142].

[149] *Infra*, next chapter.

[150] Preston's Trs. *v.* Preston, 7th March 1844, 22 D. 366; cf. Wardle *v.* Brocklehurst, 1 E. and E. 1058.

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[151] Cochrane *v.* Ewart, 13th Jan. 1860, 22 D. 358, affd. 4 Macq. 117, 121.

which was occasionally cleaned out by the tanner, on leave asked and obtained. This state of things lasted for thirty years. The Court of Session held a right of servitude to be established by the combined force of the natural disposition of the ground, implied grant, and facts and circumstances (*res ipsæ et facta*). The House of Lords threw the first and last of these grounds out of consideration, and relied solely on the doctrine of implied grant—'the 'grant accompanied by the enjoyment which existed at the time 'when the grant was made.' The Lord Chancellor said: 'I con- 'sider the law of Scotland as well as the law of England to be, 'that when two properties are possessed by the same owner, and 'there has been a severance made of part from the other, any- 'thing which was used and was necessary for the comfortable 'enjoyment of that part of the property which is granted shall 'be considered to follow from the grant, if there are the usual 'words in the conveyance. I do not know whether the usual 'words are essentially necessary.[152] The grant was of this tan- 'yard, and *that* as the whole said subjects are presently possessed 'by us, and so on, together with all right, title, and interest, and so 'on, with the pertinents hereby disponed and enclosed as afore- 'said in all time coming. Then, as the subjects of the grant were 'then possessed, the tanyard along with this gutter to the hole 'was so enjoyed, and it was necessary for the reasonable enjoyment 'of the property. When I say it was necessary, I do not mean 'that it was so essentially necessary that the property could 'have no value whatever without this easement, but I mean that 'it was necessary for the convenient and comfortable enjoyment 'of the property as it existed before the time of the grant.'[153] The same doctrine is conveyed by the expression of Lord Chelmsford that the drain 'was essential to the enjoyment of the 'tanyard.'[154] This doctrine has been recognised and given effect to in a case of servitude of access by means of an artificially constructed passage.[155] It was recognised, but the necessity demanded was held not established, in the case of a sign-board which had been erected during unity of ownership of the shop it indicated and the floor above, and projected beyond the middle of the joists which separated the two, and that although the shop was conveyed 'as presently occupied.'[156] The same was the result in the following circumstances: Access to the back-grounds

Later cases.

[152] 4 Macq., 122,
[153] Ibid., p. 123.
[154] Ibid., p. 125.
[155] Walton Brs. *v.* Mags. of Glasgow, 20th July 1876, 3 Ret. 1130—a narrow case. See M'Laren *v.* Glasgow Union Ry., 10th July 1878, 5 Ret. 1042.
[156] Alexander *v.* Butchart, 24th Nov. 1875, 3 Ret. 156. It was questioned whether the right was a servitude at all.

of two adjacent house-properties, after being originally obtained by means of separate passages within each tenement, came during a period of unity of ownership to be had by a single passage within one of them, while the other passage was used as a stance for carts. On severance, through the sale of the tenement which embraced the latter passage, the same user was at first kept up, and after a time this passage was wholly closed. Prescription was out of the case. It was held that implied grant was also excluded, since there was no such necessity for the right of way over the passage still open, as was required in the case of *Cochrane*.[157]

English cases.

A large number of the English cases of easements arising on severance depend on the interpretation of technical expressions in conveyancing, which can be of little assistance in Scotch law. But rules of more general application are therein indicated which coincide in most part with those which may be gathered from that more instructive class of cases in which general words did not affect the decision.

Destination du père de famille.

By what Lord Westbury[158] has called a fanciful analogy, copied from the French Civil Code[159] by an eminent author,[160] the rule of implied grant has been termed the 'destination of a paterfa-'milias,' who 'impresses upon the different portions of his estate 'mutual services and obligations, which accompany such portions 'when divided among the family, or even when aliened to stran-'gers.'[161]

Apparent and continuous.

The French law requires that the servitudes so imposed shall be not only apparent but continuous.[162] The English and Scotch systems demand that they shall be apparent, including therein not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject.[163] It can scarcely be said that continuity has been strictly demanded either in Scotland or in England. In the case of a right of way, it seems to be enough if an artificially formed and constructed passage exists to, and for the apparent use of, the dominant tenement.[164] An old case,[165] in which a private road to kirk was sustained after

[157] Gow's Trs. *v.* Mealls, 28th May 1875, 2 Ret. 729.

[158] In Suffield *v.* Brown, 33 L.J. Ch. 249, 259.

[159] Arts. 692-4.

[160] Mr Gale, see p. 97.

[161] L. Westbury, *ut supra*, [158].

[162] Code Civil, 694.

[163] Pyer *v.* Carter, 1 H. and N. 916, 922 (house-drain); Glave *v.* Harding, 27 L.J. Exch. 287, 292, *per* Bramwell B.

[164] Walton Bros. *v.* Mags. of Glasgow, [155]; Bramwell B. in Langley *v.* Hammond, L.R. 3 Exch. 161; Watts *v.* Kelson, L.R. 6 Ch. 166, 174; followed in Barkshire *v.* Grubb, 18 Ch. D. 616.

[165] White *v.* Wemyss, 1700, M. 10881.

only twenty-eight years' enjoyment subsequent to severance, cannot, in the light of these modern decisions, be regarded as law. A right of taking water from a pump is neither apparent nor continuous.[166]

Necessary dependence.

A more correct restatement of the requisites for the constitution of servitudes by implication is quite consistent with Lord Campbell's *dicta* in *Ewart's* case—viz., that the tenement should be 'so constructed as that parts of it involve a necessary dependence, in order to its enjoyment in that state it is in when devised, 'upon the adjoining tenements.'[167] This necessary dependence must be proved, the presumption being that the alleged servitude is really a use of convenience, which ceased when a severance took place.[168]

State of things prior to unity of ownership.

It is a matter of considerable importance, as evidence for or against the establishment of a servitude by implication, to discover if the use claimed existed as such prior to the commencement of unity of ownership.[169] It cannot make any difference in law whether this is the case or not; but if it be the case, it goes far to show the necessary dependence required.[170] This is especially the case in enabling the Court to construe general words of style referring to past use.[171] It has never been decided whether it is the same where no such general words have been used.[172] Those uses which, if the two tenements had been separately owned, would have been easements or servitudes, are, during unity of ownership, called *quasi* easements or *quasi* servitudes.[173]

Alienation of dominant.

The rules which have just been stated are unquestionably applicable to cases in which the severance happens through the sale or other alienation of that subject which on severance claims to be the dominant tenement, while the servient tenement is retained or afterwards conveyed to a third party. In that case, there is a concurrence of the general rules of law that a deed is in doubt to be read against its grantor, and that no man shall be permitted to

[166] Polden *v.* Bastard, L.R. 1 Q.B. 156; see Suffield *v.* Brown, 33 L.J. Ch. 261.

[167] Pearson *v.* Spencer, 3 B. and S. 761, 767.

[168] Kay *v.* Oxley, L.R. 10 Q.B. 360, 366. The fact of the dominant tenement being at date of grant let on long lease, makes no difference, Barnes *v.* Loach, 4 Q.B. D. 494.

[169] See the law as to confusion, *infra*, p. 368.

[170] Gow's Trs. *v.* Mealls, [157], 2 Ret. 735, *per* L. Neaves; Walton Bros. *v.* Mags. of Glasgow, [155].

[171] Borthwick *v.* L. Borthwick, 1668, M. 9632; Carnegie *v.* MacTier, 18th July 1844, 6 D. 1381, 1408; Langley *v.* Hammond, L.R. 3 Exch. 168, criticised in Kay *v.* Oxley, L.R. 10 Q.B. 367. There is no presumption that the works were first executed during unity of ownership, Mady *v.* Steggles, 12 Ch. D. 261 (signboard).

[172] Suffield *v.* Brown, 33 L.J. Ch. 249, *per* L. Westbury, p. 260.

[173] Ibid.

derogate from his own grant. He is presumed to convey the subject along with what is reasonably required for the enjoyment of it, so far as in his power to grant. The same considerations do not apply to the converse case, in which the severance takes place through the alienation of the *quasi* servient tenement. That there may be an implied grant of an apparent servitude in such circumstances is a doctrine supported by the English case of *Pyer* v. *Carter*,[174] which has been much canvassed on both sides of the Border [175] and in America.[176] The case was this: The plaintiff's and defendant's houses adjoined each other. They had formerly been one house, and were converted into two by the owner of the whole property. Subsequently the defendant's house was conveyed to him, and thereafter the plaintiff obtained a conveyance of his house. At the dates of these conveyances a drain ran under the plaintiff's house, and thence under the defendant's, and discharged itself into the common sewer. The plaintiff's house was drained thereby. It was held that the plaintiff was by implied grant entitled to have the use of the drain as it was used at the time of the defendant's purchase of his house. The reasoning of the Court applied to all cases of severance, and to all continuous and apparent servitudes. A house is purchased 'such as it is,' and the necessity is that which exists 'at the time of the conveyance and 'as matters then stood without alteration.'[177] But this rule has been much shaken—at least in the case where the transfer of the *quasi* servient tenement is the first in date—by observations of great weight which fell from Lord Westbury in a later case.[178] He said—'If a grantor intends to reserve any right over the property granted, it is his duty to reserve it expressly in the grant, 'rather than to limit and cut down the operation of a plain grant '(which is not pretended to be otherwise than in conformity with 'the contract between the parties) by the fiction of an implied

Alienation of servient.

Pyer v. *Carter.*

Suffield v. *Brown.*

[174] 1 H. and N. 916.

[175] In Scotch cases, approved in Cochrane *v.* Ewart, [151], Gow's Trs. *v.* Mealls, [157], Alexander *v.* Butchart, [156]. In England, approved in Dodd v. Burchell, 1 H. and C. 113; Watts *v.* Kelson, L.R. 6 Ch. 166; not questioned in Polden *v.* Bastard, L.R. 1 Q.B. 160, and Worthington *v.* Gimson, 2 E. and E. 618; doubted in Pearson *v.* Spencer, 3 B. and S. 762; impugned by L. Westbury in Suffield *v.* Brown, 33 L.J. Ch. 249, 260, and L. Chelmsford in Crossley *v.* Lightowler, L.R. 2 Ch. 478, 486; along with Richards *v.* Rose, 9 Exch. 218, explained on the supposition of reciprocity in Wheeldon *v.* Burrows, *infra*, [180].

[176] Washburne, p. 70 *et seq.* As to a covered *drain* not being apparent, Butterworth *v.* Crawford (1871), 7 Amer. R. 352; and *way* being non-continuous, Parsons *v.* Johnson, 23 Amer. R. 149 (a very doubtful decision); O'Rorke *v.* Smith (1875), 23 Amer. R. 440.

[177] 1 H. and N. 921-2.

[178] Suffield *v.* Brown, 33 L.J. Ch. 249; approved by L. Chelmsford in Crossley *v.* Lightowler, L.R. 2 Ch. 486, and by L. Craighill in Alexander *v.* Butchart, [156], 3 Ret. 158.

'reservation. If this plain rule be adhered to, men will know 'what they have to trust, and will place confidence in the language 'of their contracts.' Noticing the case of *Pyer* v. *Carter*, his Lordship explained the fallacy of the decision, as consisting in taking the house as such as it was, and not as such as it was described and sold and conveyed, which is the true view. But he reserved opinion as to whether the existence of the same servitude before unity of possession would have made any difference. In spite of these strong observations, a later expression of opinion on the English bench was to the effect that the order of the two conveyances in point of date was immaterial, that *Pyer* v. *Carter* was good sense and good law, and that most of the common-law judges had not approved of Lord Westbury's *dicta* in regard to it.[179] The point is now set at rest; *Pyer* v. *Carter* has been repudiated, and Lord Westbury's view adopted in an authoritative and well-considered decision,[180] in which Lord-Justice Thesiger thus stated the two general rules governing cases of this kind: 'The first of these rules is that on the grant by the owner of a 'tenement of part of that tenement as it is then used and 'enjoyed there will pass to the grantee all those continuous and 'apparent easements (by which, of course, I mean *quasi* ease-'ments), or, in other words, all those easements which are neces-'sary to the reasonable enjoyment of the property granted, and 'which have been and are at the time of the grant used by the 'owner of the entirety for the benefit of the part granted. The 'second proposition is, that if the grantor intends to reserve any 'right over the tenement granted, it is his duty to reserve it 'expressly in the grant. . . . Both of the general rules which 'I have mentioned are founded upon a maxim which is as well 'established by authority as it is consonant to reason and common-'sense—viz., that a grantor shall not derogate from his grant.' A long series of English decisions is then cited to show that the distinction between an implied grant and an implied reservation is ancient and well recognised; and it is shown that the only exceptions to the latter rule are servitudes of necessity (already noticed), and the third possible case, where neither the *quasi* dominant nor the *quasi* servient tenement is retained, but there are simultaneous conveyances, or conveyances practically contemporaneous and part of the same design.[181] This case also is ruled

[179] *Per* L.JJ. James and Mellish in Watts *v.* Kelson, L.R. 6 Ch. 166. See a recent sketch of the law by L.J.-C. Moncreiff in M'Laren *v.* Glasgow Union Ry, [155].

[180] Wheeldon *v.* Burrows, 12 Ch. D. 31, 49.

[181] Russell *v.* Watts, 47 L.T. 245.

in favour of the constitution of a servitude, at least where the disponees were each aware of the double transaction.[182]

General result.

It has been necessary to enter thus far into a sketch of the English cases, partly because they proceed on general principles of law, and chiefly because the Scotch and English systems have been declared by a high authority [183] to be identical in this matter. The circumstance that the dominant owner could obtain the same advantage without any large expenditure, and without demanding a servitude by implication, has been made a reason for refusing this demand in some American decisions; but the English criterion of necessary dependence as things stand at the date of severance has been recognised as alone decisive.[184] The distinction, however, between English and Scotch rules as to negative servitudes, such as of light, suggests a caution in making use of foreign authorities. Whatever may be the English law regarding implied grants of these,[185] the law of Scotland will be satisfied with nothing short of express agreement.[186] Negative servitudes are not apparent, in the sense of necessitating such a state of things in the servient tenement as can only be explained by an acquired right. On the contrary, its condition will always be presumed to be the result of the *mera facultas* of its owner. This exclusion of negative servitudes from the rule of law now under consideration may, it is thought, be still maintained, though inconsistent with a recent judgment of the Second Division. A villa and surrounding ground were granted out in two portions; first, to A, a shop constructed on the said ground, a cellar in the villa, access thereto from the shop, and common property with the disponer in the *solum* of the cellar: and later to B, the villa, except as above, common property with A in the said *solum*, and several property in a green to the south of the villa, 'it being 'hereby declared that there is no restriction against building or 'any right of servitude affecting the said piece of ground.' Two windows, existing in the wall of the cellar next the green before severance, were, after severance, enlarged by A, and blocked up by B. The Court held that a servitude of light and air had been constituted in A's favour, relying partly on the existence of the original windows for forty years,—which was a clearly irrelevant

[182] Swansborough *v.* Coventry, 9 Bing. 305; Compton *v.* Richards, 1 Price 27; Allen *v.* Taylor, 16 Ch. D. 355.

[183] L. Campbell in Cochrane *v.* Ewart, 151.

[184] Washburne, p. 95. The cases are collected in Mitchell *v.* Scipel, 36 Amer. R. 404, in which Wheeldon *v.* Burrows is taken as good law, anticipated in the States or some of them.

[185] Herz *v.* Union Bank, 2 Giff. 686; Robinson *v.* Grave, 27 L.T.N.S. 648; cf. White *v.* Bass, 7 H. and N. 722.

[186] *Supra*, p. 354.

fact,—partly on the inapplicable analogy of the right of upper storeys in flatted houses to light, and mainly on this doctrine of implied grant—a serious innovation in our law of servitudes.[187]

Extinction of Servitudes.[188]

Servitudes may be extinguished by express discharge, by implied discharge, and by confusion.

1. Express discharge.

1. Express discharge or renunciation must, like the constitution, be by writ, holograph or tested.[189] It may be compulsory, under the provisions of an Act of Parliament.[190]

2. Implied discharge. *Rei interitu.*

2. Discharge of a servitude may be implied in various ways. Extinction necessarily follows from the total destruction of the dominant or servient tenement. But if the destruction be only temporary, and the former state of matters be restored—either naturally, as by the return of a spring,[191] or artificially, as by the rebuilding of a house[192]—the servitude is regarded as suspended rather than destroyed, and revives *ipso facto*. There is similar extinction if the enjoyment of the servitude is rendered impossible by the lawful act of a third party, as by his building on ground interjected between the dominant and servient tenements in a servitude of light or prospect.[193]

Non utendo.

Discharge may be implied from mere lapse of time — *non utendo*—whether the servitude is incorporated in the titles of the servient tenement or not,[194] since a servitude is 'in no sense a right 'of lands,' but a real burden only,[195] and whether it originate in grant or prescription.[196] This rule is specially applicable to positive servitudes, in which, as has been seen, possession is the symbol of the right. The requisite period is the full forty years of the negative prescription.[197] In cases of positive servitude this period begins to run from the last date of user or *quasi* possession, while prescription of immunity from a negative servitude starts with the first act done by the servient owner which is repugnant to it.[198]

[187] Heron *v.* Gray, 27th Nov. 1880, 8 Ret. 155. See cases of signboard, *supra*, p. 120.

[188] Forbes, 2.4.1.5; St. 2.7.4; Ersk. 2.9.37; B. Pr. 995-9.

[189] St. 2.7.4; Ersk. 2.9.37; B. Pr. 998.

[190] See the Lands Clauses Act, sect. 93 *et seq.* in the Appx., No. 13, and authorities there.

[191] 35 D. (8.3); B. Pr. 995.

[192] 20, § 2 D. (8.2); Ersk. 2.9.37.

[193] 7, § 1 D. (8.4); B. Pr. 995.

[194] Graham *v.* Douglas, 1735, M. 10745; cf. Skene *v.* Simpson, 1774, M. 10746 (thirlage).

[195] Ersk. 3.7.12.

[196] Ersk. 2.9.37 *fin.*

[197] Beaton *v.* Ogilvie, 1670, M. 10912.

[198] Ersk. 2.9.37; Wilkie *v.* Scott, 1688, M. 11189.

Acquiescence.

While mere non-user requires to be prolonged to the prescriptive period to imply abandonment, it may be accompanied or superseded by such conduct on the part of the dominant owner as clearly indicates relinquishment of his right. The cases, already discussed,[199] of disuse of a public right of way are applicable to abandonment of a servitude road—and that the more forcibly, inasmuch as the individual interest in a private is greater than in a public right of way. Therefore, a prescriptive servitude of road was held to be abandoned by non-use for twenty or thirty years, accompanied by ploughing and enclosing across its track.[200] The rules regarding acquiescence in the establishment of a nuisance also apply *à fortiori*,[201] inasmuch as the enfranchisement or disburdening of ownership will be more easily implied than infringements of the natural rights of property. Thus, not only will the mode of constitution be strictly inquired into,[202] but a right of servitude admittedly constituted will be held to be renounced if it be omitted in readjusting the tenure of the dominant subject.[203] And where buildings had been erected in contravention of servitudes of light and *non altius tollendi*, with the knowledge and acquiescence of the dominant owner, his singular successor, purchasing in knowledge of the existence of the buildings, was not entitled to have them removed, whether before his purchase he had seen the erection in progress, and whether he at the date of his purchase was aware of the ground of challenge or not.[204] Here the author's acquiescence was gathered from his standing by without objection while expensive operations were being performed which were obviously inconsistent with the servitude, and after he had been served with a copy of the servient owner's application to the Dean of Guild accompanied by plans. But the mere disregarding of such a notice by a dominant owner who resides at a distance, and interferes as soon as he becomes aware of the scope of the erections, will not infer acquiescence, more especially if the notice does not plainly exhibit the fact that a disturbance of the servitude is contemplated.[205] Nor will the absence of objection to

[199] *Supra*, p. 282.

[200] Hill *v.* Ramsay, 1810, 5 Pat. 299.

[201] *Supra*, p. 329. But see circumstances in which a servitude of aqueduct was held *not* to be abandoned by disuse for fifteen years, and use of another lade —Robison *v.* Charles, 24th May 1831, 9 S. 627.

[202] Sivright *v.* Wilson, 19th Dec. 1828, 7 S. 210; Cowan *v.* Stewart, 24th May 1872, 10 Macph. 735.

[203] Campbell *v.* M'Kinnon (Tobermory leases), 20th March 1867, 5 Macph. 636.

[204] Muirhead *v.* Glasgow Highland Soc., 15th Jan. 1864, 2 Macph. 420.

[205] M'Gibbon *v.* Rankin, 19th Jan. 1871, 9 Macph. 423.

the contravention of a general feuing-plan at some point, as to which an individual feuar has no interest to interfere, preclude him from striking in when an attempt is made to contravene it again to the detriment of his tenement.[206] It is different if the objector is himself an offender and the abandonment of the restriction has been general.[207]

Alteration of enjoyment.

There is no authority in the law of Scotland for the proposition that a dominant owner is held to relinquish an undoubted right of servitude by altering his mode of enjoying it, or by attempting to increase the burden.[208] It is certainly not so where the rights are indicated by discontinuous use, such as servitudes of way and pasturage—for their exercise is plainly divisible—and in negative servitudes which lie only in grant. Even in servitudes *habendi* —such as demand a positive adaptation of the servient subject, as in aqueduct and acquired rights of support—there seems to be no ground for denying a restoration of the state of things which existed prior to the encroachment.[209] Lastly, it has already been pointed out that servitudes of necessity cease with the necessity.[210]

Cesser of necessity.

3. Confusion.

3. Servitudes are extinguished *confusione*[211] when both dominant and servient tenements fall under the same ownership. What were at that date servitudes come thereafter to be exercised, if at all, as part of the ordinary uses incident to the ownership of the aggregate estate. A lively controversy has raged round the question whether, in the case of continued exercise of what has been termed the *quasi* easement, the original servitude has been extinguished or only suspended by the unity of ownership;[212] and whether (to put the question more practically) it requires constitution *de novo* or revives *ipso facto* on severance. Theoretically, there is no doubt that the servitude as such is extinguished. It is a mere burden on the servient tenement, and *res sua nemini servit*.[213] It is merged in the ownership; and its exercise can no longer be ascribed to its old derivative origin. Once lost, it cannot revive; it must be reconstituted. It is

Res sua nemini servit.

[206] Ibid.; Gould *v.* M'Corquodale, 24th Nov. 1869, 8 Macph. 165.

[207] Walker *v.* Wishart, 7th July 1825, 4 S. 148 (N.E. 149). Further on conditions in feus, *infra*, chap. 27.

[208] See the English cases in Gale, p. 597 *et seq.*; Goddard, pp. 360, 383.

[209] Robertson *v.* Scouller, 13th Dec. 1825, 1 F.C. 126, 29th Jan. 1829, 7 S. 344; Hay *v.* Robertson, 4th Feb. 1845, 17 Jur. 186; Taylor *v.* Dunlop, 1st Nov. 1872, 11 Macph. 25.

[210] *Supra*, p. 358.

[211] Dirleton and Stewart, 276; Forbes, 2.4.1.5; Mack. 2.9.32; Ersk. 2.9.16.36. 37; B. Pr. 997; 1 D. (8.6). The term 'consolidation' was confined in Roman law to personal servitudes—Frag. Vat. 83; 3, § 2 D. (7.2).

[212] See Dirleton, Erskine, and Bell, *supra*, [211].

[213] Ibid., 26, 30 D. (8.2); Innes *v.* Stewart, 1542, M. 3081; Rentoun *v.* Home, 1670, M. 3086.

different with one of the natural rights of property. As soon as the pressure of an acquired contrary right—such as a legalised nuisance, or a servitude—is removed, the natural right, which is the normal condition, revives of itself. There is no such elasticity in the acquired rights. Though a servitude in these circumstances is not merely suspended, and does not revive, it has already been shown by anticipation that the existence of a servitude prior to unity of ownership goes far to prove that necessary dependence which is required for a new constitution thereof by implied grant on severance.[214] It further follows that unity of ownership will not merely, like minority, suspend the running of prescription, but interrupt it altogether; but the doctrine of implied grant deprives this consequence of all practical value.

Unity of ownership.

Confusion takes place only when there is unity of ownership. Possession by the same tenant of two subjects belonging to different owners has no such effect; and, on the other hand, if the ownership be in the same hands, it does not matter whether the same or different tenants occupy the tenements. 'Whenever a 'separation or disunion may be anticipated,'[215] the servitude is only suspended. This occurs when the unlimited fee of either estate is held along with the liferent or with the tailzied fee of the other; or perhaps when two estates are held by separate and diverging entails.[216] In England it is similarly required that the owner should have 'as high and as perdurable an estate in the one 'as in the other.'[217]

Sheriff's jurisdiction.

Questions regarding nuisance, and damage arising from the alleged undue exercise of a right of property, and regarding the constitution or exercise of real or predial servitudes, have, since 1838,[218] been competent in the Sheriff Court within whose territory the property or servitude lies. The sheriff not only may but must decide any such matter of right that may be brought before him, and cannot stop short at a possessory judgment.[219] This jurisdiction is not restricted by the value sections of the Sheriff Court Act of 1877.[220]

[214] *Supra*, p. 362. See the whole doctrine, p. 359 *et seq.*

[215] B. Pr. 997, approved in Donaldson's Trs. *v.* Forbes, 1st Feb. 1839, 1 D. 449.

[216] Ibid. Preston's Trs. *v.* Preston, 7th March 1844, 22 D. 366, is a case of a use of water, common to a tailzied and fee-simple estate, becoming a proper servitude on severance; but the use began pending unity of possession.

[217] Co. Lit. 313, a, b.

[218] 1 & 2 Vict. c. 119, sect. 15; see Brown *v.* Currie, 1st Feb. 1843, 5 D. 463; Thomson *v.* Murdoch, 21st May 1862, 24 D. 975; Stobbs *v.* Caven, 14th March 1873, 11 Macph. 530; M'Laren's Trs. *v.* Kerr, 25th Oct. 1873, 1 Ret. 60.

[219] Gow's Trs. *v.* Mealls, 28th May 1875, 2 Ret. 729.

[220] 40 & 41 Vict. c. 50, sect. 8.

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[219] Gow's Trs. *v.* Mealls, 28th May 1875, 2 Ret. 729.

[220] 40 & 41 Vict. c. 50, sect. 8.

CHAPTER XXVI.

PARTICULAR SERVITUDES.

Divisions. Rural—urban.

THE distinction of the Roman law[1] between rural and urban servitudes, though adopted for convenience by all writers on Scotch law,[2] is of no practical value. The only divisions which point to real differences in the nature of the rights are those, already noticed, between positive and negative; continuous and discontinuous; apparent and non-apparent. On a comparison of the well-known servitudes which are generally classed together under the names of rural and urban respectively, it will be seen that rural servitudes are all positive, most of them discontinuous, and some non-apparent; and that of urban servitudes, all are continuous, while some are positive and apparent, and others the reverse. It would, however, serve no good purpose to separate in this place rights which have been so generally placed together. It must be remembered that acquired or servitude rights to water and support are, by the scheme of this treatise, to be discussed in connection with the natural rights incident thereto.[3] It will be possible, after the

Positive—negative. Continuous—dis-continuous. Apparent—non-apparent.

[1] It originated in the distinction between *res manicipi* and *res nec manicipi*, probably on grounds of utility to agriculture—Gaius, ii. 29, 30; was perpetuated by differences in the early modes of conveyancing (ibid.), in the modes of extinguishment—14 D. (8.1); 20 D. (8.2)—and in rules as to heritable securities; was misunderstood and nowhere clearly explained by the Romans themselves—4, § 1 D. (20.2), 1 D. (8.4); and has given rise to much learned discussion among the civilians. See Vinnius ad I. (2.3), the moderns noticed in Vangerow, § 339, and Molitor, p. 327. The distinction, as understood by the later jurists of Rome, seems to have lain, not in the situation of either tenement in town or country, nor in either consisting of houses or of land, but in the difference recorded in 3 D. (8.1). *Urban* servitudes consist *in superficie—i.e.*, are concerned with a particular state of the surface, such as the presence or absence of buildings; while *rural* servitudes consist *in solo—i.e.*, can exist without any such condition, and are, in fact, exercised only by the act of man. Thus aqueduct or way may belong to either, according as it does or does not involve a particular state of the surface—1, § 11 D. (43.20); 11, § 1 D. (6.2); 7, § 1, 11 D. (8.4). See Molitor, *supra*.

[2] Forbes, 2.4.3; Mack. 2.9.3; St. 2.7.5.9; Ersk. 2.9.6; Bankt. 2.7.5.16; B. Pr. 983, 1001.

[3] *Infra*, chaps. 28. 29.

discussion in last chapter of the general rules applicable to all servitudes, to treat all the well-known species very briefly by describing such peculiarities only as each of them displays. Rural servitudes claim priority in respect of antiquity; and the oldest of them are servitudes of road or way.

I.—Rural Servitudes—Road or Way.

Servitude of way.

Differentiated from public right of way.

The rules applicable to public rights of way, already fully discussed, are of value in the law of servitude roads, but that only after the differences between the two rights are taken into account. These are thus described by Lord Deas:[4] 'In the first place, the 'title to pursue is different. In the one case, the title is in every 'member of the public;[5] in the other case, the title is only in 'the owner of the dominant tenement. Secondly, the effect of 'the action is different. An action at the instance of any mem- 'ber of the public for the vindication of a public road, if fairly 'tried, is *res judicata* for or against the whole public.[6] In the 'case of a servitude road, the result is *res judicata* only between 'the parties to the action and their successors, as owners of the 'dominant and servient tenements. Thirdly, the jurisdiction is 'different: a judgment of the sheriff in the case of a servitude 'road may settle the matter of right, just as would be done in a 'declarator;[7] while in the case of a public road the sheriff can 'settle only the matter of possession till a declarator is brought 'in this Court; and consequently the proof allowed is different 'in the two cases—being of forty years' possession in the one 'case and of seven years' possession in the other, facts beyond the 'seven years being no further regarded than as they may indicate 'the character of the possession[8] (as by tolerance or otherwise) 'within the possessory period. Fourthly, the very nature of the 'two rights is essentially different: a right of servitude road ex- 'cludes the public, while a right of public road admits the public. 'In the one case the dominant proprietors are the only parties 'interested, and they must use the right in the manner least bur- 'densome to the servient tenement,[9] the proprietor of which may 'with that view alter the direction of the road, or apply for the 'authority of the Judge Ordinary to do so;[10] whereas, in the case

[4] Thomson *v.* Murdoch, 21st May 1862, 24 D. 975, 982.

[5] Rules, *supra*, p. 286.

[6] *Supra*, p. 288.

[7] *Supra*, p. 369.

[8] *Supra*, p. 289.

[9] *Supra*, p. 346.

[10] See Ross *v.* Ross, 1751, M. 14531; and cf. Bruce *v.* Wardlaw, 1748, M. 14525.

'of a public road, the servient proprietor could not well convene 'all parties interested (viz., the public generally) in such an appli- 'cation, although he may get the line of road regulated inciden- 'tally if a competent process happens to be in dependence.[11] 'Fifthly, the characteristics to be proved are quite different. The 'sheriff here says it is settled law that if one terminus be a public 'place, the road may be a public one. That may be law, but I 'doubt whether it is *settled* law, and I do not wish to give any 'opinion upon it.[12] But in the case of a servitude road it is not 'necessary that either terminus be a public place.' In the same case Lord Curriehill remarked further on the proof and remedy:[13] 'If the road was claimed as servitude road, the right would be 'established by proof of usage by those parties merely who are 'in right of the dominant tenement. A right of servitude in 'favour of these parties can never be established by proof that 'third parties, however numerous, have used the road.[14] In the 'other case, the mode of establishing the right is by proof of use 'on the part of the public, and it is of no consequence whether 'the party suing the action, or his predecessors in his estate, ever 'used it themselves or not. In the next place, the remedy would 'be quite different. If it is a private servitude road, all that the 'owner of the dominant tenement is entitled to is to have a road 'left sufficient for his purpose, and in the manner least burden- 'some to the servient tenement; but if it is a public road, it must 'be made suitable for all the purposes of the public.' His lord- ship must not be regarded as excluding the use of visitors on business or pleasure, or of servants, as that of third parties; nor as throwing the obligation of making the public road suitable on the owner of the soil. Another distinction has been drawn—that between common interest and a mere servitude of way—in a case where contiguous feuars were bound in their respective titles to leave a lane or passage of a given breadth along one side of their feus for the use of themselves, the other feuars, and inhabitants in the neighbourhood, and to causeway the portion of it opposite their respective feus. This was held to be a case of common interest, partly on the rule of *res sua nemini servit*, partly on the distinction between a passage and a right of passage,[15] and partly on the active obligation to repair. The consequence was, that a

[11] *Supra*, p. 290.

[12] *Supra*, p. 283.

[13] 24 D. 980.

[14] E. Morton *v.* Stuart, 16th June 1813, 1 Dow, 91, 5 Pat. 720; Mercer *v.* Reid, Mercer *v.* Rutherford, 1840, 2 D. 520, 616.

[15] Pardessus quoted, s. 231; see also ss. 7, 8.

feuar holding subjects on each side was not entitled to bridge over the lane.[16]

Classes of ways—*iter, actus, via.*

The Roman distinction between *iter*, *actus*, and *via*,[17] which never seems to have been a hard and fast division even at home, has ceased to have, if indeed it ever had, any practical significance either in Scotland[18] or England.[19] In both countries the more usual division is into footpaths, horse-roads, drove or drift roads, and cart or carriage roads[20]—the amount of the burden being determined by the terms of the grant, or, in the absence of grant, by the state of possession. In England, it is settled that though there be a gradation of burdens in the above order as well as in the Roman division, it does not follow that the lesser right is always included in the greater—as, for instance, that a cart-road implies a right to drive cattle. This would be to increase the burden, expressly granted or prescriptive, except only where one use is necessarily or customarily involved in another—such as riding or walking in using a drove-road. The rule seems to be otherwise with prescriptive servitude-roads in Scotland, and more in accordance with the Roman law. A servitude road admittedly eighteen feet wide, and unfenced, had been used for driving carts and leading cattle to and from the dominant tenement; but use of driving 'loose bestial,' now also claimed as matter of right, was not specially averred. Yet the Court adhered to an interlocutor of the sheriff—which proceeded partly on the ground that it appeared the road in question was eighteen feet broad, which necessarily carried with it a right of using that road to the fullest extent that a road could be used by driving bestial and otherwise—and refused interdict.[21] On the other hand, an express limitation of use will be respected; while it will be read fairly, according

Foot, horse, drove, cart roads.

[16] Mackenzie *v.* Carrick, 27th Jan. 1869, 7 Macph. 419; cf. Allans *v.* Mags. of Rutherglen, 1801, 4 Pat. 269 (public road).

[17] Pr. I. (2.3), 1 pr. D. (8.3). The first two differed in amount of use, the former allowing of walking, riding, and being carried in a litter—4 D. (8.1), 7 pr. 12 D. (8.3)—the latter, of these and driving a vehicle or cattle, ibid., 2 D. (8.6), 58 D. (45.1)—cf. 1 D. (34.4), with 4, § 1, D. (8.5). The last, *via*, differed from both, chiefly in requiring a *made* track, 8 D. (8.3), 6 fin. D. (8.6). It seems even doubtful whether these were not merely technical meanings put on originally popular terms.

[18] Forbes, 2.4.3.1; Mack. 2.9.4; St. 2.7.10; Bankt. 2.7.17; Ersk. 2.9.12; B. Pr. 1010; L. Brougham in Galbreath *v.* Armour, 11th July 1845, 4 B. Ap. 374, 390.

[19] Co. Litt. 56 a; cf. Ballard *v.* Dyson, 1 Taunt. 279; Bradburn *v.* Morris, 3 Ch. D. 812.

[20] Ballard *v.* Dyson, [19].

[21] Swan *v.* Buist, 21st Jan. 1834, 12 S. 316. There is always the proviso that no alteration in the road is required; see Parkes *v.* Bishop (1876), 21 Amer. R. 519, and the public right-of-way cases, Forbes *v.* Forbes, 20th Feb. 1829, F.C., 7 S. 441, and Mackenzie *v.* Bankes, 19th June 1868, 6 Macph. 936.

to its true intent. Thus a servitude road 'for the benefit of a 'mansion-house, but specially excluding the same from farming 'purposes,' may be used for driving materials employed in adding to the offices, though there have been no previous possession of that description.[22] In contrast to this, it was held in an English case that immemorial use of a road for all necessary purposes, it being a road to a farm, did not set up a right to convey by it materials for a number of new houses on the farm.[23] If there be no limitation except as to mode of locomotion, and if there be express constitution of a servitude road, mere increase of traffic will not be an infringement so long as it is conducted in the specified modes.[24] A servitude of road for carrying peats indicates a cart-road.[25] And a width of nine feet is insufficient for a pend admitting carts and serving as access to common stairs on each side.[26]

Peat-road.

Drove-road.

A drove-road may be either a public or a servitude road, according to circumstances. There is no room for a third class of road intermediate between the two, as has been suggested.[27] If the track be used by the farmers of a large district for the transit of their stock to and from fairs, it will be of the nature of a public road.[28] If constituted for the benefit of one or more definite and neighbouring farms, it will be a servitude road, and if it be accompanied by a right of pasturing in transit, will be called a loaning.[29] Similarly a kirk-road may belong to either category, according as it is available for the whole parishioners in a certain district, and through them for others on certain days,[30] or only for the possessors of certain lands.[31]

Loaning.

Kirk-road.

How constituted.

Being a positive servitude, a servitude of road may be constituted by express grant; or grant implied, either from necessity, or, when the right is apparent, from the necessary dependence of two tenements as they stand at severance; or by prescription.

Express grant.

The following may be taken as examples of the construction put

[22] Gibb *v.* Bruce, 1 Dec. 1837, 16 S. 169.

[23] Wimbledon Conservators *v.* Dixon, 1 Ch. D. 362, and see Bradburn *v.* Morris, *supra*, note [19].

[24] Finch *v.* G. W. Ry., 5 Exch. D. 254.

[25] Dingwall *v.* Farquharson, 1797, 3 Pat. 564; Ross *v.* Ross, 1751, M. 14531.

[26] Cooper and Macleod *v.* Edinr. Impr. Trs., 18th July 1876, 3 Ret. 1106 (12 feet fixed).

[27] By Tait in reporting Porteous *v.* Allan, 1769, 5 B.S. 598.

[28] Same case also in M. 14512; Campbells *v.* Campbells, 1777, 5 B.S. 599; Ms. Breadalbane *v.* M'Gregor, 3d Dec. 1846, 9 D. 210, revd. 7 B. Ap. 43.

[29] Chatto c. Lockhart, 1790, Hume, 734.

[30] Bruce *v.* Wardlaw, 1748, M. 14525; Smith *v.* Knowles, 11th March 1825, 3 S. 652; M'Gavin *v.* M'Intyre, 12th June 1874, 1 Ret. 1016, 1024.

[31] Neilson *v.* Sheriff of Galloway, 1623, M. 10880; Fardell *v.* Wemyss, 1673, ibid.

on express grants: A right of 'free ish and entry' has been held to mean access as it existed at the time of the conveyance.[32] Of two building lots in burgh, one had attached to it a servitude of cart-entry within the bounds of the other, whose titles were burdened with this servitude, and also contained an obligation to hold a certain area (of which the entry formed a part) 'as a mean property for the preservation of light.' It was held that there was no common property, but only servitudes of way and light, and that carts could not be loaded and unloaded in the entry.[33] A party who feued out three contiguous lots of ground in the same feu-contract, but for different *reddendos*, and took the feuars bound to carry their fulzie through certain back-ground in which he bound himself to make a lane opposite the middle house of the three, with free ish and entry to the said lots of ground by this lane, was held bound to make it so as to communicate with all three[34] Where a feu was obtained of a building-stance in a street, with right of access to another street by a passage then unformed, but marked on a plan signed as relative, the superior was not entitled to shut up this passage when made and to substitute for it another passage, which, though more commodious and better lighted, made the journey from the stance to the further street about a fifth longer; for, even if such a change could have been enforced as innocuous in the case of an originally indefinite route, it could not take place except of consent where a particular line was expressly stipulated.[35] The rules as to constitution by implied grant have been sufficiently illustrated both from Scotch and English law.[36] Those which concern prescription[37] and the possessory

Implied grant.

Prescription.

[32] Ferrier *v.* Walker, 14th Feb. 1832, 10 S. 317; see Crawford *v.* Field, 15th Oct. 1874, 2 Ret. 20. This must be taken subject to the rules of implied grant, *supra*, p. 359.

[33] Baird *v.* Ross, 7 S. 361, 766, revd. 6 W.S. 127, 18th Feb. 1836, 14 S. 528.

[34] M'Culloch *v.* Laurie, 2d July 1835, 13 S. 1029. As to private railways, see Dixon *v.* Monkland, &c., Ry., 18th July 1840, 2 D. 1470, affd. 1 B. Ap. 347; Addie *v.* Henderson and Dimmack, 10th Nov. 1863, 2 Macph. 41. And as to mineral way-leaves and ways connected with working of mines, see Addie and Rankin, 15th Dec. 1859, 24 D. 1454; Graham *v.* D. Hamilton, 5th July 1869, 7 Macph. 976, revd. 9 Macph. H.L. 98; Dand *v.* Kingscote, 6 M. and W. 174; Bishop *v.* North, 11 M. and W. 418; Durham, &c., Ry. *v.* Walker, 2 Q.B. 940, from which distinguish Bidder *v.* N. Staffordshire Ry., 4 Q.B.D. 412 (reservation, in selling surface, of 'a waggon or cart-road,' not available for railroad to neighbouring collieries).

[35] Hill *v.* Maclaren, 19th July 1879, 6 Ret. 1363.

[36] *Supra*, p. 359.

[37] *Supra*, chap. 3, and p. 356; Neilson *v.* Sh. of Galloway, 1623, M. 10880; Fardell *v.* E. Wemyss, 1673, ibid.; Robertson *v.* Hamilton's Trs. 12th May 1825, 4 S. 6; Purdie *v.* Steil, 1749, M. 14511; E. Morton *v.* Stuart, 1813, 1 Dow, 91, 5 Pat. 720. Issues in Donald *v.* Glen, 1827, Macf. 602; Dauney *v.* Moir, 1830, Macf. 603; Mercer *v.* Reid, and Mercer *v.*

remedies[38] have been discussed in their proper place, and it will be sufficient to note some of the cases below.[39]

Extinction.

Abandonment, besides being proved by express discharge and by disuse for the period of the negative prescription, may be gathered from acquiescence in the closing of the road;[40] but not from its having a public road superimposed upon it, which is used by the dominant owner as by all the world. The case in which this was determined is instructive. A feu-contract, in 1722, conveyed a mill 'with free ish and entry besouth of the lead'; but this clause did not enter the record or any subsequent titles. In 1872, the only road which occupied the site so indicated was a statute-labour road, which was then conveyed to the owner of the surrounding land, on the substitution of another road which involved a long circuit to the mill. It was held that the servitude had been kept up *utendo*, that the participation of the public made no difference, and that the servient owner was not entitled to close up the road as a servitude road.[41] It is different where the original road was also a public road of a less artificial sort than that which supplants it.[42] A servitude road is not liable to be shut up by the road authorities, being beyond their jurisdiction; and obstructions set up by them may be removed *brevi manu*.[43]

Superimposition of public road.

Mode of exercise.

Examples of the rules that servitudes must be exercised *civiliter*, with the least possible disadvantage to the servient tenement consistently with a full user of the right, and that the burden must not be increased by communication or otherwise, have already been cited from cases of servitudes of way,[44] and need not be repeated here.

II.—Rural Servitudes—Pasturage.[45]

Pasturage.

The servitude of pasturage, once of great importance in Scotland, has lost most of its prominence through the advance of

[38] *Supra*, chap. 2; Ferrier *v.* Walker, [32]; Ross *v.* Fisher, 28th Feb. 1833, 11 S. 467; Liston *v.* Galloway, 3d Dec. 1835, 14 S. 97 (overruling Saunders *v.* Reid, 26th Feb. 1830, 8 S. 605; see Beaumont, *v.* L. Glenlyon, 11th July 1843, 5 D. 1337); Carson *v.* Miller, 13th March 1863, 1 Macph. 604; M'Donald *v.* Dempster, 15th Nov. 1871, 10 Macph. 94.

[39] *Supra*, [37], [38].

[40] Hill *v.* Ramsay, 1805, 5 Pat. 299; issues in Berry *v.* Wilson, 1st Dec. 1841, 4 D. 139; Douglas *v.* Hozier, 19th Oct. 1878, 16th Sc. L.R. 14.

[41] M'Gavin *v.* M'Intyre, 12th June 1874, 1 Ret. 1016 (diss. L. Ormidale); cf. a *res meræ facultatis* in Gellatly *v.* Arrol, 13th March 1863, 1 Macph. 592.

[42] Smith *v.* Knowles, 11th March 1825, 3 S. 652; cf. Ms. Breadalbane *v.* M'Gregor, 3d Dec. 1846, 9 D. 210, revd. 7 B. Ap. 43.

[43] Hart *v.* Carruthers, 21st Jan. 1830, 8 S. 356, *supra*, p. 20; Calder *v.* Learmonth, 27th Jan. 1831, 9 S. 343.

[44] *Supra*, pp. 346, 352.

[45] Craig, 2.8.33; Forbes, 2.4.3.1.3; Mack. 2.9.13; St. 2.7.14; Ersk. 2.9.14. 16; Bankt. 2.7.32-37; B. Pr. 1013; 3, 4, 6, § 1 D. (8.3).

agriculture, aided by the facilities afforded by the law for the division of commonties. The relation of the two rights — of servitude and of commonty—will be best discussed in treating of the latter. It will be enough to show here, very briefly, how the servitude right illustrates and is controlled by the general rules applicable to servitudes which have been set forth in the last chapter.

How constituted;

A servitude of pasturage is constituted by grant or prescription. The grant must be of the sort already described,[46] and may or may not be specific as to the locality, as *cum pasturâ* (more commonly *cum communi pasturâ*), *communitatis de A.*,[47] or *cum* (*communi*) *pasturâ* simply. It may be indefinite as to the extent of the right, in which case the measure is the utility of the dominant tenement—*i.e.*, the amount of stock it can winter, not the number required for labouring the ground;[48] and possession is not allowed to disturb this measure.[49] An old case of grant implied on severance of ownership has been already noticed;[50] but it is doubtful whether the decision would be repeated in regard to a servitude non-apparent and discontinuous. Prescription may proceed on a general grant, such as *cum communi pasturâ*,[51] or on part and pertinent,[52] or on a bare conveyance of land;[53] and the requisite possession may set up the right beyond the lands of the granter,[54] provided, in every case, it be uninterrupted,[55] and as of right.[56] The question whether a burgh can be the dominant tenement has been already noticed.[57] The phrase 'with shielings' is ambiguous, and may be construed, by accompanying words or by possession, to mean either property or servitude.[58] The right

and lost.

[46] *Supra*, p. 355; Bankt. 2.7.32; Turnbull *v.* Blanerne, 1622, M. 14499. See as to *tenendas*, Dundas *v.* Elphingston, 1585, M. 2255; Culross *v.* Erskine, 1704, 4 B.S. 589.

[47] E. Wigton *v.* Feuars, 1739, M. 2287. As to the construction of arrangements by decreet-arbitral, &c., see Robertson *v.* D. Atholl, 1798, 4 Pat. 54; Rutherford *v.* Stormonth, 1803, 4 Pat. 515; Mags. of Dundee *v.* Hunter, 14th Nov. 1843, 6 D. 12; 4th June 1858, 20 D. 1067; under a long lease, see Campbell *v.* M'Kinnon, 20th March 1867, 5 Macph. 636.

[48] L. Breadalbane *v.* Menzies, 1741, 5 B.S. 710; cf. Culross *v.* Erskine, [46]; Cunninghame *v.* Dunlop, 20th Dec. 1836, 15 S. 295; 1st June 1838, 16 S. 1080.

[49] St. *supra*, [45].

[50] *Supra*, p. 362; Borthwick *v.* L. Borthwick, 1668, M. 9632 (minute of sale).

[51] H.M. Adv. *v.* Dunfermline, 1686, M. 10776; Sinclair *v.* Douglas, 1695, 4 B.S. 244; Nicholson *v.* Bightie, 1662, M. 11291.

[52] Grant *v.* Grant, 1677, M. 10876; Meldrum, 1716, M. 12152.

[53] Beaumont *v.* L. Glenlyon, 11th July 1843, 5 D. 1337.

[54] St. *supra*, [45]; Knockdolian *v.* Parthick, 1583, M. 14540.

[55] Cavers *v.* Turnbull, 1629, M. 10874; Nicholson *v.* Bightie, [51].

[56] Annan *v.* M. Annandale, 1776, 5 B.S. 598; the 'start and overloup' there mentioned is a reiver's raid. See 'Monastery,' chap. 1.

[57] *Supra*, p. 350.

[58] Rattray *v.* Graham, 1724, M. 2463;

of servitude may be lost *non utendo*, by disuse for forty years, though retained in the titles of both parties or of either;[59] and a custom of commutation may apparently be set up in a shorter period.[60]

Remedies.

Servitudes of pasturage have usually sprung up in commons. Since promiscuous possession is inconsistent with the nature of the right, and destructive of peace and of the subject itself, it cannot be legalised by any period of enjoyment, and is liable at any time to be stopped by an action of *souming and rouming*,[61] whereby the servient subject is first *soumed*—or the amount of stock it can pasture determined—and then the proportion effeiring to each of the dominant tenements (*roums*) fixed according to their respective capacity for winter-foddering. The owner shares if he has possessed, or if there be a surplus,[62] but he cannot be called as sole defender in the action,[63] and he cannot be prevented from breaking up the soil by tillage, or by mining or quarrying, if such has been the usage, or if sufficient is left for the requirements of the servitude-holders.[64] The dominant owner cannot let his own summering grass and send all his cattle into the common,[65] nor communicate the servitude to others,[66] nor cut the grass,[67] nor kill the game.[68]

III.—Rural Servitudes—Fuel, Feal, and Divot.[69]

Fuel, feal, and divot.

These minor servitudes, which give a right to dig and win peat for fuel, and clods for fencing and roofing, *in alieno solo*,[70] and

E. Breadalbane *v.* Campbell, 1745, M. 14509; L. Seaforth *v.* Hume, 1814, 2 Dow, 338; D. Atholl *v.* Stewart, 18th Nov. 1825, 4 S. 197 (N.E. 198); E. Airlie *v.* Rattray, 11th March 1835, 13 S. 691; Beaumont *v.* L. Glenlyon, [53].

[59] Graham *v.* Douglas, 1735, M. 10745.

[60] Cockburn *v.* Brown, 1682, M. 10742.

[61] Soum (sowm) is grass for a cow, or for five (in some places ten) sheep. Roum (rowm, room) is an old word for a piece of land, and is still used to denote a farm.—Jamieson's Dict.; Innes on Legal Antiquities, p. 268; Act 1606, c. 7; Mackenzie *v.* M'Crae, 1825, 4 S. 146; M'Neill *v.* Nicolson, 1828, 6 S. 422. Bankton's explanation is faulty.

[62] Culross *v.* Erskine, [46].

[63] Dunlop *v.* Drumalzier, 1679, M. 14531.

[64] E. Southesk *v.* Melgum, 1680, M. 14531; Culross *v.* Erskine, [46]; Littlejohn *v.* Weir, 1693, 4 B.S. 42.

[65] L. Breadalbane *v.* Menzies, 1741, 5 B.S. 710, 724; cf. Munro *v.* Mackenzie, 1760, M. 14533.

[66] Murray *v.* Mags. of Peebles, 8th Dec. 1808, F.C.

[67] Cunninghame *v.* Dunlop, 1st June 1838, 16 S. 1080.

[68] Forbes *v.* Anderson, 1st Feb. 1809, F.C. See a case of what are called in England 'Lammas lands,' in Chatto *v.* Lockhart, 1790, Hume, 734.

[69] Forbes, 2.4.3.4; St. 2.7.13; Mack. 2.9.32; Ersk. 2.9.17; Bankt. 2.7.31; B. Pr. 986, 1014.

[70] Dinwiddie *v.* Corrie, 23d Nov. 1821, 1 S. 164 (N.E. 156). Does it extend to coal?—Harvie *v.* Stewart, 17th Nov. 1870, 9 Macph. 129.

involve the further rights of access to the locality and space for drying the products,[71] are usually associated with[72] or included in, but are quite separable from, pasturage.[73] The access is presumably but not necessarily by cart-road.[74] If these rights are by usage or grant communicable (as by sale, or by being used in the preparation of manufactures for sale), they cannot be classed as servitudes.[75] The dominant owner cannot, while retaining these servitudes for his own use, communicate them to feuars or leaseholders on his land.[76] The same rules apply, as in the case of pasturage, to the servient owner's power of 'riving out' or breaking up the soil.[77] The only recent case in which this sort of servitude came under judicial cognisance, related to a parish school and schoolhouse in Shetland, situated on a scattald or commonty belonging at one time to the whole heritors of the parish. The schoolmaster had from time immemorial been in the habit of taking fuel from the scattald for both tenements. The scattald was divided, and the school and schoolhouse passed to the School Board. The heritor, from whose portion of the moss the schoolmaster continued to take peat, sought to interdict him and the Board, but was successfully met by the plea of possessory title. A majority of the Court took occasion, however, to express an opinion that a valid servitude had been constituted since, the heritors having held the dominant and servient tenements on different titles, the maxim *res sua nemini servit* did not apply, and right rather than tolerance was to be presumed; while Lord Young, taking a stricter and juster view of the law, differed on the ground that the use was merely by tolerance or annexed to the office, as would appear at once on a sale of the school premises or on their removal elsewhere.[78]

IV.—Other Rural Servitudes.

Bleaching, &c.

The other less notorious, yet now recognised, servitudes of bleaching and of taking sea-ware, stone, slate, sand, or gravel,

[71] Duguid *v.* Farquharson, 1748, M. 14536 (grass for the horses employed); Ross *v.* Ross, 1751, M. 14531.

[72] Meldrum *v.* Feuars, 1716, M. 14541.

[73] Haining *v.* Selkirk, 1668, M. 2459. See authorities in note [69], and Craig, 2.8.35; and a case of the servitude of feal and divot being accessory to aqueduct — Prestoun *v.* Erskine, 1714, M. 10919.

[74] Dingwall *v.* Farquharson, 1797, 3 Pat. 564.

[75] Brown *v.* Kinloch, 1775, M. 14542; Leslie *v.* Cumming, 1793, ibid.

[76] Murdochs *v.* Carstairs, 25th Jan. 1823, 2 S. 159 (N.E. 145), 14th May 1829, 7 S. 607.

[77] Watson *v.* Dunkennan Feuars, 1667, M. 14529, 1 B.S. 615; E. Southesk *v.* Melgum, [64].

[78] Grierson *v.* Sandsting School Board, 21st Jan. 1882, 9 Ret. 437.

Thirlage.

for the benefit of a dominant tenement, have been already sufficiently discussed.[79] The pseudo-servitude of thirlage, once of more consequence than all the others put together, has dwindled down into insignificance and almost disappeared before the advance of more liberal notions, partly by voluntary remission, partly through the compulsory commutation granted at the suit of either party by an Act of 1799.[80] All the institutional writers have entered into the theme with unusual minuteness; and some of their works are of easy access. In these circumstances it would be useless to do more than refer to the text-books,[81] and add a note of the few cases which have arisen within the last fifty years.[82]

V.—Urban Servitudes.

Urban servitudes.

Passing over, for the present, the servitudes of support for buildings, called in Roman law *S. tigni immittendi* and *S. oneris ferendi*, which will be noticed under the head of Common Interest, and the remaining positive urban servitude of eavesdrop, which will appear among water-rights,[83] it remains to discuss the group of

Light, air, and prospect.

negative servitudes which are concerned with light, air, and prospect.[84] These go by many names, such as *S. ne luminibus* (or *prospectui*) *officiatur*, *S. luminum* (or *luminis*), servitudes of light and prospect; *S. altius non tollendi*, *S. non ædificandi*, servitudes against building higher than a given height, or against building at all,—but all concur in restraining the servient owner from making alterations on the surface of his tenement; and the interest of the dominant owner is usually the preservation, wholly or to a certain extent uninterrupted, of light, air, or prospect. The conjecture may be hazarded that no other interest will be recognised as warranting the elevation of a building restriction into a servitude. In England even easements of prospect[85] and free access to air[86] are not recognised. Feuing conditions intro-

[79] *Supra*, p. 348.

[80] 39 Geo. III. c. 55.

[81] Cr. 2.8.6-12; Forbes, 2.4.3.1.5; St. 2.7.15-27, and More's Notes, 225; Mack. 2.9.15-30; Bankt. 2.7.38-61; Ersk. 2.9. 18-32-38; B. Pr. 1016-36; Hunter 1.248-259.

[82] Kinloch *v.* Morrison, 18th Dec. 1830, 9 S. 244 (mill rebuilt); Macalester *v.* D. Argyll, 17th June 1831, 9 S. 763, var. 6 W.S. 98 (church mill: *grana molibilia*); Harris *v.* Mags. of Dundee, 23d May 1863, 1 Macph. 833 (burgh); Stobbs *v.* Caven, 14th March 1873, 11 Macph. 530 (construction of terms, jurisdiction of sheriff); Ds. Sutherland *v.* Reid's Trs., 25th Feb. 1881, 8 Ret. 514 (registration of commutation).

[83] *Infra*, chap. 29.

[84] Forbes, 2.4.3.2; Mack. 2.9.9; St. 2. 7.9; Bankt. 2.7.5; Ersk. 2.9.10; B. Pr. 1005-8.

[85] Aldred's Ca., 9 Rep. 58 b; Butt *v.* Imperial Gas Co., L.R. 2 Ch. 158.

[86] Webb *v.* Bird, 13 C.B.N.S. 841, (under L. Tenterden's Act), and windmill

duced by superiors for the preservation of amenity, or uniformity of elevation of blocks of houses, and frequently so imposed as to give the several feuars right to vindicate them *inter se*, stand on an entirely different footing—the security of the records.[87] It may be even questioned whether the law of Scotland would not follow that of England in regard to lateral access to air. There being no case of a servitude of this sort, apart from a servitude of light, being claimed, much less admitted, it can scarcely be said that the burden is known to the law—an objection of special cogency in regard to a negative servitude.[88] So that no man can be compelled to do or allow anything to be done *in suo* to cure his neighbour's smoky chimney,[89] though he may be prevented from so using his own chimney as to emit smoke into his neighbour's dwelling.[90]

Common-law rights thereby restricted.

To appreciate the scope of these servitudes, it is necessary to recall the rights of landowners at common law, by virtue of their ownership, in respect to building and planting. Except so far as controlled by the law of immission of eavesdrop,[91] and of encroachment by the growth of plants,[92] each proprietor may build or plant to the very verge of his tenement.[93] Each may cut out windows in the walls of his building; but if he does so on or near to his boundary, his neighbour may, in the exercise of his rights of ownership, and without subjecting himself to any inquiry into his motives,[94] partially obscure or wholly cut off the light which would otherwise enter, by building or planting within his own ground *ex adverso*.[95] The inconveniences arising from this, which is the normal state of the law of neighbourhood in the Roman, English, and all the best-known systems of jurisprudence, gave rise in the later Roman law to regulations enforcing an interval between the neighbouring property and a wall containing windows;[96] in the French law to similar rules, where the windows presented a view,[97] and to rules as to the height of such as were

cases there cited; Dent *v.* Auction Mart Co., L.R. 2 Eq. 238.

[87] *Infra*, chap. 27.

[88] *Supra*, p. 347.

[89] Bryant *v.* Lefever, 4 C. P.D. 172.

[90] Colchester *v.* Ellis, 2 Starkie, Ev. 537; Sampson *v.* Smith, 8 Sim. 272.

[91] *Infra*, chap. 29.

[92] Halkerston *v.* Wedderburn, 1781, M. 10495.

[93] The rules as to party walls are discussed *infra*, chap. 32.

[94] *Supra*, p. 320.

[95] Dunlop *v.* Robertson, 1803, Hume, 515; Glassford *v.* Astley, 1808, M. App. *voce* Property, No. 7, Hume, 516. Scott *v.* Muirhead, 19th May 1835, 13 S. 776, turned on a specialty. Can a Railway Co. like other owners set up a hoarding to exclude view of their line? Norton *v.* L.N.W. Ry., 13 Ch. D. 268.

[96] 12, §§ 2, 3, C. (8.10). There was no such rule in the times of the great jurists.

[97] *Vues*—Code Nap. 678-80; Pardessus, s. 203; Fournel, *s.v.*

intended only to admit light;[98] and in the English system to privileges both at common law and by statute conferred upon 'ancient lights.'[99] None of these expedients have been admitted into the law of Scotland, which has preferred to walk in the footsteps of the great Roman jurists, whose 'sentences' are partially preserved in the Pandects.

All negative.

All the servitudes now under review, as recognised in our law, are negative. Therefore the long and hot dispute which has raged over the import of the *servitus luminum* of the Romans,[100] and whether it be the same as the positive servitude of striking out a window in a neighbour's or in a party wall,[101] has no practical interest for the Scotch lawyer. If, moreover, the nature of the Roman prescription and procedure required that the extinguishment of these negative servitudes and of the positive servitude of stillicide should take place in virtue of contrary servitudes,[102] there is no such necessity with us, for the operation so accomplished is simply the disburdening of the ownership. The general principles which govern negative servitudes have been illustrated by means of these rights in last chapter, where it has been shown[103] that their most marked peculiarity consists in their incapability of adverse possession, and that, consequently, they can only be constituted by express grant.

Relate to obstructions,

The servitudes of light and prospect are divisible into two classes. The restriction imposed upon the servient owner by the first of these is, that he shall not, within any or within a specified part of his tenement, erect buildings or plant at all, or above a specified height, to the prejudice of the dominant owner's

and orifices.

light or prospect, as the case may be. By the other class of these servitudes the servient owner is restricted from striking out windows in his own wall, so as to interfere with the privacy of his neighbour's tenement. There is no example of a dispute having arisen in regard to this latter class; but there seems no doubt that it is entitled to be regarded as a true servitude.[104] It is really only a short and easy method of accomplishing what the dominant owner might have accomplished without any servitude at all, by erecting a sufficiently lofty wall within his own ground.

[98] *Jours*—Code, 676; Pard. s. 209; Fournel, *s.v.*

[99] Gale, and Goddard, *sub voce;* Washburne (American), 4.6; Cox on Ancient Lights, *passim;* L. Tenterden's Act, 2 & 3 Will. IV. c. 71, sect. 3.

[100] 4 D. (8.2). See Vangerow's account of the war, § 342, and Glück, x. § 607; Thibault, § 300; Puchta, Inst. § 253, cc.; Warnkönig, § 295; Molitor, § 42.

[101] 8 C. (3.34); 40 D. (8.2).

[102] Gaius, 2.31, 4.3; 2 I. (4.6); l. pr. 2 D. (8.2), 2 D. (8.3), 26 D. (44.2); 1 I. (2.3); Vang. § 342; Molitor, §§ 43, 44; Ersk. 2.9.10; B. Pr. 1007.

[103] *Supra*, p. 354.

[104] Stair, Erskine, and Bell, *supra* 84.

Concerning the first-mentioned class, there has, on the other hand, been considerable litigation. The result of a large part of this has already been discussed in last chapter; and much falls more naturally into the next, which deals with building restrictions. The decisions which follow, more immediately illustrate the peculiarities of the particular servitudes now in question. It is always judicious to specify particularly the amount of the restriction which it is intended to impose. Thus, in an old case,[105] it was held that 'a tolerance for a servi-'tude of light' did not imply a liberty of having open windows, and that the servient owner might build anything and to any height he pleased at an ell's distance, whereby the light would be free, and that either in town or country. And a combined servitude *non ædificandi* and against obstruction of lights is more restrictive than a servitude against building in prejudice of the same lights.[106] But merely calling the burdened area the 'mean 'property' of the parties for the preservation of light does not import more than the constitution of a servitude;[107] nor does the omission of the words 'and their heirs and assignees' after the names of the dominant owners import anything less, at least where the right was acquired for the express purpose of preserving the lights of their houses, and where the servient owner and *his* heirs and assignees were bound in all time coming.[108] While a general restriction against building will strike at the erection of a flat-roofed shed covered with lead and resting on iron pillars which are not fixed in the ground,[109] and even of an underground cellar [110] or underground passage unless the purpose of the restriction be only to preserve access and light,[111] a prohibition against making alterations in a roof which shall be offensive to certain other house-owners will be held to prevent only such changes as materially affect the light, if that be the injury complained of. *De minimis non curat prætor.*[112] In the circumstances of the case last referred to, the alterations—giving the roof a steeper slope and making larger dormer-windows—were held to be calculated to produce only a trifling diminution of light. In a case which occurred

Cases on obstructions.

Amount.

Number and size of windows.

[105] Ogilvie *v.* Donaldson, 1678, M. 14534.

[106] Clelland *v.* Mackenzie, 1739, M. 14506.

[107] Baird *v.* Ross, 17th June 1829, 7 S. 766, revd. 6 W.S. 127, 18th Feb. 1836, 14 S. 528.

[108] Boswell *v.* Inglis, 9th March 1848, 10 D, 888, affd. 6 B. Ap. 427.

[109] Mags. of Edinburgh *v.* Brown, 17th Jan. 1833, 11 S. 255.

[110] Mags. of Edinburgh *v.* Paton and Ritchie, 3d March 1858, 20 D. 731.

[111] Malloch *v.* Gray, 31st May 1872, 10 Macph. 774.

[112] M'Neill *v.* Mackenzie, 5th Feb. 1870, 8 Macph. 520; cf. Moore *v.* Hall, 3 Q.B.D. 178.

early in last century, the Court seems to have avoided the pitfalls which have beset the English Courts in similar circumstances,[113] and the same dangers have never arisen again. A tolerance to the owners of a house 'to strike out six lights' in a wall thereof which was contiguous to a neighbour's garden, 'they always filling 'the same with glass, that it might be profitable and useful to 'them in all time coming for giving light to the house,' had for forty years been followed by the possession of *nine* windows with casements made to open. The servient owner then demanded the reduction of the number to six, and that they should all have close casements. The Court found that the dominant owner might prescribe a right to more windows than were allowed by the tolerance, and likewise to open them, but that in that case the other party might use his property by planting or building, as was most convenient for him. The report is confused, more especially the reference to prescription, since none is required to enable a man to strike out windows in his own wall. But the nature of the question is clear enough, and the decision is consistent with principle. The granter of the tolerance took on himself through it a servitude against planting or building to the obstruction of the six windows. An attempt was made to increase the burden by what is erroneously called possession of three more. No amount of time could legalise such a usurpation; and the Court took the shortest way to a restoration of the state of things indicated in the original grant by deciding that the servient owner was entitled to build up the whole of the nine.[114]

[113] Renshaw *v.* Bean, 18 Q.B. 112; Tapling *v.* Jones, 11 H.L. 290; Aynsley *v.* Glover, L.R. 18 Eq. 544, 10 Ch. 283.

[114] Forbes *v.* Wilson, 1724, M. 14505; cf. Morris *v.* M'Kean, 19th Feb. 1830, 8 S. 564. For the right of flatted houses to light, see Boswell *v.* Edinburgh Mags., 19th July 1881, 8 Ret. 986, and *infra*, chap. 33.

CHAPTER XXVII.

BUILDING RESTRICTIONS.

Building restrictions.

In the last two chapters, those restrictions on ownership have been discussed which rely for their character of real burdens on their notoriety. Further examples of the same class of rights will appear again in treating of rights of water. But it seems expedient to interpolate in this place a few words concerning certain real burdens which rest on a different foundation—the faith of the records—and all the more so that the only examples of this class of rights which need be noticed in a book which is not concerned with pure conveyancing relate, like the servitudes last treated of, to buildings. They are not confined to such conditions as are known and lawful servitudes beneficial to some dominant tenement.[1]

Real conditions in general.

The law relating to real conditions in general, and to those connected with buildings in particular, was laid down by the whole Court in the leading case of *The Tailors of Aberdeen* v. *Coutts*.[2] From the elaborate opinion of Lord Corehouse, which was in principle concurred in by all his brethren and by the House of Lords, the following quotations are taken: 'To constitute 'a real burden or condition, either in feudal or burgage rights, 'which is effectual against singular successors, words must be 'used in the conveyance which clearly express or plainly imply 'that the subject itself is to be affected, and not the grantee and 'his heirs alone, and those words must be inserted in the sasine 'which follows on the conveyance, and of consequence appear on 'the record. In the next place, the burden or condition must not

Tailors of Aberdeen v. *Coutts*.

[1] Tailors of Aberdeen, *infra*, [2]; Ewing *v.* Campbell, 23d Nov. 1877, 5 Ret. 230; E. Zetland *v.* Hislop, 9 Ret. H.L. 40, 7 App. Cas. 427, *per* L. Chan. Selborne and Lord Watson.

[2] 20th Dec. 1834, 13 S. 226, remitted 2 Sh. and M'L. 609; judgment of Court of Session affd. 1 Rob. Ap. 296, where are to be found the opinions of the Scotch judges. The leading opinion (L. Corehouse's) was overruled in one point, but returned to by the House of Lords.

'be contrary to law or inconsistent with the nature of this species 'of property; it must not be useless or vexatious; it must not be 'contrary to public policy—for example, by tending to impede the 'commerce of land or create a monopoly. The superior, or the 'party in whose favour it is conceived, must have an interest to 'enforce it. If these requisites occur, it is not essential that any '*voces signatæ* or technical form of words should be employed. 'There is no need of a declaration that the obligation is real, that 'it is a *debitum fundi*, that it shall be inserted in all the future 'infeftments, or that it shall attach to singular successors. It is 'sufficient if the intention of the parties be clear, reference being 'had to the nature of the grant, which is often of great import-'ance in ascertaining its import. Neither is it necessary that the 'obligation should be fenced with an irritant clause, and far less 'with irritant and resolutive clauses.'[3] 'If the condition is one 'usually attaching to the lands in a feudal or burgage holding, in 'particular if it has a *tractus futuri temporis*, or is of a continuous 'nature, which cannot be performed and so extinguished by an 'act of the disponee or his heir, words less clear and specific 'will suffice to create it than when the burden appears to be of 'a personal nature—for example, the payment of a sum of money 'once for all in terms of a family settlement.'[4] His lordship then points out that an irritancy is not necessary for the protection of a real condition,[5] but useful as giving 'a readier and 'more powerful remedy in case of contravention,' and 'as afford-'ing the means of construing a condition, the import of which 'would otherwise be doubtful. If the granter fences a condition 'with an irritant clause, it is one reason for presuming that he 'meant it not only to apply to the granter and his heirs, but to 'singular successors also.'[6] As examples of stipulations which are contrary to public policy, were cited the cases of thirlage to a

[3] 1 Rob. Ap. 306-7; St. 2.3.54-5, 4. 35.24; Bankt. 2.5.25; Martin *v.* Paterson, 22d June 1808, F.C.

[4] 1 Rob. Ap. 308. Examples from building restrictions and the old services, ibid.; and as an example of a burden, not real because temporary—Corbett *v.* Robertson, 17th Jan. 1872, 10 Macph. 329; and see Fraser *v.* Downie, 22d June 1877, 4 Ret. 942. A real burden in the stricter sense is a (usually reserved) money payment, which cannot, while a real condition can, be enforced by personal action, *per* L. Deas in Ms. Tweeddale's Trs. *v.* E. Haddington, 25th Feb. 1880, 7 Ret. 620. See also the distinction between a perpetual annuity running with the lands, and a licence personal only and applicable to a particular building, and temporary yet transmissible—Scott *v.* Howard, 22d June 1880, 7 Ret. 997, aff. 8 Ret. H.L. 59.

[5] St. and Bankt., *supra*,[3]. Ersk. 2.3.13 and 2.5.28, and the case there relied on —Stirling *v.* Johnston, 1757, M. 2342, 5 B.S. 323, are rejected; Ivory's note, [38], to Ersk. 2.3.13; 1 B.C. 25; B. Pr. 861; Preston *v.* L. Dundonald's Credrs., 1805, M. App., Personal and Real, No. 2.

[6] 1 Rob. 316, 326-7; E. Zetland *v.* Hislop, 9 Ret. H.L. 42, 48.

brewery or smithy;[7] and as an example of want of interest, the case of restrictions against certain trades being carried on in a feuing district, when these restrictions have been abandoned generally therein.[8]

Continued.

Applying these general rules, the following were found to be real conditions of the grant—viz., an obligation on the disponee (the holding was burgage) to erect houses on the subject of a certain description, even though there was no irritant clause; an obligation, though not fenced with an irritancy, to erect an iron railing near the houses, to submit to certain servitudes, and to put down a foot-pavement; a prohibition against various nuisances;[9] and a fenced obligation to pay a specified annual ground-rent. The following were held not to be real conditions—viz., an obligation to pay a proportion of two-third parts of the expense of forming and enclosing the area in the middle of the square in which the premises stood (which area had been already laid out at the date of the disposition), and of upholding the same in complete repair, on the ground that this was an obligation not *ad factum præstandum*, but to pay an indefinite sum of money;[10] and an obligation on the disponee, his heirs and singular successors, to grant, within six months of their acquiring right, personal bonds for the performance of the above conditions.[11] Further illustrations occupy the following paragraphs. It is only necessary to add that these rules apply only when infeftment has been taken, for then only can reliance be placed on the records. So long as the right remains merely personal, an heir or disponee must take the title with all its obligations. Facilities have lately been granted for validly importing real conditions into a conveyance by reference to another deed already recorded, which contains them at full length.[12]

Requisites for real conditions.

The leading requisite laid down in the case of *Coutts* is, that words must be used which clearly express or plainly imply that the subject itself is to be affected. It might have been premised that it must be clearly shown that a condition was intended at all. The necessity for such proof is illustrated by a long series of deci-

That they are meant for conditions.

Plans.

[7] Yeaman *v.* Crawford, 1770, M. 14537; cf. Robertson *v.* Nisbet, 1681, 2 B.S.10, M. 15007; Orrock *v.* Bennet, 1762, M. 15009.

[8] Browns *v.* Burns, 14th May 1823, 2 S. 298 (N.E. 261). See other cases *supra*, p. 339, and *infra*, chap. 27. The English theories at equity and at common law are briefly noticed in Pollock on Contracts, p. 245.

[9] See *supra*, p. 339, as to conventional nuisances.

[10] A majority of the Scotch judges overruled this finding, but it was returned to in the House of Lords.

[11] Diss. Lds. Fullerton and Cunninghame.

[12] 31 & 32 Vict. c. 101, sect. 10; 37 & 38 Vict. c. 94, sect. 32.

sions regarding the imposition of conditions by means of plans. A long and interesting dissertation might be written on this specimen of case-made law: there is space here for only a brief sketch.

Not incorporated.

The series begins with the feuing of the New Town of Edinburgh. The magistrates obtained an Act of Parliament to enable them, *inter alia*, to enlarge and beautify the town by turning the North Loch into a canal, with walks and terraces on each side; exhibited to purposing feuars of Princes Street a plan showing pleasure-grounds in front; gave private assurances to the same effect; but said nothing about these matters in the charters given out. An interdict was brought against the magistrates building on the ground indicated on the plan as pleasure-ground, and the bill was passed in the House of Lords,[13] after an impassioned speech by Lord Mansfield, which, as Lord Eldon afterwards remarked,[14] perhaps almost frightened the Corporation out of their senses, for they did not attempt to proceed to the question of right.

By mere exhibition.

In the next case, two sets of proprietors, in feuing out land in lots for building along a proposed street, exhibited, and in the articles of roup referred to, a plan of the street, which was supposed to show certain old houses—which belonged to neither of them—as pulled down, so as to make the street of equal width. Nothing was said about all this in the charter, nor was the plan referred to therein. It was held that the superiors were not bound to purchase at reasonable prices these houses when in the market in order to their demolition—seeing that the mere exhibition of a plan cannot form a binding contract, nor an engagement that all which is shown on it shall be done. The charter alone must be regarded.[15] This

Endorsed and signed.

decision has been frequently recognised as undoubted law.[16] It would seem, however, that a plan—at least a plan specially prepared for the purposes of delineating a particular subject—may be 'written into' a charter without being expressly referred to therein, as by being endorsed on the charter, and signed by the superior, especially if it clears up what would otherwise be obscure in the construction of the deed.[17]

Not by mere reference.

But a mere reference in the charter is not sufficient; the plan must be shown to be intended to be part and parcel of the con-

[13] Deas *v.* Mags. of Edinburgh, 1772, 2 Pat. 259.

[14] 2 Dow, 311, 6 Pat. 369.

[15] Heriot's Hosp. *v.* Gibson, 1809, in note to 18 F.C., p. 25, revd. 1814, 2 Dow, 301.

[16] It was not followed in Young *v.* Dewar, 17th Nov. 1814, F.C., and Schultze *v.* Campbell, 29th Nov. 1815, F.C.; but was followed in Croall *v.* Mags. of Edinburgh, 20th Dec. 1870, 9 Macph. 323; and the cases in next paragraph are *à fortiori*.

[17] Crawford *v.* Field, 15th Oct. 1874, 2 Ret. 20.

tract between the parties. In the first case,[18] of reference in a charter to a plan, this requisite does not seem to have been expressly adverted to; but the decision was afterwards justified in the House of Lords.[19] A general plan and elevation of Charlotte Square, Edinburgh, were made out, and exhibited to all intending feuars, and it was provided in the articles of roup that the general plan should be signed before building. The plan was so signed, and was referred to in the charter of a feuar who was in the course of making a considerable deviation, when he was stopped by the Court on the complaint of feuars who were also bound by the plan. The plan clearly pointed out the obligations imposed on the party.[20] The point now under discussion was better brought out in a case which immediately followed. The general feuing-plan of the New Town of Edinburgh showed the houses on the south side of St Andrew Square as erected in a line, and behind each a certain space delineated as open or garden ground, extending back to a meuse lane. The feu-charter of one of the houses—which had come to be the property of the New Club—referred to its stance as 'in form of area, Letter N, lying on the south side of 'St Andrew Square.' A neighbouring proprietor now attempted to prevent the New Club from converting stables, which had originally stood on its back area, into club premises with accesses thereto. It was held that the utmost the plan indicated was the boundaries of the feu, and that it said nothing for or against building.[21] This decision was not at first regarded in Scotland as ruling the general point that such a reference to a general feuing-plan does not innovate on the common-law rights of ownership.[22] But many cases have since occurred in which it has been recognised that similar references must be regarded as made merely for identification of the subject, and that the constitution of a condition on either side demands something more.[23] Thus, where a feu-contract described the subjects as fronting a specified street, and as containing so many square yards 'as laid down upon the fore-'said feuing-plan' (which was not signed), it was held that the plan was not incorporated, except for identification of the lot, and that the feuar did not thereby obtain a right to insist on the completion of the whole street shown on it.[24] 'In construing a feu-

[18] Dirom *v.* Butterworth, 1812, note to 18 F.C. 26.

[19] 6 Pat. 368; 6 Dow, 110.

[20] Ibid.

[21] Gordon *v.* Marjoribanks, 1814, note to 18 F.C. 25, affd. 1818, 6 Dow, 87, 6 Pat. 351.

[22] Stewart *v.* Burk, 9th Dec. 1820, F.C.; cf. Laing *v.* Muirhead, 7th Dec. 1822, 2 S. 73.

[23] Walker *v.* Renton, 11th March 1825, 3 S. 650 (N.E. 455).

[24] Barr *v.* Robertson, 12th July 1854, 16 D. 1049.

'contract, the safe and proper course is to import into it the plan 'only in so far and for such purposes as it is specially mentioned 'in the feu-contract, and not to import it further except by neces- 'sary inference.'[25] Where two conterminous pieces of ground were acquired from the same author by different proprietors, and the common boundary was described in the titles of both as the central line of a proposed street, and in the titles of one of them identified by means of a plan endorsed and referred to, this reference did not entitle him to prevent the other from building up to the verge of his property.[26]

But only if intended as a condition.

On the other hand, besides the case of *Dirom*, already noticed, there have been others in which plans have been found to affect the obligations subsisting between superior and vassal, and between feuars from the same superior. Thus, where subjects were purchased as bounded by other subjects which had at one time belonged to the seller, and the disposition referred to a plan, subscribed by the latter as relative, in which an outside stair was shown as projecting from the latter subjects across the purchaser's march, he was not entitled to challenge the encroachment.[27] And similarly a plan will be respected where it appears on the face of the deeds to have been the basis of the transaction therein recorded.[28]

Plans—how construed.

When a plan has thus been incorporated in the titles, it is of importance to see what sort of construction the Court will put upon it. Thus, in feuing out building-ground, space behind the proposed dwellings was stipulated to be applied to no other purposes than for stables and other office-houses, to be executed according to a given elevation, and conform to certain restrictions as to height. A coach-hirer purchased two of the stable feus (apart from the dwellings in front) on these conditions. It was held that he was entitled to use the one feu for stables and the other for a coach-house, and that so far the plan—which contemplated a stable and coach-house on each—was not to be strictly adhered to; that he was not entitled to convert the upper storey of one of the feus into a dwelling-house independent of and not accessory (like a groom's loft) to the stable; and that the separate entrance and windows constructed with that view, and also an opening for the supply of hay, all being deviations from the plan, must be blocked up.[29] Again, while in a feu-right which conditioned that

[25] Ibid., *per* L.P. M'Neill, p. 1052.

[26] Free St Mark's *v.* Taylor's Trs., 26th Jan. 1869, 7 Macph. 415.

[27] Sim *v.* Stewart, 26th June 1827, 5 S. 841 (N.E. 780).

[28] Cockburn *v.* Wallace, 1st July 1825, 4 S. 128 (N.E. 129), alt. 2 W.S. 293; Fowlers *v.* Commercial Bank, 9th June 1831, 9 S. 705; Henderson *v.* Nimmo, 20th May 1840, 2 D. 869.

[29] Skinner *v.* Diey, 5th Dec. 1855, 18 D. 158.

an advanced sunk area should be made conform to a given plan, it was held to be a contravention to throw out a projection 6½ feet into the area and to 'plat' over all the rest of it, the opposite was held concerning projections of one foot for shop-fronts, and the conversion of dwelling-houses into shops, which had been already done without opposition.[30]

Title of third parties to enforce conditions.

Let it now be supposed that, the general rules regarding the constitution of real conditions having been duly attended to, these are incorporated with and form part of a binding contract between the parties to a conveyance and their successors—*i.e.*, between superior and vassal, or between disponer and disponee, as the case may be—and that, by virtue of privity of contract, they may be enforced by either party against the other attempting contravention. The question then arises whether a title to enforce them may not be acquired by others who took no part in the agreement. Some of the cases already cited on the subject of plans[31] show that such a title may be acquired. The rules relating to this matter are obviously of the greatest importance to the owners of town feus; for the superior may be indifferent to the alterations proposed, or may have been bought off, or may himself be anxious for further freedom, and the sole interest to object may be with the adjoining feuars.

Repelled.

It will be well to observe, in the first place, in what circumstances a right has been held *not* to rest in parties outwith the contract. Land was feued out with an obligation not to sell or sub-feu for the purpose of building. Both before and after the date of this conveyance, the same superior feued out subjects on the opposite side of the street, and in some cases referred to a plan and articles of roup which represented that for the sake of a view the buildings to be erected thereon were to be placed opposite to interspaces between the villas on the first-mentioned feu, which was thereafter reacquired by the superior and consolidated. It was held that the conditions were solely for the benefit of the superior, and that consequently the latter feuars had no right to prevent buildings being erected on the interspaces referred to.[32] There was here no express obligation not to build these up, and no mutuality of obligation imposed on the neighbours. Again, where two parties took building-feus from the same superior, the first subject being described as an area marked No. 218 on a feuing-plan, which indicated the contemplated formation of a

[30] Mags. of Edinburgh *v.* Macfarlane, 2d Dec. 1857, 20 D. 156.

[31] Dirom, [18]; Fowlers, [28]; Skinner, [29]; Free St Mark's, [26], *supra*.

[32] Blackwood *v.* Bell, 20th May 1825, 4 S. 26 (N.E. 27).

street in the neighbourhood, and the second conveyance containing an obligation to make this street, it was held to be *jus tertii* in the former feuar to compel the latter to proceed with its construction, since the reference to the plans in his own titles was merely for identification, and the obligation in the titles of the other was solely for the benefit of the superior, who had a right to relinquish it, and had in fact done so.[33] It is thought that the same result ought to have followed in a recent case, in which there was a difference of opinion on the bench.[34] Contiguous subjects—one feu, the other burgage—were given out in the same conveyance with a prohibition against the use of any portion of the ground for depositing manure. The portion held feu came to be the property of one party under a feudalised disposition which omitted the condition; while the part held burgage came into the hands of another who had the condition engrossed in all his titles by progress and in the record. It was held that the former had a title to prevent a contravention of the prohibition. The majority relied partly on the power of the superior to compel reinsertion of the condition in future renewals of the feu, and partly on the condition being a negative servitude which required no infeftment.[35] These grounds were disposed of by the Lord President, who replied that there was no nuisance, no such servitude, no case of any other restriction binding a singular successor without appearing on the record,[36] and therefore no mutuality of obligation.

Allowed.

On the other hand, building conditions have been maintained by persons, who have no direct title to sue on the agreement by which they were imposed, in such circumstances as the following:[37] In a contract between the several proprietors of a large piece of building-ground, reference was made to a ground-plan for feuing purposes, and it was agreed that no buildings should be erected above a certain height. In laying out a street on land belonging to one of these proprietors, all the articles of roup and feu-contracts referred to the plan and contained this restriction, but in none of them was a right expressly granted to enforce the re-

[33] Carson *v.* Miller, 13th March 1863, 1 Macph. 604.

[34] Robertsons *v.* N.B. Ry., 18th July 1874, 1 Ret. 1213. Lds. Deas and Ardmillan affirmed the judgment of the S.-S. and Sheriff, diss. L.P. Inglis. The doubt in the text is shared by Lord Watson in Macritchie's Trs., *infra*, [47], 8 Ret. H.L. 102; cf. Beattie *v.* Ures, 18th March 1876, 3 Ret. 634.

[35] It is to be observed, with reference to the citation at 1 Ret. 1220, that L. Corehouse does not say that a conventional nuisance need not enter the record, but only that servitudes need not.

[36] Pollock *v.* Turnbull, 16th Jan. 1827, 5 S. 195 (N.E. 181).

[37] And in those of Dirom, [18]; Free St Mark's, [26]; and Skinner, [29], *supra*.

striction on the other feuars. In an action for the enforcement of the restriction, brought by one feuar against another, it was held by the Court of Session, and acquiesced in, that there was a good title to sue, since the conditions were evidently intended for the benefit of the feuars.[38] In more recent cases the principle thus broadly laid down has been more narrowly examined; and some doubt has been thrown on the doctrine as so stated.[39] But these points may be regarded as settled: that, in the case of such building restrictions as those now under review, no declaration of their being real burdens, nor any fencing with irritant or resolutive clauses,[40] is required, though both are commonly inserted; that mutuality of obligation is essential—*i.e.*, that similar restrictions must be imposed on the party seeking to enforce them and on the party contravening; that, in order to secure this, the superior or disponer should take himself bound to insert the same conditions in each subsequent conveyance of adjoining subjects, though this is not necessary provided they be so inserted in fact;[41] that unity of title—*i.e.*, holding from the same superior—is not necessary;[42] that the right so acquired is to be ascribed to the doctrine of *jus quæsitum tertio*, rather than to any implied contract;[43] that the right of the feuars arising from mutuality of obligation cannot be curtailed by a discharge of the common restriction, granted by the superior to one or more of the feuars, but not to all;[44] that it is inconsistent with the notion of a *jus quæsitum* for the superior in feuing out to retain an express power to dispense with a restriction;[45] that an infringement of a condition cannot be attacked by an adjoining feuar who has himself contravened it;[46] and that the objector must be able to show an intelligible interest.

[38] Cockburn *v.* Wallace, 1st July 1825, 4 S. 128 (N.E. 129), alt. 2 W.S. 293, on a different point; followed in Fowlers *v.* Commercial Bank, 9th June 1831, 9 S. 705 (street); Skinner *v.* Diey, 5th Dec. 1855, 18 D. 158; Mags. of Edinburgh, *v.* Macfarlane, 2d Dec. 1857, 20 D. 156.

[39] *Per* L. Deas in M'Gibbon *v.* Rankin 19th Jan. 1871, 9 Macph. 423, 433; and see Alexander *v.* Stobo, 3d March 1871, 9 Macph. 599, 605, 609. See Ewing *v.* Hastie, 12th Jan. 1878, 5 Ret. 439.

[40] Cases in last note; Gould *v.* M'Corquodale, 24th Nov. 1869, 8 Macph. 165; M'Neill *v.* Mackenzie, 5th Feb. 1870, 8 Macph. 520; Morrison *v.* M'Lay, 1st July 1874, 1 Ret. 1117.

[41] Free St Mark's *v.* Taylor's Trs., 26th Jan. 1869, 7 Macph. 415, and cases in last two notes; Allan's Trs. *v.* Dixon's Trs., 9th Dec. 1868, 7 Macph. 193, aff'd. 8 Macph. H.L. 182. See as to reserved right to alter, &c.—Henderson *v.* Nimmo, 20th May 1840, 2 D. 869; Glasgow Jute Co. *v.* Ure, 5th Nov. 1869, 8 Macph. 93.

[42] Alexander *v.* Stobo, *supra*, [39].

[43] Mags. of Edinburgh *v.* Macfarlane, [38]; Allan's Trs. *v.* Dixon's Trs., [41]; M'Gibbon *v.* Rankin, [39]; Alexander *v.* Stobo, [39], *supra*.

[44] Dalrymple *v.* Herdman, 5th June 1878, 5 Ret. 847.

[45] Thomson *v.* Alley, 22d Dec. 1882, 10 Ret. 433.

[46] Walker *v.* Renton, 11th March 1825, 3 Sh. 650 (N.E. 455).

Macritchie's Trs. v. Hislop.

A recent case [47] which went to the House of Lords is an excellent illustration of the sort of questions which here arise, and an authoritative guide towards answering them. Of five detached houses which (with their grounds) lined one side of a square, No. 2 was feued with a prohibition against the erection of any other buildings except the tenement of houses and walls of enclosure already erected thereon; and if the feuar or his successors should build any offices on the back-ground, which they were at liberty to do, the same were not to exceed 12 feet in height in the side walls. Nearly two years later, No. 4 was feued out to a different feuar, for the erection of a tenement, to be placed in a line with houses thereafter to be built on an adjoining feu, and of the same height; and the feuar bound himself and his successors not to erect any other buildings besides this, except walls of enclosure and necessary offices, neither of which were to exceed 9 feet in height. The restrictions laid on No. 1 were different from any of these; those laid on No. 3 were the same as attached to No. 2; No. 5 was under substantially the same conditions as No. 3. Prior to the raising of the question in dispute, the conditions imposed on Nos. 2 and 4 had been violated, so far as they restrained building on the ground behind the original houses, but the space in front of each of these houses, built on these feus, and between them and the street, was still vacant. The proprietors of No. 4 now sought interdict against the proprietor of No. 2, to prevent him from erecting, on this space in front, a showroom stretching forwards to and opening from the street, and at the back an office, almost exactly on the site of a building already erected there. The judges of the Second Division, in granting interdict, mainly relied on the consent and concurrence of the superiors to the complaint, as narrated in the complaint itself, but not established by compearance; but Lord Gifford, agreeing with Lord Rutherfurd Clark, the Lord Ordinary, thought there was sufficient mutuality. The House of Lords, agreeing with Lord Young, held the concurrence founded on to be of no avail; and held further that there was no such mutuality of obligation among the feuars as to enable the complainers to enforce the respondent's observance of the conditions of his feu. The rule was thus stated by Lord Chancellor Selborne: 'The fact of several 'feuars of neighbouring plots of building-land in the same 'street holding from a common superior does not by itself entitle 'one of those feuars to claim the benefit of restrictions contained

[47] Macritchie's Trs. *v.* Hislop, 17th Dec. 1879, 7 Ret. 384, rev. 8 Ret. H.L. 95, 6 App. Cas. 560.

'in the feu-contract of another, unless some mutuality and com-
'munity of rights and obligations is otherwise established between
'them, which can only be done by express stipulation in their
'respective contracts with the superior, or by reasonable implica-
'tion from some reference in both contracts to a common plan or
'scheme of building, or by mutual agreement between the feuars
'themselves.'[48] Lord Watson, in an extremely able judgment, pointed out the difference between the right so vested in each feuar and a mere assignation to each of the superior's right as against the others: the one leaves unimpaired, while the other would *pro tanto* destroy the superior's right; and his Lordship classified the cases under two categories: (1) 'Where the superior 'feus out his land in separate lots for the erection of houses in 'streets or squares upon a uniform plan; and (2) where the supe-'rior feus out a considerable area with a view to its being sub-'divided and built upon, without prescribing any definite plan, 'but imposing certain general restrictions which the feuar is 'taken bound to insert in all sub-feus or dispositions to be granted 'by him.' In the first case, 'the feuar, who stipulates with his 'superior that a particular restriction shall be imposed on all his 'fellow-feuars, as well as upon himself, must intend that he shall 'have the power of enforcing it against them, and that they shall 'have the like power as in a question with him.' In the second case, 'the feuar is held as consenting to be bound by the law 'laid down by the common author for the benefit of all future 'feuars.'[49]

Interest of superior and third parties.

The superior is entitled to rely on the terms of his contract, unless he has passed from it, and does not require to show any patrimonial interest, to enforce a condition imposed by himself or his author,[50] and cannot be met with the reply that all his land in the neighbourhood has been feued out and built upon, and that his feu-duty is amply secured.[51] Or, as stated by Lord Watson in the *Grangemouth* case, 'the case of the *Tailors of Aberdeen* v. 'Coutts does determine that, wherever a feu-right contains a 'restriction on property, the superior, or the party in whose 'favour it is conceived, cannot enforce it unless he has some 'legitimate interest. But that case does not lay down the doc-

[48] Overruling *dicta* of L.J.-C. Hope in Cockburn *v.* Wallace, *supra*, [38], and of L. Ardmillan in Robertson *v.* N.B. Ry. *supra*, [34]—see Lord Watson's opinion.

[49] In 8 Ret. H.L. 102, 103, 104.

[50] *Per* Lord Watson in 8 Ret. H.L. 102, and L. Neaves in Campbell *v.* Clydesdale Bank, *infra*, [51].

[51] Mags. of Edinburgh *v.* Macfarlane, [38]. In Campbell *v.* Clydesdale Bank, 19th June 1868, 6 Macph. 943, there was personal bar; in Naismith *v.* Cairnduff, *infra*, [58], interest was proved.

'trine that an action at the superior's instance, which merely sets 'forth the condition of his feu-right and its violation by his 'vassal, must be dismissed as irrelevant because the pursuer has 'failed to allege interest. *Primâ facie*, the vassal in consenting 'to be bound by the restriction, concedes the interest of the 'superior; and therefore it appears to me that the *onus* is upon 'the vassal who is pleading a release from his contract to allege 'and prove that, owing to some change of circumstances, any 'legitimate interest which the superior may originally have had 'in maintaining the restriction had ceased to exist.'[52] It is different with the adjoining feuar, under a mutual condition with his neighbour, but with no privity of contract.[53] A distinct patrimonial interest must then be set out and proved,[54] since 'the right of the feuar, though arising *ex contractu*, is of the 'nature of a proper servitude, his feu being the dominant tene-'ment;[55] and it will be a matter for the discretion of the Court to determine what will be sufficient interest in each case, taking all the circumstances into account. In this respect, as in all others except the mode of constitution, there is no distinction between an ordinary servitude and a real condition. They are both parts of the law of neighbourhood. Thus it has been seen that an immaterial deviation from a plan[56] will not be regarded; while there may be sufficient interest, in one who is in right of a condition that any erections made on adjoining ground should be of stone and lime, to insist on the removal of a brick stable[57] —or in a superior who has bound a feuar to erect nothing but cottages on his feu, to object to the building of a house of two square storeys under the roof,[58] as he might be thereby involved in an enhanced claim for surface-damages through mineral-workings. It is no objection to the interest of the feuar that it is merely æsthetic, provided it be not illusory.[59]

Remedy lost by acquiescence.

But both superior and adjoining feuar may be barred from objecting to infringements of building conditions by compulsory surrender of the servient tenement under Act of Parliament;[60] by acquiescence in such circumstances as may infer consent to

[52] *Per* Lord Watson in E. Zetland *v.* Hislop, 9 Ret. H.L. 47.

[53] Mags. of Edinburgh, [51].

[54] Gould *v.* M'Corquodale, [40]; Dennistoun *v.* Thomson, 22d Nov. 1872, 11 Macph. 121, 128.

[55] *Per* Lord Watson at 8 Ret. H.L. 102.

[56] Skinner *v.* Diey, [29]; Mags. of Edinburgh *v.* Macfarlane, [38]; M'Neill *v.* Mackenzie, [40], *supra*.

[57] Beattie *v.* Ures, [34].

[58] Naismith *v.* Cairnduff, 21st June 1876, 3 Ret. 863.

[59] Stewart *v.* Bunten, 20th July 1878, 5 Ret. 1108.

[60] Baily *v.* De Crespigny, L.R. 4 Q.B., 180.

the buildings or alterations in question,[61] or by expressly or tacitly abandoning the conditions. But, their rights being independent, 'the superior's consent to discharge the condition cannot affect 'the right of the feuar, and as little can the feuar's renunciation 'of his servitude impair the superior's right to enforce the con-'dition.' Tacit abandonment will not be inferred from permitting slight deviations from a plan or detailed restriction;[62] nor from permitting any, however important, if made in such a position that the objecting feuar had no interest to complain, and only interposed when his own interests were imperilled.[63] In one case it was held that waiver of objection by a superior could only be proved by writ or oath; but the consent there founded on was express consent by word of mouth.[64] So relinquishment by the superior of an obligation on the vassal to build within a certain time was gathered from the fact that this period had long passed, that possession had never been given, the feu-duty had never been paid, and the position of the lots had been altered.[65] In a decision[66] which has been much canvassed[67] but never overruled, superiors attempting to enforce, against a feuar who was proceeding to erect a shop on a street feu, a prohibition in the feuar's title against his subjects being used for the prosecution of any trade or merchandise, were held to have no interest, and to be barred, *personali exceptione*, by having permitted, without objection, all the houses built in the same street and under the same conditions to be converted into shops. Again, in feuing out street tenements on the Blytheswood estate, a condition was inserted in all the feu-contracts, and kept up in all the renewals, that 'for the utility and ornament of the said streets' the houses should not exceed a certain height. The feuars agreed to disregard the condition, and did so disregard it in many tenements near to that which was at length objected to, without interference by the superior, whose agent was well aware of what was going on. It was held that the condition could not be enforced on one victim only; and the opinion of the Court was reserved as to

[61] *Supra*, p. 329. Muirhead *v.* Glasgow Highland Soc., 15th Jan. 1864, 2 Macph. 420; M'Gibbon *v.* Rankin, [39]; Russell *v.* Cowpar, *infra*, [73], *per* L. Mure.

[62] Dirom *v.* Butterworth, 1814, in note to 18 F.C. 26; Mags. of Edinburgh *v.* Macfarlane, [38]; Allan's Trs. *v.* Dixon's Trs., 9th Dec. 1868, 7 Macph. 193, affd. 8 Macph. H.L. 182; Naismith *v.* Cairnduff, [58] (deviation in site).

[63] Gould *v.* M'Corquodale, [40].

[64] Scot *v.* Cairns, 18th Dec. 1830, 9 S. 246.

[65] E. Moray *v.* Pearson, 11th June 1842, 4 D. 1411.

[66] Browns *v.* Burns, 14th May 1823, 2 S. 298 (N.E. 261).

[67] In Mags. of Edinburgh *v.* Macfarlane, [38], 20 D. 171, 177. See L. Corehouse in Tailors of Aberdeen *v.* Coutts, 1 Rob. App. 296, 320.

what would be the result if all the contraveners were attacked together. The attack has never been made.[68] Acquiescence in one deviation from the contemplated scheme of building, or even in more than one, does not necessarily involve abandonment of the whole plan; the degree of renunciation will be a matter of circumstances.[69] And the rule in *Campbell's* case does not apply to a single limited departure from the conditions of the feu of one of two plots of ground, since such an isolated permission by the superior could not be taken as the 'law of the estate.'[70]

Interpretation of building restrictions.

The rule of construction, which applies to servitudes properly so called, is equally applicable to all these building conditions or restrictions; and the illustrations which follow will be taken indiscriminately from both classes of burdens, without reference to the class to which the cases properly belong. The bias of the law is to presume in favour of the freedom of ownership; and the rule thence arising is, that restrictions on the uses of property must be subjected to a strict construction. This was definitively settled in last century, in a case in which an attempt was made to set up an opposite rule by a stretch of the analogy between feus and leases. A feu was granted with the condition that it should 'not be leisom to the said J. C. and his foresaids to dig 'for stones, coal, sand, or any other thing within the said ground, 'nor to use the same in any other way than by the ordinary 'labour of plough and spade, without the consent of the granters.' This was found to be no obstacle to covering the ground with buildings.[71] And this rule has been followed ever since. 'Re-'strictions on the use of property cannot be easily implied, nor 'enforced without clear and strong reasons.'[72] Thus, a prohibition against erecting 'any buildings on any part' of a yard behind a fore-tenement 'so as in any way to prejudice the lights of the 'other storeys of the said fore-tenement, but to use the same for 'a garden only,' is no absolute veto against building, being only intended for the protection of the lights of the dominant subjects.[73]

Presumption for freedom; therefore strictly,

[68] Campbell *v.* Clydesdale Bank, 19th June 1868, 6 Macph. 943; English cases there quoted, and German *v.* Chapman, 7 Ch. D. 271; Fraser *v.* Downie, 22d June 1877, 4 Ret. 942.

[69] Stewart *v.* Bunten, 20th July 1878, 5 Ret. 1108; Cochran *v.* Paterson, 7th Feb. 1882, 9 Ret. 634; Macritchie's Trs. *v.* Hislop, *supra*, [47], in Court of Session; E. Zetland *v.* Hislop, *per* Lord Watson, 9 Ret. H.L. 47.

[70] Ewing *v.* Campbells, 23d Nov. 1877, 5 Ret. 230.

[71] Heriot's Hosp. *v.* Ferguson, 1773, M. 12817, affd. 3 Pat. 674.

[72] Dennistoun *v.* Thomson, 22d Nov. 1872, 11 Macph. 121, 127; see also Gould *v.* M'Corquodale, [40]; M'Gibbon *v.* Rankin, [39]; Alexander *v.* Stobo, [39], *supra*.

[73] Russell *v.* Cowpar, 24th Feb. 1882, 9 Ret. 660. The Court held the Dean of Guild's opinion as to the amount of obstruction to light to be conclusive, but this can scarcely be taken as a rule of practice.

Again, a common wall between two back areas was restricted in the titles of one of the tenements to a height 'specified in the 'titles of the other.' It was not, in fact, so specified. The restriction was held void for vagueness; and it was observed that even if the servitude could have been enforced, it would not have prevented the servient owner from building a house of any height within the wall.[74] The second Lord Mackenzie was of opinion that a restriction against buildings consisting 'of more than a 'ground storey and two storeys above' was prohibitive of a sunk storey.[75] And a servitude against building, on certain back-ground, higher than ten feet, 'in order to preserve the light,' does not prevent the servient owner from covering the whole of the back-ground with buildings of that height, though the effect would be to shut up windows in the dominant tenement, concerning which there was a provision that they should be stanchioned 'so 'as to prevent access.'[76] In a mutual contract—never recorded—between proprietors whose back-greens adjoined, one of them became bound to erect 'a small building or cellar, not above one 'storey in height,' on the ground behind his house. In a question between singular successors, it was held that a servitude *altius non tollendi* had been thereby constituted in favour of the other tenement, but that it did not prevent the addition of a chimney thirty inches square and reaching to the roof of the adjoining house. The building itself measured six feet three inches by five feet, and there was no prohibition against placing a fire in it; and a chimney of the height mentioned was necessary for proper venting.[77] A prohibition against alteration in the appearance of existing buildings, and against the erection of any except stables, coach-houses, or other offices, to be built in a certain line, does not prevent a building in the proper line and of the required appearance from being used as a shop, or for any other purpose not creating a nuisance.[78] Again, an obligation on the disponee in a contract of ground-annual to pay one-half of the expense of maintaining the common sewer opposite his premises does not make him liable for any part of the cost of constructing it.[79] Where a house is situated at a corner between two streets run-

[74] Ross *v.* Cuthbertson, 3d March 1854, 16 D. 732.

[75] Mags. of Edinburgh *v.* Paton & Ritchie, 3d March 1858, 20 D. 731.

[76] Craig *v.* Gould, 9th Nov. 1861, 24 D. 20.

[77] Banks & Co. *v.* Walker, 5th June 1874, 1 Ret. 981 (diss. Deas).

[78] Boswell *v.* Inglis, 9th March 1848, 10 D. 888, affd. 6 B. Ap. 427; see op. of L. Shand in Fraser *v.* Downie, [68].

[79] Stewart *v.* Meikle, 27th Jan. 1874, 1 Ret. 408. See as to making a road, Cumming *v.* Brown, 2d Feb. 1859, 21 D. 752.

ning at right angles to each other, and there is a restriction against raising the houses in one of the streets, but not in the other, above a specified height, this will not affect that part of the building which, properly speaking, fronts to and enters from the latter street, and only presents its side to the former.[80] A stipulation that the house or houses to be erected shall not consist of more than three nor less than two square storeys in height, does not entitle the superior to object to attics constructed under a roof of ordinary—rectangular—pitch, with storm-windows, which obstructed no one's light, the objection really being not to the construction, but to the use of the attics by separate families, at the risk of overcrowding.[81] A stipulation to erect and thereafter to uphold and maintain on a feu two detached dwelling-houses or villas (with suitable offices), at least six feet back from a street, according to plans approved by the superiors, does not prevent the erection of an outside stair leading to the upper floor of one of the self-contained villas which had been previously erected and approved, the object being to turn this villa into a flatted house; there being no prohibition of this addition, and no restriction on the freedom of use.[82] A 'self-contained' house is one which is adapted for the residence of a single family, and not necessarily a house which can be turned to no other use; so that it was held to be a mistake to apply, on the ground of structural contravention, for demolition of a house which, originally intended to accommodate more than one family, and furnished with an outside stair, was, by an afterthought devised to evade the restriction, provided with an inner stair. It was not decided what would have been the result of an application for removal of the outside stair; but the epithet imports no restriction on the use of the house.[83]

but not judaically.

But it must not be supposed that these restrictions are subjected to a judaical construction in favour of the liberty of ownership. Any leaning in that direction is arrested by plain unambiguous words, which will receive their full force and effect. Thus, a prohibition against erecting houses on a back area with

[80] Alexander *v.* Stobo, 3d March 1871, 9 Macph. 599. This construction was helped by the lie of the ground. Cf. Davidson *v.* Mercer, 18th Dec. 1823, 2 S. 597 (N.E. 510), which was a palpable evasion; Burnet *v.* Bush, 13th Nov. 1849, 12 D. 44.

[81] M'Ewan *v.* Stewart, 10th March 1880, 7 Ret. 682.

[82] Moir's Trs. *v.* M'Ewan, 15th July 1880, 7 Ret. 1141. The rules as to restrictions on use have been treated in the close of the chapter on Nuisance, *supra*, p. 339.

[83] Buchanan *v.* Marr, 7th June 1883, 20 Sc. L.R. 635 (diss. L. Rutherfurd Clark, on grounds which might have suggested a restriction of the prayer to removal of the outside stair).

roofs 'higher than the joists of the parlour floor' of the dwelling-house, refers to the joists in the floor of the parlour-storey, not those in the ceiling.[84] A restriction against building, except 'one ' or more little houses, a stable, or any other small buildings for ' the conveniency of the house, for the purpose of preserving light, ' air, and prospect to the neighbours,' excludes the erection of a shop, though it permits buildings more offensive.[85] It has been seen that the term 'buildings' includes a moveable structure, and, if the sole purpose of the prohibition be not the preservation of light, an underground structure as well.[86] A restriction of the height of houses to three square storeys and a sunk storey prevents the erection of a 'blocking-course'—that is, an additional wall above the ceiling of the top square storey, supporting on its summit the roof of the house, and thus making a better *quasi* garret.[87] The authority of this decision was, though with much misgiving, admitted in a case where the restriction was to buildings 'which shall be three square storeys above the surface of the ' ground but not more in height,' and the proposal was to add about five feet of wall on the top of one-half of the front wall (the other half being occupied by a balustrade, which was also to be raised), so as to obtain not a square but a better attic storey, and to infix dormer-windows almost flush with the wall.[88] It does not seem to be easy to justify either of these decisions without some standard of height for each storey. Where a local Act prohibited the height 'of houses or buildings in any existing street ' or court' being increased so as to be above one and a half times the width of the street or court, and certain proposed buildings were to be bounded by a broad street in front and a narrow meuse lane behind, they were held for the purposes of the Act as being wholly in the front street.[89] A prohibition against a class of houses inferior to a specified standard will receive a fair construction;[90] and a villa of two square storeys under the roof is too important a house to be classed as a cottage.[91] It has been held by the Second Division that restrictions which are intended for the mutual benefit of a number of tenements are

[84] Greenhill *v.* Forrester, 26th Nov. 1824, 3 S. 325 (N.E. 231).

[85] Greenhill *v.* Allan, 8th July 1825, 4 S. 160.

[86] Mags. of Edinburgh *v.* Brown, 17th Jan. 1833, 11 S. 255; *Iid. v.* Paton & Ritchie, 3d March 1858, 20 D. 731; Malloch *v.* Gray, 31st May 1872, 10 Macph. 774.

[87] Campbell *v.* Allan, 18th Dec. 1855, 18 D. 267.

[88] Cochran *v.* Paterson, 7th Feb. 1882, 9 Ret. 634.

[89] Pitman *v.* Burnett's Trs., 26th Jan. 1882, 9 Ret. 444.

[90] Morrison *v.* M'Lay, 1st July 1874, 1 Ret. 1117.

[91] Naismith *v.* Cairnduff, 21st June 1876, 3 Ret. 863.

specially deserving of a fair construction; and it has been observed in the First Division that this is particularly so when the formation of a street or other access is in question.[92]

[92] Dennistoun *v.* Thomson, 22d Nov. 1872, 11 Macph. 121. And as examples, Fimister *v.* Milne, 24th May 1860, 22 D. 1100; Glasgow Jute Co. *v.* Ure, 5th Nov. 1869, 8 Macph. 93; Thomson *v.* Alley, 22d Dec. 1882, 10 Ret. 432. See also cases of Conventional Nuisances, *supra*, chap. 24, *ad fin.*

CHAPTER XXVIII.

SUPPORT OF LANDS AND HOUSES—SURFACE-DAMAGES.

A VERY important department of the law of neighbourhood [1] is that which relates to the support of lands and houses. Little assistance is to be had from the Roman law, whose sole contributions are the servitudes *oneris ferendi* and *tigni immittendi* in urban subjects,[2] and certain regulations, derived from the laws of Solon and copied in the XII. Tables, regarding the distance from his boundary-line within which an owner of rural subjects is not entitled to dig.[3] The Romans, down at least to a very late period, knew little of mining operations, and still less of the thorough modes of excavation which are adopted in modern times. The same explanation will account for the almost total absence of authority both in Scotland and England down to within the last half-century. In recent years, however, there has been a plentiful crop of litigation, more especially across the Border. In determining the questions raised, Scotch authorities have been quoted on the English bench;[4] and in the Scotch Courts, English cases have been extensively cited at the bar,[5] and founded on in judgment:[6] and it has been stated that the rules observed in both systems are identical, and rested on grounds common to every known system of jurisprudence.[7] It will be seen shortly that

In Roman,

English, and Scotch law.

[1] *Supra*, p. 309.

[2] *Infra*, chap. 33. See the later constitutions, 14 D. (8.2); 11 C. (8.10).

[3] 4 § 10, 13 D. (10.1), Nov. Leonis, 71.

[4] *Per* L. Campbell C.J., in Humphries *v.* Brogden, 12 Q.B. 739, 756.

[5] Andrew *v.* Buchanan, 24th Feb. 1871, 9 Macph. 554.

[6] L.P. in Balds *v.* Alloa Colliery Co., 30th May 1854, 16 D. 870, 875.

[7] *Per* L. Chan. Cranworth in Caledonian Ry. *v.* Sprot, 15th Feb. 1854, 16 D. 559, revd. 2 Macq. 449, 461; and L. Chan. Selborne in Andrew *v.* Buchanan, [5], revd. 11 Macph. 13, 16. Yet, except arbitrary regulations as to building near boundary, there is no notice of support by land to land or to buildings in the French (C. Nap. § 640), Prussian (2.16.152 *et seq.*), Austrian (472 *et seq.*), or Italian (570 *et seq.*) Codes. The English author-

this *dictum* must not be taken as literally exact, since in one important particular—that of ancient buildings—the English law proceeds on an analogy which is unknown to the law of Scotland. There are three possible cases: (1) there is the support due by land to land unencumbered with buildings or other structures; (2) that due by land to land encumbered with buildings or other structures; and (3) that due by buildings to buildings. In each of these cases the support may be afforded either by adjacent or by subjacent premises; but it would be useless to discuss separately the law applicable to these two sorts of support, since no valid distinction[8] can be drawn between them—unless, perhaps, in the case of one building supporting another.[9]

A natural right.

I. *Support by Land to Land unencumbered with Houses.*—It is one of the natural rights incident to the ownership of land in its natural state that the owner is entitled to such support for his land from the adjacent and subjacent soil as shall be sufficient to retain it in its natural state. The distinction between natural rights and acquired or servitude rights has been already pointed out.[10] The right to support of this kind belongs to the former class. This was determined very clearly in the leading English case,[11] and has been recognised by the House of Lords.[12] It has been compared to the natural right of a riparian owner to the flow of water in a natural river.[13] Were it not for this application of the rule —*sic utere tuo ut alienum non lædas*—the owner of lands or minerals adjacent to the lands of another owner might excavate up to the verge of his premises, however friable his soil might be, and, without actual negligence in working, might thereby cause his neighbour's soil to set or fall in. Again, where the ownership of minerals has been severed from that of the superincumbent soil, or different strata have come into the hands of different owners, it would be in the power of the inferior proprietor, by operations in his own premises, to do much damage to the soil or strata above

ities are collected in Gale, 358 *et seq.*, 446, and Goddard, *sub voce;* and the American law in Washburne, chap. iv. sects. 1.2.4; and Wood on Nuisance, p. 180 *et seq.*

[8] The distinction suggested by Watson B., in Rodgers *v.* Taylor, 2 H. and N. 828, 834, finds no countenance elsewhere, and is opposed to the leading case of Humphries *v.* Brogden, [4].

[9] *Infra*, p. 420; cf. Richards *v.* Rose, 9 Exch. 218, with Solomon *v.* Vintners Co., 4 H. and N. 585, esp. opinion of Bramwell B. In a case of subjacent support, prescription would not be required; in a case of adjacent support, it would probably not be admitted.

[10] *Supra*, p. 322.

[11] Humphries *v.* Brogden, 12 Q.B. 739, 744, *per* L. Campbell.

[12] Bonomi *v.* Backhouse, E.B. and E. 622, 644, 9 H.L. 503, 512, 513; Rowbotham *v.* Wilson, 8 H.L. 348, 359, 367.

[13] *Per* Erle C.J., in Bonomi *v.* Backhouse, [12]; *per* Pollock C.B., in Solomon *v.* Vintners Co., [9], 4 H. and N. 598.

these, were it not for the recognition of this natural right. 'It 'stands on natural justice, and is essential to the protection and 'enjoyment of property in the soil.'[14]

The nature of the right of support is well described by Lord Campbell in a passage which succeeds that which has just been quoted. He is speaking of subjacent minerals, and is delivering the judgment of the Court of Queen's Bench: 'Where there are 'separate freeholds, from the surface of the land and the minerals 'belonging to different owners, we are of opinion that the owner 'of the surface, while unencumbered by buildings and in its 'natural state, is entitled to have it supported by the subjacent 'mineral strata. These strata may of course be removed by the 'owner of them, so that a sufficient support for the surface is left; 'but if the surface subsides and is injured by the removal of these 'strata (although, on the supposition that the surface and the 'minerals belong to the same owner, the operation may not have 'been conducted negligently nor contrary to the custom of the 'country), the owner of the surface may maintain an action 'against the owner of the minerals for the damage sustained by 'the subsidence. Unless the surface-close be entitled to this 'support from the close underneath, corresponding to the lateral 'support to which it is entitled from the adjoining surface-close, 'it cannot be securely enjoyed as property; and under certain 'circumstances, as where the mineral strata approach the surface 'and are of great thickness, it might be entirely destroyed. We 'likewise think that the rule giving the right of support to the 'surface upon the minerals in the absence of any grant, reserva- 'tion, or covenant, must be laid down generally, without reference 'to the nature of the strata, or the difficulty of propping up the 'surface, or the comparative value of the surface and the minerals. 'We are not aware of any principle upon which qualifications 'could be added to the rule; and the attempt to introduce them 'would lead to uncertainty and litigation. Greater inconvenience 'cannot arise from this rule in any case, than that which may be 'experienced where the surface belongs to one owner and the 'minerals to another, who cannot take any portion of them with- 'out the consent of the owner of the surface. In such cases 'a hope of reciprocal advantage will bring about a compromise 'advantageous to the parties and to the public. Something has 'been said of a right to a reasonable support for the surface: but 'we cannot measure out degrees to which the right may extend; 'and the only reasonable support is that which will protect the

Character of right of support.

Removal of strata.

Reasonable support?

[14] Humphries *v.* Brogden, [11], 12 Q.B. 744, *per* L. Campbell.

'surface from subsidence and keep it securely at its ancient and 'natural level.'[15] The doctrine enunciated in the outset of this quotation is in other words set forth by Lord Cranworth:[16] 'It 'has been supposed that the right of the party whose land is in- 'terfered with is a right to what is called the pillars or the sup- 'port. In truth, his right is a right to the ordinary enjoyment 'of his land; and till that ordinary enjoyment is interfered with, 'he has nothing of which to complain.' It rather appears, however, that, since prevention is better than cure, interdict will be granted, to prevent threatened damage,[17] if the miners 'were 'doing an act which it could be proved by satisfactory experts' 'evidence would necessarily have the effect of making the land 'subside.'[18] The absolute nature of the right of support, on which Lord Campbell remarks at the close of the passage quoted, may extend to a total negation of the enjoyment of his property by the owner[19] of the minerals subjacent or adjacent. 'There might 'be land of so solid a character, consisting of solid stone, that a 'foot of it would be enough to support the land. There might 'be other land so friable and of such an unsolid character, that 'you would want a quarter of a mile of it; but, whatever it is, 'so long as you have got enough land on your boundary which, 'left untouched, will support your land, you have got your neigh- 'bour and you have got your neighbour's land, to whose support 'you are entitled.'[20]

Right to ordinary enjoyment.

Contribution by an intervening owner; or by complainer himself.

The case which gave rise to these observations was one in which danger of subsidence to one piece of land arose from excavations in another subject, which was separated therefrom by a strip of land belonging to a third party, under which strip mines had been recently driven. It was proved that, if this strip had not been undermined, no danger could have resulted from the excavations in the lands beyond it. It was held that the burden of supporting adjacent soil could not be increased by the act of the intermediate owner, and that consequently the owner of the endangered subjects could not complain of the excavations referred to.[21] It may be gathered from general principle, as illustrated in cognate

[15] Ibid. p. 744. See *per* L. Blackburn in White *v.* Dixon, 19th March 1883, 20 Sc. L.R. 541; and ops. in Dalton *v.* Angus, 6 App. Cas. 740, *passim*, esp. *per* L. Chan. Selborne, p. 791 *et seq.*

[16] In Bonomi *v.* Backhouse, [12], 9 H.L. 512.

[17] *Per* Selborne L. Ch., in Andrew *v.* Buchanan, *supra*, 11 Macph. H.L. 16.

[18] *Per* Jessel M.R., in Mayor of Birmingham *v.* Allen, 6 Ch. D. 284, 287.

[19] *Per* Malins V.C., in Wakefield *v.* D. Buccleuch, L.R. 4 Eq. 613, 654, revd. on a different ground, L.R. 4 H.L. 377.

[20] *Per* Jessel M.R., in Mayor of Birmingham *v.* Allen, [18].

[21] Ibid.; cf. Aspden *v.* Seddon, 1 Exch. D. 496.

cases,[22] and from the analogy of support to buildings,[23] that a proprietor who has himself undermined his soil near to his boundary is not entitled to complain of subsidence occasioned by workings beneath adjacent premises, unless he is able to show that his own excavations had not contributed to the result, and that the same subsidence would have taken place though these had not existed.[24] He cannot, any more than the intermediate third party in the case of *Allen*, add to the burden laid by the law on his neighbour.

Hydrostatic pressure of water in pit-wastes;

The doctrines just enunciated apply primarily to cases in which the required support is afforded by adjacent or subjacent soil. The English and Scotch Courts have arrived at contrary results where it has been sought to enforce the same rules in regard to the support afforded by the pressure of water accidentally present in old mines. In the only Scotch case, a proprietor granted a feu of a piece of land, but reserved the minerals. He afterwards let the minerals under the ground so feued, and the whole minerals on his estate, to a third party. At the date of the feu-right, and long prior to it, the greater part of a seam of coal under the ground feued had been worked out, and the waste allowed to fill with water, which, by its hydrostatic pressure, supported the roof. The tenants pumped out the water preparatory to working the minerals, and thereby caused a sit of the ground, and consequent injury to the surface. A jury found that it was obvious that injury to the feuar's property would follow from withdrawing the water, and that that injury might have been prevented had proper precautions been taken. It was held by the Court that the party who withdraws a natural support, or the artificial support which has come in the place of the natural support, does so at his peril; that the withdrawal of the water, being necessary to the working of the minerals, must have been in contemplation both of the superior and his tenant when the minerals were let; that the neglect of proper precautions was their common neglect, and that both were equally responsible for the damage done.[25] The water in the wastes was regarded as fulfilling much the same office as natural pillars of coal (of which some were left in the old seam), or purely artificial pillars, with this difference in favour of the owner of the surface, that the water was a natural product. A different doctrine seems to obtain in England. In a case which was involved in specialties, the circumstances were, that an old

[22] *E.g.*, Wilsons *v.* Waddell, 8th Jan. 1876, 3 Ret. 288, affd. 1 Dec. 1876, 4 Ret. H.L. 29; cf. Durham *v.* Hood, 3d Feb. 1871, 9 Macph. 474.

[23] *Infra*, p. 416.

[24] See Goddard, p. 37.

[25] Balds *v.* Alloa Colliery Co., [6].

shaft leading down to horizontal mines was entered by a river which had overflowed its banks, and the mines were filled with water, which exerted a considerable upward pressure. It was decided that no right of support thereby was acquired, seeing that the flooding was accidental; that all concerned knew, as every one in a mining district did, that a drowned mine is frequently revived after a long period of time; and that, in the circumstances, such a contingency should have been specially provided against.[26] The same has been held, with regard to *lateral* support, in a case where cottages built on marshy land were injured by subsidence of their site, caused by the draining of adjoining land preparatory to the erection of a church.[27] 'Although there is no doubt that 'a man has no right to withdraw from his neighbour the support 'of adjacent soil, there is nothing at common law to prevent his 'draining that soil, if for any reason it becomes necessary or con-'venient for him to do so. It may indeed be, that when one 'grants land to another for some special purpose—for building 'purposes, for example—then, since according to the old maxim 'a man cannot derogate from his own grant, the granter cannot 'do anything whatever with his own land which might have the 'effect of rendering the land granted less fit for the special pur-'pose in question than it otherwise might have been.'[28] In the light of these English decisions it is thought that the case of *Balds* was wrong decided. The flooding of the wastes was not intentional; the draining of the water ought to have been anticipated by the feuar when he built above it; and there was no implied warranty in his favour. The fallacy of the decision lies in applying, to the case of a severance of the ownership of surface and minerals subsequent to excavation and flooding, the same rules as would have been applicable to a severance completed prior to the drowning of the mine.

And in marshes.

How lost?

The right of support for land, being a natural right of property, needs no separate constitution apart from the acquisition of ownership. It may be lost, like a right to pure air or pure water. As most of the decisions illustrative of this loss relate to buildings, and the rules are identical in both cases, it will be well to postpone consideration of them to a later page. It only remains to add here, that the main damage to the surface of land from sub-

Surface-damages.

[26] N.E. Ry. *v.* Elliott, 29 L.J. Ch. 808, 812, *per* Wood V.C.; 30 L.J. Ch. 160; 10 H.L. 333. But it is different if the draining of the waste or of other underground water taps a natural surface-stream—Grand Junction Canal Co. *v.* Shugar, L.R. 6 Ch. 483; see Elwell *v.* Crowther, 31 L.J. Ch. 763.

[27] Popplewell *v.* Hodkinson, L.R. 4 Exch. 248, Exch. Ch.

[28] Ibid. p. 251, *per* Cockburn, C.-J.

sidence consists of the dislocation of drains, disfigurement of the contour,[29] and destruction of trees; and that the right of support, though absolute in the sense of not admitting of degrees, is not absolute in the sense of giving rise to a right of action when no appreciable damage has been sustained. There is all the difference in the world between encroaching on a neighbour's land—as in the case of a cornice passing the boundary-line—and doing something on one's own land which causes injury to adjoining premises.[30]

Upper and lower mine-owners.

These rules apply between upper and lower mine-owners, the upper owner having right to support for his strata from the lower strata, to protect himself by interdict, and to indemnify himself for loss by action of damages.[31]

By land to buildings. A derivative right.

II. *Support by Land to Land encumbered with Houses and other Structures.*—Here, again, it is necessary to rely for the most part on English decisions; for though the Scotch books are not (as in the preceding sections) virtually blank, yet the cases decided have mostly turned on the special terms of conveyances. But the English cases must be used with discrimination: and the safest guide will be found in the principles which have been already enunciated in treating of servitudes. For this at least seems to be common to both systems, that a right of support accruing to land, when it comes to be loaded with artificial structures, is no longer a natural right of property, but an acquired or servitude right, separate from ownership, and demanding separate constitution by grant, express or implied.[32] If the right to support of unencumbered land is analogous to a right to the pure and undiminished flow of a natural stream, the present right may, by parity of reasoning, be compared to a right of sink or aqueduct. It is a servitude *habendi*, similar to the *s. oneris ferendi* of the Roman law;—a positive servitude, since it enables the dominant owner to do something with or on the servient—that is, to exert physical pressure on it which it would not otherwise have had to bear, therein differing from the negative servitudes, of light and prospect, though the distinction is thin enough. As put by

[29] See Baird's Trs. *v.* Mitchell, 8th July 1845, 7 D. 1001; 8 D. 464; 13 D. 982.

[30] Smith *v.* Thackerah, L.R. 1 C.P. 564; cf. Miln *v.* Mudie, 12th June 1828, 6 S. 967, *supra*, pp. 119, 121.

[31] Hurlet Alum Co. *v.* E. Glasgow, 12th Feb. 1850, 12 D. 704 affd. 7 B. Ap. 100 (the rubric in the last report misses the point); Yandes *v.* Wright (1879) 32 Amer. R. 109; Mundy *v.* D. Rutland, 23 Ch. D. 81.

[32] Hide *v.* Thornborough, 2 C. and K. 250; Wyatt *v.* Harrison, 3 B. and A. 871; Partridge *v.* Scott, 3 M. and W. 220; Humphries *v.* Brogden, 12 Q.B. 739, 749; Bonomi *v.* Backhouse, E.B. and E. 622, 9 H.L. 503.

Lord Chancellor Selborne, 'The dominant tenement imposes upon 'the servient a positive and a constant burden, the sustenance of 'which by the servient tenement is necessary for the safety and 'stability of the dominant. It is true that the benefit to the 'dominant tenement arises, not from its own pressure on the 'servient tenement but from the power of the servient tenement 'to resist that pressure, and from its actual sustenance of the 'burden so imposed. But the burden and its sustenance are 'reciprocal and inseparable from each other, and it can make no 'difference whether the dominant tenement is said to impose or 'the servient to sustain, the weight.'[33] In the Scotch authorities the derivative nature of the right has never been clearly brought out, but its similarity to the Roman institute has not been wholly ignored.[34] It has been laid down by high authorities that the same rules apply to the natural right of support and to the servitude right now under discussion, once it is properly constituted.[35]

How constituted? By express grant.

It may be constituted by express grant. Thus, the reservation of minerals in feuing out land may have appended to it a surface-damages clause which may be read as extending to damage to buildings.[36] It must be observed that surface-damages, properly so called, do not extend to injury occasioned by subsidence, but only to such as affect the ordinary agricultural use of the subjects[37]—*e.g.*, damage to crops by use of the surface, or by the smoke coming from colliery-works or pit-heaps, in respect of which compensation is payable under leases or reservations of coal.[38] But the terms of the compensation clause either in a lease or in a reservation may point to a narrower or to a wider meaning.[39] In the case of *Oswald*, the words 'surface-damages' in a lease were held to extend to damages occasioned by underground as well as by surface operations (*e.g.*, injury to buildings by a sit), but not to injury to the use of a bleaching-green, washing-house, and laundry, caused by the smoke and ashes of an engine. Injury from a sit to a house forty years old and erected after severance on a purely agricultural subject, then furnished only with a few cottages, was held to be covered by a surface-damage clause, since

Surface-damages, *quid?*

[33] In Dalton *v.* Angus, 6 App. Cas. 793, see also obs. of L. Watson in the same case at p. 830.

[34] Hamilton *v.* Turner, 19th June 1867, 5 Macph. 1086, 1090.

[35] Bonomi *v.* Backhouse, [32], E.B. and E. at p. 655; and L. Chan. Selborne in Dalton *v.* Angus, 6 App. Cas. 792.

[36] Dunlop's Trs. *v.* Corbet, 20th June 1809, F.C.

[37] Galbraith's Tr. *v.* Eglinton Iron Co., 25th Nov. 1868, 7 Macph. 167, 172.

[38] Allaway *v.* Wagstaff, 4 H. and N. 681. See Bell *v.* Wilson, L.R. 1 Ch. 303; Hext *v.* Gill, L.R. 7 Ch. 699; Roberts *v.* Haines, 6 E. and B. 643. It does not include trespasses by the miners employed—Young *v.* Colt's Trs., 16th June 1832, 10 S. 666.

[39] Galbraith's Tr. *v.* Eglinton Iron Co., [37]; Oswald *v.* Gordon, 22d Nov. 1853, 16 D. 70.

that reached not only buildings in existence at severance, but such as would have been reasonably suitable to the ground as at that date, though not perhaps if it came to be covered with streets.[40] And in the case of *Galbraith's Trustee*, an obligation imposed on a lessee 'to pay all damage that shall be done to the surface or 'grounds and buildings thereon' was interpreted by other parts of the lease to extend only to the real damage to the surface and buildings, and not to injury from smoke. These were cases of lease; but, though there is a marked difference between a reservation or out-and-out conveyance of land and a lease,[41] this difference is less apparent when the subject of the lease is a seam of minerals which is expected to be exhausted before the ish.[42] Moreover, it is more difficult to hold an obligation to compensate for damage to the surface to be reserved or imposed in favour of a lessor, who has a common interest with his tenant in the working out of the minerals, than in favour of the disponee of the surface, who has no such interest. Accordingly, cases of tenants being actually so burdened are *à fortiori* in the present question. A clause relating to surface-damages is not a clause of style, where minerals are reserved in a conveyance; the feuar is left to his rights at common law.[43] Nor, when introduced, does it impose a real burden in the sense of making each proprietor of the minerals liable for all damage done to the neighbouring lands or buildings. The rule is, that each is liable for his own individual actings.[44] 'Breaking' the surface does not necessarily mean digging from above only; it may include disintegration or disturbance, temporary or permanent, and must be distinguished from subsidence which, though usually, is not necessarily accompanied by breaking.[45]

By prescription.

Following the same order as in treating of the constitution of positive servitudes generally, it seems to be part of the English law that the easement of support for buildings may be acquired by prescription—that is, that the peaceable possession of a building, supported by adjacent or subjacent soil in the ownership of another party, for twenty years, is sufficient to presume a grant of a right to the continuance of this support.[46] It has never been

[40] Neill's Trs. *v.* Dixon, 19th March 1880, 7 Ret. 441.

[41] Eadon *v* Jeffcock, L.R. 7 Exch. 379, 388.

[42] Hamilton *v.* Turner, *supra*, [34], *per* L.P. p. 1095.

[43] Steuart *v.* Johnston, 17th July 1857, 19 D. 1071.

[44] Baird's Trs. *v.* Mitchell, 8th July 1845, 7 D. 1001; 6th Feb. 1846, 8 D. 464, affd. 1850, n.r.; 21st May 1851, 13 D. 982.

[45] *Per* L. Watson in White *v.* Dixon, 19th March 1883, 20 Sc. L.R. 541.

[46] Dodd *v.* Holme, 1 A. and E. 493, 503, 505; Partridge *v.* Scott, 3 M. and W. 220; Hide *v.* Thornborough, 2 C. and K. 250, 255; Gayford *v.* Nicholls, 9

decided whether our positive prescription can be turned to the same use. On the one hand, the English Courts have found some difficulty in pointing out any ground of principle in favour of the rule they have adopted, and have fallen back on the analogy between the law of 'ancient lights' and 'ancient messuages,'[47] and on the expediency of 'preserving the enjoyments acquired by the 'labour of one man, and acquiesced in by another who has the 'power to interrupt them.'[48] Now the proprietor of the subjacent or adjacent land is not entitled to prevent the owner of the surface from erecting buildings or other structures thereon, on the plea of these being an addition to the burden laid upon him.[49] It is true that he might remove the support before the lapse of the prescriptive period; but failure to do so can scarcely infer acquiescence in an enhanced burden, when removal of the support might be inconvenient to himself, might put him to great expense,[50] and might expose him to the risk of its being proved that the surface would have come down even if it had not been loaded with buildings.[51] It is *res meræ facultatis*. The argument which prevailed with Baron Bramwell in the case of *Solomon*, that the possession proved was clandestine, not open, and therefore not useful for prescription, is equally applicable to all support, or at least to support from adjacent soil.[52] It is never easy, sometimes impossible, to say whether a building requires the support of adjoining land. Other elements of difficulty are introduced when the subsidence follows at a considerable interval after the excavations which occasioned it, and when questions may be raised as to the state of repair of the buildings which are injured.[53] On the other hand, it is now settled[54] that the servitude belongs to the class of positive servitudes; that to them, without any known exception, the positive prescription is applicable; that the law Lords in the case of *Dalton* had the Scotch law of servitude and prescription fully in view;[55] that the plea of *non valens agere*, or of no adverse possession, has been banished from a large part at

Exch. 702, 708; Rowbotham *v.* Wilson, 8 E. and B. 123, 140; and now finally by Dalton *v.* Angus, 6 App. Cas. 740.

[47] Hansell *v.* Jollard, 1 Selwyn, N.P. 457, 11th ed.; Humphries *v.* Brogden, 12 Q.B. 739, 749.

[48] 12 Q.B. 749; Hunt *v.* Peake, 29 L.J. Ch. 785; Solomon *v.* Vintners Co., 4 H. and N. 585, 599.

[49] Dunlop's Trs. *v.* Corbet, 20th June 1809, F.C.

[50] See obs. of Parke B. in Arkwright *v.* Gell, 5 M. and W. 203; and of the Court in Webb *v.* Bird, 13 C.B.N.S. 268.

[51] *Infra*, p. 416.

[52] See as to this very doubtful distinction, Rogers *v.* Taylor, 2 H. and N. 828.

[53] Dodd *v.* Holme, 1 A. and E. 493, 506.

[54] *Supra*, p. 409.

[55] L. Chanc. Selborne, 6 App. Cas. 793; L. Blackburn, p. 818; and L. Watson, 831.

least of the realm of the positive prescription;[56] and lastly, that in the present case there is always a power to interrupt, at whatever risk, and such cases should not depend 'upon the greater or 'less facility or difficulty, convenience or inconvenience, of practi-'cally interrupting.'[57] On balancing these arguments, it may be allowable to hazard the opinion that there is nothing in our system of land rights to cause a divergence between the legal systems south and north of the Tweed in this matter.[58]

By implied grant.

Like other positive servitudes of a continuous and apparent kind, the right of support to buildings and other artificial structures on the surface may be constituted by implied grant. It is true that, as has just been noticed, the fact of actual support being afforded by the neighbouring soil is not always apparent; but it has been already seen[59] that the requirements of the law are sufficiently met by such an obvious condition of the neighbouring tenements—adjacent or subjacent—as ought to put any prudent purchaser on his inquiry. The general rules applicable to implied grants have been already discussed.[60] It will be sufficient to notice here how these have been observed in cases of servitudes of support.

Going back to unity of ownership.

In all cases the two tenements must be traced back to unity of ownership; in other words, the two subjects—alongside of each other, or one subjacent, the other superincumbent—must at one time have been held by the same owner. The important moment is that of severance. A grant of a servitude of support will then be implied in either of two cases, and in these alone: either, first, if the surface of one of the subjects, in cases of lateral support, or, in the case of subjacent support, if the surface above the minerals severed, be already loaded with buildings or other artificial structures; or, secondly, if the surface be feued out or retained for the purpose, expressly mentioned or plainly implied, of being covered with such structures. In the first case, the loaded surface bears already the character of a *quasi* dominant tenement; in the second case, this character is impressed on the surface in the act of severance. In both cases a further subdivision must be made in order to reach the theory on which the law proceeds; since it is obvious that the severance may take place through the alienation of the *quasi* dominant tenement, through the alienation of the *quasi* servient tenement, or through the alienation of both to

Buildings then existing.

Or expressly contemplated.

Severance by alienation of *quasi* dominant.
Of *quasi* servient.
Of both.

[56] *Supra*, p. 53, and esp. M'Neill *v.* Macneal, 4th March 1858, 20 D. 735.

[57] *Per* L. Chanc. at 6 App. Cas. 797.

[58] Most of the United States reject constitution of the servitude of support by prescription on the ground of absence of adverse possession, Mitchell *v.* Rome, (1873), 15 Amer. R. 669; Gilmore *v.* Driscoll (1877), 23 ibid., 312.

[59] *Supra*, pp. 356, 361.

[60] *Supra*, p. 357.

different persons. In the first and third of these events, the maxim applies that no man shall be allowed to derogate from his own grant. Thus, where a long lease was granted in England for the erection of a house according to plans approved by the lessor, and the house was built up to boundary, the expense of underpinning, necessitated by the deeper foundation of a house built conform to a subsequent lease on the adjoining land belonging to the same lessor, was thrown on the second lessee, though the first knew that the other lot was destined for building.[61] But in the second of these events, according to the latest *dicta*,[62] this principle is inapplicable, and it is ruled that if a granter intends to reserve any right over the tenement granted, he must reserve it expressly in the grant.[63] The law is thus illustrated by Lord Cranworth: 'Thus, if I grant 'a meadow to another, retaining both the minerals under it and 'also the adjoining lands, I am bound so to work my mines and 'to dig my adjoining lands as not to cause the meadow to sink 'or fall over. But if I do this, and the grantee think fit to 'build a house on the edge of the land he has acquired, he 'cannot complain of my workings or diggings if by reason of the 'additional weight he has put on the land they cause his house 'to fall. If, indeed, the grant is made expressly to enable the 'grantee to build his house on the ground granted, there is an 'implied warranty of support subjacent and adjacent, as if the 'house had already existed.'[64]

Scotch cases.

The principles enunciated in the last paragraph have been steadily adhered to in England.[65] They are not expressly laid down in any of the Scotch cases, as these have been decided on special points; but the result has been uniformly in accordance with them. In the earliest case, the point decided was that the owner of the surface was not entitled to retain the feu-duties payable to his superior, who had disponed to a third party the subjacent minerals, on account of damage sustained by the mansion-house on the lands, through rents and sits caused by the workings of the mine-

[61] Rigby *v.* Bennett, 21 Ch. D. 559. There was no common law liability. See *supra*, p. 312. The rules common to both cases are stated, *supra*, p. 362 *et seq.*

[62] Wheeldon *v.* Burrows, 13 Ch. D. 31, 49.

[63] See the reasoning abridged, *supra*, p. 363.

[64] In Caledonian Ry. *v.* Sprot, 7, 2 Macq. 451. Similarly in the U.S. Supreme Court, Transportation Co. *v.* Chicago (1878), 9 Otto, 635; see also Coleman *v.* Chadwick (1876), 21 Amer. R. 93.

[65] In the case of grant for the express purpose of building, &c.—N.E. Ry. *v.* Elliott, 29 L.J. Ch. 808, 30 L.J Ch. 160, 10 H.L. 333; Popplewell *v.* Hodkinson, L.R. 4 Exch. 248. In the case of existing buildings, &c.—Dugdale *v.* Robertson, 3 K. and J. 695; Richards *v.* Rose, 9 Exch. 218; cf. Murchie *v.* Black, 19 C.B.N.S. 190.

owner, since the latter had bound himself and was liable to relieve the common author of all claims for damages. The decision is justified by the fact, which appears incidentally, that a mansion-house existed on the lands at the date of severance.[66] The case of *Balds* v. *The Alloa Colliery Co.*[67] has been already commented upon in another relation. If the Court was right in holding the surface-owner entitled to the support of the drowned mine, it was also justified in extending the compensation to the injury done to his buildings; for it appears that at the date of severance the ground was partly built upon, and that it was granted out for the purpose of being further built upon.[68] In a later case, the main question was as to whether both or either, and which, of two persons, the proprietor of a mineral-field and his tenant, were liable for damage done to houses on the surface, which had been feued out during the currency of the lease. Here, again, the owner of the subjacent strata was clearly liable for this damage; for though the compensation clause only adverted generally to 'all damages the subjects may 'sustain,' the purpose of the feu was shown by an obligation being imposed on the feuar to erect houses within a given time under pain of an irritancy.[69]

It must not be overlooked, however, that in the last-mentioned case,[70] and in one which was decided in the same year,[71] opinions were expressed that, both under such a general compensation clause as that which has just been quoted and at common law, a mine-owner is bound to afford sufficient support to buildings erected subsequent to the severance and not contemplated at its date; and that for the reason, that loading the surface with such structures is a legitimate use of the ground. Stated thus broadly,[72] this view is opposed not only to what Lord Cranworth has declared to be common to every system of jurisprudence,[73] but also to the general rule, that a burden laid upon a servient tenement cannot be materially increased without the consent, express or implied, of its owner. Accordingly, the Lord President and Lord

Dicta contra to above.

[66] Simson *v.* Ker, 1792, 3 Pat. 238.

[67] *Supra*, p. 407.

[68] 16 D. 876. In the case of the Hurlet, &c., Co. *v.* E. Glasgow, 12th Feb. 1850, 12 D. 704, affd. 7 B. Ap. 100, the lease, on the terms of which was founded a claim of support, was prior in date to the lease of the subjacent mineral.

[69] Hamilton *v.* Turner, 19th July 1867, 5 Macph. 1086.

[70] *Per* L.O. Kinloch, 1089, 1091; L. Pres. 1093; L. Deas, 1098; L. Ardmillan, 1100. It should be remembered that restrictions on a lessee are here *à fortiori*, *supra*, p. 411.

[71] Bain *v.* D. Hamilton, 4th Nov. 1867, 6 Macph. 1.

[72] See L. Ardmillan's obs. in Hamilton *v.* Turner, [69], and L.O. Kinloch's in that case and in Bain, [71].

[73] *Supra*, p. 403. See also the doubt expressed in Dunlop's Trs. *v.* Corbet, 20th June 1809, F.C., even where the servitude was expressly constituted.

Deas, in the passages referred to, in treating of the relation of landlord and tenant,[74] so state their affirmation of the surface-owner's right to support for new buildings as to be quite in consistency with the leading rule that there must be no *material* increase of burden. Lord Deas thus suggests some cases in which the rule would be sufficiently observed: 'I do not think it can 'be inferred universally or even generally, when a proprietor lets 'certain of the minerals in a large and extensive estate, that he is 'to build upon no part of that estate; that he is not to build a 'farm-steading if that should happen to become necessary, or to 'add a stable or a byre to the offices which already exist; or that 'he is not to erect a lodge at his gate, or cottages for colliers to 'work such of his minerals as are not included in the lease. But 'if such an absolute restriction against building is not to be in-'ferred, it cannot, I think, be inferred that there is to be no duty 'whatever incumbent on the mineral tenants with respect to 'houses which may thus be erected; that they are not bound to 'adopt any precautions of any kind for the safety of the houses 'beyond what they usually adopt to diminish subsidence of the 'agricultural surface, but are entitled to proceed with their work-'ings precisely as they would do if no houses were there, and 'that they will incur no liability for the consequences, however 'injurious to the houses these may be.'[75]

Proof that buildings did not affect the fall of surface.

But the erection of houses or other structures loading the surface does not do away with the surface-owner's natural right to support for his soil. If he builds without the consent, express or implied, of the servient owner, and damage is caused by subsidence, the injury is supposed to have been contributed to by the extra loading, and compensation is refused. But if the owner of the buildings be able to prove that the increased pressure had nothing materially to do with the subsidence, but that it would have happened all the same if no such structures had existed, the mine-owner will be liable in reparation;[76] and that not only for the loss which would have been incurred if there had been no buildings on the spot, but also for the actual damage done to these.[77] It would

[74] *Supra*, p. 411.

[75] 5 Macph. 1098.

[76] Ibid. p. 1099. This seems the logical position of the *onus probandi;* yet there is strong American authority *contra*. Wood on Nuisance,' p. 188; Wilms *v.* Jess (1880), 34 Amer. R. 242.

[77] Brown *v.* Robins, 4 H. and N. 186; Stroyan *v.* Knowles, 6 H. and N. 454; Hunt *v.* Peake, 29 L.J. Ch. 785. But see Gilmore *v.* Driscoll (1877), 23 Amer. R. 322, and cases there cited. It was there held that the measure of damages was neither the cost of restitution nor the difference in market value, but what a jury or arbiter might fix as the loss of or injury to the soil. Is the same rule applicable to buildings in existence at severance

seem, however, that to found any right of action, it must be proved both that the land would have sunk without the additional weight, and that there would have been appreciable damage though no buildings had been erected.[78]

How lost.

Both the natural right of support and the servitude right may be lost. It would appear that the only way in which this can happen is by express renunciation; a mere reservation or grant of minerals, with general power to work them, is not enough.[79] Acquiescence or *mora*, and even the negative prescription, can scarcely infer anything more than abandonment of any claim to reparation for past damage;[80] not consent to endure further injury without complaint. Accordingly, it has been repeatedly held in England that extinguishment of a right of support cannot be set up by a custom[81] or by prescription;[82] for that may be expressly granted which, on account of its unreasonableness, cannot be obtained by prescription.[83] But the same object may be accomplished by the express words of an Act of Parliament—such as an Inclosure Act[84] or Railway Act[85]—or by the express terms of a voluntary conveyance. An opinion was expressed by Lord Denman on one occasion,[86] that an express covenant of so unreasonable a character would be unavailing; but this *dictum* has been more than once repudiated.[87] The only Scotch authority[88] is a very strong illustration of the rule that men must be held to their contracts, however improvident these may be, so long as they are not contrary to the public law of the land. In feuing out a piece of building-ground, the superior reserved the minerals

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being added to? See *per* Erle C.J., and Willes J., in Murchie *v.* Black, 19 C.B.N.S. 190, 205, 206.

[78] Smith *v.* Thackerah, L.R. 1 C.P. 564.

[79] Harris *v.* Ryding, 5 M. and W. 60; Smart *v.* Morton, 5 E. and B. 30; Proud *v.* Bates, 34 L.J. Ch. 406.

[80] The period begins to run from the emergence of the damage, not from the date of the operations which caused it—Bonomi *v.* Backhouse, [32].

[81] Hilton *v.* E. Granville, 5 Q.B. 701, which seems to be approved on this point in Wakefield *v.* D. Buccleuch, L.R. 4 Eq. 650, L.R. 4 H.L. 399, 410, and in Ms. Salisbury *v.* Gladstone, 9 H.L. 702; see Davis *v.* Treharne, 6 App. Cas. 460; Jones *v.* Wagner (1871), 5 Amer. R. 325, and Horner *v.* Watson (1876), 21 ibid., 55.

[82] Blackett *v.* Bradley, 1 B. and S. 940.

[83] See Aikman *v.* D. Hamilton, 1832, 6 W.S. 76; Dyce *v.* Hay, 1852, 1 Macq. 312; Ms. Salisbury *v.* Gladstone, 9 H.L. 705, 709.

[84] Roberts *v.* Haines, 6 E. and B. 643, 7 E. and B. 625; Rowbotham *v.* Wilson, 6 E. and B. 593, 8 E. and B. 123, 8 H.L. 348; Wakefield *v.* D. Buccleuch, [81].

[85] See next paragraph.

[86] Hilton *v.* E. Granville, 5 Q.B. 730.

[87] Cases in [84] and [88].

[88] Andrew *v.* Buchanan, 24th Feb. 1871, 9 Macph. 554, revd. 10th March 1873, 11 Macph. H.L. 13. A similarly wide exemption from liability has been held in America not to absolve from the exercise of ordinary care, or even, if necessary for support, from the obligation to leave stoops — Livingstone *v.* Moingona Coal Co. (1878), 31 Amer. R. 150.

and working facilities, 'and that free of all or any damage which 'may be thereby occasioned; . . . and it is expressly agreed 'that the first party [the superior] and his foresaids shall not 'be liable for any damage that may happen to the said piece of 'ground, buildings thereon, or existing hereafter thereon, by or 'through the working,' &c.; and he further took the feuar bound to erect a dwelling-house of a given value, and to maintain it in a proper and efficient state of repair, so as always to yield the same yearly rent. The superior's mineral tenants, working on the modern stoop and room system, were proceeding to take out all the coal underneath and adjacent to the said feu, and had already rent and shaken the walls, ceiling, and partitions, displaced the doors, and damaged the walls of the house built on it in conformity with the above obligation, when the feuar presented an interdict against continuance of the workings to his detriment, and called both the superior and his tenants. The Lord Ordinary and the Second Division (Lord Justice-Clerk Moncreiff dissenting), after a proof, granted interdict against both of these parties; but this judgment was reversed in the House of Lords, on the ground that the contract between the superior and the feuar was unambiguous and not unlawful, and that interdict could not be granted when only *damnum sine injuriâ* was made out. The obligation to build made no difference; and was not sufficient to distinguish the case from an earlier English decision,[89] where there was no obligation but only a known purpose to build. The Lord Chancellor seemed to think, in *Andrew's* case, that the simple clause freeing 'of all or 'any damage which may be thereby (*i. e.*, by the workings) occa-'sioned' would have been sufficient to express the renunciation, without anything more.[90] This variation of the common-law right may take place both when the severance takes place by the grant of the minerals, about which there could never have been a doubt, and when it is a term in a grant of the surface, as is now settled by the cases of *Rowbotham* and *Andrew*.[91] In English cases it has been held that compensation clauses in leases give a right to bring down the soil by working the mineral out and out on making compensation,[92] provided they clearly contemplate letting down the surface.[93] The same would be held of similar clauses in feus of the surface, though the position of parties is different to this extent, that in the case of a lease of minerals it is easier to gather

[89] Wiliams *v.* Bagnal, 15 W.R. 272.

[90] 11 Macph. H.L. 18.

[91] *Per* L. Blackburn in White *v.* Dixon, *infra*, [96].

[92] Smith *v.* Darby, L.R. 7 Q.B. 716; Eadon *v.* Jeffcock, L.R. 7 Exch. 379; Aspden *v.* Seddon, L.R. 10 Ch. 394, 1 Exch. D. 496.

[93] Davis *v.* Treharne, 6 App. Cas. 460.

that all the minerals were meant to be taken, letting down the surface, than in the case of a reservation or out and out sale.[94] Thus it has been held that a clause binding the superior to give satisfaction for the damage the feuar should 'happen to sustain 'through leading or setting down of the said shanks' did not import a discharge of the common-law right to reparation for damage caused by subsidence.[95] And the same was held to be the import of a clause providing for indemnification to the surface owner for the whole damage and injury occasioned by the foresaid 'operations'—the 'operation' of letting down the surface, if such it could be called, not having been mentioned in the deed.[96]

Miscellaneous structures, railway, &c.

The rules of the common law, respecting support from land to buildings, are equally applicable to support for such structures as are placed on the land—as part of the undertaking of a railway, a canal, or a water company. If the land is purchased for the express purpose of being so employed, and there is no stipulation to the contrary, the vendor is bound to furnish sufficient support from his adjacent premises.[97] If he reserves the minerals underneath the land sold, he must also furnish sufficient subjacent support. If the company desires further support—from land no part of which has been taken—it must acquire the servitude.[98] In cases of reservation of subjacent minerals, if the conveyance bears that these are not to be worked so as to cause damage to the line, and yet is silent as to the company's power or obligation to purchase them, the working is done at the risk of the mine-owner,[99] and no compensation is due by the company[100] unless by compact. But the ordinary case is that provided for by the Railways Clauses (Scotland) Act, 1845,[101] which reserves the minerals to the landowner; gives the company right to take them, on notice by the landowner of his intention to work within a certain distance, on paying compensation; and provides for ways and levels to connect severed mineral-fields, for severance compensation generally, and for inspection by the company. A fuller discussion of these provisions would lead beyond the limits of this work into the department of railway law. It must suffice to note below the treatises in

[94] *Per* L. Blackburn, 6 App. Cas. 467.

[95] Bain *v.* D. Hamilton, 4th Nov. 1867, 6 Macph. 1; Roberts *v.* Haines, [84]; Gill *v.* Dickinson, 5 Q.B.D. 159.

[96] White *v.* Dixon, 22d Dec. 1881, 9 Ret. 375, affd. 19th March 1883, 20 Sc. L.R. 541.

[97] Caledonian Ry. *v.* Sprot, 15th Feb. 1854, 16 D. 559, revd. 2 Macq. 449; do. *v.* L. Belhaven, 5th June 1857, 3 Macq. 56; Midland Ry. *v.* Checkley, L.R., 4 Eq. 19.

[98] Ibid., and Elliott *v.* N.E. Ry., 30 L.J. Ch. 164, 10 H.L. 333.

[99] L. Kingsdown, at 10 H.L. 364.

[100] Reg. *v.* Aire, &c., Navigation, 30 L.J.Q.B. 337.

[101] 8 & 9 Vict. c. 33, sects. 70-78.

which the authorities are collected.[102] Many of the English cases relate to canals. Provisions similar to those in the above Act are to be found in the Water-Works Clauses Act of 1847.[103] The Acts relating to roads and to gas-works make no innovation on the common law.[104]

Of buildings to buildings.

III. *Support of Buildings to Buildings.*—In so far as this kind of support is subjacent, and in so far as it is involved in the law of mutual gables, it will be considered in treating of common interest.[105] Cases in which no servitude of support existed, and in which, consequently, the only question was as to the existence of negligence in making alterations on adjoining houses, have been already noted.[106] Adjacent or lateral support of one wall by another—the walls not being mutual—may conceivably be expressly granted,[107] or may possibly be implied on severance of ownership;[108] but not, according to an English decision, constituted by prescription, seeing that the leaning of the one wall on the other, and its incapability of standing alone, are clandestine, and therefore insufficient to infer prescriptive possession.[109]

[102] Deas on Railways, p. 168 (the only Scotch cases since 1873, when that work was published, are Caledonian Ry. *v.* Henderson, 17th Nov. 1876, 4 Ret. 140, and Caledonian Ry. *v.* Dixon, 13th Nov. 1879, 7 Ret. 216, affd. 7 Ret. H.L. 116); Hodges on Railways (6th ed.), 232; Shelford on Railways, 2, 608; Godefroi and Shortt on Railways, 386; Browne and Theobald on Railways, *ad loc.*; Brice on *Ultra Vires*, 125; Rogers on Mines, 296; Bainbridge, chap. 5; add. Errington *v.* Metropolitan Ry., 19 Ch. D. 559, and Midland Ry. *v.* Hannchwood Co., 20 Ch. D. 552.

[103] 10 & 11 Vict. c. 17, sect. 18 *et seq.* See New River Co. *v.* Johnson, 29 L.J. M.C. 93; Benfieldshire Board *v.* Consett Iron Co., 3 Exch. D. 54.

[104] See Normanton Gas Co. *v.* Pope, 8th June 1883, W.N. 108.

[105] *Infra*, chap. 33.

[106] *Supra*, p. 359.

[107] Brown *v.* Windsor, 1 Cr. and J. 20.

[108] Pollock C.B., in Solomon *v.* Vintners Co., 4 H. and N. 585; *sed quære! Ex hypothesi* the necessity is not apparent.

[109] Bramwell B., ibid.; but see Le Maitre *v.* Davis, 19 Ch. D. 281, as to ancient messuages. The Roman law allowed a bulge of anything less than half a foot—17 pr. D. (8.5).

CHAPTER XXIX.

WATER.

Introductory.

No part of the law of neighbourhood has given rise to so many difficult and delicate questions as the law which relates to rights in water. The shifting and inconstant nature of the element itself, while doubtless the chief cause of the difficulties which pervade this department of jurisprudence in all systems of law, is a fair symbol of the vagueness which has too often characterised the body of legal doctrine that forms the subject of this chapter. In this more than any other portion of the law of ownership is to be observed the modifying influence of climate, of the configuration of the land, and of human industry. The leading principles of the law were laid down centuries ago in the Roman jurisprudence. These have been recognised as a safe guide during the whole history of Scotch law, have been appealed to in the Courts of England and America, and have been taken over as authoritative in France and Germany. But many of the most interesting and important developments of the institute have been reserved for the determination of the lawyers of the present century. In the following remarks—which will suffer the greatest amount of condensation consistent with perspicuity—it will be necessary and justifiable to borrow freely from the English law: necessary, since many points have been by it actually determined which seem to have been taken for granted by our own countrymen; and justifiable, since—with the exception of certain specialties in the English law of prescription—the rules of the two systems seem to be identical.[1] They have been frequently so treated in the Court of last resort; and English authorities are freely quoted in the Scotch Courts.

[1] The peculiarities of the English law of *profits à prendre* do not interfere, since rights to water *in alieno solo* are easements —*i.e.*, servitudes, not profits,—Race *v.* Ward, 4 E. and B. 702.

Distinctions.

It may serve to indicate the complexity of the problems raised by the law of water-rights if some of the distinctions are noted which have been raised and given effect to as of importance in our own Courts and in England. Thus, it is necessary to discriminate between natural rights or natural servitudes of water, and acquired rights or servitudes proper; between property and common interest; between subterranean and surface waters; between *aqua pluvia* and streams; between torrents and streams; between water flowing without and water flowing in definite known channels; between channels natural and artificial; between opposite and successive ownership on water-courses; between navigable and non-navigable rivers; and between navigable rivers where the sea ebbs and flows, and where it does not. With respect to some of these distinctions, it will be enough to observe that the law relating to lochs has been already discussed in connection with the doctrine of part and pertinent,[2] and the rules regarding navigable rivers as part of the doctrine of Crown or public rights.[3] The present chapter is concerned only with non-navigable rivers. It will be found possible and useful to treat the other distinctions as subordinate to the first two—viz., the radical distinction between natural rights and servitude or acquired (derivative) rights, and the distinction between property in water and common interest. The relation of servitudes to the natural rights incident to land-ownership has been already discussed,[4] and will receive many illustrations in this chapter. The distinction (of right) between property and common interest is nearly commensurate with the leading distinction (of subject) between water which does not flow in any definite known channel and that which does. In elucidating the doctrine of rights in water it will be found expedient to adhere to this last division of the subject, and to begin with the less complex of the two.

Natural and servitude rights. Ownership and common interest.

I.—Rights in Water not confined in any definite Channel.

Aqua profluens.

The law of Scotland, following that of Rome, recognises the distinction between running waters (*aqua profluens*), which are 'common to all men, because they can have no bounds,' and water standing and capable of bounds, which may be appropriated.[5] But in neither system is the line drawn exactly as thus stated. The Romans seem to have distinguished between

[2] Chap. 11.
[3] Chap. 15.
[4] *Supra*, p. 322.
[5] 1, I. (2.1); St. 2.1.5; see Ersk. 2.1.5.

a stream and the water of which it is composed, and to have regarded the later as a *res communis*, and the former as public if perennial, and private if casual.[6] And the private ownership which is thus recognised as subsisting in casual streams, seems to have been admitted also in regard to springs or wells, and surface-water squandered over the soil.[7] It is true that water, as such, cannot be said to be appropriated till it has been separated from its natural surroundings, as by being drunk, or confined in a vessel, just as a piece of coal is appropriated, as such, by being separated from its seam. But water in certain cases is, just as much as the coal, the property of the landowner on whose land it may be found, being indistinguishable from the rest of his heritable estate.[8] He may dispose of it as he pleases, under certain conditions imposed for the benefit of his neighbour. He can prevent others from making use of it, while on his land, by barring their access to it.[9] The same principles as rule the cases which are discussed in the following paragraphs would seem to apply equally to the case of a perennial stream which rises, flows, and enters the sea within one and the same estate, since in such circumstances no one but the owner of the estate has any title to interfere with the water. But the most common cases are those of surface-drainage, *stagna*, underground waters, and eavesdrop.

Water regarded as *pars soli*.

Stream wholly within one estate.

1. *Surface-water.*—Water which descends from the clouds in rain, hail, or snow, and which, without collecting in a marsh, pond, or spring, percolates through the soil with a tendency towards the lowest point in its neighbourhood, is, in a wet country like Scotland, regarded usually as an enemy, to be got rid of as quickly as possible. As *pars soli* it is entirely at the disposal of the owner of the infiltrated soil; but his interest impels him to release himself of a subject which is too discrete and unmanageable to be useful.[10] His neighbour has equal cause to object to the immission of the water upon his land. In these circumstances, the rights of parties are determined by the natural situation of the ground.[11] 'Where two contiguous fields belong 'to different proprietors, one of which stands upon higher grounds 'than the other, nature itself may be said to constitute a servitude

Surface-water.

Natural situation of the ground.

[6] 1, 2 I. (2.1), Vinnius, *ad loc.*; Championniere (Eaux Courantes), p. 43; Pagenstecher (Eigenthum), p. 52; cf. with 1, § 3 D. (43.12); 4, § 1 D. (1.8). The word 'pæne' is inadvertently omitted in the corresponding passage in the Institutes.

[7] 1, §§ 12 and 15 D. (39.3).

[8] See obs. of Tindal C.J., in Acton *v.* Blundell, 12 M. and W. 324, 354.

[9] Race *v.* Ward, 4 E. and B. 702, *per* L. Campbell C.J.

[10] This is not always the case, Johnstown Co. *v.* Veghte, 25 Amer. R. 125.

[11] 1, § 14, 2 pr. D. (39.3).

'on the inferior tenement, by which it is obliged to receive the 'water that falls from the superior. If the water which would 'otherwise fall from the higher grounds insensibly, without hurting 'the inferior tenement, should be collected into one body by the 'owner of the superior in the natural use of his property, for drain-'ing his lands or otherwise improving them, the owner of the in-'ferior tenement is, without the positive constitution of any servi-'tude, bound to receive that body of water on his property, though 'it should be endamaged by it. But as this right may be over-'stretched in the use of it without necessity, to the prejudice of the 'inferior grounds, the question, how far it may be extended under 'particular circumstances, must be arbitrary,'[12]—in other words, in the discretion of the Court. The doctrine thus enunciated by Erskine points to an extension of the natural servitude (or, as it is better named, the natural right) of a superior tenement in its natural state, to the case of that state being altered in the ordinary administration of an agricultural subject. This extension is founded on plain equity and on the Roman law,[13] and the passage above cited has been recognised as an accurate statement of the law in a recent case.[14] The drainage of two fields on the same property naturally ran into a natural 'sheugh' which lay between them, and thence, on account of the slope of the ground, through the march-fence and into the adjacent property, which lay generally at a lower level. The tenant of the fields was proceeding to drain one of them in the ordinary way by a furrow-drain with tiles, without changing the natural course of the water, and without encroaching beyond his march in arranging for the outfall at the same point, when the lower proprietor sought to interdict him, on the ground that the amount of water sent down would be greatly enhanced by these operations, or at least that the natural flow was altered to the detriment of his lands. The Court refused the interdict, on the special ground that the damage complained of was imaginary, or at all events so slight as not to entitle the inferior heritor to stop an operation performed in the ordinary administration of the superior tenement as an agricultural subject. But the judges went further, and restated the law as enunciated by Erskine, and used the concluding observation of that learned author regarding the Court's power to check an undue

Campbell v. *Bryson.*

[12] Ersk. 2.9.2; see Bankt. 2.7.30; B. Pr. 968.

[13] 1, §§ 3-9, 15 D. (39.3).

[14] Campbell *v.* Bryson, 16th Dec. 1864, 3 Macph. 254; B. Pr. 968. Most of the American States follow the law here laid down—*e.g.*, M'Cormick *v.* Kansas Ry., 35 Amer. R. 431; Templeton *v.* Voshloe, 37 Amer. R. 150, and Washburn, p. 452; others deny any right of flow off *jure naturæ*, Atchison Ry. *v.* Hammer, 31 Amer. R. 216.

stretch of the right, to qualify another passage in his treatise,[15] and to explain the true meaning of Lord President M'Neill's *dictum* in an earlier case, to be noticed presently, that a party is not entitled to cut a drain 'and lead the end of it into his 'neighbour's field.'[16] 'On the contrary,' it was replied, 'he must 'study the convenience of the inferior heritor in his own plan of 'operations in making the drain.'[17] It will be sufficient for the superior proprietor to show that there is no material increase of the burden, and that the operations have been performed in good faith, truly for the benefit of his own estate, and in the ordinary administration thereof.[18]

Increase of the burden.

The relation of the parties arises, as has been said, from the natural situation of their estates. Therefore, while the inferior heritor is not entitled, by means of such *opera manufacta* as a puddle-wall or a superficial embankment, to prevent the natural percolation or drain-water from entering his land, and thereby causing it to restagnate on the upper land,[19] the superior landowner is equally precluded from bringing upon the land which naturally drains towards his neighbour's estate water which would not, without artificial means, be there at all.[20] The mere putting in of tiles to facilitate drainage in the case of *Campbell* was very different, since these were not adapted to bring more than the natural supply of water on the dominant tenement, but merely to get rid of what was naturally there more thoroughly and rapidly, in the ordinary course of farming. The same object may be quite legally attained by impounding and evaporating the surface-water, since the inferior heritor has no right at common law to the descent of the water. If, however, it is allowed to take its natural course, it must be sent down unpolluted. The question, whether the superior proprietor may safely pollute his surface-water, and send it down to his neighbour by percolation or drains in that state,

Tile-drainage.

Pollution.

[15] Ersk. 2.1.2.

[16] Montgomerie *v.* Buchanan's Trs., 9th July 1853, 15 D. 853, 859.

[17] *Per* L.J.-C. Inglis, 3 Macph. 260.

[18] Ibid. p. 259. The law stated in this case is that of France—Pardessus, §§ 79, 83, 86; of America—Washburn, pp. 450, 464; and probably of England—see *infra*, p. 430, cases of Rawstron *v.* Taylor, 11 Exch. 369; Broadbent *v.* Ramsbotham, 11 Exch. 602.

[19] Tootle *v.* Clifton, 10 Amer. R. 732; and that though the objector came to the nuisance, Ogburn *v.* Connor (1873) 13 ibid., 213.

[20] *Per* L. Cowan, 3 Macph. 261-2. The case of Montgomerie, [16], was one involving pollution, and the water complained of had a definite course in pipes; but it was also in the position here indicated, being brought from a distance. Pardessus, § 82, contrasts the introduction of foreign water, as for irrigation, with the opening of a spring on the lands. It is a wrong to raise the surface in such a way that rain-water is thrown through a wall into a neighbour's house—Hurdman *v.* N.E. Ry., 3 C.P.D. 168. Contrast this with Wilsons *v.* Waddell, *infra*, [61].

has been left undecided in Scotland,[21] but is decided in the negative in England, in a case where water polluted by a factory on the top of a hill was suffered to find its way through the earth to a cavern, and thence to a stream.[22] But the flow of drainage by a particular drain for the prescriptive period will not give the inferior heritor a right to demand its continuance or to resist an improved system.[23] This would be to alter the relation of dominant and servient tenement. These questions, however, lead to the other cases belonging to this part of the subject, in which the water is usually regarded, not so much as a nuisance to be got rid of, as in the light of a boon to be claimed. It must be remembered, further, that the restrictions imposed by the above rules on both parties may be overcome by the establishment of contrary servitude-rights; and that, as is the case with many of the rights treated of in this chapter, that is regarded as the natural disposition of the soil which has existed during the prescriptive period as an assertion of right.

Drainage of Lands Act, 1847.

One of the points which the inferior proprietor in the case of *Campbell* v. *Bryson* attempted unsuccessfully to prove was, that the drainage operations of his neighbour involved an encroachment beyond the march at the point of outfall. Had this been so, the act would have been plainly illegal at common law. But the manifold benefits accruing to the health and wealth of the community from the system of land-drainage have induced the Legislature, besides advancing money by loans on terminable rent-charges,[24] to make provision for the improvement of outfalls by an Act passed in 1847.[25] The leading section enacts that 'where any land shall be capable of being drained, or improved 'by drainage, by means of works to be executed on the same *and* '*other* lands for obtaining or improving the outfall, or otherwise, 'it shall be lawful for any persons interested in the lands so 'capable of being drained or improved, and who shall be desirous 'for that purpose to execute all or any of the works hereinafter 'mentioned, and shall be unable to execute such works by reason 'of the objection, absence, or disability of any person whose land,

[21] See obs. of L.J.-C. Macqueen in Miller *v.* Stein, Bell's Oct. Ca. 334, 337; L. Pres. in Montgomerie, [16], 15 D. 859; D'Eresby's Trs. *v.* Strathearn Hydropathic Co., 21st October 1873, 1 Ret. 35. In Caledonian Ry. *v.* Baird, 14th June 1876, 3 Ret. 839, a *stream* was polluted by surface-water.

[22] Hodgkinson *v.* Ennor, 4 B. and S. 229; also Womersley *v.* Church, 17 L.T. N.S. 190; Wood on Nuisance, p. 120.

[23] *Per* Cur. in Wood *v.* Waud, 3 Exch. 748, 778; Greatrex *v.* Hayward, 8 Exch. 291.

[24] 9 & 10 Vict. c. 101; 10 & 11 Vict. c. 11; 13 & 14 Vict. c. 31; 19 & 20 Vict. c. 9.

[25] 10 & 11 Vict. c. 113.

'property, or rights would be entered upon, cut through, inter-'fered with, or affected by, or for the purpose of such works,' to apply to the sheriff, producing plans and estimates (sect. 1), and sending notices to owners and occupiers, as under the Lands Clauses Act (sect. 2). The sheriff may require caution for all expenses incident to the application (sect. 3). If objections are made, he must appoint a properly qualified person to inspect and report; and, if necessary, he may call a meeting of all interested (sect. 4). If, after inquiry, the sheriff shall be of opinion that 'the benefit to be derived from such drainage or improvement 'outweighs the damage to be done thereby, and the proposed 'method of drainage is in the whole circumstances the best, and 'that such drainage or improvement may be effected without 'material detriment to the lands, property, or rights so proposed 'to be entered upon, cut through, interfered with, or affected, and 'that' the damage done 'may be adequately and effectually com-'pensated under the provisions of this Act,' he may allow the works, limiting the time for their execution (sect. 5). Parks, policies, gardens, pleasure-gardens, planted walks, avenues, and streams or springs supplying a mansion-house or offices with water, or contributing to the amenity of any mansion-house, park, policy, garden, or pleasure-ground,—are not to be affected except with the written consent of the owners (sects. 5, 11). There are further provisions for expenses; superintendence of works, in case of no objection being made; removal of obstructions in rivers; protection of salmon-fisheries, mills, and dwelling-houses; entry on the lands in order to execute and maintain the works, on obtaining permission from the sheriff; and compensation. Though the Lands Clauses Act is incorporated, the improving landowner cannot demand from his neighbour an express conveyance of a servitude of access to repair—the right of access resting wholly on the statute, and being under the sheriff's control.[26]

2. *Stagna.*—The distinction in law between a *stagnum*, a bog, marsh, morass, or swale, on the one hand, and a lake or loch, properly so called, on the other, has been already indicated.[27] It was clearly drawn about the middle of last century in a case of which we have three reports—one by Lord Kames,[28] another by Lord Monboddo,[29] and the third by Lord Hailes.[30] Lord Kames

Stagnum, quid?

[26] Mackenzie *v.* Gillanders, 1870, 7 Sc. L.R. 333.

[27] *Supra*, p. 168. The definitions are contained in 3, 4 D. (43.14); cf. 1, § 2 D. 43.12); Pardessus, § 80; Callis, 102.

[28] Mags. of Linlithgow *v.* Elphinstone, 1768, M. 12805, cited in argument in Embrey *v.* Owen, 6 Exch. 353; and observed on in L. Blantyre *v.* Dunn, 28th Jan. 1848, 10 D. 509, 532, 543.

[29] 5 B.S. 935.

[30] Dec. 203.

points out how the rule that rivers cannot be appropriated or diverted does not apply to mosses or springs, since that would involve a prohibition against draining a moss or intercepting a spring by digging a pit in one's own land. 'An excellent practical 'rule is laid down in the Roman law, which is, that we cannot 'divert from a river any rill or runner that has a perennial course, 'but that we may use freedom with all other water within our 'bounds. And the distinction is sensible, for nothing properly 'can be considered as a part or branch of a river but what, like 'itself, has a constant flow.' Lord Monboddo states the same distinction thus: 'A burn is a *flumen* in the sense of the Roman 'law, being perennial, and having an established channel or course: 'it is, therefore, according to the doctrine of the Roman law, *publici* '*juris*, so that no man through whose ground it passes can stop or 'alter the course of it. But a *stagnum* or *torrens*, which has not 'a perpetual course, is entirely *privati juris;* and therefore the 'heritor upon whose ground it is may make what use of it he 'pleases.' The action which gave rise to these remarks was brought by mill-owners on a stream to prevent the diversion therefrom of water which, partly by a natural overflow, partly by artificial channels, flowed into it from two lochs. It was proved by experiment in a summer month that the water was not perennial, and the Court found that the owner of the lochs 'lay under 'no restriction from using them as he pleased.' With this decision must be compared a later case, in which the facts were these: There was ordinarily, and, except in times of great drought, a run of water, less or more, issuing from a spring or springs in a piece of wet ground into and along a ditch, which gave into a larger water-course. The water had for the prescriptive period been used by a low riparian owner for various purposes. It was held that the owner of the wet ground was not entitled to divert the water after it had reached the ditch, to the prejudice of the other. The judges were of opinion that the Roman law referred only to underground water.[31] There is no doubt that this is the most frequent, and as little that it is not the only, case of full control over water.

Negligent use.

The absolute control thus attributed to the owner of a *stagnum* will, however, be qualified by rules similar to those laid down in reference to percolating surface-drainage. Though he may prevent the natural descent of the water altogether, by consuming it or

[31] Cruikshanks *v.* Henderson, 1791, Hume, 506. See also obs. of L.J.-C. Macqueen in Miller *v.* Stein, 1791, Bell's Oct. Ca. 334, and of L.J.-C. Hope in L. Blantyre *v.* Dunn, 28th Jan. 1848, 10 D. 509, 524.

diverting it in another direction, or impound it by raising an embankment, or prevent it accumulating by filling up the swale, or drain it away and thus disturb the natural outflow,[32] he will not, on the other hand, be entitled to send it down in artificial flood by a reckless opening of sluices or destruction of embankments. If the water is artificially impounded he will be liable for damage done, not only by such illegal acts or through specific neglect, but also for all injury caused by the water, since he is held as insuring his neighbour against detriment caused by such *opera manufacta*, and not ascribable to *damnum fatale*.[33] It may be for the interest of the owner of the pond, *stagnum*, or moss, to drain it, and he is quite entitled to do so; but the principle laid down in the case of *Campbell* v. *Bryson*,[34] that, as far as possible, the interests of inferior heritors must be consulted, will apply here with the more cogency that the danger is greater. Again, it seems unquestionable that if the superior heritor chooses to let the water follow its natural course, he will not be entitled to foul it with polluted matter artificially introduced;[35] but it has never been decided whether the vegetable pollution which naturally arises from the drainage of a moss or morass can be complained of. A very early case, in which it was alleged that the stinking water from a loch near Selkirk fouled the pure water of the Tweed and scared the salmon, produced no other result than an elaborate argument,[36] which seems to have convinced Mr Erskine,[37] of the superior heritor's absolute right, and to have failed to convince Lord Ivory[38] and Mr Bell.[39] It is probable that the Court would interfere on an application being made by an inferior heritor, and, after inquiry by an expert, arrange a *modus vivendi*.[40]

Result of precariousness of supply.

The precarious nature of the supply of water from a *stagnum* has another result. The owner of a marsh which might have been drained towards either of two streams chose to send the water into one of them, on which an inferior heritor possessed a paper-mill, and he claimed right to take off, below the *stagnum* and above the mill, an equal quantity of water from the same stream, without returning it above the mill. This claim was rejected as

[32] Swett *v.* Cutts, 9 Amer. R. 276, is repudiated in Chase *v.* Silverstone, 16 Amer. R. 419. See also Barkley *v.* Wilcox, 40 Amer. R. 519; Waffle *v.* N.Y. Central Ry., 13 Amer. R. 467.

[33] See cases, *supra*, p. 314 *et seq.*

[34] *Supra*, p. 424.

[35] Hodgkinson *v.* Ennor, Womersley *v.* Church, *supra*, [22].

[36] Mayor of Berwick *v.* Hayning, 1661, M. 12772, 2 B.S. 292. See Sir Geo. Mackenzie's arg. in Works, vol. i. Pleadings, p. 24.

[37] Ersk. 2.1.2, commented on in Campbell *v.* Bryson, [14].

[38] In Montgomerie *v.* Buchanan's Trs., 9th July 1853, 15 D. 853, 859.

[39] B. Pr. 968.

[40] See Campbell *v.* Bryson, [14].

bad in law, since water derived from a *stagnum* would not be a fair compensation on account of its precarious character, and because the superior heritor could not be bound to keep up the supply unless by agreement. He might have disposed of the water or diverted it as he chose before it reached the stream, but after that he had no control over it.[41] The question of acquiescence was held here not to be sufficiently raised, and there was no room for prescription; but an *obiter dictum* of Lord Justice-Clerk Inglis seems to be stated too generally. He says:[42] 'Then, 'again, the law is clear that although he [the superior heritor] 'carried it [the water from the *stagnum*] into the Dron Burn, he 'was entitled at any time within forty years to divert it and 'carry it off in an opposite direction.' It seems clear that the limitation of time here indicated can apply only to cases in which the draining of a marsh has had the effect of generating a perennial supply, running in a definite channel. Forty years of such a flow would give the current all the privileges of a natural water-course. On the other hand, if the supply still continues precarious, facilitating the flow of the water in a particular direction natural to it, being *res meræ facultatis*, cannot give any right to the inferior heritor.[43]

English cases.

It will aid the transition from the law of surface-drainage and *stagna*, to the similar rules relating to underground waters, to refer to certain English authorities in which all three sorts of vagrant waters were discussed. The leading decisions were given by the same Court within a twelvemonth. In the first of these, the water appearing at a wet spot and overflowing generally, but not all the year round, and the water from an almost perennial spring, were diverted for draining purposes and house-supply. It was held that an owner of land has an unqualified right to drain it for agricultural purposes, in order to get rid of mere surface-water, the supply being casual, and the flow following no regular or definite course.[44] He cannot be compelled 'to maintain his fields as a mere water-'table.'[45] The same rule was afterwards applied to a shallow basin filled with water and having no continuous outfall, a swamp, a casually overflowing well, and a constant spring which was intercepted before it reached a defined natural water-course. 'The 'right to the natural flow of the water in L. Brook . . . cannot

[41] Cowan *v.* L. Kinnaird, 15th Dec. 1865, 4 Macph. 236; see obs. in Wood *v.* Waud, 3 Exch. 748, 779, and in Blantyre *v.* Dunn, [31], 10 D. 509, 523, 541.

[42] 4 Macph. 240.

[43] See L. Monboddo's remarks in Mags. of Linlithgow *v.* Elphinstone, 5 B.S. 936. There is no *perpetua causa* to warrant prescription. See also Arkwright *v.* Gell, 5 M. and W. 203; Ersk. 2.9.35.

[44] Rawstron *v.* Taylor, 11 Exch. 369.

[45] *Per* Platt B. p. 383.

'extend further than a right to the flow in the brook itself, and to 'the water flowing in some definite natural channel, either sub-'terranean or on the surface, connecting directly with the brook 'itself.'[46] Modifications to which these rules are subject have been judicially pointed out. Thus, if the supply be constant, not casual or occasional, a deeply furrowed, accurately defined course need not be proved in order to give the inferior owner a right to prevent diversion. And if the source of the water is so close to the lower boundary of the land, and is of such a nature (*e.g.*, a pond) as to drain by no defined channel before the water passes across the march, the inferior heritor may be entitled to prevent diversion.[47]

Springs in marshes.

Like the pieces of water just treated of, natural springs may, according to circumstances, be regarded as part and parcel of the streams which they feed, or as something separate. Though most springs are perennial, yet many are so small, or situated so low in a district, that, instead of forming a stream, they squander their waters over the surface and form morasses or *stagna*, liable to be sucked dry by infiltration and evaporation. These springs follow the fate of the marshes they create, and may be drained and diverted at will.[48] Other springs, being more happily situated or stronger, instantly on emerging from the earth give rise to a definite rill or stream. Such springs are as sacred from private appropriation or diversion as the stream itself of which they are regarded as an integral part.[49] It appears, moreover, that this character, once gained, is not lost by the stream losing its defined course again and sinking into the soil, if the water be again collected.[50] The rules explained under the next head, in regard to the disturbance of artificial wells, apply equally to natural springs.

Springs part of stream.

Underground water and wells.

3. *Underground Water and Wells.*—It has been decided in England that underground streams, natural and artificial, having a known and definite channel, are to be treated in the same way as surface-streams of similar origin.[51] We are now concerned with such subterranean waters as do not possess this character. The law respecting the supposed right to support of superincumbent strata from the hydrostatic pressure of water which chances to be collected in coal-wastes has been already examined.[52] It remains

[46] Broadbent *v.* Ramsbotham, 11 Exch. 602, *per* Alderson, B., p. 615.

[47] Ennor *v.* Barwell, 2 Giff. 410, 424.

[48] Rawstron *v.* Taylor, [44]; Broadbent *v.* Ramsbotham, [46], *supra*.

[49] Dudden *v.* Clutton Union, 1 H. and N. 627.

[50] Holker *v.* Porritt, L.R. 8 Exch. 107, 10 Exch. 59; Macomber *v.* Godfrey (1871), 11 Amer. R. 349.

[51] Wood *v.* Waud, 3 Exch. 748; Dudden *v.* Clutton Union, 1 H. and N. 627, 630, *per* Pollock C.B.; Dickinson *v.* Grand Junction Canal, 7 Exch. 282, 300; Chasemore *v.* Richards, 7 H.L. 349, 374. So also in America, Hanson *v.* M'Cue (1870), 10 Amer. R. 299.

[52] *Supra*, p. 407.

to discuss the rules regarding drainage in mines, and regarding the disturbances of underground sources of water-supply.

Drainage of mines.

The rules regarding the drainage of mines are the same as those which hold with respect to the surface, with the modifications which naturally arise from the difference in the use of the subject. The surface of land is made use of *salvâ substantiâ;* the effect of mining is to exhaust the subject of ownership. 'There 'can be no doubt, on the one hand, that the owner of a mine is 'entitled to work out the minerals without regard to the interests 'of his neighbour, so long as he confines his operations to his own 'grounds and resorts to no extraordinary means of working; and 'if the effect of working out these minerals be to throw water 'down upon his neighbour, who lies upon a lower level than 'himself, that is just the natural servitude which the lower heritor 'below ground must submit to, as the lower heritor above ground 'does: and, on the other hand, the lower heritor, if he desires to 'protect himself against the invasion of water from above, must 'secure that protection by leaving a sufficient barrier of his own 'minerals upon the march to prevent the water finding its way to 'him.'[53] Therefore the owner of minerals to the rise may work them out to the verge of his estate without being liable for damage done to the mine-workings which lie to the dip,[54] even though he knows that no effectual barrier has been left by his neighbour.[55] The water naturally present in the mines is a common enemy, against which each man must defend himself.[56] But the mine-owner to the rise will not be entitled to get rid of the water in his workings by such extraordinary means as the use of unusually large blasts in his mine close to the march, and if a rush of water through the barrier follows, the *onus* will lie on him to prove that it was *not* caused by his operations.[57] In the Scotch case cited, the inferior heritor was not debarred from objecting to these blasts by having encroached beyond her march.[58] Nor is the lower heritor bound to suffer the descent of more water than would naturally drain into his works. The owner of the higher mine has no right to be an active agent in sending water

[53] *Per* L.P. Inglis in Durham *v.* Hood, 3d Feb. 1871, 9 Macph. 474, 479; see also *per* L. Campbell, Chan., in Scots Mines Co. *v.* Leadhills Co., n.r. in the Court of Session, 34 L.T. 34; Baird *v.* Monkland Co., 18th July 1862, 24 D. 1418, 1425, *per* L.J.-C.

[54] Harvey *v.* Wardrop, 26th Nov. 1824, 3 S. 322 (N.E. 229).

[55] Smith *v.* Kenrick, 7 C.B., 515, 564.

[56] Ibid. p. 565.

[57] Durham *v.* Hood, [53]; contrast West Cumberland Co. *v.* Kenyon, 11 Ch. D. 782.

[58] See Firmstone *v.* Wheely, 2 D. and L. 203, remarked on in Smith *v.* Kenrick, [55], 7 C.B. 564; also Clegg *v.* Dearden, 12 Q.B. 576.

into the lower mine, as by pumping into his levels leading to it water which would not have reached these by gravitation.[59] If the burden of water is thus unduly increased, the inferior heritor will be entitled, by means of downsets filled with clay, or in any other way, to prevent the water from reaching his workings through a porous barrier.[60] But the owner of the higher mine is not responsible for damage done by water which would not have collected on the surface or drained into the mine, had it not been for sits and dislocation of drains occasioned by his workings—the reason being that the minerals were taken out in the ordinary way, and that there was no duty incumbent on him to fill up the sits or keep the surface water-tight.[61] But the upper heritors were held liable in a case where the sits so caused were partly filled by an unusual flood in a river which they had diverted from its natural course, since this diversion furnished a channel less efficient than the old.[62] A curious question was raised but not decided in a case which ended with interim interdict—namely, whether a coal-owner to the rise is entitled to pierce a slip-dyke, which, situated well within his march, had prevented water, long accumulated in wastes behind it, from descending through his workings into his neighbour's mine to the dip, which was not protected by any barrier of mineral. No opinion was given as to the matter of right, and the possessory judgment proceeded on a balance of expediency, and on an undertaking by the inferior heritor that he would cease crushing in the superior heritor's workings at the march.[63] The owner of the surface below the outfall of a level is not entitled to object to the superior heritor making, in the ordinary course of working his mines, an open cast therefrom to carry the water along its natural course.[64] The rule is the same as in regard to surface-drainage.

Servitudes thereanent.

But these rules of the common law may be reversed by the constitution of a servitude of aqueduct—the communication of levels—or by an acquired right to a barrier within the upper lands. The import of a clause communicating levels has only

[59] Baird *v.* Williamson, 15 C.B.N.S. 376.

[60] Hope *v.* Wauchope, 1779, M. 14538; acquiesced in on this point—2 Pat. 524, note.

[61] Wilsons *v.* Waddell, 8th Jan. 1876, 3 Ret. 288, *per* L. Gifford, and adopted by the House of Lords—2 App. Ca. 95, 99, 4 Ret. H.L. 29. See Rylands *v.* Fletcher, L.R. 3 H.L. 330, 338, for the principle.

[62] Fletcher *v.* Smith, 2 App. Cas. 781. See earlier stages in L.R. 7 Exch. 305, 9 Exch. 64.

[63] Baird *v.* Monkland Co., 18th July 1862, 24 D. 1418.

[64] Aitken *v.* Dewar, 1734; Elchies *v.* Property, No. 1.

arisen in connection with leases.[65] The law of artificial water-courses will be noticed further on.[66]

Cutting off springs.

It seems to have been taken for granted in Scotland that no action will lie for the diversion of underground water which flows in no known course[67]—since there is no reported case, till within very recent times, in which the matter has been stirred; but it has undergone elaborate discussion in England in two cases, which have settled the law there, and have been cited with approval in the Court of Session. In the first of these[68] the facts were, that in 1824, within the prescriptive period, the plaintiff's predecessor had sunk a well in his land for raising water to work his mill; that in 1837 the defendants had sunk a coal-pit in the land of one of them about three-quarters of a mile from the well, and about three years later a second pit at a somewhat shorter distance: the consequence of which sinkings was, that by the first the supply of water was considerably diminished, and by the second was rendered altogether insufficient for the purposes of the mill. The direction given to the jury was, that if the defendants had proceeded and acted in the usual and proper manner on the land for the purpose of working and winning a coal-mine therein, they might lawfully do so; and the Court of Exchequer Chamber sustained this ruling. The broad question presented in argument was, whether the right to the enjoyment of an underground spring or of a well supplied by an underground spring is governed by the same rule of law as that which applies to and regulates a water-course flowing on the surface. After explaining shortly the law of streams running in their natural course, and attempting to show that it had its ground and origin in the publicity and notoriety of the riparian rights, and in the length of enjoyment, and pointing out the difference between streams and underground waters in these respects,[69] Tindal, C.-J., in delivering the judgment of the Court, observed: 'But 'the difference between the two cases, with respect to the conse-'quences, if the same law is to be applied to both, is still more 'apparent. In the case of running streams, the owner of the soil

Acton v. Blundell.

[65] Wauchope *v.* Hope, 1773, 2 Pat. 286; 1774, 2 Pat. 338; 1779, M. 14538, rem. 2 Pat. 519; E. Wemyss *v.* Hope's Trs., 7th Feb. 1808, F.C.; Halkett *v.* E. Elgin, 5 S. 154, 9 S. 412, 11 S. 203, affd. 1 S. and M'L. 629; Crawford *v.* Dixon, 3d Feb. 1824, 2 S. 667, affd. 2 W. and S. 354. As to the effect of the termination of the lease, see Bruce *v.* Elphingston, 4 B.S. 736.

[66] *Infra*, p. 477.

[67] See obs. of L. Kames in Mags. of Linlithgow *v.* Elphinstone, *supra*, [43].

[68] Acton *v.* Blundell, 12 M. and W. 324.

[69] This account of the origin of the law of running streams has been questioned — *infra*, p. 444; Chasemore *v.* Richards, 7 H.L. 384; Wood *v.* Waud, 3 Exch. 775; but the rest of the judgment stands.

'merely transmits the water over its surface; he receives as much 'from his higher neighbour as he sends down to his neighbour 'below; he is neither better nor worse; the level of the water 'remains the same. But if the man who sinks a well on his 'own land can acquire by that act an absolute and indefeasible 'right to the water that collects in it, he has the power of pre-'venting his neighbour from making any use of the spring in his 'own soil which shall interfere with the enjoyment of the well. 'He has the power still further of debarring the owner of the land 'in which the spring is first found, or through which it is trans-'mitted, from draining his land for the proper cultivation of the 'soil; and thus, by an act which is voluntary on his part, and 'which is entirely unsuspected by his neighbour, he may impose 'on such neighbour the necessity of bearing a heavy expense, if 'the latter has erected machinery for the purpose of mining, and 'discovers, when too late, that the appropriation of the water has 'already been made. Further, the advantage on one side and 'the detriment on the other may bear no proportion. The well 'may be sunk to supply a cottage or a drinking-place for cattle, 'while the owner of the adjoining land may be prevented from 'winning metals and minerals of inestimable value. And last-'ly, there is no limit of space within which the claim of right 'to an underground spring can be confined.'[70] No opinion was expressed as to the effect of prescriptive possession of a certain spring; and the decision was said to be founded on the principle 'which gives to the owner of the soil all that lies beneath his 'surface; that the land immediately below is his property, 'whether it is solid rock, or porous ground, or venous earth, or 'part soil, part water; and that the person who owns the surface 'may dig therein, and apply all that is there found to his own 'purposes, at his free will and pleasure.'[71] After a contrary judgment,[72] the principles thus enunciated were supported in a case in which the House of Lords called to their assistance six of the common-law judges.[73] The plaintiff occupied an ancient mill, which had for more than sixty years been worked by the flow of the river Wandle, within whose catchment area lay the town of

Chasemore v. Richards.

[70] 12 M. and W., p. 351. In Chasemore *v.* Richards, [69], L. Brougham referred to a French artesian well which was said to draw part of its supplies from a distance of 40 miles.

[71] Ibid. p. 354. The Roman law was quoted as in agreement—1 § 12, 21 D. (39.3).

[72] Dickinson *v.* Grand Junction Canal, 7 Exch. 282; overruled in next case—7 H.L. 369, 378.

[73] Chasemore *v.* Richards, 7 H.L. 349. These cases are followed in America, Delhi *v.* Youmans (1871), 6 Amer. R. 100; Chase *v.* Silverstone (1873), 16 ibid. 419.

Croydon. The water of the rainfall sank into the soil of this area, and reached the river by percolation and affluents. The Board of Health of the town sank a well 74 feet deep in their own land, about a quarter of a mile from the river, and pumped large quantities of water from it for the town's use, and thereby diverted underground water—and that only—from the Wandle and from the plaintiff's mill. The House of Lords held that no action lay against the Board. In doing so, it settled the point left open in *Acton* v. *Blundell*, by holding that enjoyment of a certain water-supply for the prescriptive period confers no right to demand its continuance, and that on grounds which apply equally in Scotch law—viz., that the person who cuts off the supply could not have prevented the enjoyment of the water percolating away from his land, and therefore could not be said to consent thereto, and that, having no visible means of tracing its course, the possession was clandestine.[74] And since the party complaining of the diversion had never any right to a continuance of the subterranean flow, it did not matter to what use the party diverting meant to put the water, whether for employment in his own land or for sale beyond it.[75] The principle of these decisions applies equally to cases of water being prevented from percolating into a well, and cases of water being abstracted which had already so percolated into and was in it.[76] Nothing has been added by later English cases to the doctrines so propounded,[77] except that they do not apply to the case in which the draining away of underground water has the effect of drawing away water which has already reached a definite channel. 'If you cannot get at the underground water 'without touching the water in a defined surface-channel, you 'cannot get it at all.'[78]

Followed in Scotland.

In the only reported Scotch case,[79] these English decisions were cited and followed. Part of the water-supply of certain mills held by tenants was derived from springs on their landlord's ad-

[74] 7 H.L. 370, 385, overruling L. Ellenborough in Balston *v.* Bensted, 1 Camph. 463, at *N. Prius*.

[75] 7 H.L. 373. L. Wensleydale doubted as to the last point, p. 389. He also thought the distinction between streams and underground waters lay, first, in artificial means being always required for the enjoyment of underground water; and secondly, that the interests of society required that the natural advantages of the land should be made fully available, and that the owner must therefore be permitted to dig in his own soil, ibid. p. 386.

[76] New River Co. *v.* Johnson, 2 E. and E. 435, 442.

[77] R. *v.* Metropolitan B. of Works, 3 B. and S. 710; Ballacorkish, &c., Co. *v.* Harrison (Isle of Man), L.R. 5 P.C. 49.

[78] Grand Junction Canal *v.* Shugar, L.R. 6 Ch. 483, 488, *per* L. Hatherley, L. Chan. See *supra*, p. 425, as to pollution.

[79] Blair *v.* Hunter, Finlay, & Co., 29th Nov. 1870, 9 Macph. 204.

jacent land, but they had no express right to it. The springs fell off in consequence of the working of minerals under these lands; but the supply was kept up so long as the mineral tenants pumped out the water in their mine and sent it down its natural course. The mineral tenants then sold the water-supply so obtained to another manufacturer and diverted it. It was held that they were entitled to do so, provided the line of the diversion did not at any place pass over the lands leased to the complainer. The words of Lord Justice-Clerk Hope[80] were quoted with approval, and may be compared with those of Chief-Justice Tindal: 'The 'water he [the mine-owner or his tenant] thus creates he may 'send where he chooses, if within his competency, for it had previ- 'ously no definite existence, no certain outlet, no distinct or estab- 'lished run.' If there had been a guarantee of the water-supply in the leases, the landlord might have been liable in damages.[81] The ordinary servitude of watering will be discussed along with that of aqueduct.

Eavesdrop. Application of foregoing rules to buildings.

4. *Eavesdrop.*—The preceding exposition of the burden imposed upon the inferior heritor, to receive the surface-water which naturally descends to him from the superior tenement in its natural state, explains at once the rules which obtain in cases where the latter tenement is built upon. Its owner is entitled by artificial means to collect and impound every drop of water which reaches him from the clouds, either before or after it finds its way into the soil, but he is not entitled to enhance the burden laid upon his neighbour by any *opus manufactum*. The roof of a house or the area of a cistern prevents rain from reaching the soil in the ordinary way, accumulates it in a certain line or point, and sends it to the earth with concentrated force. But if the line or point at which it reaches the earth be within the boundary of the superior tenement, this result is regarded either as an increase to the neighbour's detriment too insignificant to be restrained, or as an ordinary exercise of property. But if the line or point, in consequence of the building being constructed up to or near to the boundary, lie beyond the same, the other proprietor (whether inferior or superior in respect to the soil, so long as the building is higher than the adjacent land) is entitled to object to the direct immission of water into his premises as unwarrantable. There is thus a practical prohibition at common law against building to

[80] In Irving *v.* Leadhills Co., 11th March 1856, 18 D. 833, 841, which related to an artificial water-course, *infra*, p. 477.

[81] *Per* L.J.-C. Moncreiff, 9 Macph. 207. See Whitehead *v.* Parks, 2 H. and N. 870, for a stipulation sufficient to protect springs. See on the subject of subterranean springs—Pardessus, §§ 78, 105.

the verge or within a certain distance from it, which by the Roman law[82] was thirty inches, and by the custom of certain burghs in Scotland nine[83] or eleven[84] inches—involving, therefore, an interval of double that distance between two adjacent buildings. This hardship may be overcome, as to two sides, by building continuously streetwise, 'which is tacitly imported in the incorporation of 'towns or union of villages;'[85] or again, as to one of the conterminous proprietors, by the constitution of a servitude of eavesdrop.

Constitution.

The servitude of eavesdrop,[86] eavesdrip, easedrop, easingdrop, or stillicide, is a positive servitude of the class called *servitutes habendi*, which consist in the right to institute and maintain a certain state of things as against the servient tenement.[87] It may therefore be constituted by express grant, by implied grant,[88] or by prescription.[89] Where there is no express grant, it will always be very difficult to distinguish between such possession as infers a servitude only, and such as would avail to set up complete ownership in the space in dispute, since a right of eavesdrop is always a strong presumption of property, and the real question between the parties may be one of boundary.[90] The proper course, in case of doubt, is to take alternative issues.[91] The servitude right may be lost by acquiescence,[92] by disuse, or by express renunciation. The burden cannot be enhanced without the consent of the servient owner; and therefore the Roman law allowed the dominant tenement to be raised in height, but not lowered;[93] but it may be continued in favour of a house of the same or greater height which comes in the place of the original building.[94]

Extinction.

[82] Cic. de legg. 1.21; Glück, Comm. xi. 434; Rudorff in Savigny's Zeitschrift, x. 347. *Marciano*, in St. 2.7.7, should be *Mamilio*. Cf. 12 C. (8.10).

[83] Clark *v.* Gordon, 1760, M. 13172; Gariochs *v.* Kennedy, 1769, M. 13178.

[84] Spottiswoode's Practicks, p. 24.

[85] St. 2.7.7; see Stirling *v.* Finlayson, 1752, M. 14526; Buchanan *v.* Bell, 1774, M. 13178.

[86] Forbes, 2.4.3.2; Mack. 2.9.8; St. 2.7.7; Ersk. 2.9.9; Bankt. 2.7.12 and 13; B. Pr. 1004; 2, 20 §§ 3-6, 21, 41 § 1 D. (8.2); Glück's Commentar, x. 125; Molitor, § 44. It means the drop from the boundary (efese, *Sax.*)

[87] The contrary servitude—*stillicidii non avertendi*, 2 D. (8.2)—is merely the technical mode in Roman law of extinguishing the servitude,—Vanger., § 342.3.

[88] Pyer *v.* Carter, 1 H. and N. 916; and authorities, *supra*, p. 359.

[89] Stirling *v.* Finlayson, [85]; Yeats *v.* Hugo (1874), 15 Amer. R. 80.

[90] Scouller *v.* Pollock, 24th Jan. 1832, 10 S. 241. See Jack *v.* Lyall, 12th June 1833, 11 S. 711, affd. 1 Sh. and M'L. 77, for L. Brougham's contrast of the two rights at p. 87 *et seq.*

[91] Such as those in Steele *v.* Oliver & Boyd, 25th July 1832, 10 S. 857.

[92] In Clark *v.* Gordon, [83], infringement of a customary interval was acquiesced in, and the servitude was not required, as the roof sloped away from the boundary.

[93] 20, § 5 D. (8.2); see Thomas *v.* Thomas, 2 C.M. and R. 34, and Harvey *v.* Walters, L.R. 8 C.P. 162; and see a case of actual damage—Gould *v.* M'Kenna (1878), 27 Amer. R. 705.

[94] 20, § 2 D. *eod. tit.*

The servitude entitles its holder to prevent any erections on the servient tenement which may be inconsistent with the right.[95] It may either take the form of stillicide or eavesdrop proper, a right to shed the water *passim* from the roof; or of *flumen*, the right to collect it by rones and get rid of it by spouts. If there be no servitude in operation, it will be only in very special circumstances that the use of a spout to prevent drip beyond the march will be deemed sufficient; for if it gets out of order, the neighbouring owner may be put to the trouble of an action to get it repaired.[96] Effect.

II.—Natural Water-courses.

An entirely different set of considerations from those which are applicable to waters not confined by any definite channel comes into play when we pass to water-courses natural or artificial, or at least to the most of these. The reservation thus suggested may be at once disposed of. As will presently appear, the peculiar doctrines of law which obtain with reference to streams arise from the common interest which all the landowners through or past whose lands they flow have in the maintenance of their natural course. No such community of interest can exist where a stream rises, flows, and disappears in the sea within the bounds of the same estate. In that case the owner of the land is also owner of the water, and may dispose of it as he chooses, no one else having any right to interfere.[97] The same absolute control resides in the whole body of riparian owners, who, if they all agree, may dispose of the water as they please. The members of the public, as such, have no title to object.[98] Full property in, and control of, the water in a stream, may also be acquired through Act of Parliament.[99] Stream wholly within one estate. Rights of public.

Before proceeding further, it will be well to point out the scope of the present and the following divisions of this chapter. First, we are here only concerned with non-navigable water-courses, and with navigable rivers in so far as they are governed by the rules common to all streams—the law specially relating to navigable rivers having been already discussed.[100] Secondly, only such water-courses as flow through or past the land of more than one Division of subject.

[95] 20, § 3 D. *eod. tit.*

[96] Cf. St. 2.7.7, with Stirling *v.* Finlayson, [85].

[97] Fergusson *v.* Shirreff, 18th July 1844, 6 D. 1363, 1374, *per* L. Cockburn; L. Blantyre *v.* Dunn, 28th Jan. 1848, 10 D. 509, 529, *per* L.J.-C. Hope.

[98] Fergusson *v.* Shirreff, *loc. cit.*, [97]; L. Ch. Cairns in Lyon *v.* Fishmongers Co., 1 App. Cas. 662, 673.

[99] Medway Co. *v.* E. Romney, 9 C.B. N.S. 575.

[100] *Supra*, p. 235.

proprietor are here treated of. Thirdly, the present division of this chapter relates only to natural water-courses. It has been already shown[101] that nothing turns on the circumstance that some of these may run above, others beneath, the surface, provided they be entitled to the character of defined water-courses. The remaining heads of this chapter will be taken up with artificial water-courses and servitudes, and fishing.

'Water-course.'

The term 'water-course,' though, properly speaking, applicable only to the bed or channel in which a stream flows, and so used in the Rivers Pollution Act,[102] is also used to denote the running water itself. In this latter sense it is useful as a general term including all streams large and small, and as pointing out the distinction between water enclosed in a known channel and water squandered over or under the ground. It has not been formally

'Stream.'

defined in Scotch law, nor has its equivalent, the term 'stream,' in the strict sense of the word. The best formal definition is American: 'A water-course is a stream of water usually flowing 'in a definite channel, having a bed and sides or banks, and 'usually discharging itself into some other stream or body of 'water. The size of the stream is not important; it might be 'very small, and the flow of the water need not be constant. 'But it must be something more than mere surface-drainage over 'the entire face of a tract of land occasioned by unusual freshets 'or other extraordinary causes.'[103] Or it is a 'distinct channel 'cut through the turf and into the soil by the flowing of the 'water, presenting evidence of frequent (not necessarily constant) 'flow,—not a mere depression.'[104] Considerable confusion has arisen from the random use of the phrases 'public river' and

'Public and 'private river.'

'private river.' The original distinction is that of the Roman law, already noticed, turning upon the permanent or occasional nature of the flow of water; and to this signification the words ought to be confined, though the private rivers in this country would be thereby reduced to a very small number.[105] But the terms are also more frequently used to signify navigable and non-navigable rivers, those in which the public have and those in which they have not certain rights of user. It will be well to discard the former use of the terms as of no practical importance,

[101] *Supra*, p. 431.

[102] Sect. 20; Portobello Mags. *v.* Edinburgh Mags., 9th Nov. 1882, 10 Ret. 130.

[103] Luther *v.* Winnisimmet Co., cited in Washburn, pp. 279, 468. See also Callis, 54; Woolrych, 31; Angell, 2; and the Irish case of Briscoe *v.* Drought, 11 Ir. C.L. 250, 263, 272.

[104] Gibbs *v.* Williams, 37 Amer. R. 241.

[105] As in Linlithgow *v.* Elphinstone, *supra*, p. 427; Downie *v.* E. Moray, 19th June 1824, 3 S. 158 (N.E. 107), 12th Nov. 1825, 4 S. 167 (N.E. 169).

and to adhere to the more useful modern terminology. The term 'riparian,' points to ownership of the bank rather than of the *alveus*,[106] and the rights of a riparian owner are none the less though he has acquired the subject for the very purpose of controlling others in their use of the stream.[107] 'Riparian.'

It may serve as a fitting preface to the more detailed account, which is to follow, of the law of natural water-courses as thus defined, to quote the most succinct and compendious statement thereof that is to be found in a Scotch law-book.[108] 'The rights 'of parties in private[109] streams of water depend upon their rel- 'ative situations. The rights of upper heritors and of lower 'heritors are of a certain description; the rights of opposite 'heritors are, from the nature of the thing, of another description. Abstract of rights in water-courses.

'An upper heritor, after enjoying the use of the water which 'passes through his lands, has nothing more to do with it, unless 'some operation below shall operate to his prejudice by making 'it regorge or stagnate or decrease in velocity or freedom of flow 'within his property. A lower heritor has this interest in the 'stream, that in passing through the lands of others it shall be 'transmitted to him undiminished in quantity, unpolluted in 'quality, and unaffected in force and natural direction and cur- 'rent, except in so far as the primary uses of it may legitimately 'operate upon it within the lands of the upper heritor. Opposite 'heritors are in a different situation from these persons, and for 'very obvious reasons. They are, in the first place, proprietors 'respectively of the *solum* of the *alveus* up to the middle of the 'stream as it naturally flows; there is no common property in the '*solum*. They are conterminous proprietors whose march lies in 'the *medium filum fluminis*; and accordingly, if anything can be 'done which does not affect the state of the water, it may be 'done by each: the minerals under it belong to each party re- 'spectively, and may be a most valuable estate. Second, besides 'this ordinary right of property, which is precisely the same when 'the river is there as if it were to disappear and the channel be- 'come dry,[110] they have a common interest arising from another 'right, as they have each a right in the water, not of property, 'for certainly *aqua profluens* is not the subject of property so long Of upper and lower heritors. Opposite heritors. 'Common interest.'

[106] Lyon *v.* Fishmongers Co., 1 App. Cas. 662.

[107] Crossley *v.* Lightowler, L.R. 2 Ch. 478.

[108] *Per* L. Neaves in Morris *v.* Bicket, *infra*, [112], 2 Macph. 1092.

[109] *E.g.*, non-navigable streams, and navigable streams above high-water mark, *supra*, p. 235. There was no question of the public rights in navigable rivers above that line in the case in hand.

[110] Or change *avulsione*, *supra*, p. 100. and see L. Ch. Chelmsford's op. in Bicket *v.* Morris, 4 Macph. H.L. 44.

and ownership.

'as it is running. When you get it into your pitcher or pipe, it 'becomes your property, just as game and fish when they are 'caught become the property of the person who catches them; 'but while it is flowing and in its channel, no portion of the water 'either on one side of the *alveus* or the other belongs to one party 'or the other. It is as much the property of no one as the air 'that we breathe or the sunlight that shines upon us. But each 'heritor, as it passes, has a right of an incorporeal kind to the 'usufruct of that stream for domestic purposes and for agricultural 'purposes, and, it may be, also for other purposes, subject to cer-'tain restrictions. This right in the general current of the stream 'gives him an interest in the whole of the *alveus*, and for this 'obvious reason, that no operation can, by the nature of things, be 'performed upon one half of the *alveus* that shall not affect the 'flow of the water in the whole. Thus neither of the opposite 'proprietors can withdraw the water by a cut—unless, at least, it 'were merely a pipe for domestic uses and a mere mechanical 'facility for drawing water, as might be done with a bucket: 'that might be allowed, because it would be just the application 'of the water to its proper purpose. But when a cut or channel 'to withdraw the water is made for other purposes, that is not 'allowed, unless it is fortified by the acquisition of a servitude. 'In the same way, if any channel is attempted to be stopped up, 'that cannot be allowed—as, if there was an island in the stream, 'and you proposed to stop up the channel between that island 'and your property, you will not be allowed to do that; neither 'can any of the proprietors occupy the *alveus* with solid erec-'tions without the consent of the other, because he thereby affects 'the course of the whole stream. If one proprietor on one side 'occupies the stream, the water that would run there must run 'somewhere else; and that must immediately and instantly operate 'upon the other half of the *alveus*, because it must either narrow 'and deepen the channel or it must drive the water to the other 'side, and thus either encroach on the bank of the opposite heritor, 'or increase the weight of water upon his soil. It is thus im-'possible that any operation *in alveo* can take place as between 'opposite owners without affecting the position and course and 'force of the water that belongs to them both, and without oper-'ating practically upon the water in the lands within the actual 'march of the opposite proprietor. Now the common interest, 'therefore, amounts to a right of preventing anything that shall 'palpably affect the water.' It is not meant in these remarks that a common interest in the water resides only in opposite pro-

prietors; the sort of right so indicated is equally incident to successive riparian ownership. The above quotation sufficiently indicates the two leading distinctions: that between the ownership of the *alveus* of a stream, and the interest which riverain owners have in the running water; and the difference between the rights of opposite owners *inter se*, and the rights of successive owners. The first distinction is radical; the other, though useful as grouping the questions according to the circumstances in which they usually arise, cannot be strictly relied on.

Alveus.

There is no difficulty regarding the ownership of the bed of a stream which runs *through* an estate; so far as it does so, the *alveus* belongs to the owner of the land, being regarded as a continuation thereof, which happens to be covered with water.[111] It has already been pointed out in treating of boundaries, that, where a river forms the march of two estates either *de facto* or with an express boundary in the titles of either or both of the riverain subjects 'by' the river, the *medium filum* is the line of demarcation.[112] Therefore no one has a right to interpose between the riparian heritors and the river.[113] In regard to the water, a distinction, derived from the Roman law,[114] is drawn between the drops or particles of matter which go to make up the stream at any given moment, and the stream itself as a perpetual body, constantly renewed. The water in a running stream is accordingly regarded at each moment as common to all[115]—'not as a *bonum* 'vacans in which any one might acquire a property; but as 'public or common in this sense only, that all might drink it or 'apply it to the necessary purposes of supporting life: and no one 'had any property in the water itself, except in that particular 'portion which he might have abstracted from the stream, and of 'which he had the possession, and during the time of possession 'only.'[116] The stream, as a whole, or any part of it, is, on the contrary, the subject only of incorporeal rights of use, which approach closely to ownership. The right of property obtained by the occupation of a certain quantity of water drawn from a stream

Of march-streams.

The stream and the water composing it.

[111] See a curious corollary in Lyell's Trs. *v.* Forfarshire Rd. Trs., 18th May 1882, 9 Ret. 792.

[112] *Supra*, p. 98; Wishart *v.* Wyllie, 1853, 1 Macq. 389; Morris *v.* Bicket, 20th May 1864, 2 Macph. 1082, affd. 13th July 1866, 4 Macph. H.L. 44, 50; Gibson *v.* Bonnington Sugar Co., 20th Jan. 1869, 7 Macph. 394. See doubts of the universality of the rule in M'Intyre's Trs. *v.* Cupar-Fife, 24th May 1867, 5 Macph. 780. It is the same in English law—Morris *v.* Bicket, *supra*, in H.L.

[113] Fishers *v.* D. Atholl's Trs., 3d June 1836, 14 S. 880.

[114] 1, I. (2.1), Vinnius *in loc.*

[115] St. 2.1.5; Ersk. 2.1.5.

[116] The Roman law is thus stated in Mason *v.* Hill, 5 B. and A. 1, 24. Lyon & Gray *v.* Bakers of Glasgow, 1749, M. 12789; Hamilton *v.* Edington & Co., 1793, M. 12824.

gives no right to any other water in the same stream, nor to any other use of the stream. Accordingly, the right of permanent user of the stream must have some other origin than that of acquisition by the first occupier.[117] It is really an incident to the ownership of the lands past or through which the stream flows; each riparian proprietor has a right to receive the flow in its natural course, and to transmit it in the same; this is a natural right of property, a natural servitude, not a servitude in the strict sense of the word; it arises *ex jure naturæ*, and not out of any supposed absolute rule of law, nor out of any presumption flowing from the notoriety of possession:[118] and the sum of these similar rights is the common interest which all the riparian heritors have in the natural and accustomed flow of the water. In other words, 'the right to have the stream to flow in its natural state, without 'diminution or alteration, is an incident to the property of the 'land through which it passes. Each proprietor of the adjacent 'land has the right to the usufruct of the stream which flows 'through it. This right to the benefit and advantage of the water 'flowing past his land is not an absolute and exclusive right to the 'flow of *all* the water in its natural state; but it is a right only 'to the flow of the water, and the enjoyment of it, subject to the 'similar rights of all the proprietors of the banks on each side to 'the reasonable enjoyment of the same gift of Providence.'[119]

Right to stream a natural right of property.

A.—OPPOSITE PROPRIETORS.

Rights of opposite heritors *inter se.*

The other distinction indicated above is that between the rights of opposite riparian owners *inter se*, and the rights of successive owners *inter se*. The distinction is not so marked as to introduce an entirely different set of legal rules, since the interests of all these parties are in many respects similar. But some interests come more prominently forward in one case, some in another. Beginning with the case of opposite owners, it will appear that each of them is specially concerned in operations performed by the other

[117] This was early settled in Scotland—Bannatyne *v.* Cranston, 1624, M. 12769. In England the opposite could be maintained till the above case of Mason *v.* Hill, [116].

[118] Obs. in Chasemore *v.* Richards, [69], and Wood *v.* Waud, [69], on Acton *v.* Blundell, [68]. In the mining districts of the Western States of America these rules break down, and the first appropriator or diverter of a stream is protected against injury by later comers—Aitchison *v.* Petersen, 20 Wall. Sup. Ct. Rep. 507.

[119] Embrey *v.* Owen, 6 Exch. 353, 369; see also a similar general statement in Wright *v.* Howard, 1 Sim. and Stu. 190. It is the same in American law; see obs. of Justice Story in Tyler *v.* Wilkinson, 4 Mason, 397, 3 Kent. Com. 439; in French law, Pardessus, § 104; in Prussia, Law of 28th Feb. 1843, in Koch, note to IV. a, p. 763.

which (*a*) cause some alteration in the bed of the water-course; or (*b*) affect the banks; or (*c*) in especial divert the whole or part of the water.

Alterations in *alveo*.

(*a*) *Alterations in alveo.*—The natural right, incident to riparian ownership, to prevent erections or alterations being made by an opposite proprietor, even within his own half of the *alveus*, was the subject of an elaborate judgment of the Court of Session and of the House of Lords in 1864 and 1866.[120] The defender having it in view to straighten a wall washed by the Water of Kilmarnock, and, in doing so, to advance part of the wall for some distance into the *alveus*, obtained permission from the pursuers, who were the proprietors opposite, to build up to a fixed limit. Finding that this limit was being exceeded, the pursuers interfered by suspension and interdict, and also by action of declarator and removing of the buildings already erected. Both the Court of Session and the House of Lords were satisfied that the fixed limit had not been observed; a plea of acquiescence was repelled; and the question therefore came to be, whether the pursuers had a right at common law to prevent encroachment on the channel, and if so, on what conditions. It was held by both Courts that such a right existed, and that for its existence it was not necessary for the pursuers to prove damage actually caused or clearly foreseen. The common interest in the water necessitates some restriction in the use of the *alveus*, though there is in it no common property, but ownership in severalty, with the thread of the water as the march. The restriction must be to all intents and purposes absolute—since 'the smallest interference with the course 'of running water may be productive of effects which nobody can 'foresee or could have contemplated,'[121] the operation of water being 'an empirical affair;'[122] and since otherwise it would be impossible to draw the line between lawful and unlawful encroachment, and one of the parties might gradually build up to the *medium filum*, and thus increase the burden on his neighbour—who would be, moreover, entitled to do the same.[123] There is *injuria sine damno*, an infringement of a right, though no specific damage is done; and this the Court will step in to put a stop to. But the defender in such a case is not precluded from proving that his operations are *innocuæ utilitatis*, of so trifling a kind as demonstrably leading to no possible damage to his neighbour's

Morris v. *Bicket*.

[120] Morris *v.* Bicket, 20th May 1864, 2 Macph. 1082, affd. 13th July 1866, 4 Macph. H.L. 44.

[121] 2 Macph. 1089, 1092; 4 Macph. H.L. 48, 50.

[122] 2 Macph. 1093.

[123] 4 Macph. H.L. 49.

tenement—such as the driving of a stake, or the erection of a temporary boat-house: *de minimis non curat prætor.*[124] Lord Benholme and Lord Westbury were inclined to extend to such a case of common interest the rule of the Roman and Scotch law applicable to common property, *melior est conditio prohibentis;* while Lord Justice-Clerk Inglis was of a different opinion.[125] The authority of the case of *Morris* v. *Bicket* has been expressly acknowledged in a later decision of the Court of Appeal.[126]

Earlier Scotch cases.

The doctrine thus settled, though treated as novel in the Court of Appeal,[127] had been laid down in the Court of Session before the middle of last century;[128] and given effect to again in a very special case where a river had formed three distinct channels. The southmost, originally a small rill, had gradually become the main stream; the middle course, originally the main stream, had become deserted; and the northmost course carried part of the water through land belonging to a different owner from the proprietor of the other two. The latter, finding it impossible to fish for salmon in the first-mentioned stream, was attempting to throw a bulwark across it, so as to direct the water into the old main channel, when he was stopped by the neighbouring heritor. There were specialties in the case: but it is enough to say that the Court held the innovator to have no right to alter the *alveus* of the south stream to the prejudice of the other; and Lord Kilkerran begins his report by remarking that 'though it is not allowable for con-'terminous heritors *aliquid cripere in alveo fluminis*, which runs 'between their several lands, yet it is allowable to either *munire* '*ripam*, so as to prevent the river's encroaching upon him.'[129] The same distinction was taken in a later case, where the Lord Ordinary at once interdicted an erection *in alveo*, and this judgment was acquiesced in; while certain operations on the bank were the subject of much discussion, and of an appeal to the House of Lords.[130] It is of no consequence what the purpose

[124] 2 Macph. 1089, 1093; 4 Macph. H.L. 49, 50.

[125] 2 Macph. 1087, 1090; 4 Macph. H.L. 52. As to this question, see *infra*, chap. 33.

[126] Colquhoun's Trs. *v.* Orr Ewing & Co., 26th Jan. 1877, 4 Ret. 344, revd. 30th July 1877, 4 Ret. H.L. 116. See especially L. Blackburn's opinion, and *supra*, p. 237; see Jackson *v.* Marshall, 4th July 1872, 10 Macph. 913.

[127] *Per* L. Westbury, 4 Macph. H.L. 52.

[128] Farquharson *v.* Farquharson, 1740, M. 12779, 5 B.S. 688, Elchies, Property, No. 5, explained by L. Eldon in another relation, 3 W.S. 244. See also King *v.* Hamilton, 17th Jan. 1844, 6 D. 399.

[129] Mags. of Aberdeen *v.* Menzies, 1748, M. 12787; D. Gordon *v.* Duff, 1735, M. 12778. The same distinction holds in America—Gerrish *v.* Clough (1868), 2 Amer. R. 165.

[130] Menzies *v.* E. Breadalbane, 4th July 1826, 4 S. 783, var. 3 W.S. 235. See obs. of L.J.-C. Inglis in Morris *v.* Bicket, *supra*, [120].

of the encroaching heritor may be—whether to secure his soil, or to form a mooring-place, or to improve his fishing,[131] or to get rid of rubbish.[132] The cases in which his object is to divert the water are referred to further on;[133] those in which the operations have been performed in a navigable river have been already discussed.[134]

(*b*) *Operations on the Bank.*[135]—These, as has just been indicated, are in a very different position. While it is the nature of the channel to be covered with water, it is the function of the banks to restrain the stream without being covered by it. The extent of the channel is determined, not by the reach of the water in average flow, nor by its devastations in extraordinary floods,[136] but by the land it covers in the ordinary floods, which occur after wet weather in the usual course of things.[137] The rules which govern operations performed *ripæ muniendæ causâ* are well brought out in the *Bolfrax* case.[138] The Tay there passed through holm-land. It had at one time surrounded an island, which belonged still to the opposite riparian heritors, half to each; but the south channel had gradually been deserted, except as a flood-outlet, and had been regularly cultivated for many years. An interdict was brought against the proprietor of the south bank, to prevent his erecting a bulwark from the upper end of his haugh to the upper end of the old island, and at a distance of four or five yards from the ordinary channel, on the *ratio* that, the old channel being thus blocked up, the water in flood would be thrown with increased momentum on the north bank. An engineer reported that 'in defending 'haughs and holms against the encroachments of a river which 'forms the common boundary between the lands of two conter- 'minous proprietors, two methods have usually been adopted: one 'consists in facing the gravelly margin of the ordinary channel of 'the river, and sometimes part of its bottom, with stone and 'other heavy firm materials; and the other, in raising embank- 'ments of earth and other matters above the level of the surface 'of the haughs, at a distance from and nearly parallel to the 'margin of the ordinary channel of the river, so as to form the 'banks of the extraordinary or flood channel of the river.' The

Operations on bank.

Extent of water-course.

Munire ripam —quid? *Bolfrax* case.

[131] See E. Kinnoull *v.* Keir, 18th Jan. 1814, F.C.; Robertson *v.* Foote & Co., 16th July 1879, 6 Ret. 1290 (blasting boulders *in alveo*), *supra*, p. 264; D. Roxburghe *v.* Waldie's Trs., 18th Feb. 1879, 6 Ret. 663, *supra*, p. 262.

[132] Lanark Twist Co. *v.* Edmonstone, 1810, Hume, 520.

[133] *Infra*, p. 449.

[134] *Supra*, p. 237.

[135] As to change of the course of a river and the formation of islands, see p. 100.

[136] Nairn *v.* Brodie, 1738, M. 12779.

[137] Menzies *v.* E. Breadalbane, [130], 3 W.S. 243; Jackson *v.* Marshall, [126].

[138] Menzies *v.* E. Breadalbane, [130].

operations in question were of the latter sort, and were too near the margin of the river.[139] The Court of Session was of opinion that, as the embankment was made entirely on the property of the southward heritor, it was not relevant to allege that damage would be sustained during floods by his opposite neighbour; but this decision was recalled by the House of Lords, whose judgment prohibited any *opus manufactum* on the banks which might have the effect of diverting the stream of the river in times of flood from its accustomed course, and throwing the same on the lands *ex adverso*. Lord Chancellor Eldon quoted with approval the *dictum* of Erskine, that 'when a river threatens an alteration of 'the present channel, by which damage may arise to the pro- 'prietor of adjacent or opposite ground, it is lawful for him to 'build a bulwark, *ripæ munimdæ causâ*, to prevent the loss of 'ground which is threatened by that encroachment; but this 'bulwark must be so executed as to prejudice neither the navi- 'gation nor the grounds on the opposite side of the river: and, as 'a guard against these consequences, the builder, before he began 'his work, was obliged by the Roman law[140] to give security.'[141] In a very similar case, in which the alterations were made in places which were more distinctly part of the flood-channel than in the *Bolfrax* case, the result was the same.[142]

Result of cases.

It may be gathered, that the first mode of protecting riverain property—by rendering that part of the bank which was formerly friable stanch and strong, without raising any embankment—will in every case be allowed, as a legitimate precaution; but that, if a mound be raised above the former level of the bank, the *onus* will lie on the builder, similar to that which is imposed on the erecter of a structure *in alveo*, of showing that there was no possibility of material damage to the land *ex adverso*, at least in ordinary floods.[143] That the sole object of embanking in any case is to prevent a stream from leaving its old course will not be enough to justify this latter sort of embanking, to the prejudice of the opposite proprietor; but the latter may be precluded from object-

Custom of district.
Personal bar.

[139] 3 W.S. 237.

[140] L. un. D. (43.15), imitated in D. Gordon *v.* Duff, 1735, M. 12778.

[141] Ersk. 2.1.5; cf. 2.9.13. In 2.6.17 the author is misled by the different meanings of 'public river.' See St. 2.7.12; B. Pr. 1102.

[142] Jackson *v.* Marshall, 4th July 1872, 10 Macph. 913; (see obs. of L.J.-C. Moncreiff in Murdoch *v.* Wallace, 28th June 1881, 8 Ret. 855.) Similarly in America—Shane *v.* Kansas, &c., Ry., 36 Amer. R. 480.

[143] L. Benholme, in Morris *v.* Bicket, 2 Macph. 1091, thought the same would apply to extraordinary floods; but this seems to be contrary to L. Chan. Eldon's opinion, 3 W.S. 243.

ing by the custom of the country, and by himself similarly protecting his own side.[144]

(*c*) *Diversion of Water.*—The operations referred to in the foregoing paragraphs may have the effect of diverting the stream, or part of it, from its accustomed channel, without having such diversion as their object; and it is the possibility or danger of alteration in the natural course of the stream which determines their illegality. Much more are those operations unlawful which are from the first intended to divert the whole or part of the current without the consent of the opposite owner. The latter is entitled to stand on his natural right, as riparian owner, to have the stream flowing in its ordinary course, without any proof that he had already appropriated the use of the current, or that any damage had been done to him, even to his amenity or trout-fishing.[145] Though he has no present use for the stream, he may possibly come to have; and the injury done by diversion is injury to this potentiality.[146] Consequently, the consent of the opposite proprietor is required to enable his neighbour to throw a mill-weir or cauld across the river;[147] to take off any water by artificial means (such as lades) except by a pipe for primary uses;[148] to lengthen a lade so as to drive an additional mill, and then return the water further down the stream than its ancient outfall;[149] or, except in certain circumstances, to use part of the water for irrigation.[150] These are mostly operations, however, which may affect the quantity of water through the whole course of the river, or at least among many successive proprietors, and will be more fitly discussed under the following head of this chapter.[151] But the present topic is further illustrated by a case which underwent a great deal of discussion, and was decided, in unfavourable circumstances, in accordance with the strict rules laid down

Diversion of water.

D. Roxburghe v. Waldie.

[144] Farquharson *v.* Farquharson, 1740, M. 12779, 5 B.S. 688, Elch. Property, No. 1, noticed 3 W.S. 244; cf. Campbell *v.* Ms. of Bute, 30th June 1831, 9 S. 848. The English law on the subject of embanking is similar—R. *v.* Trafford, 1 B. and Ad. 874, 8 Bing. 204, 210; but a distinction is drawn in regard to canals, which may be embanked without regard to neighbouring land—Nield *v.* L.N.W. Ry., L.R. 10 Exch. 4; and to the sea, which is a common enemy—R. *v.* Pagham Comrs., 8 B. and C. 355. See Hudson *v.* Tabor, 1 Q.B.D. 225, 2 Q.B.D. 290.

[145] Bannatyne *v.* Cranston, 1624, M. 12769; Hay *v.* Feuers, 1677, M. 1818. In England—Mason *v.* Hill, 5 B. and Ad. 1; Embrey *v.* Owen, 6 Exch. 367, and authorities there quoted. See obs. of L. Blackburn in Colquhoun's Trs. *v.* Ewing & Co., [126].

[146] Ibid.; Hamilton *v.* Edington & Co., 1793, M. 12824; cf. Burgess *v.* Brown, 1790, Hume, 504; Bairdie *v.* Scartsonse, 1624, M. 14529.

[147] Hay *v.* Feuers, [145].

[148] *Infra*, p. 475; Johnstone *v.* Ritchie, 15th Feb. 1822, 1 S. 327 (N.E. 304).

[149] Lanark Twist Co. *v.* Edmonstone, 1810, Hume, 520.

[150] *Infra*, p. 459.

[151] *Infra*, p. 458.

above. The owner of lands and a mill on the north bank of the Tweed and of an island *ex adverso*, for the purpose of deepening the channel—called the north channel—between his lands and the island, and of thereby increasing the water-power of his mill, removed gravel from the channel, and also from the bed of the river above the island, *ex adverso* of lands belonging to the Duke of Roxburghe. He also constructed a cauld from the upper end of the island to the south bank, resting it there on the land of a riparian owner whose consent he had obtained; but part of the cauld lay opposite lands on the south side which also belonged to the Duke. The effect was to raise the water in the north channel by six or eight inches. The Duke objected, alleging loss of salmon-fishing, amenity, and command of water-power in the south channel, and also prospective injury to the bank of his land on the north side from increase of current there. After various proceedings in the Sheriff Court and in the Outer House, a report by an engineer, suggesting means to diminish the injury, and a supplementary action, rendered necessary by the limited scope of the original interdict,—the Court came to be of opinion that in a question of right the general prohibitive rule regarding march-streams applied; that the cauld must be removed; that the defender was not entitled, without the Duke's consent, to widen or deepen the north channel at any part, to the effect of drawing a greater quantity of water into it than would naturally flow therein; and that the defender should be ordained to restore the channel to its former state, and keep it so, in so far as any change might in future be the result of his operations. It was no answer that these were performed *in suo*, since, if the channel were deepened below, the current higher up would be accelerated, and would bring down the gravel from its upper end, and thus deepen the channel above in the main stream.[152] It thus appears that the Court will protect a riparian proprietor against alterations in the channel *ex adverso* of his lands, both those performed directly therein, and those which plainly follow from alterations made below his lands. It would be the same if they were made at any point above his lands.

Loss of these natural rights.

The natural rights treated of in the foregoing paragraphs may be relinquished—in other words, the corresponding nuisances or infringements of these rights may be legalised—in any of the ways and according to the rules which have been described in

[152] D. Roxburghe *v.* Waldie, 1821, Hume, 524; see a case from the same locality, the interest affected being, however, salmon-fishing—D. Roxburghe *v.* Waldie's Trs., 18th Feb. 1879, 6 Ret. 663, *supra*, p. 262.

an earlier chapter on Nuisances in general,[153] and also in the case of intentional diversion, by the constitution of a servitude of aqueduct.[154] Thus the erection of a structure *in alveo*, or of an unlawful embankment, may be expressly allowed;[155] or may be fortified by prescription, to the extent to which possession has been had, and no further;[156] and objection may be barred by a plea of acquiescence in such circumstances as infer consent, but in no others.[157]

B.—SUCCESSIVE PROPRIETORS.

Successive proprietors. Nature of the common interest.

The interest of upper and lower riverain proprietors in the preservation of the flow of the stream in its natural condition may be generally described as a common interest, but not in the same strict way in which the phrase is applicable to the relation of opposite owners *inter se*. In the latter case, the interest of each to prevent the other from interfering with the water, the channel, or the banks, in certain ways, is obvious, and will be presumed[158] till the contrary is proved—a task which, looking to the empirical nature of running water, is no light one. It is true that even in such cases the size of the stream and the character of the *opera manufacta* enter into the problem, and may decide the Court not to interfere. But this is true in a far more important sense in studying the relation subsisting between upper and lower proprietors. In questions between such parties, the interest of one riparian owner to interfere for the protection of the stream's natural condition may be, in some circumstances, as obvious as in the case of opposite owners; in others, it may be doubtful, and may require to be proved; in others, it may be non-existent.[159] In treating of these matters, the general plan of this work shall be adhered to—namely, to regard the relation of successive owners from the stand-point of the restrictions which are laid upon one neighbour in his use of the water-course for the benefit of the others. It will be possible to dismiss, in a single paragraph, the restriction imposed on an inferior in questions with a superior heritor. The converse case demands fuller treatment.

[153] *Supra*, p. 329.

[154] *Infra*, p. 475.

[155] D. Roxburghe *v.* Waldie, [152].

[156] Farquharson *v.* Farquharson, *supra*, [144].

[157] Ibid., *supra*, p. 329; Johnston *v.* Scott, 26th Feb. 1834, 12 S. 492; Morris *v.* Bicket, *supra*, [120].

[158] Morris *v.* Bicket, [120], explained by L. Blackburn in Colquhoun's Trs. *v.* Ewing & Co., [126].

[159] The common interest arising from rights of salmon-fishing in a river has been discussed, *supra*, pp. 264, 271.

Upper as against lower heritor. Regurgitation.

Apart from questions concerning the passage of migratory fish, the inferior proprietor is limited in his use of the water-course in a question with his neighbour up-stream only in one way—that he shall not by any *opus manufactum* cause the water to regorge or restagnate to a greater extent than is natural. This restriction, though of less importance in a country of rapid streams than in England and abroad,[160] has formed the subject of several decisions in Scotland. In one of the earliest of these, the inferior heritor, proposing to erect a mill within his property, drew a dam-dike across the river, which, though about half a mile below the pursuer's mill, had the effect of making the water regorge on some occasions more than it formerly did, to the prejudice of the mill. The mischief was not thoroughly removed by the dam-dike being lowered 18 inches; and the defender offered, at his own expense, to alter the pursuer's mill so as to prevent any injury from the regurgitation. At first the Court were inclined to insist on compliance with this offer, but finally held that the defender was not entitled to cause the water to restagnate to the prejudice of a going mill, and that the pursuer was not obliged to suffer the offered alterations, nor the defender entitled to insist on them.[161] The question there mooted, whether it would have been the same if no mill had existed, seems to be answered in the affirmative by the cases cited above regarding the infringement of a possible enjoyment:[162] the water-power is a valuable right incident to riverain ownership, which may be used or not until it is lost by express or implied abandonment.[163] Accordingly, this was expressly laid down in a later case, where injury by regurgitation to the level of a quarry was apprehended, but never actually caused. As the Lord Justice-Clerk (Macqueen) said: 'It is enough for the 'superior heritor to say that he may have occasion for every inch 'of his level, and that no one has right to touch or meddle with 'his property, which is sacred.' A similar offer to that which was made in the earlier case was similarly rejected.[164] In the latest case, damage was actually caused by flooding the superior heritor's pasture-lands.[165] Merely overcharging the soil with

[160] Saunders *v.* Newman, 1 B. and Ald. 257; Washburn, p. 376 *et seq.*; Pardessus, § 92.

[161] Fairly *v.* E. Eglinton, 1744, M. 12780.

[162] *Supra*, pp. 445, 449.

[163] See Baillie *v.* Ly. Saltoun, *infra*, 165.

[164] Burgess *v.* Brown, 1790, Hume, 504.

[165] Baillie *v.* Ly. Saltoun, 1821, Hume, 523; see Home *v.* Home, 1683, M. 11241, 11253, 3 B.S. 606; Graham *v.* Loch, 1829, 5 Mur. 74; Bridges *v.* L. Saltoun, 20th March 1873, 11 Macph. 588. In America, regurgitation which happens only in cases of extraordinary floods—*damno fatali*—is no wrong,—Washb. p.

water is a nuisance.[166] If the damage follows from the silting up of the channel behind the weir, it will be ascribed to the erection of the weir, and the miller will be liable for the natural consequences of obstructing the natural flow of the water.[167] The superior heritor's remedy against restagnation is not cut off by his increasing the volume of water through pumping out a quarry, provided he did not bring on the land drained by the stream more water than would have come to it naturally.[168]

Lower as against upper heritors.

Proceeding now to the restrictions imposed upon the use of a water-course by a superior heritor in questions with inferior heritors, it will be found that these relate to three particulars—viz., the natural flow, the quantity, and the quality of the water.

Natural flow.

(*a*) *The natural flow.*—There are certain operations not involving any diminution of the quantity or deterioration of the quality of the water sent down from an upper riparian estate, which may injuriously affect a lower property on the same stream, and which the lower proprietor is therefore entitled to restrain. Of this sort are works which cause material increase in the momentum of the water as it leaves the upper estate and enters the lower, such as the construction of a lade with the outfall of the tail-race close to the march. This may cause injury to the banks of the lower estate, or necessitate their being strengthened to resist. On the other hand, the lower proprietor may be able to qualify damage, actual or prospective, from the opposite cause, a retardation of the flow as it reaches him, since the natural head of water may be of material value to him.[169] Again, injury to his banks may be caused by changes not so much in the force as in the direction of the current at his upper march. It may be deflected from its natural course by any of the structures in the bed or banks of the stream, which have been discussed above.[170] And it seems undoubted that if the lower proprietor can qualify a material and intelligible interest, he will be entitled to restrain his upper neighbour from so interfering with the natural course of the stream. Referring to the case of *Morris* v. *Bicket*, Lord Blackburn says: 'I think the same principle will apply where 'the complaining party is not a proprietor *ex adverso* of the spot, 'but is a proprietor of lands on the banks of the stream below

Increasing head of water.

Diminishing the same.

Deflection of flow.

338. This coincides with Scotch law, *supra*, p. 314. As to accumulation by ice, see Washb. p. 345.

[166] Cases in Wood on Nuisance, p. 122.

[167] See obs. in Gray *v.* Maxwell, 1762, M. 12800, on Carlile *v.* Douglas, 1731, M. 14524; but not apparently if the silt is due to matter artificially added upstream—Proctor *v.* Jennings (1870), 3 Amer. R. 240.

[168] M'Cormick *v.* Horan (1880), 37 Amer. R. 479.

[169] Case of Lord Glenlee, *infra*, [173].

[170] *Supra*, p. 445 *et seq.*

'the spot, but so near to it that the erection *in alveo* alters the 'natural flow of the water on the complaining parties' lands. 'But I do not think it law that a riparian proprietor on the 'water of Kilmarnock, or on the water of Irvine, into which it 'flows, ten miles below the town, on whose land the flow of the 'water would be in no way affected, could have maintained the 'action.'[171] In a recent case[172] some observations were made by the Second Division, which were not required for the decision, and point to a somewhat dangerous relaxation of the rule against deflection at exit. A tenant of lands at the beginning of a nineteen years' lease diverted a small burn from its originally tortuous course through his farm into a straight cast, joining the old channel at right angles thereto just before it reached the next property. Opposite the junction he raised an embankment, to save the lower lands on his farm from inundation. The effect was to throw gravel on two acres of the neighbouring property, whose owner objected at the time, threatened but did not raise proceedings, and refused to allow the straight cast to be continued through his lands. Just before the ish of the innovator's lease, his neighbour sued for damages and restoration. The claim was repelled on the ground that the pursuer had failed to establish that the operations complained of were to his injury or beyond the legitimate rights of the defender. The facts—especially the refusal to accept the tenant's offer and the long delay—showed the alteration to have been *innocuæ utilitatis;* but, if the original objection had been pressed before harm had been done or soon after a flood, there could have been no doubt that there was a material deflection of the water as it emerged from the upper land, and that this could have been put a stop to. The Lord Justice-Clerk, Lord Moncreiff, was of opinion, however, generally that, 'so long as an agriculturist is merely performing operations 'on his own side of a stream for the benefit of his own farm, it 'will require a very substantial amount of damage to be made 'out before the law will interfere with him.' And Lord Young discriminated between a river and 'one of those little streams 'which flow down the hills,' and added, 'I think that the law is 'in accordance with the familiar practice of the country—viz., 'that an upper heritor is entitled to do anything to make a 'stream passing through his land as beneficial, and also as little 'hurtful as possible to his own property; and if he sends down all 'the water he gets in as pure a condition as he got it to the lower

[171] See Colquhoun's Trs. *v.* Ewing, *supra*, [126].

[172] Murdoch *v.* Wallace, 28th June 1881, 8 Ret. 855.

'heritor, the latter has nothing to complain of.' The favour to agriculture has never gone so far as is here claimed; the distinction between greater and smaller streams is novel to the law; and the passage cited can scarcely be regarded as a full statement of riparian duty.

Storing.

The natural flow of a stream may likewise be interfered with by an upper heritor in such a way as to affect, not the immediately succeeding estate only, but the whole properties washed by the stream. This may be done by alternately accumulating the water of the stream in reservoirs, and letting it out for the convenience of a mill. Thus, in the *Barskimming* case[173] the upper proprietors, who owned a cotton-mill, constructed a reservoir for the purpose of accumulating the water during the night, the stream being insufficient in its natural state for driving their machinery. During the accumulation no water passed down the channel of the river. The water thus collected was let out as found necessary; so that even in a dry season there was a regular though intermittent supply. They were proceeding to add another reservoir, which would have produced the same effect to a still greater degree, when a riparian heritor two miles down the stream, and owner of two going mills upon it, obtained declarator that he had a right to the full lawful enjoyment of the water, particularly for the use of one of his mills; that the upper heritors had no right to make any reservoir for the purpose of diverting or arresting and detaining the stream, and preventing it from continually running with its ordinary current through the pursuer's property. The defenders were accordingly prohibited from using any reservoir for such a purpose, and from making others, and were ordained to demolish such as were already in existence. The pursuer alleged injury to water-power, to amenity, and to fishing.

L. Glenlee v. *Gordon.*

Reasonable storage.

This was a case of unreasonable use of the water of a small stream by one of the riparian proprietors, owner of a large mill; and it must not be taken as setting up a hard and fast rule against all detention of water for dynamical purposes. This would have the effect, if strictly carried out, of putting a stop to the use of water-power on a natural stream, unless the whole riparian owners came to some agreement.[174] It is impossible to lay down any rule; every case will turn on its special circumstances, and on the determination of the question 'whether under 'all the circumstances of the case the use is reasonable and con-'sistent with a correspondent enjoyment of right by the other 'party.' This is the only rule laid down in America, where the

[173] L. Glenlee *v.* Gordon, 1804, M. 12834.

[174] See Sampson *v.* Hoddinott, 1 C.B. N.S. 590, 611.

subject of water privileges has given rise to much discussion.[175] In determining the reasonableness of a given use, the custom of the district is there admitted to proof.[176] And the courts look to the size and capacity of the stream, the periods of recurrence and the duration of the detention, and economy of water-power in the discharge.[177] It would be probably held of more importance in this country to look to the behaviour of the parties after injury actually set in. Where there is no necessary conflict between the several uses made of the stream, the Court of Session will step in to regulate matters,[178] 'so as to prevent damage by opening or 'shutting sluices at improper times or in an improper manner,' even though there has been no prescriptive possession. The impounding of the water must be reconciled with the 'reasonable' rights of neighbours.[179] There is a recent excellent example of this.[180] At the instance of an inferior heritor, owner of a paper-mill on a small stream, the Court interdicted a corn-miller, tenant of an upper proprietor, from using any reservoir, dam, or other *opus manufactum*, to arrest or detain the water of the stream, so as to prevent the same from flowing continuously through the complainer's property, except on Sundays, and at other times when his mill was not at work. The facts were that a former tenant of the corn-mill had, with the aid of steam, worked it for about forty years night and day, Sunday and week-day, till 1846, when he gave up Sunday work and closed his sluices from Saturday night to Monday morning, without complaint, since the paper-mill also rested during that period; that the respondent in 1877, gave up steam and night-work, and closed the sluices every night; and that this mode of working interrupted the complainer's night-work, mudded the stream in the morning, and set him every morning to watch the arrival of the water. The respondent's plea, that if right of storage be once obtained, the

[175] See Washburn, pp. 348, 351, and especially Merritt *v.* Brinkerhoff, 17 Johns. 306. The citation is from a jurist of whom all American lawyers are proud, the late Chief-Justice Shaw. In the well-argued case of Dumont *v.* Kellogg (1874), 18 Amer. R. 102, it was held unreasonable to object to a *material* diminution of water in a river-dam by evaporation and soakage. That, again, would depend on circumstances.

[176] Dumont *v.* Kellogg, last note.

[177] Pool *v.* Lewis (1870), 5 Amer. R. 526.

[178] See a case where an aggrieved riparian owner was held justified in proceeding *brevi manu*, Clinton *v.* Myers (1871), 7 Amer. R. 373.

[179] Ms. Abercorn *v.* Jamieson, 1791, Hume, 510.

[180] Hunter & Aikenhead *v.* Aitken, 23d Jan. 1880, 7 Ret. 510. (The opinions are very instructive. Lord Mure thought muddying the water would not have been a nuisance. Lord Shand's obs. must not be taken as bringing a case of the long negative prescription (legalised nuisance) under the nomenclature of the positive prescription.)

measure of the right is the utility of the mill, was plainly untenable, though founded on a passage in Erskine's Institutes.[181] The nuisance had been objected to as soon as it set in, since regulation for the purpose of obtaining as great a continuous flow as possible was as much a service to the lower as to the upper tenement, while the case was altered by an attempt to get a larger flow occasionally. A plea of legalised nuisance was ruled out on the facts.

Alien water.

There is much authority also, in America, for the case, which has never come up in Great Britain, of reservoirs filled from sources other than the stream, to supply occasional deficiencies in the natural flow. The rule there seems to be, that the upper millowner is entitled to throw in as much water as will make up the natural—*i.e.*, the average—flow, and no more, unless in exceptional circumstances.[182] It must also be remembered that these natural rights may be surrendered expressly or by acquiescence, as in other cases of nuisance.[183] Though the water thus artifically added to the stream increases its volume, the owner who makes the addition will not be entitled to carry off a similar quantity of water naturally flowing into the same stream and throw it into another.[184]

Participation in benefit of storage.

If the water-power of an inferior heritor is benefited by such operations of a superior heritor as those which are here indicated, he will nevertheless be entitled to participate, without contributing to the expense, if no agreement to the contrary exists. Thus, the millowners on the Levern, a small stream, obtained leases of lochs or dams near its source, for the purpose of regulating the descent of the water, and contributed according to arrangement. Thereafter, new leases were entered into, introducing certain additions to the supply; but one of the millowners was not present, did not agree to the new arrangement, and refused to pay his quota, but still reaped the benefit of the water. It was held that he was not liable for the proportion of the rents due under the new leases, to which he was not a party.[185] The extent of benefit derived from the storage of water in such a case will be calculated by multiplying the quantity of water used in each mill by the height of the fall.[186]

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[182] Washburn, p. 357.

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[184] Cowan *v.* L. Kinnaird, 20th June 1863, 1 Macph. 972; 15th Dec. 1865, 4 Macph. 236.

[185] Orr *v.* Graham, 15th Dec. 1831, 10 S. 135; see Washb. p. 363.

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Quantity.

(*b*) *Quantity.*—An upper heritor is not entitled to diminish the quantity of the water which would naturally pass into the land of his neighbour down-stream. This does not mean that he is obliged to send down to his lower march just so much water as he had received at his upper, without taking into account the diminution of the stream by evaporation, and its increment from rain, springs, and affluents during its course through his land, but only that he must do nothing to diminish the size of the stream as it would naturally leave his estate. The converse case of an augmentation of the flow to the detriment of an inferior owner does not frequently occur; and when it does, is usually of the sort mentioned in last paragraph—a regulation of the flow of water which would have reached the stream anyhow, rather than sending down one course water which would naturally have followed another.[187] If water be diverted and stored in this last mode, the person who employs so risky an agent will be liable for any damage which can be traced to it, on the principle of the cases of *Kerr* v. *Earl of Orkney* and *Rylands* v. *Fletcher*.[188] Diminution of the quantity of water sent down may take place through diversion or consumption either for primary uses, or for secondary, such as agricultural and manufacturing, purposes.

Primary uses.

The strict rule against diminishing the current of a stream is liable in all countries[189] to the relaxation that each riparian owner is entitled to use and consume as much water as he requires for the primary uses. The nomenclature seems to have been first introduced by Lord Justice-Clerk Macqueen, where he says, 'There is a certain order of uses. The natural and 'primary uses are preferable to all others. These are, drink 'for man and beast.'[190] To these may be added all family uses, such as for cooking, baking, washing of all sorts, and even for malting in home-brewing,[191] but probably not for the supply of water-closets.[192] For these purposes, the riparian heritor and those in his right are not compelled to draw the water by hand, but may construct pipes sufficient for their family supply, sending the surplus back to the stream within their own land.[193] But the

[187] As to this latter case, see *infra*, p. 477, on artificial channels.

[188] *Supra*, p. 316.

[189] *Per* L. Kingsdown in Miner *v.* Gilmour, 12 Moore, P.C. 156, a Canadian case; L. Norbury *v.* Kitchin, 9 Jur. N.S. 132; Nuttall *v.* Bracewell, L.R. 2 Exch. 1; *per* L. Chan. Cairns in Swindon Waterworks *v.* Wilts, &c., Canal, L.R. 7 H.L. 704. In America—Washburn, Tit. 3, sect. 1; in France—Pardessus, § 107.

[190] In Russel *v.* Haig, Bell's Oct. Ca. 346; and by L. Monboddo, ibid.

[191] Ogilvie *v.* Kincaid, 1791, M. 12824, Hume, 508; Johnstone *v.* Ritchie, 15th Feb. 1822, 1 Sh. 327 (N.E. 304); B. Pr. 1105.

[192] See Bonthrone *v.* Downie, 13th Dec. 1878, 6 Ret. 324.

[193] Cases in note [191]; Hood *v.* William

right does not extend beyond the riparian lands. Thus, one who was not a riparian owner fixed a pipe into a water-trough, from which the inhabitants of a village had been in the custom of taking water, in such a position as to draw off only the surplus, after the wants of the villagers had been supplied, and by means of the pipe led the water into his own land for domestic use only. It was held that though the inhabitants, as such, had no interest to interfere, a lower proprietor, past whose land the burn ran into which the surplus would naturally have flowed, was entitled to interdict this diversion, as lessening his supply.[194] And in a similar case, a non-riparian heritor in a burgh was held not to be entitled to convey water from a small stream to supply water-closets, to the prejudice of a millowner, whose supply was thereby diminished, though there had been use of the stream by inhabitants of the burgh, who carried water from it in pitchers for washing.[195] Neither for these uses, nor for the benefit of manufactures on non-riparian land, can a riparian owner grant rights of taking water, which shall be binding on any one but himself or his successors; he cannot by licence introduce a *de jure*, without creating a *de facto*, riparian owner,[196] unless the granter so uses the water as to cause absolutely no damage to other heritors on the stream, since in that case there is no interest to protect, and no fear of a prescriptive user being reared up.[197] Cases may be figured of a diversion, by means of household pipes, one or more, of the whole of a streamlet in a populous neighbourhood, or of a large riparian estate being so supplied, and so exhausting the water, while other sources were equally available; and it may be conjectured that in such circumstances the Court would interfere to regulate the user in the same way as in regard to water-power. A riparian right.

One of the principal agricultural uses of running streams—the watering of cattle—belongs, as has been seen, to the primary uses. The other—irrigation—is a secondary use, to which the same considerations of necessity do not apply. On the other hand, agriculture has always been a favourite with the law; and the rule which prohibits any artificial diminution of the natural flow will not be enforced with the same strictness as in the case of manufactures properly so called.[198] There is very little Irrigation.

sons, 8th Feb. 1861, 23 D. 496; cf. Donaldson *v.* E. Strathmore, 26th June 1877, 14 Sc. L.R. 587.

[194] L. Melville *v.* Denniston, 21st May 1842, 4 D. 1231.

[195] Bonthrone *v.* Downie, *supra*, [192].

[196] Stockport Waterworks Co. *v.* Potter, 3 H. and C. 300; Ormerod *v.* Todmorden Mill Co., 11 Q.B.D. 155.

[197] Kensit *v.* G.E. Ry., 23 Ch. D. 566 (abstracted for condensing, and returned in time, undiminished and unpolluted).

[198] Code Nap. § 644; Pardessus, § 105.

authority in the law of Scotland. In an early case,[199] the owner of a mill which had been in existence for threescore years complained of the diversion of so much water by the tenants of two farms up-stream in irrigating their land that sufficient was not left to drive his mill. It was proved that the surplus returned to the stream before it reached the pursuer's dam, that the tenants of one of the farms had irrigated their land in a similar way for forty years, and that the tenants of the other had done so for thirty-four or thirty-five years. The Court proceeded expressly on the immemorial possession of the 'mill and her 'privilege,' and held that 'no less than forty years' peaceable 'possession of diverting the water for watering was sufficient, 'that being the only legal term.' The irrigation of the first farm was therefore allowed to be continued; that of the other was stopped. The watering of the ground was spoken of as being 'the most natural and ordinary effect of burns and waters;' but the general question of the scope of this natural effect did not arise. The only other case[200] was free from the element of prescriptive possession by either party. It is badly reported: but the session-papers show that the question arose between upper and lower heritors on a burn who had both set up a system of irrigation; that neither party could plead prescription; and that the surplus-water, after passing over and through the upper heritor's meadow by natural flow, emerged into the stream of which the burn was an affluent past the lower heritor's land. The interlocutors, to which the Court adhered, found it lawful for the upper heritor to divert the course of the burn so as to make it overflow his meadow, but not *in æmulationem*, and only in such a way that the surplus should be returned into the burn before reaching the lower heritor's meadow; and in respect this was not the case, held the diversion unlawful.[201] This case points out the necessary condition on which alone irrigation will be permitted. In the earlier decision the surplus returned in time. In both the streams were small, and the damage to the lower owner material. In both it seems to have been recognised that there is in the law of Scotland no absolute prohibition against diversion for irrigation, and that the reasonableness of the practice will be a question of circumstances.

[199] Beaton *v.* Ogilvie, 1670, M. 10912; see Washburn, p. 314, for a similar American case; cf. Wallace *v.* Morrison, 1761, M. 14511. Irrigation with clean water is not a nuisance in the popular sense of the word—D'Eresby's Trs. *v.* Strathearn, &c., Co., 21st Oct. 1873, 1 Ret. 35.

[200] Kelso *v.* Boyds, 1768, M. 12807.

[201] For an issue of failure to return the surplus, see Mackenzie *v.* Woddrop, 24th Jan. 1854, 16 D. 381.

English cases.

This is consistent with the law of England and America. The leading case in England was one in which a millowner complained of a superior heritor irrigating his land by processes which were proved to be discontinuous, and to cause no diminution of the water cognisable by the senses. It was found that this was a not unreasonable abstraction of the water. The Court quoted, with approval, a passage from Kent's 'Commentaries,'[202] in which the learned author lays it down that 'the owner must 'so use and apply the water as to work no *material* injury or 'annoyance to his neighbour below him; . . . and it would 'be unreasonable, and contrary to the universal sense of mankind, 'to debar every riparian proprietor from the application of the 'water to domestic, agricultural, and manufacturing purposes, 'provided the use of it be made under the limitations which have 'been mentioned; and there will, no doubt, inevitably be in the 'exercise of a perfect right to the use of water some evaporation 'or decrease of it, and some variations in the weight and velocity 'of the current. But *de minimis non curat lex.* All that the 'law requires of the party by or over whose land a stream passes 'is, that he should use the water in a reasonable manner, and so 'as not to destroy or render useless or materially diminish or 'affect the application of the water by the proprietors above or 'below the stream.' The Court illustrated this rule by contrasting the extreme cases of continuous irrigation of many thousand acres of porous soil on the one hand, and the filling of a watering-pot on the other.[203] Consequently, no such rule can be laid down as that, if the surplus be returned within the irrigator's land, any diminution, however great, caused by evaporation and absorption, will in every case be allowed. The circumstances of each case will determine whether there be a reasonable relation between the size of the stream and the amount diverted.[204] In America, which abounds in large rivers, greater latitude is allowed.[205]

Consumption by upper heritor in manufacture.

The quantity of water which ought to reach the land of an inferior heritor may be diminished by a heritor up-stream for manufacturing purposes in either of two ways: first, by consuming the whole or part of the water in his works, as for generating steam, or in his dams by evaporation or soakage;[206] and secondly, by diverting the stream in whole or part in such a way that it does not return to the main channel within his bounds. The

[202] III., 440.

[203] Embrey *v.* Owen, 6 Exch. 353, 372.

[204] See Wood *v.* Waud, 3 Exch. 748, 772; Sampson *v.* Hoddinott, 1 C.B.N.S. 611, and Chasemore *v.* Richards, 2 H. and N. 190, *per* Coleridge J.

[205] Washburn, 3.2.6.

[206] See Dumont *v.* Kellogg, *supra* [176].

case of consumption of water in manufactures is similar in many respects to the case of irrigation last mentioned. In both there is an inevitable diminution of the current;[207] and in both the surplus must be returned before the stream leaves the diverter's land. The practical distinctions are, on the one hand, that manufactures, properly so called, are not in the same favourable position as agriculture (though the distinction may be obliterated by the nature of the district, and such a use of water as would elsewhere have been 'extraordinary' may thus become 'ordinary');[208] and, on the other hand, in producing steam in an ordinary factory, the loss of water is not likely to be so great as in irrigating many acres of meadow. The true question for the jury will be, whether, taking all the circumstances into consideration—the size of the stream, the amount of water consumed,[209] the times of diverting it—there is a material injury to the lower heritor's right to have the stream flowing down to him undiminished in quantity. The problem and its solution may be illustrated by an American and an English case, in both of which the question was, whether a railway company was entitled to take water for the supply of locomotives at a point in a stream where it was a riparian owner. In the American case[210] the effect was perceptibly to reduce the volume of water, and materially to diminish the grinding power of a mill down-stream. In the English case[211] the detainer did no damage in wet weather, and in dry weather shortened work at the mill below for only a few minutes in the day. The one was not, the other was, a reasonable use. In order to qualify injury to his right, the lower proprietor will not be called upon to prove actual use and actual damage; on the other hand, it will be enough for the upper heritor to prove that the diversion is such as is insignificant in comparison with the volume of the stream.[212] The maxim '*Ubi jus ibi remedium*' is balanced by the other, '*De minimis non curat lex.*'[213]

Failure to return *intra fines.*

While in such cases it may be in the power of the upper heritor to show that his operations are *innocuæ utilitatis*, and that

[207] Unless in such a case as Dakin *v.* Cornish, mentioned by Alderson B. in Embrey *v.* Owen, 6 Exch. 360, where the diverted was mixed with well water, and the surplus *of both* returned to the stream.

[208] Ormerod *v.* Todmorden Mill Co., 11 Q.B.D. 155, *per* Brett and Bowen, L.JJ.

[209] *Per* L. Chan. Cairns in Swindon Waterworks *v.* Wilts, &c., Canal, L.R. 7 H.L. 704.

[210] Garwood *v.* N.Y. Central Ry., 38 Amer. R. 452.

[211] E. Sandwich *v.* G.N. Ry., 10 Ch. D. 707.

[212] The *onus* lies on him—Hood *v.* Williamsons, *infra*, [218].

[213] See *supra*, p. 446.

the lower heritor has no substantial interest to object, it will be different if the former so divert the stream that the whole or part of it does not return to the natural channel within his own lands. The infringement of right is then obvious and incontrovertible. It is the same, as has been seen, with the surplus of water diverted for the primary and the other secondary purposes. The ordinary case here contemplated is that of a mill lade or race.[214] It was early held that the owner of both banks of a stream might build a dam-dike and divert the water, provided he returned it to the stream before it left his land.[215] The law was carefully considered, near the end of last century, in a case where the lands of the diverter lay both opposite to and above those of the complainer. Above the lands of the latter was a mill-dam from which two opposite mills were supplied with water, which returned, however, to the river before reaching his march. The opposite proprietors bought one of these mills, and proposed to lengthen the lade so as to supply their works, and thereby to carry a considerable part of the water, which formerly flowed between the estates of the parties, entirely past the land of the complainer. The Court suspended,—on the ground that mere possibility of damage gave a sufficient interest, and that there was no means of drawing a line between diversion of a whole river—which was plainly unlawful—and diversion of a part.[216] The prohibition against diversion extends to the excess of water which comes down in flood-time. Therefore, where a sewer had been built to contain the flow of a natural stream, a riparian proprietor was not entitled to draw off the flood-water by a pipe so contrived as to let the ordinary flow pass on its natural course. 'A flood may be of great value for the purpose of scouring or 'keeping clean a water-course.'[217]

Hood v. *Williamsons.*

The whole law regarding diversion of water was fully considered in a more recent case.[218] Part of the water of a small natural stream, which drove the thrashing-mill of an inferior heritor, was, by the tenant of a farm up-stream, diverted, for the purposes of his farm, by means of a turf, set, as occasion required, across the current at the inlet of a conduit which conducted the water into two adjoining fields, so situated that no part of the water

[214] *Supra*, p. 449, as to the relation of opposite owners in this respect.

[215] Cunningham *v.* Kennedy, 1713, M. 8903, 12778.

[216] Hamilton *v.* Edington & Co., 1793, M. 12824. See Bannatyne *v.* Cranston, 1624, M. 12769; Lanark Twist Co. *v.* Edmonstone, 1810, Hume, 520 (cases of opposite proprietors); Ms. Abercorn *v.* Jamieson, *infra*, [222].

[217] M'Lean *v.* Hamilton, 15th July 1857, 19 D. 1006.

[218] Hood *v.* Williamsons, 8th Feb. 1861, 23 D. 496.

could return into the natural stream. In these circumstances the Lord Ordinary (Kinloch) further found that the lower heritor, complaining of this diversion, had failed to prove the existence of a surplus after the cattle were supplied, or of any wilful waste, and accordingly assoilzied the upper heritor and his tenant; but this finding was recalled by the Inner House, on the ground that the *onus* of proof had been laid on the wrong shoulders. The Lord Justice-Clerk (Inglis) said: '*Primâ facie*, and as a general 'rule, no proprietor on the banks of a running water is entitled to 'divert a portion of the stream without returning it to its channel 'within his own grounds. That is clear as regards the use of 'water for machinery, and we are all familiar with the ordinary 'case of a mill; and no man is entitled within his own ground to 'divert a portion of a stream for a mill, except under the condi-'tion and obligation that he shall return the water within his own 'ground to the ordinary channel. I do not dispute that water may 'be diverted for the ordinary primary purposes for which water 'is used. But that is under the obligation that what is not con-'sumed shall be returned into the ordinary channel before the 'stream leaves the ground of the proprietor. He cannot be 'obliged to return it all, for the exercise of his right infers the 'consumption of a part of it. . . . When any one avails 'himself of his power, I do not say his right, over the stream that 'runs through his lands, to the effect of diverting a portion of it 'out of the ordinary channel, he must show that he does so in 'a lawful manner, and is not diverting without returning any 'water which he does not use for primary purposes.'[219]

Loss of these natural rights.

Such being the natural rights incident to riparian ownership, with respect to the natural flow and volume of a stream, any infringement of them is a nuisance. The rights themselves may be relinquished; in other words, the corresponding nuisances may be legalised, according to the rules laid down in an earlier chapter on Nuisances in general.[220] Thus a right to divert may be acquired, as between successive riparian owners, just as it can between opposite owners.[221] And the same will be the result of prescriptive possession. A village and coal-work had from time immemorial been supplied with water by a side-cut from a natural burn, at the inlet of which was a large stone, set on end and

[219] 23 D. 501-2.

[220] *Supra*, p. 329. Some take the form of nominate servitudes, *infra*, p. 475. See a case where a superior got rid of all liability to his own tenant for obstruction caused by the feuar—Gardner *v.* Walker, 19th July 1862, 24 D. 1430.

[221] Braid *v.* Douglas, 1800; Aytoun *v.* Douglas, 1800; Aytoun *v.* Melville, 1801, M. Appx. Property, Nos. 2, 5, and 6; M'Intyre *v.* Orr, 1868, 41 Sc. Jur. 112.

pierced with a hole 'about the bigness of the mouth of a choppin 'stoup or more,' through which the diverted water ran. No part of it returned. In a question with a lower heritor, the diversion was supported in so far as it had been prescriptively possessed; in other words, as measured by the stone gauge.[222]

(c) *Quality.*—The most general rule regarding rights to water is, that no landowner shall be permitted to pollute the water which escapes from his lands. We have seen that in many cases a proprietor is not compelled to allow the water which he finds on or in his estate to escape. There are others in which he cannot be forced to direct it in one course rather than in another. But in all cases, whether the water leaves his land in a defined course or not,[223] and whether its course be natural or artificial, if he allows it to get beyond his bounds, he will be restrained from doing anything to pollute it beyond certain limits. Pure water is a 'neces-'sary article,'[224] 'the first gift of nature;'[225] and to keep it pure, whether it appear in springs or wells, or in streams natural or artificial, is one of the most difficult problems in a crowded manufacturing and mining country. The present results, in this respect, of more enlightened views of sanitary science, have been the issuing of several reports on river-pollution, the passing of an Act,[226] the formation of an active defence association, and the institution of various conservancy boards for particular rivers. The Act referred to expressly saves the old common law (sect. 16)—the efficiency of which, in putting a stop to the unwarrantable fouling of streams, has in Scotland been proved over and over again. It remains yet to be seen whether the new broom will sweep cleaner.

Quality. Protected by common law and statute.

1. *Pollution of Streams at common law.*[227]—The question, what in the eye of the law is pollution of running water, involves the other question, what degree of purity the law will enforce. It is needless to say that it lays down no standard based on chemical analysis; even the recent statute does not venture on such a course. Different streams—nay, the same stream at different parts of its course—are by nature of different degrees of purity;

Standard of purity.

[222] Ms. Abercorn *v.* Jamieson, 1791, Hume, 510; Brown *v.* Best, 1 Wils. 174; Bealey *v.* Shaw, 6 East. 208. See also cases of irrigation, *supra*, p. 459.

[223] Cases of the latter sort are cited *supra*, p. 426. See case of the continuance of sheep-washing being prohibited in a natural lake, which had been turned into a town-supply reservoir—Dumfries Comrs. *v.* M'Culloch, 4th June 1874, 1 Ret. 975.

[224] Miller *v.* Stein, 1791, Bell, Oct. Ca. 334, *per* L.J.-C. Macqueen.

[225] Ibid., *per* L. Monboddo.

[226] Pollution of Rivers Act, 1876, 39 & 40 Vict. c. 75, U.K.

[227] Ivory's Note to Ersk. 2.1.5; B. Pr. 1105-6.

the action of man, through a long course of time, creates other divergences. In the light of these facts the law is thus stated by Lord President Inglis: 'Riparian proprietors are entitled to use 'the water in any way they like as it passes through their pro- 'perty, subject only to certain conditions. Now these conditions 'are, that they shall send down the water to their neighbours 'below undiminished in quantity and unimpaired[228] in quality. 'As regards the matter of purity, it is impossible in the nature 'of things that a running stream should not receive in its course 'certain impurities as it passes along. The action of nature is 'inconsistent with such a condition as that. But the meaning of 'the condition is, that no unnecessary or artificial impurity shall be 'put into the stream so as thereby to diminish the purity of the 'water as it passes to the proprietors or the inhabitants below.'[229] 'No burn-water is absolutely pure; indeed, in the strict sense, 'no water except distilled water is perfectly pure. Purity, in 'regard to water, is a relative term. Even well-water is not 'always pure. But the condition of purity which the law looks 'to in such a question as this, is just the state in which the burn 'was before the defender's works were erected.'[230] It follows, that in every question of river-pollution at common law the real question of fact is, whether there has been any material increase of pollution[231] beyond that which is natural to the particular stream, or beyond that which had existed there for the prescriptive period.[233] It matters not whether the source of pollution be the sewage of a town,[233] or the working of a manufac-

Increase of pollution.

[228] This may in certain cases prevent the immission of pure water, artificially heated. See L. Rockville in Russel *v.* Haig, 1791, Bell, Oct. Ca. 338; Mason *v.* Hill, 3 B. and Ad. 304, 5 B. and Ad. 1; Tipping *v.* Eckersley, 2 K. and J. 264.

[229] *Per* L.P. (then L.J.-C.) Inglis in his charge to the jury in the Esk case—D. Buccleuch *v.* Cowan, 21st Dec. 1866, 5 Macph. 214, 216. See a perilous relaxation of the rule, in favour of sawdust, shavings, and waste sent down in the ordinary course of using a mill, Jacobs *v.* Allard (1869), 1 Amer. R. 331.

[230] *Per cund.* in Rigby & Beardmore *v.* Downie, 8th March 1872, 10 Macph. 568, 572.

[231] It is not enough for the complainer to prove change in the mode or materials of manufacture—Baxendale *v.* M'Murray, L.R. 2 Ch. 790.

[232] The latter alternative was that which was put to the jury by the same judge in the case of Home *v.* Police Commissioners of Dunse, Dec. 1875. The special verdict of the jury in reply is set out in the report at the close of the case, 10th June 1882, 9 Ret. 924. [Was the case properly brought against the Local Authority? See Att.-Gen. *v.* Dorking Guardians, 20 Ch. D. 595; Glossop *v.* Acton Board, 12 Ch. D. 102. To demand that it should stop up existing drains would have been out of the question, Att.-Gen. *v.* Acton Board, 22 Ch. D. 221.] See issue in Ewen *v.* Turnbull's Trs., 21st Feb. 1857, 19 D. 513.

[233] Dunse case, [232]; Montgomerie *v.* Buchanan's Trs., 9th July 1853, 15 D. 853; Mackay *v.* Greenhill, 14th July 1858, 20 D. 1251; Caledonian Ry. *v.* Baird & Co., 14th June 1876, 3 Ret. 839.

tory,[234] or the *débris*[235] or drainage—even the natural, inevitable, acidulous drainage—of a mine.[236] As in the case of nuisance to air,[237] the public convenience, except in so far as supported by compulsory powers, must bow to private right.

Destruction of primary uses.

While it thus appears that the real question regarding alleged pollution is as to its increase within the prescriptive period, and that, as this question may be raised by any inferior heritor having an interest, the interest may be either that of a manufacturer[238] or of an ordinary riparian proprietor; yet the case which is usually maintained is the alleged destruction of the primary uses, as these are defined in a previous paragraph.[239] Nor is this wonderful when it is considered that these are the natural, ordinary, and most general uses of running water, those which have been enjoyed ever since the country began to be peopled, and those which every riparian owner has a present, not merely a potential, interest to protect. Accordingly, the earlier cases are of this sort. In the earliest, an interdict was continued against the fouling of a stream, originally fit for family uses, through the refuse of a distillery.[240] In the next, decided in the Court of Session on the same day, complaint was also made of the refuse of a distillery; and the Court arrived at the same result, being of opinion on the facts that the stream, 'formerly fit for the necessary purposes of 'life, had been thereby rendered unfit for these purposes.' As a matter of fact, the burn or rill received the sewage of part of the town of Edinburgh. The House of Lords, observing the necessity of discovering the origin of a practice so important in a question of this sort, remitted to the Court 'to inquire how far the rill is 'liable to the service of a common sewer,[241] and to receive the 'offscourings of houses and other trades, and in what parts built 'and established, and to what extent; also, how far the actual 'use made of the distillery in question can be impeached in law

In England—Wood *v.* Sutcliffe, 2 Sim. N.S. 163, *per* Kindersley V.C.; Att.-Gen. *v.* Luton Board, 2 Jur. N.S. 180; Att.-Gen. *v.* Birmingham, 4 K. and J. 528; Goldsmid *v.* Tunbridge Wells, L.R. 1 Eq. 169, 1 Ch. 352, and cases there; Att.-Gen. *v.* Colney Hatch Asylum, L.R. 4 Ch. 146.

[234] *Passim*, in the following paragraphs.

[235] Robinson *v.* Black Diamond Co., (1881), 40 Amer. R. 118.

[236] Pennsylvania Coal Co. *v.* Sanderson (1880), 39 Amer. R. 785, and see 27 Amer. R. 711.

[237] *Supra*, p. 328.

[238] Cases of Ewen *v.* Turnbull's Trs., [210]; Rigby & Beardmore *v.* Downie, [230]; Dunn *v.* Hamilton, 11th March 1837, 15 S. 853, affd. 3 S. and M'L. 356; Collins *v.* Hamilton, 19th April 1837, 15 S. 895; Richmond Co. *v.* Atlantic Co. (1871), 14 Amer. R. 658.

[239] *Supra*, p. 458.

[240] Miller *v.* Stein, 1791, M. 12823; Bell's Oct. Ca. 334.

[241] See the cognate expression 'mainly 'used as sewers' in the Rivers Pollution Act, 39 & 40 Vict. c. 75, sect. 20, *infra*, Appx. No. 15, and case there.

'as a nuisance of a rill so circumstanced, and by what means in 'particular, within the description of the libel, such annoyance is 'occasioned, and how far the same affects the parks of the pur-'suer.'[242] The Court of Appeal here evidently points at two things—prescriptive destruction of the primary uses at some part of the course of the rill, and such destruction at that part where were the pursuer's lands,—two things which, as Lord Eskgrove[243] had pointed out in the Court below, might be very different. In fact, there are many cases in which it would be impossible for the heritor next below the source of pollution to prove the primary uses within the prescriptive period; while a heritor further down the river might be able to point to the commencement of the pollution in *his* part of the stream within that time.[244] The former would certainly fail, the latter as certainly succeed, in having the nuisance abated. The several uses known as primary are separable in law: some may be proved to have been taken away, while others have been unimpaired.[245]

Prescription in different parts of same stream.

Dunn v. *Hamilton.*

The fallacies which are apt to appear in considering cases of pollution are well illustrated by a charge of Lord Jeffrey's, which underwent much criticism.[246] The verdict went for the defenders, the alleged polluters. The first exception was taken to a part of the charge which directed the jury that 'for all the necessary 'purposes of the occupation of land and of ordinary life, such 'deterioration of the water is permitted as may be ultimately 'fatal to its use by the inferior heritors; that one of the natural 'uses of a running stream was to remove the impurities neces-'sarily incident to habitation, even though these might be greatly 'augmented by increase of population.' In sustaining the exception, the Court observed that the first part of the above quotation ignored the distinction between primary and secondary uses, and that the second part was too general, and passed over the important element of the size of the stream. In treating the second exception, the Court repudiated a standard of purity suggested by the learned judge—'that if a person established a useful manu-'factory on the banks of a stream, and if this manufactory did not

Influence of size of stream.

Criterion of 'large family.'

[242] Russel *v.* Haig, 1791, M. 12823, Bell, Oct. Ca. 338, rem. 3 Pat. 403. These cases were followed in Millar *v.* Marshall, 1828, 5 Mur. 28; Graham *v.* Loch, 1829, 5 Mur. 74; Montgomerie *v.* Buchanan's Trs., [233] (where foreign water was introduced along with sewage); Scott *v.* Scott, 28th June 1881, 8 Ret. 851.

[243] Bell, Oct. Ca. p. 346.

[244] As to the 'restorative power' of running water, see L.J.-C. Inglis in the Esk case, 5 Macph. 217.

[245] Home *v.* Dunse Police Comrs., 10th June 1882, 9 Ret. 924.

[246] Dunn *v.* Hamilton, 11th March 1837, 15 S. 853, affd. 3 S. and M'L. 356.

'pollute the water more than a single large family might have 'done,' the inferior heritor could not object. Here, again, nothing had been said of the primary uses being destroyed, nor of the size of the stream, nor of the size of the large family. The fifth exception was taken to a direction that, although the water had been rendered useless for the purposes of bleaching and finishing, yet if it was still fitted for all common uses, and for all the uses to which it had been hitherto applied, the defenders were entitled to a verdict. The direction was sustained, on the ground that it was not enough for the pursuers to put a hypothetical case, and say there might possibly be an abuse if that case ever happened. The pursuer sued both as an ordinary riparian heritor and as the owner of manufactories down-stream, but neither of the uses suggested had been in fact enjoyed.[247] In an action of damages brought at the same time against the same parties by another manufacturer, tenant to the pursuer in the other case, a bill of exceptions to Lord Cockburn's charge to the jury was not insisted in, and the verdict for the defenders stood.[248] His lordship distinguished these three cases: '1. The river may be a public river, 'or immemorially abandoned to public works. 2. It may be a 'private river, retained for the primary purposes to which water is 'applicable. 3. There is, however, an intermediate case where the 'stream has been partly appropriated to manufacturing purposes, 'and is in part applicable to the primary uses. Such a case is 'regulated by this rule, that no person is entitled to destroy or 'materially impair the fitness for manufactures previously existing 'to a greater extent than formerly. But, on the other hand, a 'party complaining of being injured is not entitled to increase his 'liability to injury by giving up precautions previously used, or 'neglecting to give warning to the party injuring him.'

'Public,' 'private,' 'intermediate' rivers.

The rule of law being thus illustrated, that an inferior riparian heritor is entitled to have the water of the stream flowing past or through his land in its natural purity, it might be sufficient to refer to the general observations made in a former chapter on Nuisance to show how this right may be lost, and the nature of certain pleas which have been opposed to its being vindicated.[249] It will be necessary, however, to remark further on the last of

Loss of these natural rights.

[247] The 3d exception comes in more fitly *infra*, p. 472; the 4th was taken to the vagueness of a part of the charge; the 6th was on the law of landlord and tenant—see 2 Hunt. 523. The case was appealed on the last point, 3 S. and M'L. 356. On a new trial a verdict for the pursuers was agreed to after evidence led on both sides—1839, Macf. on Issues, 241.

[248] Collins *v.* Hamilton, 19th April 1837, 15 S. 895.

[249] *Supra*, p. 325.

By prescription.

these—the plea of prescription.[250] Upon this, rather than upon acquiescence in the technical sense of the word, rests the 'liability 'to the service of a sewer' and 'the immemorial abandonment to 'public works,' which have been noticed above. In these cases the existence of a nuisance has endured so long that the right to object is held to be abandoned. The true principle then is that this abandonment goes no further than the amount of fouling which has subsisted for forty years.[251] A trifling and occasional use of the stream for a long period, such as for receiving the foul water from flax-pits, will not come up to a dedication to public works.[252] But in the ordinary case, if the whole of the primary uses have been destroyed for that period, the riparian heritor has no material interest to object to further pollution; and this seems to be the principle given effect to in the *Water of Leith* case,[253] pointed at in the *Lochrin* case,[254] and properly put to the jury in the *Esk* case.[255] It must not be supposed, however, that the primary uses are inseparable from each other—for some may have been destroyed for forty years, while others have not, and are accordingly entitled to protection. It may be confidently affirmed that it is only in the way thus indicated that rivers may be dedicated to public uses of manufacture or sewage-carrying; and that the distinction between private rivers, and public rivers which are the 'natural' vehicles for carrying away excrement and other noxious things,[256] has no further foundation than this, that it takes a great deal more filth to foul a large river than a small one.

Issues.

Questions of pollution are eminently fitted for jury trial, and will always be disposed of in that way, unless both parties agree to an ordinary proof,[257] or legal questions of novelty and difficulty are the main points in dispute.[258] The issue usually puts the question whether between certain dates, or before a specified date, the defenders polluted the stream to the nuisance of the pursuer, as riparian proprietor or as manufacturer, as the case may be.[259]

[250] See, in English law, Carlyon *v.* Lovering, 1 H. and N. 784; Gaved *v.* Martyn, 19 C.B.N.S. 732.

[251] *Supra*, p. 466, and Crossley *v.* Lightowler, L.R. 2 Ch. 478, 481.

[252] Robertson *v.* Stewarts, 6th Dec. 1872, 11 Macph. 189.

[253] Downie *v.* E. Moray, 19th June 1824, 3 S. 158 (N.E. 107), 12th Nov. 1825, 4 S. 167 (N.E. 169); cf. the case of an adjoining lade, Eyre *v.* E. Moray, 10th July 1827, 5 S. 912 (N.E. 847).

[254] Russel *v.* Haig, *supra*, [242].

[255] D. Buccleuch *v.* Cowan, *supra*, [239], at 5 Macph. 218.

[256] Berwick *v.* Hayning, 1661, M. 12772, 2 B.S. 292, Mackenzie's Works, Pleadings, p. 24; Mags. *v.* Skinners of Inverness, 1804, M. 13191. See Downie *v.* E. Moray, [253], Collins *v.* Hamilton, [248], for a misuse of the term 'public'; and L. Pres. M'Neill in Montgomerie *v.* Buchanan's Trs., 9th July 1853, 15 D. 853, 858.

[257] Hume *v.* Young, Trotter, & Co., 19th Jan. 1875, 2 Ret. 338.

[258] White *v.* Dixon, 7th July 1875, 2 Ret. 904 (water from mines).

[259] See cases of Dunn *v.* Hamilton, [246];

Questions of difficulty have arisen under the Public Health Acts, both in Scotland and England, as to the parties who shall be liable as authors of the nuisance.[260] At common law it has been settled that, apart from any question with feuars who actually sent sewage into a drain leading to a ditch *in alieno*, their superior who gave them express permission in their titles so to send it was liable to be interdicted in respect of the permission.[261] The term 'wrongfully' is not required to qualify nuisance; and prescription or acquiescence can be proved without a counter-issue, provided they be relevantly alleged in the record.[262] If the action is only for damages, it has been held that under such an issue damage must be proved to entitle the pursuer to a verdict.[263] If there be a conclusion for interdict,[264] and the pursuer holds a verdict, he is, strictly speaking, entitled to the prohibitory judgment. In the *Esk* case, this was not demanded for six years, conform to agreement; and even when it was at last demanded, the Court gave the defenders time to put in a minute stating what they were prepared to do for the abatement of the nuisance —moved thereto by the long establishment on the stream of important industrial works.[265] In a similar way the procedure in many of the *Almond* and *Tweed* pollution cases has been, that on admission of the pollution by the defenders, decree of declarator thereof was issued against them, and a remit was made to men of skill to report, at the defender's cost, on the feasibility and mode of abatement. This is an indulgence to the defender, not a matter of right.[266] When complete abatement is reported, the conclusions for interdict will be dismissed;[267] and the whole expenses will be thrown on the polluters, except such as can be clearly traced to unneces-

Interdict.

Collins *v.* Hamilton,[248], and discussions in Ewen *v.* Turnbull's Trs., 21st Feb. 1857, 19 D. 513, and D. Buccleuch *v.* Cowan, 23d Feb. 1866, 4 Macph. 475.

[260] English cases in [232], and Barony Board *v.* Cadder Board, 26th Jan. 1883, 10 Ret. 510.

[261] Scott *v.* Scott, 28th Jan. 1881, 8 Ret. 851.

[262] See the last two cases in [259].

[263] Collins *v.* Hamilton, [248].

[264] See Young *v.* Bowie, 20th Nov. 1824, 3 S. 307 (N.E. 217).

[265] D. Buccleuch *v.* Cowan, 10th June 1873, 11 Macph. 675. No minute was lodged, and interdict was granted. See *Iid. v.* Brown & Co., 29th Oct. 1873, 1 Ret. 85, 29th June 1874, 1 Ret. 1111, as to the liability of new members of an old polluting firm.

[266] In Caledonian Ry. *v.* Baird & Co., 14th June 1876, 3 Ret. 839, a month was allowed to suggest a remedy. See the similar English practice in Att.-Gen. *v.* Colney Hatch Asylum, L.R. 4 Ch. 146. In the *Dunse* case, [267], where the verdict affirmed increase of pollution within the prescriptive period, there was also a remit to an engineer, and afterwards to a chemist as well, for the purpose of having the water restored to its condition prior to the prescriptive period. After operations for 4¼ years, and frequent applications to the Court, restoration was reported as due to irrigation.

[267] Home *v.* Dunse Police Comrs., 10th June 1882, 9 Ret. 924.

sary objections taken by the complainer.[268] On the other hand, if nuisance be denied, the defenders will not be entitled to prove abatement made after the action was brought and before the trial came on, for the same thing might be done over and over again, and the remedy eluded.[269] Where it is alleged that a river running past or through the lands of more than one proprietor is being polluted, it is competent, may be convenient, and is in the discretion of the Court, to allow all or any number of those injured to sue in the same action of declarator and interdict. Where it is alleged that the pollution is being caused by a number of persons at different places along the stream, the Court may, in its discretion, allow them to be sued in the same action of declarator and interdict, or separate actions of that kind to be conjoined, provided in each case there be such *contingentia* as precludes injustice being thereby caused, and makes the conjunction expedient. It is different in England. The same considerations would not apply to an action concluding for damages.[270]

1606, c. 13.

2. *Statutory.*—There is a long interval between 1606 and the present generation; yet there is nothing in the statute-book to prove that the enlightened policy of the earlier date, which is identical with that of the present day, was maintained, and much has been said in the foregoing paragraphs showing that the protection of rivers from pollution was afforded only under important reservations. By the Act 1606, c. 13,[271] the laying of green lint in lochs and burns was prohibited as being hurtful to fish and bestial, unprofitable for the use of man, and very noisome to all the people dwelling thereabout.

Various sanitary Acts.

The principal modern statutory provisions regarding the pollution of water, prior to the Rivers Pollution Act, are certain sections in the Water-Works Act, 1847, designed for the protection of the undertakers' works;[272] certain sections in the Cemeteries Act, 1847, against the fouling of water by matters proceeding from cemeteries;[273] and certain provisions of the Public Health Act, 1867.[274] These regulations belong more to the law of local government than to the subject of the present work. It will

[268] Ibid.

[269] Dunn *v.* Hamilton, [246] (3d exception).

[270] D. Buccleuch *v.* Cowan, *supra*, 2 Macph. 653, 4 Macph. 475, 5 Macph. 214, 1054, 11 Macph. 675, affd. 30th Nov. 1876, 4 Ret. H.L. 14. As to the rules regarding the granting of interdict, see *supra*, p. 13.

[271] Renewed 1685, c. 20; not affected by 13 Geo. I. c. 26, sect. 4 (for 'bog-house' read 'boghole'); and in observance in 1781—Kinloch *v.* Ogilvie, M. 13183.

[272] 10 & 11 Vict. c. 17, sects. 61-67.

[273] 10 & 11 Vict. c. 65, sects. 20-22.

[274] 30 & 31 Vict. c. 101, repealing earlier Acts, and itself amended in minor details by 34 & 35 Vict. c. 38, 38 & 39 Vict. c 74, 42 & 43 Vict. c. 15, and 45 Vict. c. 11.

suffice, therefore, to note below the sections of the Public Health Act which specially relate to this matter.[275] The protection of salmon has been already discussed.[276]

Rivers Pollution Prevention Act, 1876.

The Rivers Pollution Prevention Act, 1876,[277] is printed with notes in the appendix. It followed, *longo intervallo*, the recommendations of a Royal Commission (appointed in 1868 and extended to Scotland in 1869),[278] whose first report was published in 1870, and the sixth in 1874. This last report deals with surface, spring, and well water only; the others with the purification of rivers. In their fifth report, the Commissioners declared that 'in every case efficient remedies exist and are available, so 'that the present use of rivers and running waters for the purpose 'of carrying off the sewage of towns and populous places, and the 'refuse arising from industrial processes and manufactures, can be 'prevented without risk to the public health or serious injury to 'such processes or manufactures.'[279] They proposed certain standards of purity,[280] below which no drainage-waters should be dischargeable into river-channels—standards which were very similar to those recommended in their first report;[281] and some of these were introduced into Lord Shaftesbury's Bill of 1873. A bill introduced by the Government in 1875 reached the House of Commons too late to become law. The Act which passed in the following year takes no cognisance of definite standards; prohibits pollution without defining it; puts important powers into the hands of the sheriff; draws a distinction between pollution existing at the date of the Act and that which arises thereafter from sewage and manufactures; defines the spheres of action of individual complainers, of the local authority, and of the Secretary of State; and leaves the common law unaltered, except by the odd proviso that in proceedings for enforcing rights existing apart from the Act the Court 'shall take into consideration any certificate 'granted under this Act' (sect. 16). The Act deals not only with pollution but with interference with the due flow of a stream through the discharge into it of solid matter (sect. 2). This nuisance, as also pollution by solid matter, and pollution issuing from channels non-existent at the date of the Act (except in the case of mines), are absolutely prohibited. In other cases (includ-

[275] Sects. 16 b, 24, 25, 27, Part 6, sect. 94, sub-sect. 1.

[276] *Supra*, p. 267; 25 & 26 Vict. c. 97, sect. 13, amended by 31 & 32 Vict. c. 123, sect. 16.

[277] 39 & 40 Vict. c. 75, U.K., Appx. No. 14.

[278] There was an earlier Commission, appointed in 1865, which reported on the Thames, Lee, Aire, and Calder, without making any recommendations.

[279] Fifth Report, 1874, p. 1.

[280] Ibid., p. 48.

[281] P. 130.

ing all liquid discharges from mines, old or new), the use of the best practicable and available means will be an excuse. It thus appears that the Act is not a very thorough-going measure; and it is not wonderful that in practice the old common law has been found to be still in many cases the more available weapon.

III.—Servitudes and Artificial Water-courses.

Servitudes.

In the preceding paragraphs of this chapter, the natural rights to water incident to the ownership of land, and the corresponding nuisances which spring from an infringement of these rights, have been alone discussed, leaving to this place a consideration of the proper servitudes of water which are known to the law of Scotland, and of the law of artificial water-courses, which, as understood here, in England, and in America, is really a part of the doctrine of aqueduct. The general rules regulating servitudes have been already laid down. It is only necessary here to explain the scope of the particular rights of water which have attained to the dignity of servitudes proper, and to illustrate the general rules referred to by means of the cases of which water has been the subject. The servitudes are of two sorts—to take water *in alieno solo* without conducting it away by fixed apparatus, and to lead water from, through, or into the land of another by fixed apparatus. To begin with the simpler case.

Involving or not involving fixed apparatus.

Watering.

1. '*Watering* is a servitude of taking water proper to one 'ground for the use of another, whether it be for the cattle of the 'dominant ground or for other uses thereof,'[282] as for the domestic uses of the owner, or of those in his right.[283] It involves right of access for the dominant owner, with or without cattle, as the case may be; also right to clean out and repair the well whenever necessary,[284] and to prevent pollution of the well or stream,[285] but not to obstruct the flow of a stream in defence of the servitude.[286] It would probably give the dominant owner a title to object to operations beneath the servient tenement—such as mining or sinking another well—which would drain off the water,[287] unless another source of supply equally convenient were offered.

[282] St. 2.7.11; Forbes, 2.4.3; Mack. 2.9.4; Bankt. 2.7.28; Ersk. 2.9.13; B. Pr. 1011.

[283] The first is technically *s. pecoris ad aquam appulsûs;* the second, *s. aquæ haustûs.* See case of mineral well, Waddell *v.* Russell, 1781, 2 Pat. 579.

[284] Stair, Ersk., Bankt., Bell, *supra*, [282]; l. un., § 6 D. (43.22).

[285] *Supra*, pp. 426, 429, 465.

[286] Brand *v.* Charters, 3d Jan. 1842, 4 D. 345.

[287] See *supra*, p. 432.

If the supply disappears from natural causes, the right is suspended, but revives with its return,[288] at least if within the prescriptive period. There must be a dominant tenement,[289] so that though the title of a royal burgh[290] or of a feuar is sufficient, that of an 'inhabitant' merely does not avail,[291] since it has never yet been decided that there can be such institution at common law as a public well. The servitude must be exercised *civiliter*, and does not therefore prevent the servient owner from covering over the water-course in question, provided he leaves a sufficient number of convenient watering-places.[292] A clause in a feu-charter by which the proprietor had liberty 'to collect the 'water of the several springs' on adjacent lands belonging to the superior, and convey it to the lands feued, gave no right to bore for water.[293]

2. *Aqueduct.*[294]—The general term aqueduct is employed to include the enjoyment of water *in alieno solo*, for behoof of a dominant tenement, in one or all of three ways—the servitude of dam or *damhead*, or the right of resting an end or both ends of a dam-dike or weir on neighbouring lands; the servitude of *water-gang* or *aqueduct proper*, the right of leading water through neighbouring lands towards the dominant tenement; and the servitude *aquæ educendæ* (of which one example is the right of *sinks*), or the right to send down water on neighbouring land in other than the natural mode.[295] To all these rights the rules enforced in regard to positive servitudes generally, their constitution, enjoyment, and extinction, are applicable;[296] and no distinction between them can be drawn in this respect. The cases may be gathered together here in which these general rules have been applied. The servient owner, though entitled both to demand that the servitude shall be exercised in the way least inconvenient to him, consistently with full enjoyment, and to stop enhancement of his burden,[297] will be

Aqueduct, including dam, water-gang, and outfall.

Civiliter.

[288] 35 D. (8.3), B. Pr. 995.

[289] Stair, Ersk., Bankt., Bell, *supra*, [232]; 20, § 3 D. (8.3).

[290] See Falkland *v.* Carmichael, 1708, M. 10916.

[291] Mackenzie *v.* Learmonth, 17th Nov. 1849, 12 D. 132, dispels any doubt which might arise from Thorburn *v.* Charters, 4th Dec. 1841, 4 D. 169. Cf. L. Melville *v.* Denniston, 21st May 1842, 4 D. 1231; Geils *v.* Thompson, 12th Jan. 1872, 10 Macph. 327; Harrop *v.* Hirst, L.R. 4 Exch. 43; but see Smith *v.* Denny Police Comrs., 19th March 1879, 6 Ret. 858, aff. 7 Ret. H.L. 28, 5 App. Cas. 489, commented on, *supra*, p. 295.

[292] Beveridge *v.* Marshall, 18th Nov. 1808, F.C.

[293] Tennent *v.* Muter, 13th May 1831, 9 S. 586.

[294] Forbes, 2.4 3; Mack. 2.9.4; St. 2.7.8 and 12; Bankt. 2.7.28; Ersk. 2.9. 13 and 35; B. Pr. 1012; pr. I. (2.3); 9 D. (8.1); 21 D. (8.3); 17 D. (39.3); 1 D. (43.21); 6, 7, 10 C. (3.34).

[295] St. 2.7.8; 29 D. (8.3); 8, § 5, D. (8.5). In England, Wright *v.* Williams, 1 M. and W. 77.

[296] *Supra*, chap. 25.

[297] Christie *v.* Wemyss, 2d Dec. 1842,

Repair.

prevented from detracting from that enjoyment, as by making cruives in a weir.[298] The dominant and not the servient owner has the burden of repairing the works;[299] but the servient owner cannot compel the other to do so against his will, but may himself perform such operations as are necessary for the safety of his land or advantageous to it, and not hurtful to the dominant tenement.[300] A practice of repairing a lade or dam-dike may be important evidence in establishing a servitude of aqueduct by prescription.[301] This subordinate right involves right of access to the weir or lade at reasonable times when repair is required, but not at any time the dominant owner or his servants choose to visit these works for the purpose of ascertaining their condition.[302]

Access.

Constitution and extinction.

These servitudes may, like other positive and continuous servitudes, be constituted by express grant, by acquiescence,[303] by grant implied on severance,[304] or by prescription,[305] and extinguished by express or implied abandonment.[306] Though the dominant is not bound at the instance of the servient owner to keep up the aqueduct in a certain state of efficiency,[307] and is entitled to give it up altogether, he can do so only on the condition that he does not thereby prejudice the latter.[308] Neither the dominant nor the servient owner has a right to pollute artificial any more than natural water-courses;[309] in a question at least with one who has a right to the water, not merely a licence to use it or casual user.[310]

5 D. 242; cf. Lyon & Gray *v.* Glasgow Bakers, 1749, M. 12789, where there was no servitude between the parties. See the case cited in Ersk. 2.9.4, and remarked on by Lord Ivory, note, *ad loc.*, and in the text, *supra*, p. 45. Taylor *v.* St Helen's, 6 Ch. D. 264.

[298] Robertson *v.* Gibson, 1761, M. 12799.

[299] Parson of Dundee *v.* Inglish, 1687, M. 14521; Pringle *v.* D. Roxburghe, 1767, 2 Pat. 134; Gray *v.* Maxwell, 1762, M. 12800, overruling Carlile *v.* Douglas, 1731, M. 14524; Middleton *v.* Old Aberdeen, 1765, 5 B.S. 904.

[300] Gray *v.* Maxwell, [299], *supra*, Carlile *v.* Douglas, [299].

[301] Prestoun *v.* Erskine, M. 10919, 10 D. 526, note.

[302] Weir *v.* Glenny, 4th Feb. 1832, 10 S. 290, revd. 7 W.S. 244.

[303] Kincaid *v.* Stirling, 1752, M. 8403, 12796; Elch. *v.* Servitude, No. 6; see 10 D. 526; Stirling *v.* Haldane, 26th Nov. 1829, 8 S. 131.

[304] *Per* L.J.-C. Hope in L. Blantyre *v.* Dunn, 28th Jan. 1848, 10 D. 509, 522, and the Scotch and English cases, *supra*, p. 359 *et seq.*

[305] Borthwick *v.* Kirkland, 1677, Mor. Suppl. Vol., Stair, 66; Prestoun *v.* Erskine, [301]; Falkland *v.* Carmichael, 1708, M. 10916.

[306] Robison *v.* Charles, 24th May 1831, 9 S. 627.

[307] Gray *v.* Maxwell, 1762, M. 12800.

[308] Bridges *v.* L. Saltoun, 20th March 1873, 11 Macph. 588.

[309] Eyre *v.* E. Moray, 10th July 1827, 5 S. 912 (N.E. 847); Irving *v.* Leadhills Co., 11th March 1856, 18 D. 833, 837; Ewen *v.* Turnbull's Trs., 21st Feb. 1857, 19 D. 513; Mackay *v.* Greenhill, 14th July 1858, 20 D. 1251; Caledonian Ry. *v.* Baird & Co., 14th June 1876, 3 Ret. 839; Magor *v.* Chadwick, 11 A. and E. 571; Wood *v.* Waud, 3 Exch. 748; Sutcliffe *v.* Booth, 32 L.J.Q.B. 126.

[310] Whaley *v.* Laing, 3 H. and N. 675,

A curious question has recently arisen, and given rise to a difference of opinion. Of two lots of land exposed for sale, the disposition conveying A reserved to the purchaser of B 'a right 'in common with the purchaser of the lot hereby conveyed' to a dam—within A—and mill-lade, 'with right of access thereto for 'repairing the same;' and the disposition of B added the said right in the same terms. The dam was used for mills on both estates. The owner of A gave permission to the tenant of riparian lands below the dam to obtain a supply of water for cattle and domestic uses by taking advantage of the head of water in the dam by means of a hydraulic ram. Proposing to insert a feed-pipe for this purpose in the dam, he was interdicted by the owner of B. The Court was unanimously of opinion that interdict must be granted, under reservation of right to take overflow-water passing over the dam by any competent means; but the result was reached in different ways. The Lord Ordinary (Adam) and Lord Ormidale regarded the right of the owners of A and B as joint property, entitling neither to alter the subject without consent of the other. Lord Justice-Clerk Moncreiff and Lord Gifford — with, it is deemed, more reason—regarded the right of the owner of B as one of servitude,—the servitude being a *s. habendi*, entitling its holder to the preservation of a certain state of the *superficies*—of certain structures necessary for the use of the right. Lord Gifford seemed to be further of opinion that not only moveable structures —about which there could be no doubt—but also permanent fixtures, belonged to the dominant owner. But the Lord Justice-Clerk was of the opposite opinion; and there seems to be no good reason for setting up an exception to the rule of inædification, where the matter can be sufficiently explained by a well-known incorporeal right.[311]

Common property or servitude of dam?

The right to collect and transmit or to receive water by an artificial channel different from that in which it would naturally flow, demands the constitution of a servitude in one or other of the modes now indicated, except where this channel is wholly within the lands of the same heritor. Even in the latter case there may be circumstances in which proprietors of land downstream below the outfall of the artificial water-course may acquire rights in regard to the latter very similar to those which gather round a natural stream, in particular to prevent diversion to their prejudice. This is really the acquisition of a servitude right of

Artificial channels.

901; Stockport Waterworks *v.* Potter, 3 H. and C. 300; Crossley *v.* Lightowler, L.R. 2 Ch. 478. The law is not on a satisfactory footing.

[311] Scottish Highland Distillery Co. *v.* Reid, 17th July 1877, 4 Ret. 1118.

aqueduct, which imitates very closely the natural right incident to riparian ownership; and the usual mode of acquisition is by the positive prescription. The general rules already discussed in regard to that department of the law of Scotland afford a ready solution of the questions which may here arise; and they shall now be illustrated, first by cases in which prescription could not be relied on, and then by cases in which it could.

Irving v. *Leadhills Co.*

No amount of possession, however long continued, will avail if it has been precarious, at the will of the alleged servient proprietor. Thus, a ridge containing lead, lying between two burns, was pierced by two levels, the higher of which conducted the water from the part of the mine which it drained into burn S, while the lower discharged into burn G. The whole minerals belonged to the same proprietor. Tenants to whom he had let part of the field, and who had mainly so worked their mines as to send the drainage into the higher level and thence into S, were proceeding in the ordinary course of mining to work deeper, with the admitted result of sending this water into the lower level and thence to G, when a suspension and interdict was raised by the opposite riparian owner on S, on the ground that his riparian rights would be prejudicially affected, and that this might be prevented by pumping. The Court repelled the reasons of suspension.[312] Regarding, in the first place, the interference with the higher level, this was shown to be 'wholly an artificial run made 'for the drainage of the workings as then carried on,' which, although it had carried off the water for a long period of time, was not of the nature of a permanent work, either in origin or character, but dependent on the continuance of workings capable of being drained by it. The other aspect of the case—the sending of the water down to the lower level—has been noticed on an earlier page.[313] The questions, whether a capricious diversion or one *in æmulationem*,[314] by operations not in the ordinary course of mining, could have been prevented, and whether the use of the water for a mill down-stream would have given the complainer a better title,[315] were expressly reserved. In a more recent case,[316] water, part of it by natural gravitation, but most of it by being pumped, from mineral workings, had, so far as not taken with the miner's consent from the level by a millowner, been for more than forty years discharged into a natural stream and there made use

Heggie v. *Nairn.*

[312] Irving *v.* Leadhills Mining Co., 11th March 1856, 18 D. 833.

[313] *Supra*, p. 437.

[314] See *supra*, p. 319.

[315] See *supra*, p. 463, and next case.

[316] Heggie *v.* Nairn, 8th March 1882, 9 Ret. 704.

of by another millowner, as it passed his land. It was held that the latter was not entitled to object to an arrangement between the first miller and the miner, by which the former was to be allowed to increase his take of water. Some weight was attributed to the artificial character of the conduit, and if that had been all that was in the case, the question left open, whether there might have been prescriptive possession by the lower heritor, would have been of importance. But the real *ratio* was the precarious nature of the source of the bulk of the water—a defect which it was out of the power of the positive prescription to mend.

English cases.

These decisions are in entire consistency with the English law. A case very similar to *Irving* v. *Leadhills Co.* had occurred previously on the other side of the Border, and was quoted with approval by the Court.[317] Then followed a case of pollution of water flowing from a mine which had been disused for thirty years. The water was used for brewing, and the pollution arose from new workings. The presiding judge, Lord Denman, charged the jury that, 'in 'the absence of custom, artificial water-courses are not distinguished 'in law from such as are natural;'[318] but this was put right in a later case, where the law was thus stated: 'The right to artificial 'water-courses, as against the party creating them, must depend on 'the character of the water-course, whether it be of a permanent 'or temporary nature, and upon the circumstances under which it 'was created.'[319] The character of permanency or temporariness refers to the nature of the source more than the use made of the water, and depends more on the intention of the originator of the stream and his successors than on the period of its existence.[320] Thus there is an essential difference between a stream which originates in the pumping dry of a pit, and an ordinary mill-race. The law relating to artificial water-courses of the latter sort has been the subject of considerable discussion.

Prescriptive possession.

In the first Scotch case a servitude of aqueduct was clearly proved, not only by immemorial use for water-power of the stream in its artificial channel, but also by a similar use of repairing the water-course with feal, clay, divot, and other necessary materials taken from the servient tenement. The scope of the servitude was held to extend to 'such a quantity of water as was sufficient 'for serving' the works of the dominant owner.[321] In the next

[317] Arkwright *v.* Gell, 5 M. and W. 203.

[318] Magor *v.* Chadwick, 11 A. and E. 571.

[319] Wood *v.* Waud, 3 Exch. 748, 778.

[320] See L. Campbell in Beeston *v.* Weate, 5 E and B. 986, 997; Briscoe *v.* Drought, 11 Ir. C.L. 250, 263, 272.

[321] Prestoun *v.* Erskine, 1714, M. 10919, 10 D. 526, note. Borthwick *v.* Kirkland, 1677, Mor. Suppl. Vol., Stair, 66, only rules as to the nature of prescriptive possession.

case,[322] an upper proprietor was held entitled to divert a run of water which had for the prescriptive period flowed into a natural stream above the lower proprietor's mill, on the ground that the run was artificial, that the water had formerly flowed into the stream below the mill, and that it had been diverted for the upper proprietor's own purposes. The Court seems also to have been influenced by the smallness of the diverted current, and by the nimious character of the objection, as no present injury was done. These two minor grounds were regarded in the next case to be unsound or doubtful,[323] except in so far as justified by the rule that a servitude must be exercised *civiliter*;[324] and the principal *ratio* was held to be bad law. The case of *Lord Blantyre* v. *Dunn*[325] is the leading decision. An immemorial artificial stream, the original purpose of which was not ascertainable, conveyed water from one natural stream C through the defender's lands, where it served mills belonging to him, and into another natural stream D at a point where the defender was owner of one half of the *alveus* and the pursuer of the other. Further down D the pursuer owned both of the banks, and two mills which had enjoyed from time immemorial the combined current of D and the artificial stream. The defender, with a view to increase the flow of the latter, and thereby the water-power furnished to his mills on its course, had at various times, some of which fell within the prescriptive period, improved the intake from C, and stored water in reservoirs. He lastly proceeded to draw off the water from the artificial stream after it had served his mills, and to send it down to a newly-erected mill, after serving which it ran into C, and eventually into the combined streams C and D at their junction. The effect of this was to divert the artificial stream from its former outfall into D above the pursuer's mills. The action was for declarator of the pursuer's exclusive property in the water of D adjacent to and opposite his mills, including therein the portion of the water of C which had been prescriptively used by him, and that the defender had no right to make any operation on the burns or on the water-courses connected therewith to the effect of diverting the water; and there were conclusions for restoration of the artificial channel to its former condition. The Court declined to declare in terms of the leading conclusion; but found that the pursuer had a common interest with the defender in the stream D formed at the outfall into it of the artificial stream, and that the

L. Blantyre v. *Dunn.*

[322] Kincaid *v.* Stirling, 1752, M. 8403, 12796; Elch. *v.* Servitude, No. 6.

[323] 10 D. 526, 544.

[324] Ibid., 533, 546.

[325] 28th Jan. 1848, 10 D. 509.

defender was not entitled to divert any portion of the water which had formed part of D up to the date of his withdrawing the water of the artificial stream for his new mill; and decerned in the conclusions *ad facta præstanda*. The result was, that the immemorial artificial stream was held to be in all questions as to interference with its flow in the same position as a natural stream, at least so long as the defender's mills on its course were worked by means of its water. The right of the lower heritor was to receive all the water which entered the tail-race of these mills, and not merely the quantity which had flowed down for forty years, unaugmented by the defender's improvements. The opinions of the judges are very instructive, and show that this result was not reached by the same route; but after what has already been said in this chapter, the true *ratio* seems plain enough. There could be no question of a right of property in the water, either of the natural stream or of its artificial confluent; nor of a common-law right of common interest in the augmented stream, for that can only exist with reference to a natural stream. An artificial stream can only give rise to acquired rights—rights of servitude properly so called; and the mode of acquisition in the present case was the positive prescription. The possession indicated a right not merely to the amount of water sent down for forty years, but to all the water which the defender made use of for his own purposes; and the rule *tantum præscriptum quantum possessum* was therefore not transgressed.[326] The doctrine of Erskine,[327] that the defender's use, being *res meræ facultatis*, could not give rise to adverse rights, does not apply to cases of water having a permanent source. If the defender desired to stop the acquisition of a servitude, he should have taken measures to interrupt prescription. The question, what would be the result of the defender's ceasing to use the mills, received no reply. It is probable that the pursuer would in that case be entitled to maintain the artificial supply up to the quantity at least which he had enjoyed for the prescriptive period.[328] In a later case, the law laid down in *Lord Blantyre* v. *Dunn* was recognised, and it was held that 'the ground on 'which the judgment there proceeded was not limited to the 'necessity of the water for the particular purposes averred. There 'being no proof that the water was diverted from its course for 'some particular use which was to terminate, the very permitting

Expansible right.

[326] Contrast Taylor *v.* St Helens, 6 Ch. D. 264.

[327] 2.9.35.

[328] Cf. an English case of abandonment of works—Mason *v.* Shrewsbury, &c., Ry., L.R. 6 Q.B. 578, esp. L.C.-J. Cockburn's remarks, p. 587.

'it to be turned in that direction was held to imply that the 'party was looking forward to the advantage he was to derive 'from permitting it to be done.'[329] The law of England with reference to the assimilation of a permanent artificial to a natural stream seems to be identical with the law of Scotland.[330]

IV.—Fishing.[331]

White-fishing.

The rules applicable to the public right of fishing in the sea, and in rivers so far up as the sea ebbs and flows,[332] and to the regalian right of salmon-fishing,[333] have been already discussed; as has also been the law relating to the ownership of lochs.[334] It only remains to notice here the law of white-fishing in private streams, in navigable rivers above the sweep of the tide, and in private lochs. The rules are identical in the two first of these cases;[335] in the third a distinction is caused by the peculiarity that a loch cannot be said to have only two banks. Accordingly, where there is more than one riparian property on a loch, there is a joint right of fishing over the whole loch, along with an exclusive right in each of the owners to draw the nets on or make other uses of his own shore; and this joint right may be subdivided along with subdivision of the adjacent shore, but always under the check of regulation by the Court, if the right of any proprietor is materially interfered with on account of excessive partition.[336] In other respects white-fishing in private lochs is regulated by the same rules as white-fishing in private streams.

In lochs.

Part and pertinent.

In both cases the fishing—whether originally a public franchise or not[337]—is now part and pertinent of the riparian lands, requiring no special grant, nor a general clause *cum piscationibus*,

[329] Mackenzie *v.* Woddrop, 24th Jan. 1854, 16 D. 381, 384, *per* L.P. M'Neill.

[330] Nuttall *v.* Bracewell, L.R. 2 Exch. 1; Holker *v.* Porritt, L.R. 8 Exch. 107; cf. Stockport Waterworks *v.* Potter, 3 H. and C. 300. As to canals, see Staffordshire, &c., Canal *v.* Birmingham Canal, L.R. 1. H.L. 254, and cases there. See *dicta* as to the differences between natural and artificial water-courses in Rameshur Sing *v.* Koonj Pattuk, 4 App. Cas. 121.

[331] See Cr. 1.16.38, 2.8.13-15; St. 2.1.5, 2.3.69 and 76; Ersk. 2.6.6; B. Pr. 747, 1100; Stewart on Fishing, p. 246 *et seq.*

[332] *Supra*, pp. 224, 236.

[333] *Supra*, p. 257.

[334] *Supra*, p. 167.

[335] Hargreaves *v.* Diddams, L.R. 10 Q.B. 582.

[336] *Supra*, p. 171; Menzies *v.* Macdonald, 10th March 1854, 16 D. 827, affd. 2 Macq. 463.

[337] See L.J.-C. Hope in Fergusson *v.* Shirreff, 18th July 1844, 6 D. 1363, 1364, on St. 2.1.5, 2.3.69 and 76; and in L.J.-C. Miller's remarks in Carmichael *v.* Colquhoun, 1787, M. 9645, 2 Hailes, 1033.

nor depending for its retention on being exercised.[338] It may be reserved from a grant or transferred to a third party.[339] If the grantee or reservee hold no adjacent land, it is certain that he is not entitled to the privileges of the holder of a servitude; and it seems clear, both on principle and authority, that there is no known servitude of fishing in the law of Scotland.[340] It would probably make no difference in this respect whether the grant was one of 'fishings,' or of a right or privilege of fishing with rod or in some other way. The grant will stand on personal contract,[341] or may perhaps be raised into a real burden or condition,[342] or a separate estate.[343] The right of white-fishings is also conveyed in a grant of salmon-fishings to one who is not also a riparian proprietor at the locality, since the greater includes the less; but it has never been determined whether the minor right extends into the close time for salmon.[344] If the salmon-fishing and white—such as trout—fishing are in different hands, the one party must not needlessly interfere with the other; and the Court will, if necessary, regulate the possession. Thus, in one case, the pursuers were held to have a right to fish for trout with rods and hand-nets, but not with net and coble, or in any way prejudicial to the salmon-fishing;[345] and this was followed in a later case by the House of Lords.[346] In the last decision on this matter interdict was refused, at the instance of the proprietor of one bank of a river, who had also the salmon-fishings over its whole breadth, against one, not the proprietor of the other bank, fishing therefrom for trout with ordinary trout-tackle, it not being alleged that he was fishing in an illegal manner, or covertly injuring the complainer's rights. It was observed, on the bench, that the proprietor of the latter bank had an undoubted right to fish for trout therefrom, even in salmon-casts; but that it was not necessarily *jus tertii* for persons having the rights of the complainer to

Grant.

Over against salmon-fishing.

[338] Cases of lochs, *supra*, p. 167. Scot *v.* Lindsay, 1635, M. 12771; Scott *v.* L. Napier, n.r., revd. 11th June 1869, 7 Macph. H.L. 35; Stewart's Trs. *v.* Robertson, 6th Jan. 1864, 1 Ret. 334; Macdonald *v.* Farquharson, 14th Dec. 1836, 15 S. 259. In rivers—Carmichael *v.* Colquhoun, [337]; Mackenzie *v.* Rose, 26th May 1830, 8 S. 816, affd. 6 W.S. 31. See the effect of a lateral movement of a river—Foster *v.* Wright, 4 C.P.D. 438.

[339] Carmichael *v.* Colquhoun, [337].

[340] Patrick *v.* Napier, 28th March 1867, 5 Macph. 683, 693, 699, 706; cf. L. Deas's opinion, 707.

[341] Cf. case of fowling—E. Aboyne *v.* Innes, 22d June 1813, F.C., aff. 6 Pat. 444; do. *v.* Farquharson, 16th Nov. 1814, F.C.

[342] *Per* L.P. Inglis in 5 Macph. 699.

[343] *Per* L. Cockburn in Fergusson *v.* Shirreff, [337], 6 D. 1374, *sed quære.*

[344] B. Pr. 747; Stewart on Fishing, p. 250.

[345] Carmichael *v.* Colquhoun, [337], *supra.*

[346] Mackenzie *v.* Rose, [338]. Forbes *v.* E. Kintore, 31st May 1826, 4 S. 650 (N.E. 656), was remitted for proof of possession. For issues, see Macfarlane, p. 590.

inquire whether a person fishing from the opposite bank had or had not the leave of the proprietor of that bank.[347] He would be in a better position to do so than a superior or inferior heritor seeking to interdict trespass on lands not opposite his own.[348] The *medium filum* is here the boundary between opposite owners, as in salmon-fishing. The public have in no case except by express dedication, a right of fishing in private lochs or rivers; nor can they acquire any such right by possession, however long continued, even if they have access to the bank at one point or from a public road skirting the water.[349] Eels are in the same position as other white fish; but a right to fish for them by means of cruives may be acquired by possession under an infeftment in the adjacent lands with part and pertinent.[350]

Public.

Eels.

Trout, &c., Acts, 1845, 1860.

By statutes passed in 1845 and 1860, and printed in the Appendix,[351] provision was made for preventing the destruction of trout and other fresh-water fish by nets, or, in the later statute, by nets, double-rod fishing, cross-line fishing, set lines, otter-fishing, burning the water, striking the fish with any instrument, pointing and putting into the water lime or any other destructive substance with intent to destroy the fish. Penalties are imposed for taking or attempting to take fish in any of these ways, and for trespassing with intent. Provision is made for committal, summary trial, appeal, destination of the penalties, and limitation of action. There are certain discrepancies between the enactments of the two statutes, which are pointed out in the notes in the Appendix. For these and other particulars of the statutory offences reference is made to that part of the volume.

[347] L. Somerville *v.* Smith, 22d Dec. 1859, 22 D. 279, 287, 288.

[348] *Per* L. Deas in Steuart *v.* M'Barnet, 23d Nov. 1866, 5 Macph. 753, 762; see *per* L. Ardmillan, p. 765.

[349] Carmichael *v.* Colquhoun, 1787, M. 9645, corrected by 2 Hailes, 1033; Fergusson *v.* Shirreff, [337]; Montgomery *v.* Watson, 28th Feb. 1861, 23 D. 635. An ordinary agricultural lease does not pass to the tenant a right to fish in lochs or streams on or adjoining the lands let—Copland *v.* Maxwell, 20th Nov. 1868, 7 Macph. 142, aff'd. 9 Macph. H.L. 1.

[350] Braid *v.* Douglas, 1800; M. *v.* Property, App. No. 2.

[351] 8 & 9 Vict. c. 26; 23 & 24 Vict. c. 45—Appendix, Nos. 15 and 16, with notes.

CHAPTER XXX.

LIMITED ESTATE.

COMMON PROPERTY.

Limited estate —*quid?*

In the foregoing chapters of this Part, those restrictions on the freedom of ownership have been discussed which are imposed by law or may be imposed by convention on the enjoyment of the highest as of the lowest form of property—on a fee-simple estate, as on the limited estates which may be carved out of it. In the succeeding chapters attention shall be directed to those restrictions which arise from the circumstance that the possessor of heritable property holds a limited estate or interest under a limited title. It must be remembered that the limitations now to be treated of are to be regarded as additional to the restrictions already described. The limited owner is restrained by law in favour of the Crown, the public, and his neighbours, and he may, so far as his interest extends, incur conventional burdens, in the same way as the holder of the more extensive right. The limited estates which now claim notice are common property, commonty (in connection with which it will be convenient to describe the rules of division of runrig), common interest, liferent and fee, and entailed fee.

Divisions.

Common property.

'Common property is a right of ownership vested *pro indiviso* 'in two or more persons, all being equally entitled to enjoy the 'uses and services derivable from the subject; and the consent 'of all being requisite in the management, alteration, or disposal 'of the subject.'[1] It would lead too far for the scope of this treatise into questions of conveyancing, and especially into the doctrines of copartnery, trust, and succession, to explain the modes

[1] B. Pr. 1072. Among the civilians, following the phraseology of 5, § 15 D. 13.6), it is defined as 'dominium pluri-'um in eadem re pro partibus indivisis.' On the civil law relating to this chapter, see Gesterding, § 9; Pagenstecher, § 3.

Joint and *pro indiviso* ownership.

in which this right of ownership may arise. The right itself, however produced, may be one of two different kinds—a joint or conjunct right, or a right of common property simply. The distinction is thus drawn by Lord Moncreiff:[2] 'Heirs-portioners 'are not joint proprietors, but, as their name imports, part-owners 'or portioners. They hold *pro indiviso* while the subject is 'undivided. But each has a title in herself to her own part or 'share, which she may alienate or burden by her own separate 'act. The condition of two joint proprietors in the fee is very 'different; they have no separate estates, but only one estate 'vested in both, not merely *pro indiviso* in respect of possession, 'but altogether *pro indiviso* in respect of the right. The distinc-'tion is the same which the Lord Ordinary believes is expressed 'by English lawyers by the terms joint tenants and tenants-in-'common.'[3] The joint right may be of such a kind as not to admit of severance at the will of any one of the conjunct fiars, as in the case of copartners[4] and trustees;[5] or it may only infer a *jus accrescendi* or benefit of survivorship,[6] as in many cases of *mortis causâ* destination. To attempt an explanation of the peculiarities of these rights would, as has been said, lead beyond the limits of this book. The rules which follow apply to the other sort of right—common property in its simpler form—and to joint ownership only in so far as it is unaffected by these peculiarities. These rules relate to two matters—the management of the common subject while it remains common, and the severance of the community.

Management. *Melior est conditio prohibentis.*

1. *Veto.*—Except in the cases indicated above, each of the co-proprietors is entitled to dispose of his *pro indiviso* right without reference to the wishes of his fellows. This right or ideal share[7] of each in the common subject may be equal or unequal. But all have equally a share of the whole subject in its every part vested in each of them, and are entitled equally to a voice in the control or management; and no co-owner or section of the co-owners is at liberty to overbear or ignore the resistance of any other, however small the interest of the latter may be.[8] This is expressed in

[2] Cargills *v.* Muir, 21st Jan. 1837, 15 S. 408, adopted by the Court there, and by L.J.-C. Hope in M'Neight *v.* Lockhart, 30th Nov. 1843, 6 D. 128, 136.

[3] The English law regards the right of heirs-portioners (co-parceners) as intermediate between these two—2 Blackst., chap. 12; Smith on Real and Personal Property, Pt. ii. tit. vii.

[4] 2 B.C. 500, 544. Clark on Partnership, 168 *et seq.*; cf. Lawson *v.* Leith, &c., Packet Co., 26th Nov. 1850, 13 D. 175.

[5] M'Laren on Wills, 2, 176 *et seq.*

[6] 1 M'Laren, 637, 675; St. 2.3.41; Ersk. 3.8.35; B. Pr. 1882; Bell's Conveyancing, 785.

[7] 5 D. (45.3). Hence opposed to a '*pars certa*,' 25 D. (7.4).

[8] See 5, § 1 D. (39.2); Bruce *v.* Hunter, 16th Nov. 1808, F.C.

the brocard, '*In re communi melior est conditio prohibentis.*'[9] Illustrations of the absolute character of this veto will appear in contrasting common property with common interest.[10]

Title to sue.

It is further illustrated in some recent cases of title to sue, from which it appears that the objection to certain acts of management, that they are not concurred in by all the co-owners, may be taken not only by the dissident co-owner himself, but by third parties; and that these latter objectors are not set to prove active dissent on the part of one or more of the proprietors, but only passive want of consent. The obvious reason is, that they would otherwise be exposed to the risk of further litigation regarding the same matter, without being entitled to plead *res judicata*. Thus, an action of declarator of marches raised against his neighbour by one who on the face of his titles had only a personal right to a *pro indiviso* half of the land, whose boundaries he wished to have determined, was thrown out on the defence of no title to sue, although he alleged an old division of the common subject prior to the said personal title. The action was not raised for the purpose of repelling any active encroachment, but had arisen out of a change of course in a march-burn.[11] But such a defence is an objection to the instance, and should be taken *in initio litis*; at all events it will be taken too late after proof has been led. It is not *pars judicis* to point out the defence, for it is not a defence in all cases; more especially, not in cases where the action relates to encroachment or mere squatting.[12] In the case here cited it was observed: 'One object of the action 'was to challenge certain encroachments on the property held *pro* 'indiviso, and accordingly there are conclusions for interdict; and 'I am not prepared to say that one *pro indiviso* proprietor has not 'the right to vindicate the property against such encroachments. 'The other proprietor is not entitled to lie by and tie up the 'hands of his co-proprietor.'[13] 'The rule is general, but not 'universal, that *pro indiviso* proprietors must all concur in actions 'relative to the *pro indiviso* property. It could hardly be pleaded, 'I think, by a mere intruder who had no vestige of a title.'[14] These observations point back to a very special case which had been decided a few years earlier. It was an action of declarator of property in a piece of ground as bounded by the sea-shore, and for removal of certain buildings erected thereon. The pursuers

[9] Paraphrased from 28 D. (10.3). See also 8, 27 § 1 D. (8.2); 11 D. (8.5).

[10] *Infra*, chap. 33.

[11] Millar *v.* Cathcart, 16th March 1861, 23 D. 743.

[12] Lade *v.* Largs Baking Co., 6th Nov. 1863, 2 Macph. 17.

[13] Ibid. p. 20, *per* L. Curriehill.

[14] Ibid. p. 21, *per* L. Deas.

were certain of the *pro indiviso* proprietors of the ground; and two of the defenders, the erectors of these buildings, had for many years leased from them the shore ground, but had latterly refused to acknowledge the pursuers as their landlords or to remove from the subjects. The other *pro indiviso* owners, whose residence abroad was unknown, were called as defenders. The Court repelled a plea of no title to sue, on these special grounds—that this was not an ordinary action of removing; that it was an alleged case of encroachment without title; and that the only title the defenders ever had came from the pursuers' ancestor alone, not from the whole body of owners.[15] The later cases already cited show that the reason of the rule now under discussion goes deeper than the distinction between a removing and a declarator of property.[16]

Against tenants.

The allusion made in some of these cases to ordinary removings justifies a short digression beyond the limits of this work into the law of landlord and tenant, in order to illustrate fully the relation of common owners of land *inter se* and towards third parties. As all must concur in such acts of management as the granting of leases,[17] so all must concur in sequestrating [18] and in removing a common tenant.[19] Thus, where the co-owner who had been alone in use to let the subject in question, and had in fact alone let it to the tenant in the case, brought a removing, he was stopped by a plea that the other proprietor had consented to the tenant remaining.[20] The smallness of the interest of the non-concurring heritor makes no difference.[21] In a recent case the co-owners were A and B, who alone brought the action of removing, C, who was abroad, and the heirs of D. D had granted the lease in his own name, as mandatory for A and B, and as *negotiorum gestor* for C, who took no part in the management of the property. The removing was held to be invalid. If D had survived and brought the action, he would have been held to be acting in the same capacity as when granting the lease, and the non-concurrence of C would not have been a bar. On his death, the proper course would have been to get a factor appointed to

[15] Johnston *v.* Craufurd, 3d July 1855, 17 D. 1023.

[16] Cf. L. Curriehill's obs., p. 1024-5, with the obs. of the same judge at 23 D. 746.

[17] 1 Hunter, 122; Campbell *v.* Campbell, 24th Jan. 1809, F.C. (shooting-lease).

[18] Stewart *v.* Wand, 5th Feb. 1842, 4 D. 622.

[19] Ibid., St. 2.9.43; More's Notes, 258; Ersk. 2.6.53, 'because every inch of the 'ground belongs to both proprietors *pro* '*indiviso* in determinate proportions.'

[20] Murdoch *v.* Inglis, 1679, 3 B.S. 297.

[21] Bruce *v.* Hunter, 16th Nov. 1808, F.C. (1-71st part).

his children; and the factor's concurrence would have apparently cured the defect.[22] The rule appears to be relaxed in favour of diligence, when the landlords are co-adjudgers.[23]

Parties called.

Returning to the proper subject of this chapter, these further points have been decided: All the co-heirs who have not renounced must be cited in bringing an adjudication.[24]

Judicial factor.

If there be no room for division or sale, on account of the subsistence of a liferent or where the *pro indiviso* right is a liferent, and the parties cannot agree on a manager, the Court will appoint a judicial factor, so as to prevent the control of the common subject falling into or remaining in the hands of parties who have only a partial interest.[25] It is thought that where the remedy of division or sale is open, no such appointment is competent,[26] unless in very exceptional cases. Special circumstances may warrant the appointment of a factor, even after decree of division has been obtained.[27] A written offer to purchase a house belonging to a married woman and her sister *pro indiviso* was accepted by them in a writing which was not signed by the husband of the former. A reference by the purchaser to the oath of her and her husband, as to whether the husband had consented to the acceptance, was refused, on the ground that the alleged sale was a sale of the entire property, and that the oath of the husband could not affect the interest of the unmarried sister. The contract being *unum quid*, and the married sister not being bound, the other was also free, and could not be affected by reference to the oath of a third party.[28]

Reference to oath.

The co-proprietors are jointly and severally liable for the burdens which lie on the property at the time when it falls into community. Thereafter, each can burden his own *pro indiviso* share, and no more.

Incidence of burdens.

The Roman law allowed of two exceptions to the absolute veto which was common to it and the Scottish jurisprudence. One of these—in virtue of which a co-proprietor might legally be buried, against the will of his fellows, in the common subject, especially if there were no other burying-place to be had[29]—belongs to a

Necessary repairs.

[22] Grozier *v.* Downie, 13th June 1871, 9 Macph. 826. The case of Murdoch, [20], shows that the doctrine of not repudiating the author's title does not apply where the author is one of several co-owners. See obs. on this point in Grozier.

[23] A. *v.* B., 1680, M. 2448; Halliday *v.* Bruce, 1681, M. 2449; 2 Hunter, 12.

[24] Salton *v.* Salton, 1672, M. 5360.

[25] Pollock *v.* Macleod, 28th June 1839, D. 1135; Mackintosh, 1849, 11 D. 1029. See Watson *v.* Crawcour, 21st Nov. 1856, 19 D. 70; Watson, 28th Nov. 1856, 19 D. 98; Martin, 1852, 14 D. 761.

[26] See obs. in Morrison, 11th Dec. 1857, 20 D. 276.

[27] Bailey *v.* Scott, 24th May 1860, 22 D. 1105.

[28] Dickson *v.* Blair, 3d Nov. 1871, 10 Macph. 41.

[29] 41 D. (11.7); cf. 2 § 1, 43 D. *cod. tit.*; 6 § 6 D. (10.3); 9 I. (2.1).

very technical part of the Roman system. The other is based on general considerations of equity which are universally applicable. While no alteration was allowed to be made on the common subject without the concurrence of all the proprietors, and while any alteration which a dissentient owner could not have prevented, and which was not for the benefit of the common subject, had to be restored at the innovator's expense,[30] it was different if the common subject—a house, for instance—were in want of necessary repairs. For these the co-owners who had resisted or done nothing were liable, equally with those who had been active in preserving the common subject.[31] The exception did not extend to alterations or repairs which, though useful, were not necessary.[32] The rule of Scotch law seems to be similar—'that 'necessary operations in rebuilding, repairing, &c., are not to be 'stopped by the opposition of any of the joint owners.'[33]

Division.

2. *Division.*—The rule which has thus been illustrated shows clearly enough the private inconvenience and public loss which result from the ownership of land remaining common to several individuals. Accordingly, a ready remedy for these evils lies in the further rule, that none of the co-owners can be compelled to remain in the community against his will. He has an absolute right at any time to demand division of the subject, if it be divisible—or sale, followed by division of the price, if it be not. The only limitations to this right are those cases of joint right already alluded to,[34] and cases of common walls and other erections, which will be more conveniently noticed in a later chapter.[35] He cannot be called on to show cause for his demand.[36] This right is traceable back to the *actio communi dividundo* of the Roman law.[37] 'That law, and our common law following it, pro-'ceed upon the principles that no one should be bound to remain '*in communione* with another or others as proprietors of a com-

Actio communi dividundo.

[30] 37 D. (39.2); 28 D. (10.3); 26 D. (8.2).

[31] In the Roman law, if the co-proprietors were called to the common task and refused, and if they had not paid their share of the expense within four months, their share fell to their active fellow—52, § 10 D. (17.2); 4 C. (8.10). In other cases there was the remedy of an ordinary action—35, 36, 37, 41 D. (39.2).

[32] Gesterding, p. 49.

[33] B. Pr. 1075. As to common walls, see *infra*, chap. 32. The statement in B. Pr. 1077, that in case of disagreement 'either the will of the majority rules, 'or,' &c., is inconsistent with the rule of *veto*.

[34] *Supra*, p. 486.

[35] *Infra*, chap. 32.

[36] It differs thus from a cognition and sale—Frizell *v.* Thomson, 9th June 1860, 22 D. 1176.

[37] St. 1.7.15; 4.3.12; 1 B.C. 62; B. Pr. 1079. Erskine's obs., 3.3.56, are misleading. The action is not confined to moveables; and the Act 1695, c. 38, applies to commonties only, not to common property.

'mon property; that for reasons of public policy, and especially 'to insure the advantageous management of such property, any 'joint proprietor should have it in his power, against the will of 'the others, to put an end to the communion; and that there 'arises out of the situation itself an obligation to divide, or, where 'division or any other arrangement is impracticable, consistently 'with retaining the property, to adjust their respective interests 'by sale and division of the price.'[38] Since these partitions of common property are usually made without coming to the Court, and there is not, in consequence, much authority in our books on the subject, it will not be out of place to set forth briefly the rules of the Roman *actio communi dividundo*.[39]

In Roman law.

It was one of the three sorts of actions which were mixed, in the double sense of being both real and personal, and of confounding the relation of pursuer and defender.[40] It applied only to the partition of a *res singularis*, not of a succession.[41] It recognised the fact of an existing community, and had for its objects the division of the subject and the fulfilment of the personal obligations connected therewith. It could not be stopped by the non-concurrence of any of the co-owners.[42] A contract not to divide for a certain period was good; a contract never to divide was void.[43] If the subject were divisible, it was divided;[44] if indivisible, it was allotted to that one of the *socii* who should first bid its value, beginning with him who had the largest interest, and so on[45]—failing which, it was put up to public sale,[46] or disposed of otherwise so as to be best for all parties.[47] The personal prestations proper to the action were restoration of undue profits obtained by any of the co-owners;[48] indemnification to any of them who had expended money necessarily on the subject, and that according to this rule, that if it was laid out in the knowledge that the subject was common, the action lay—while if it was laid out in the belief that the subject was sole property, it did not;[49] and lastly, reparation for damage done through the fraud or fault of one of the owners, the criterion of diligence being that amount of care which the said owner was in use to exercise in

[38] *Per* L. Rutherfurd in Brock *v.* Hamilton, 25th Nov. 1851, 19 D. 701, note.

[39] See Glück's Commentar., xi. 119; D. (10.3); C. (3.37); Pothier, Société, p. 125 *et seq.*

[40] 20 I. (4.6); 37, § 1 D. (44.7); 10 D. (10.1).

[41] 4 pr. D. h.t. The latter had an *actio familiæ herciscundæ* applicable to it; as to which, see Cred. of L. Rosebery *v.* Primrose, 1744, Elchies, Heirs-portioners, No. 3; D. (10.2); C. (3.36 and 38).

[42] 8 pr. D. h.t.

[43] 14, § 2 D. h.t.

[44] 1 C. h.t.

[45] 34, § 2 C. (8.54).

[46] 3 C. h.t.

[47] 21 D. h.t.

[48] 4 I. (3.26); 5 C. (8.10).

[49] 14, 29 D. h.t.

his own affairs.[50] In so far as these rules are applicable to the mode of sale, they are not binding in Scotch law; and the limitation of indemnification for outlay to the case of one consciously expending on a common subject results from a technical division of actions in the civil law: but the inherent liability of a common subject to division, and in certain cases to sale, depends on no peculiarity of process.[51]

Brieve of division.

The old mode of division—still competent—was by brieve of division, not retourable to Chancery, but pleadable and subject to advocation or appeal even after a verdict.[52] This remedy was open to all sorts of co-owners, as adjudgers, heir-portioners, and joint disponees. The brieve was directed from Chancery to the sheriff, parties interested being called specially, and not merely by edictal citation. The case was sent to a jury, which fixed the boundaries of the allotments; lots were cast; and the partition so arrived at was recorded in the sheriff's decree. It is obvious that this antique procedure was not well adapted for the partition of an estate which might be loaded with debt or might be ill suited for division. It might, moreover, be converted into an ordinary action by advocation or appeal. Accordingly, the old form is practically superseded by an action of declarator and division (and sale, according to circumstances).[53] The action, since it does not involve any exercise of the *nobile officium*, is not an Inner House action.[54] It may now be brought in the Sheriff Court, where the value of the subject in dispute does not exceed the sum of £50 by the year or £1000 value.[55] The Court appoints a man of skill to examine and report on the divisibility of the common subjects, if that be disputed, and, in the event of their being capable of division, to report the scheme of division which he would suggest; and in the event of his being of opinion against a division, to settle the upset price, and any conditions of sale which may appear to him expedient.[56] If the parties cannot agree, it may be necessary to enter into inquiries as to the amount of burdens, and the mode in which they should be allocated;[57] as to indemnification for outlay by one of the co-pro-

Declarator and division (and sale).

[50] L. ult. I. (3.26); 72 D. (17.2).

[51] See obs. of L. Rutherfurd, *loc. cit.* [38].

[52] St. 4.3.12 and 15; Bankt. 1.8.38; Brock *v.* Hamilton, [38], 19 D. 702; cf. L.J.-C. Hope and Lord Moncreiff in M'Neight *v.* Lockhart, 30th Nov. 1843, 6 D. 128, 139, 140, the last case of a brieve of division. See also Cathcart *v.* Rocheid, 1772, M. 7663, 5 B.S. 399; B. Pr. 1081; 1 B.C. 62; Shand's Practice, 605.

[53] Jur. Styles, 3, 145-7; Shand's Practice, p. 604.

[54] Anderson *v.* Anderson, 11th March 1857, 19 D. 700; M'Bride *v.* Paul, 19th Feb. 1862, 24 D. 546.

[55] 40 & 41 Vict. c. 50, sect. 8 (3).

[56] Thom *v.* Macbeth, *infra*, [66].

[57] Dundas *v.* Biggar, 1670, M. 5359.

prietors, having regard to the nature of his authority, and to the rules already laid down with reference to meliorations made *in bonâ fide;*[58] and as to reparation for loss caused through the fraud or negligence of any of the parties.[59] If there be more than one subject to be divided, it seems to have been held, under the old procedure, that each of them should be partitioned, or at least that only such subjects as were situated in the same county should be massed together;[60] but the modern form of process is susceptible of greater freedom.[61]

Conveyance following.

After decree of division, the severance of the common subject was formerly completed by means of mutual conveyances of the several allotments. An alternative and simpler form is now authorised by the Conveyancing Act of 1874,[62]—viz., by making use of the decree—whether pronounced by a Court, or by arbiter, or by an oversman—as a conveyance; and recording an extract thereof in the register of sasines, or, as the case may be, treating it as an assignation of a personal right. The title-deeds, both before and after division, are held by the co-proprietor who has the largest interest, under obligation to make them forthcoming to any of the rest having occasion for them.[63] If no one has pre-eminence over the rest, they ought to be deposited in neutral custody.[64] Modern titles recorded for preservation are now all retained in the register;[65] and extracts will, when necessary, be made at the common expense.

Indivisibility.

The character of indivisibility, which must be proved in order to force on a sale, instead of division of the subject, against the will of any dissenting co-owner, must be taken in a reasonable sense. 'Physically, almost everything—every subject, whether 'heritable or moveable—is divisible, if all considerations of expense 'of division, and of deterioration or possible destruction of the 'value of the subject are to be disregarded.'[66] The rule is that, in order to force on a sale, the estate must be shown to be incapable of division with due regard to the rights and interests of

[58] *Supra*, p. 78 *et seq.*

[59] *Supra*, p. 491, on the Roman rules.

[60] Carruber *v.* Boyd, 1669, M. 5357; Cathcart *v.* Rocheid, 1772, M. 7663, 5 B.S. 399.

[61] Cases of division among heirs-portioners are expressly, and all others may be taken to be by the general words of the section, included among the extraordinary actions of A.S. 11th July 1828, s. 103.

[62] 37 & 38 Vict. c. 94, sect. 35.

[63] The eldest heir-portioner, though she may come to have a less share than another—Denholms *v.* Denholms, 1638, M. 2447. See A. *v.* B., 1680, M. 2448; Cunningham *v.* Cardross, 1680, M. 2449, 3 B.S. 389; Cowie *v.* Cowies, 1705, M. 2453, 5362; Stevenson *v.* Pitcairn, 1711, M. 2456.

[64] Bell, Pr. 1085.

[65] 31 & 32 Vict. c. 34.

[66] *Per* L. Gifford in Thom *v.* Macbeth, 26th Nov. 1875, 3 Ret. 161, 165.

the parties.[67] Thus, it will not be enough for one who desires the estate to remain in communion to say that he will draw a larger income from the subjects as they now are than the interest of any price that is likely to be realised, especially where the rental has fallen, and is falling, and where one of the co-proprietors has become bankrupt.[68] It is impossible or impracticable, in this sense of the words, to divide an inn with its offices and yard into four parts,[69] or a brew-house and its accessories into two.[70] The same was held where a reporter stated that the estate was incapable of division in the proportion required without great depreciation of value, and that as portions of the estate had a present and prospective feuing value, it would (looking at the value to be put upon these as more or less speculative) be next to impossible to make a fair and just allocation, and that the estate would sell readily as a whole and fetch a higher price if exposed in one lot than it would fetch were it put up for sale in several lots.[71] The sale must be by public roup, and power may be reserved in the articles to any one interested to bid.[72] It is quite competent for one who is a co-proprietor *qua* trustee to sue an action of division and sale though there be no power to sell in the trust-deed; for this is not an exercise of powers of sale, but an act of ordinary administration.[73] Decree is only granted after full inquiry, though no contradictor appears.[74]

Sale.

Præcipuum. In the case of heirs-portioners succeeding *ab intestato*, or under a destination to heirs whatsoever,[75] but not in the case of sisters *nominatim* called as joint disponees,[76] there is the peculiarity—due to feudalism—that the eldest has the benefit of a *præcipuum*, both during the community and at division. Pending the community, she alone has a right to the family title, unless otherwise limited;[77] and, before the introduction of an implied entry,[78] vassals might get themselves entered either by her alone or by the whole heirs-portioners jointly.[79] In a division she is entitled

[67] Ibid.

[68] Brock *v.* Hamilton, [38]. See Anderson *v.* Anderson, [54].

[69] Bryden *v.* Gibson, 4th Feb. 1837, 15 S. 486.

[70] Milligan *v.* Barnhill, 1782, M. 2486.

[71] Thom *v.* Macbeth, [66].

[72] Ibid. There was also a question here started, as to the effect of a trustee, who had also an individual interest, bidding at the sale.

[73] Craig *v.* Fleming, 14th March 1863, 1 Macph. 612.

[74] Bryden *v.* Gibson,[69]; Frizell *v.* Thomson, 9th June 1860, 22 D. 1176 (party abroad and a minor).

[75] Wight *v.* Inglis, 1798, M. Heir-portioner, Appx. 1; Maclauchlane *v.* Maclauchlane, 1807, ibid., 3; Dinniston *v.* Welsh, 17th June 1830, 8 S. 935.

[76] Cathcart *v.* Rocheid, 1765, M. 5375, 5 B.S. 465.

[77] Ersk. 3.8.13; B. Pr. 1659.

[78] 37 & 38 Vict. c. 94, sect. 4.

[79] Ly. Luss *v.* Inglis, 1678, M. 15028; Fenton *v.* Dirleton, 1523, M. 5357.

to the subjects which are indivisible. Thus she takes, without indemnifying the others, and over and above her share of the divisible subjects, the mansion-house of a landed estate, with the offices, garden, orchard, or other ground occupied along with it, and not let separately from it;[80] and that though the mansion-house be actually occupied by more than one family, and is alleged to be disproportionate to the land, either in the way of being too large or too small.[81] Though a practice of occasionally letting the mansion-house will not destroy the *præcipuum*, the conversion of it into a farmhouse let with a farm for agricultural purposes will have that result.[82] A town-house and a country villa do not fall to the eldest *jure præcipui*, but must be included in the general division or sale.[83] In the division the eldest heir-portioner has a right to that portion of the land which lies next the mansion-house; the others cast lots for their shares.[84] The second has no claim to be preferred to a second manor-house or residence which may happen to stand on the estate.[85] There is no *præcipuum* in regard to feu-duties, since they give a fixed yearly return.[86] If there are several superiorities, and these can be allocated so as to give each of the heirs-portioners an equal share of the feu-duties, that will be done. If not, the eldest takes her choice, and so on till the superiorities are exhausted, and then those who get none or only an inadequate share are entitled to recompense.[87] Where there is a blench superiority, whose whole value consists in the casualties, there is no fund out of which, keeping the subject intact, recompense can be drawn; the superiority is indivisible, and goes to the eldest *jure præcipui*, like the mansion-house, without compensation to the others.[88] For the same reason, if the eldest portioner obtains as part of her share a superiority with a feu-holding, she is not obliged to account for the value of the casualties in computing the recompense due to the others, except perhaps for the value of such as had been made liquid before the division.[89]

[80] St. 3.5.11; Ersk. 3.8.13; Cowie *v.* Cowies, [63]; Peadie *v.* Peadies, 1743, M. 5367, 5 B.S. 728; Chalmers *v.* Chalmers, 1750, M. 5369, note; Elchies, Heirs-portioners, No. 4; Ireland *v.* Govan, 1765, M. 5373; Dinniston *v.* Welsh, [75].

[81] Forbes *v.* Forbes, 1774, M. 5378; Cowie *v.* Cowies, [63]; Hawthorn *v.* Gordon, 1696, M. 5361.

[82] Halbert *v.* Bogie, 28th May 1857, 19 D. 762.

[83] Wallace *v.* Wallace, 1758, M. 5371; Thomson *v.* Angus, 1786, Hume, 765; Smith *v.* Wilson, 1792, M. 5381; Rae *v.* Rae, 1809, Hume, 764.

[84] Ly. Houston *v.* Dunbar, 1744, M. 5366, 5 B.S. 727; Inglis *v.* Inglis, 1781, Hume, 762.

[85] Inglis *v.* Inglis, [84].

[86] Cr. 2.14.7; St. 3.5.11; Ersk. 3.8.13; Rae *v.* Rae, [83].

[87] Ly. Houston *v.* Dunbar, [84]; Chalmers *v.* Chalmers, [80], explained in 6 D. 138, 143.

[88] M'Neight *v.* Lockhart, 30th Nov. 1843, 6 D. 128.

[89] Ibid. pp. 139, 144.

CHAPTER XXXI.

LIMITED ESTATE—*continued.*

COMMONTY.

History of land-ownership.

IN a work which is intended to explain the present state of the law, it would be out of place to turn aside into that field of speculation which, more than any other at the present day, has engaged and repaid the painstaking labour of the historical jurist. The nature of primitive land-ownership, and the history of its development; the interaction of national habits of life, municipal and local institutions, and the tenure of land; the outbursts of agrarian revolt, Jacquerie, peasants' wars, and enclosure riots; the fate of *heredium* and *ager publicus*, bocland and folkland, infield and outfield, Hof and Mark, the Russian *mir* and the Swiss *allmend*, and even the history of the village community in India, Java, and Slavonia, are of the highest interest not only to the historical student, but also to the practical politician.[1] The Scotch lawyer, too, will do well to bear in mind, though the fact will scarcely be forced on his attention in practice, that the history of land-ownership in Scotland seems to have passed through the same phases as are to be observed in the development of all nations whose property law has been studied historically. These phases in our own history

Nomadic.

may be shortly described thus: In prehistoric times there prob-

[1] The most accessible authorities are Maine's Ancient Law, ch. viii.; Maine's Village Communities, 1871; and Early Institutions, 1875, *passim;* E. de Laveleye's Primitive Property, 2d ed., translated by G. R. L. Marriott, 1878, *passim;* Wallace's Russia, i. cc. 8 and 9; Cobden Club Publications for 1870; Campbell's Modern India; Von Maurer's Mark-verfassung; Cliffe Leslie on Land Systems, 1871; Nasse's Agricultural Communities in England, translated for the Cobden Club, and his article in the Contemporary Review, May 1872; Skene's Note on Tribe Communities in Appx. to Fordun's Chronicle, vol. ii.; Sigerson's Land Tenures in Ireland; Marshall's Treatises on Agriculture; Hearn's Aryan Household; De Coulange, La Cité Antique; Peschel, Völkerkunde; Phear's Aryan Village; Skene's Celtic Scotland; Seebohm's English Village Community. Aristotle had observed these archaic customs, Politics, ii. 2.

ably was a nomad period of which no trace remains, when society did not exist, and there was no permanent appropriation of the soil. Then came the era when the only landholder was a community massed in a village by the chance of war, the necessity of mutual protection, and the scarcity of food caused by increase of population. There was no such right as that of individual ownership in any part of the soil. In the break-up of this system, first the house, then the adjoining infield acre, after an interval in which periodical repartition obtained,[2] fell under absolute ownership, the rest remaining common, subject to the tillage of part at regular intervals by the families composing the community, whose lots in these *hill parts* were fixed by *cut and cavel*.[3] In the third stage, out of the chance aggregate of the village arose the family community, the *gens* or clan, with the tradition of descent from a common ancestor, under a head, whose rule was in all known countries limited by well-defined custom. The land was still the common property of all who by birth or adoption belonged to the clan—or rather, the clan as an ideal *persona* was the landholder, and the chief merely the principal manager of the common good. The last stage arrived with the feudal system. By it the king was regarded as the owner of all the land within his dominions. The greater part he granted out to his retainers as reward for services; and no other title was allowed in law except such as flowed directly or mediately from him. First, in the Lowlands, the smaller townships, partly by stress of law, chiefly for aid in troublous times, were forced into dependence on the lords of castles, mail, and men-at-arms. The process of disintegration followed more slowly in the larger burghs, and was due mainly to peculation or mismanagement. In the Highlands, the feudal system was firmly established only in comparatively recent times, and in a way which gives some indication of the hardships through which their southern neighbours must have passed before surrendering rights which, however alien to modern notions of economy, had come down to them from time immemorial.

Village communities.

Families.

Feudal system.

It thus appears that the view of the origin of commonty which

[2] The origin of rundale (roinn-diol), *infra*, p. 505.

[3] The lamentable dilapidation of burgh property which went on into the present century has left only one case of this archaic form of ownership, masked under a Royal Charter—in the Royal Burgh of Lauder. See Report of the Municipal Corporations Commission of 1835, vol. ii. p. 195; Return of Boroughs, &c., possessing Common Land, Appx. I. p. 132, House of Commons, 10th Aug. 1870; Village Communities, *supra*, [1], p. 95; Laveleye, *supra*, [1], p. 114. As to Orkney and Shetland, see Notes to the Pirate; and Scott's Life, iii. 145.

Origin of commonty.

prevailed before the results of modern historical research were published, is exactly the reverse of the truth. It is thus stated by Mr Bell:[4] 'This peculiar right of usufruct in a common arose 'at first from grants, made by feudal lords and proprietors to their 'feuars and tenants, of rights to pasture their cattle on the graz- 'ing grounds or wastes of the barony. Sometimes also by vicin- 'age and custom, cottagers were suffered to establish a right of 'common over these wastes and pasture-lands. Neighbouring 'towns, too, and hamlets, permitted reciprocal encroachments on 'their pasture-ground, and so established commonty of pasture by 'mutual agreement and forbearance.' All history shows that the tendency is the very opposite—for the powerful to encroach on the ancient rights of the weak. There is no trace in any part of the world of the customs of such inter-commoning beyond the bounds of the *mark*, as seems to be indicated in the last sentence; and the careful verification of boundaries[5] which survives in the pageantry of 'perambulating the marches,' tells strongly the other way. With reference to the rest of the passage, it may be safely stated that in most, if not in all, of the conveyances of commonty to be found in ancient charters or spelt out of them by immemorial possession, there is to be found not a new grant, but the recognition of a state of possession already subsisting beyond the memory of man, and too firmly rooted to be easily dislodged. Of the right of commonty in its modern form, engrafted so anomalously on the feudal system, it may be permitted to treat with all possible brevity; since the process of division instituted at the end of the seventeenth century, has gone so far as to leave few traces of commonable land in any part of the country.

Quid?

Commonty may be described as a species of common property, differing, however, from the right described in last chapter in three ways—in the mode or origin of its constitution, in the manner of its enjoyment, and in the rules for its division. It is distinguished[6] from the Roman usufruct, as being not personal but an accessory of the private estate of the commoners;[7] from the Scotch liferent, as being perpetual and without any reversionary right of fee in another; from servitude—and especially from the servitude of pasturage[8]—as being a right of common property, which cannot be prescribed for beyond the express boundaries of a grant,[9] and

[4] B. Pr. 1088.

[5] *Supra*, p. 94.

[6] B. Pr. 1088, which explains the leading statement of 1087.

[7] It seems not to be capable of standing alone—L. Blantyre *v.* Jaffray, 13th Dec. 1856, 19 D. 167.

[8] *Supra*, p. 376.

[9] Hepburn *v.* D. Gordon, 25th Nov. 1823, 2 S. 525 (N.E. 459); Gordon *v.* Grant, 12th Nov. 1850, 13 D. 1; cf. Beaumont *v.* L. Glenlyon, 11th July 1843,

which gives a right to demand and an obligation to suffer the statutory division.[10]

Commonty and pasturage.

In regard to the constitution of commonty, as adopted into the feudal system, it is enough to say that the main difficulty is to distinguish between a grant thereof and a grant of the servitude of pasturage.[11] Right of commonty is indicated by an express infeftment 'in a proportional part of the muir of R,'[12] by a conveyance *cum communio, cum communiis*, or 'with commonty,' whether the locality be expressed or not.[13] If not expressed the grant may be explained by possession. The addition of the words 'and common pasturage in the lands of C,' does not appear to affect the scope of the grant.[14] A simple grant of land with or without a clause of parts and pertinents may be explained by prescriptive possession to carry a right of commonty as accessory to the private estate,[15] though the moor is expressly included in the titles of another party, and though an old decree has found the right to be merely one of servitude; since prescriptive possession might be sufficient to establish the higher right of ownership, by pointing clearly to that and not to the lower right.[16] On the other hand, a mere servitude of pasturage is conveyed, though the possession be exactly similar, by such phrases as the following—*cum pascuis et pasturis*,[17] 'with the liberty and privi-lege of the commonty of B,'[18] 'with common pasturage used and wont,'[19] 'with pasturage of cattle and privilege of commonty.'[20] The servitude may also be acquired on a bare grant of land with or without parts and pertinents, by prescriptive possession,[21] more especially in those cases where prescription of commonty would be impossible.[22] A grant of sheilings,[23] like all ambigu-

5 D. 1337, and authorities there. Watt *v.* Paterson, 1813, 2 Dow 25, is in this respect inexplicable, or else bad law. See 13 D. 6.

[10] *Infra*, p. 501.

[11] *Supra*, p. 376; and see terms of a charter which were held to purport a right of common property, not a mere incorporeal right of servitude, Baird & Co. *v.* Kilsyth Feuars, 1st Nov. 1878, 6 Ret. 116.

[12] Johnston *v.* D. Hamilton, 1768, M. 2481, and in note to 16 F.C. 688.

[13] Haining *v.* Selkirk, 1668, M. 2459; Bain *v.* Mags. of Wick, 4th March 1834, 12 S. 522.

[14] Gordon *v.* Grant, *supra*, [9], 13 D. 32, *per* L. Moncreiff.

[15] E. Wigtown *v.* Feuars of Biggar, 1739, M. 2287, 2468, 5 B.S. 209, 662, Elchies, Commonty, No. 2; Johnston *v.* D. Hamilton, [12]; Carnegie *v.* MacTier, 18th July 1844, 6 D. 1381; Gordon *v.* Grant, [9], 13 D. 7.

[16] E. Fife's Trs. *v.* Cuming, 16th Jan. 1830, 8 S. 326; 25th Jan. 1831, 9 S. 336.

[17] Haining *v.* Selkirk, [13].

[18] E. Wigtown *v.* Feuars of Biggar, [15].

[19] Ibid., H.M. Adv. *v.* Dunfermline, 1686, M. 10776; Sinclair *v.* Douglas, 1695, 4 B.S. 244; Nicolson *v.* Bightie, 1662, M. 11291.

[20] Johnston *v.* D. Hamilton, [12].

[21] Grant *v.* Grant, 1767, M. 10876; Meldrum, 1716, M. 12152.

[22] Beaumont *v.* L. Glenlyon, [9], *supra*.

[23] Rattray *v.* Graham, 1724, M. 2463, and other cases, *supra*, p. 175.

ous grants,[24] may be explained by other words in the deed or by possession; and, if neither party is able to qualify thereby a right plainly superior to that of the other, commonty is inferred.[25]

Veto. In regard to the enjoyment of the commonty, the same rule of *veto* against innovation applies as holds in respect to other common ownership. Thus, 'the Court were of opinion that, in the case of 'a commonty, the general rule was *melior est conditio prohibentis;* 'that from this rule an exception must be admitted of such uses 'as were ordinary; that perhaps, as an ordinary use one joint 'proprietor may be entitled, without the consent of the other, to 'shoot on the commonty himself, or even gratuitously to grant 'permission to his friends to do so; but that a grant of liberty to 'shoot, made by lease for a rent in the way here done, was not at 'all an ordinary use of the commonty, and therefore it was not 'effectual without express consent of both the joint proprietors.'[26] Similarly the consent of all is required for a grant to a stranger of right to cut peat.[27] 'Whatever is done by one proprietor of a 'common property, without consent of his co-proprietors, is an 'encroachment on the common property, and can be executed 'only by sufferance, and under the known condition that he may 'be deprived of the right of it. One of several proprietors of a 'moor on which there are grouse, is not entitled to burn it, though 'it may thus be rendered valuable sheep-pasture; nor is one of the 'proprietors of a snipe-bog entitled to drain it that it may be ren-'dered arable, though he may imagine that to be an improvement.'[28]

Remedies. The natural and usual enjoyment of a common is by pasturing the sheep or cattle which are wintered on the commoner's private property. This is a mode of using the common which can be so regulated as to avoid dilapidation of the subject and private appropriation however transient. Disputes as to the amount of stock which each of the commoners is entitled to send on the common, are settled in the same process and under the same rules as in cases of the servitude of pasturage.[29] The higher right carries also the privilege of taking fuel, feal, and divot,[30] and entitles any commoner to drive off deer.[31] The common right

Minerals. extends below the surface to the minerals there; and it is not

[24] Graham *v.* Rennie, 27th Feb. 1822, 1 S. 356 (N.E. 333).

[25] Gibson *v.* Oswald, 1668, M. 12739.

[26] Campbell *v.* Campbell, 24th Jan. 1809, F.C.

[27] Wilson *v.* Buchanan, 1800, Hume, 120.

[28] Innes *v.* Hepburn, 18th May 1859, 21 D. 832, *per* L.J.-C. Inglis.

[29] *Supra*, p. 377. See a faulty remedy for overstocking—Scott *v.* M'Dowall, 29th May 1857, 19 D. 769.

[30] *Supra*, p. 378.

[31] Robertson *v.* D. Athole, 22d May 1810, F.C., aff'd. 6 Pat. 72.

enough for one of the commoners to prove that he alone has been in use to work them, in order to set up an exclusive right.[32] For that an express and exclusive Crown grant is necessary.[33] Where on part of the common there exists an indivisible subject, such as a valuable stone-quarry, it will not be divided in the process now to be explained.[34] It is usually let out, and the rent distributed among the commoners.

No machinery existed at common law[35] capable of extricating the complicated rights and interests of the commoners and servitude-men; yet it was plainly politic that some mode should be devised whereby the inconveniences of a common right might be exchanged for the freedom of several ownership. Accordingly, the statute 1695, c. 38, was passed, 'concerning the dividing of 'commonties.' It ordained 'that all commonties, excepting the 'commonties belonging to the king and royal burrows, that is, all 'that belongs to his Majesty in property[36] or royal burrows in 'burgage,[37] may be divided at the instance of any having interest' by certain proceedings before the Court of Session. Mosses were to be included in the division, unless 'it be instructed to the 'said lords that the said mosses cannot be conveniently divided.'[38] The Act further declared 'that the interest of the heritors having right in the said commonties shall be estimate according to 'the valuation of their respective lands or properties, and which 'divisions are appointed to be made of that part of the commonty 'that is next adjacent to each heritor's property.' The process so authorised is an Inner House action,[39] and is regulated by an Act of Sederunt passed in 1852, which was rendered necessary by the confusion into which the procedure had then fallen.[40] The action is now competent in the Sheriff Court where the value of the subject

Division, 1695, c. 38.

[32] Johnston *v.* D. Hamilton, [12].

[33] Spence *v.* E. Zetland, 25th Jan. 1839, 1 D. 415; cf. Henderson *v.* Makgill, 1782, M. 2487, and Baird & Co. *v.* Kilsyth Feuars.[11]

[34] Bonshaw's Trs. *v.* D. Queensberry, 1764, M. 2481; Shand's Practice, p. 858, note.

[35] Cr. 2.8.35; Bankt. 2.7.32; Ersk. 3.3.56; B. Pr. 1087; More's Notes to Stair, p. 52.

[36] Sandilands *v.* Mags. of Falkland, 19th Jan. 1809, F.C. Cf. Rattray *v.* Graham, 1724, M. 2463. As to Caithness and Orkney, relaxed by 10 Geo. IV. c. 132.

[37] Hunter *v.* Mailler, 22d Feb. 1854, 16 D. 641. The exception does not apply to a commonty conveyed to feuars in a burgh of barony, though used as a public resort —White *v.* Calder, 13th Feb. 1812, in note to Henderson *v.* Mags. of Abernethy, 29th June 1815, F.C.

[38] If excluded from a former division, mosses will not be afterwards divided unless they have in the meanwhile ceased to be used as such—for peat-cutting, &c.—Johnson *v.* Johnston, 29th Nov. 1831, 10 S. 70. See L. Blantyre *v.* Jaffray, 13th Dec. 1856, 19 D. 167.

[39] Shand's Practice, p. 845; 1 Mackay, 361.

[40] A.S., 18th June 1852. See Gordon *v.* Grant, [9], 13 D. 2, 35.

in dispute does not exceed the sum of £50 by the year or £1000 value.[41] The action, wherever brought, is only applicable where a commonty exists, and therefore not where there is only one proprietor, and all the others interested are holders of servitudes;[42] but this defect can be cured, so far as it is a bar to the proprietor, by his conveying a share in the commonty to one of the servitude-holders, even *pendente lite*.[43] The servitude-holder has in no case a title to sue for division.[44] A decision that an action of division of commonty could not be sued by one who was only a trustee with the ordinary powers of management[45] seems erroneous.[46] A mere tenant can neither sue nor be called as party, nor be made liable for any of the expenses of the suit.[47]

Rules of division.

The rules of division differ, according as the partition takes place between the commoners themselves, that being the proper object of the statute, or between a commoner and servitude-men holding their right from him, that being an ordinary incident of the division of commonties. 1. The statutory criterion as between commoners is the valued rent of their respective private estates to which the commonty stands in the relation of an accessory. The rule is absolute, and holds even though the commoners have possessed for a long period of time in proportions determined by a conventional *souming*,[48] and though parts of the principal lands have a right of commonty attached to them and enjoyed in connection with them in another muir.[49] It seems to be settled that if the principal lands form a barony, the value of the whole of them, so far as not feued out with right of commonty, must be taken into account, and not merely that part which had in practice shared in the benefits of the common.[50] It is no objection to the rule of division according to the valued rent that the valuation embraces, along with other subjects, a mill and its mul-

Among the commoners.

[41] 40 & 41 Vict. c. 50, sect. 8 (3).

[42] Stewart *v.* Feuars of Tillicoultry, 1739, M. 2469; cf. Stewart *v.* Mackenzie, 1748, M. 2476, 14541; Laurie *v.* D. Hamilton, 1771, M. Appx. *v.* Commonty, No. 2; Gall *v.* Greenhill, 31st May 1810, F.C.; Gordon *v.* Grant, 12th Nov. 1850, 13 D. 1.

[43] Maitland *v.* Lambert, 1769, M. 2483.

[44] Laurie, Gall, Gordon, [42], in which Polwarth *v.* E. Home, 1724, M. 2462, affd. 1 Pat. 186, seems to have been overruled. It was not regarded as decisive three years after the affirmance, 1739, 5 B.S. 663.

[45] Graham's Tr. *v.* Boswell, 2d Dec. 1830, 9 S. 121.

[46] Craig *v.* Fleming, 14th March 1863, 1 Macph. 612 (a division and sale at common law).

[47] Drummond *v.* Swanston, 1782, M. 2487.

[48] D. Douglas *v.* Baillie, 1740, M. 2474.

[49] Sharp *v.* Carlile, 1748, M. 2478.

[50] Balfour *v.* Douglas, 1757, M. 2480, overruling E. Wigtown *v.* Feuars of Biggar, 1739, M. 2468; Dalrymple *v.* Hay, 1739, M. 2469; Moncrieff *v.* Balfour, 1752, M. 2479.

tures, which can make no use of the common.[51] If a *cumulo* valuation includes subjects which have fallen into several different hands, application must be made to the Commissioners of Supply for an allocation.[52] The only exceptions[53] to the rule of division by valued rent are to be found in the case of mosses, which, being separately treated by the statute, have by practice been exempted from its rule of partition, and are divided according to frontage;[54] and in the case of commonties in Shetland, where, in the absence of the valued rent, the rule of division is the number of merks-land belonging to the commoners respectively, even though no cess is paid.[55]

Superiors.

The right of the commoner arises from his several property in the principal lands and common property in the muir, not from any right of superiority. The feu-duty, instead of giving the superior a right to share, must be deducted from his valuation, and be imputed in determining the gross annual value of his vassal's feu.[56] There are three supposable cases. Either the lands are not feued out, but are held by the original Crown vassal and possessed by himself or his tenants, in which case he shares according to the foregoing rules. Or he has feued out conform to titles which grant to the vassals only a right of servitude, in which case the superior is held to retain the property *quoad hoc*, and shares accordingly. Or lastly, he has feued with right of commonty, and thus loses the share of the common effeiring to the lands so granted.[57] It is no objection to a claim to share in a division that the commoner had formerly claimed the exclusive ownership of the muir.[58]

Improvements.

Each commoner will receive the share nearest to his own property. According to the general rule[59] in cases of common property, he will be indemnified for necessary expenditure in the maintenance of the subject, though it is difficult to discover what outlay could come within that category with respect to a com-

[51] Small *v.* Fergusson, 1804, M. Commonty, Appx. No. 3.

[52] D. Queensberry *v.* Johnston, 1771, M. Commonty, Appx. No. 1. The rule of allocation is then the immemorial use of paying cess, *supra*, p. 192.

[53] Tennant *v.* Murray, 1738, M. 2466, was special.

[54] Campbell *v.* L. Douglas, 1804, M. Commonty, Appx. 4, and cases there noticed.

[55] Bruce *v.* Grierson, 11th Dec. 1823, 2 S. 573 (N.E. 494); Spence *v.* E. Zetland, 25th Jan. 1839, 1 D. 415.

[56] L. Adv. *v.* Balfour, 2d Feb. 1838, 16 S. 420.

[57] D. Buccleuch *v.* Erskine, 16th June 1812, F.C. (explained by L. Moncreiff in the last case); Johnston *v.* D. Hamilton, 1768, M. 2481, and note to D. Buccleuch's case, 16 F.C. 688. See Polwarth *v.* E. Home, 1724, M. 2462, var. 1 Pat. 186.

[58] Gilchrist *v.* Houston's Trs., 14th Nov. 1828, 7 S. 18.

[59] *Supra*, p. 490.

mon. On the other hand, if he has simply improved part of the muir in the sense of cultivating it, he is entitled to no pecuniary compensation; and the same principle would have seemed to extend so far as to compel him to receive the portion of improved land falling to him at its improved, not at its unimproved, value, had it not been for observations which fell from the Court in a recent case of a very special kind,[60] and a relaxation allowed in an earlier case in respect of permanent improvements, such as drainage and fencing.[61] Agricultural operations of this sort may be important evidence of exclusive ownership, if of long duration, or if coupled with other circumstances pointing in the same direction.[62] Encroachments or over-possession by one of the commoners at any time before the final decree will not found an action of damages, since the possession is too uncertain and promiscuous;[63] but after the commissioner has settled the allocation, and before decree, interdict will be directed against encroachments on any of the lots so defined.[64]

Among servitude-holders.

2. When the muir has been allocated among the commoners, such of them as are burdened with servitude rights may agree with the holders of these rights, or some of them, to commute the burdens for a portion of the land as an equivalent. The parties transact outwith the common law of division of common property and outwith the statute; and none of them can compel the other to commute against his will.[65] The rule of division in such cases is the number of stock in use to be pastured,[66] without reference to the priority of the rights,[67] or to the extent of ground actually grazed.[68] The servient owner is no longer entitled to any *præcipuum* in respect of his right of property.[69]

Conveyances.

In addition to the old forms of mutual dispositions, a decree of division of commonty or of runrig may be made use of in making up titles to the divided lots, in the same way as in the case of a division of common property at common law.[70] The common expenses of the process are a debt due by each of the parties *in*

[60] Innes *v.* Hepburn, 18th May 1859, 21 D. 832.

[61] Kinloch, 14th Jan. 1814, F.C.

[62] Stewart *v.* Mackenzie, 1748, M. 2476; Watt *v.* Paterson, 2 Dow, 25.

[63] Houston *v.* Dempster, 19th Feb. 1835, 13 S. 492.

[64] Smyth *v.* Guthrie, 8th Feb. 1831, 9 S. 401.

[65] Laurie *v.* D. Hamilton, Gall *v.* Greenhill, Gordon *v.* Grant, *supra*, [42].

[66] Maitland *v.* Tait, 1772, M. 2485.

[67] Hepburn, 2d Feb. 1814, F.C.

[68] M'Kenzie *v.* Mags. of Fortrose, 5th Dec. 1823, 2 S. 558 (N.E. 482).

[69] E. Wigtown *v.* Feuars of Biggar, 1739, M. 2287, 2468, 5 B.S. 209, 662, Elchies, Commonty, No. 2; Henderson *v.* Makgill, 1782, M. 2487; Spence *v.* E. Zetland, 25th Jan. 1839, 1 D. 415, overruling Polwarth *v.* E. Home, 1724, M. 2462, acquiesced in as to this point, 1 Pat. 186.

[70] *Supra*, p. 493; 37 & 38 Vict. c. 94, sect. 35.

solidum, with relief against the others, according to the value of their shares.[71] Tenants, as already mentioned, do not require to be called, and are not liable in any part of the expenses of a litigation in which they have no share, and which may be prejudicial to their interests.[72]

Runrig and rundale.

Runrig and Rundale.[73]—That sort of ownership of land which gives alternate or intermixed patches or ridges to each heritor in several property took its origin in the same primitive community of land which has been adverted to in the beginning of this chapter. It marks the epoch at which the strict rule of a community of immoveables began to yield to the conveniences of absolute ownership. At first there seems to have been a system of periodical aggregation and repartition, or what are called 'shifting 'severalties.' At a later period this ceased, but there remained the awkward subdivision by intermixed estates, which had been adopted as the fairest division, where there was much difference in the value of the soil, and as not inconvenient at a time when no enclosures existed. The generic word for this arrangement was runrig.[74] More specifically, the term was used for division by strips or ridges of an acre or two; while 'rundale'[75] or cutchery[76] indicated the existence of larger intermixed fields. The same considerations of equality and primitive convenience, as well as the example of the old divisions, led to the adoption of partition by runrig in severing the community of co-adjudgers, heirs-portioners, and others.[77] This latter source of runrig is avoided by the modern practice of massing the shares as much as possible together; and of the primitive division there are now to be found only a few traces in some Highland districts. This change has been accomplished by aggregation of the patches through excambion, either by agreement or under the powers of an Act[78] passed in the same year as the Act for dividing commonty. It enacts that 'wherever lands of different heritors be runrig, it 'shall be leisum to either party to apply to the sheriffs, stewarts, 'and lords of regality or justices of the peace of the several 'shires where the lands lie, to the effect that these lands may be

[71] Wilson, 10th July 1813, F.C.; Brodie *v.* L. Cawdor, 7th July 1836, 14 S. 1097.

[72] Drummond *v.* Swanston, 1782, M. 2487.

[73] Ersk. 3.3.59; B. Pr. 1098.

[74] *I.e.*, share-ridge (Gael. *roinn* = share).

[75] *I.e.*, *roinn-diol* (Gael.) = share of reward or of recompense—Sigerson's Land Tenures in Ireland, p. 161; Wakefield's Account there cited.

[76] Probably from Gaelic *cuidfir* = a man's share. See Chalmers *v.* Pew, *infra*, [77].

[77] L. Deas in Bs. Gray *v.* Richardson, 14th July 1876, 3 Ret. 1046, goes no further back than this. The argument in Chalmers *v.* Pew, 1756, M. 10485, with more reason cites Tacitus.

[78] 1695, c. 23.

'divided according to their respective interests.' 'Special regard' is to be 'had to the mansion-houses [79] of the respective heritors, 'and that there may be allowed and adjudged to them the 'respective parts of the division as shall be most commodious 'to their mansion-houses and policy.' The Act does not extend 'to burrow [80] and incorporat acres.' In construing these provisions the Court has determined that the process is competent before the Court of Session; [81] that that Court alone has jurisdiction to determine questions of heritable right that may arise; [82] that the Act only applies to pieces of ground belonging to different owners, intermixed with each other, [83] and each of no greater area than four acres, [84] though the fact that some of the originally runrig lands have become united will not stop the beneficial operation of the Act. [85] Bisection of a field of seven acres belonging to the same owner by a road into two equal parts, does not bring the parts within the statute. [86] It is not necessary to call tenants [87] or servitude-holders; [88] but the superior should be called. [89] The respective interests of parties are determined by the actual value of the subjects at the date of exchanging. [90]

[79] They are thus practically excluded, however mean and inconsiderable—Taylor *v.* E. Callander, 1698, M. 14141. As to meaning of mansion-house and policy, see Gray *v.* Wardrop, 1777, 5 B.S. 580, M. Appx. Commonty, No. 1. This does not apply to houses for agricultural purposes—see case in Gray.

[80] *I.e.*, royal burgh—Douglas *v.* Inglis, 1777, 5 B.S. 581, M. Appx. Runrig, No. 2.

[81] Russel *v.* York Buildings Co., 1774, M. 14144, 5 B.S. 580.

[82] Davidson *v.* Heddell, 10th Dec. 1829, 8 S. 219; but the Sheriff Court is now competent up to £50 a-year or £1000 value—40 & 41 Vict. c. 50, sect. 8 (3).

[83] Hall *v.* Callander, 1744, M. 14141; Murison *v.* Drysdale, 1780, M. 14151, 5 B.S. 582.

[84] Ly. Gray *v.* Blairs, 1782, M. 14151, overruling Inveresk *v.* Milne, 1755, M. 14142; see Buchannan *v.* Clark, 1766, M. 14142; and Chalmers *v.* Pew, 1756, M. 10485, where the action, apparently founding on this Act, was brought against a tenant.

[85] Russel *v.* York Buildings Co., [81].

[86] Burns *v.* Bogle, 14th Feb. 1829, 7 S. 415.

[87] Bruce *v.* Bruce, 1792, M. 14152.

[88] Jardine *v.* Ly. Douglas, 1793, ibid.

[89] Russel *v.* York Buildings Co., [81].

[90] See *supra*, p. 504, as to the mode of making up titles.

CHAPTER XXXII.

LIMITED ESTATE—*continued.*

MARCH-FENCES AND GABLES.

Introduction.

THERE are certain subjects which may be, and generally are, held in common ownership, but which from their nature or purpose are amenable to the rules of common ownership only under important limitations. These are fences on the boundary between premises of different owners and gable-walls. In treating of the comprehension of a grant of heritage, occasion was taken to examine the rules of the law of Scotland with respect to boundaries—the ideal lines of demarcation between estates.[1] It is now necessary to supplement that examination by first investigating the rules relating to the artificial structures which are formed on these lines, for the double purpose of warning against and obstructing trespass by man or beast; and then taking up the law of common gables.

I.—MARCH-FENCES.

Statutory.

The term 'march-fence' is a *nomen juris*, unknown to the common law, but introduced by statute. At common law no one was entitled to compel his neighbour to concur with him in erecting or maintaining a fence on the common boundary. The sole obligation which lay on either was negative—not himself to trespass on the grounds of the other, and not to allow his bestial to trespass.[2] Moreover, it was a relic of the primitive community of ownership in land that, before 1686, this obligation existed only for the protection of artificial crops 'in haining-time while 'the corns are upon the ground.'[3] It was enforced, according to

Common-law obligation.

[1] *Supra*, chap. 6.

[2] It is the same in England—3 Blackst. Com. 210.

[3] St. 2.3.67. Forests were 'an exception—ibid., and authorities there.

an ancient custom, which was observed on both sides of the Tweed, by detaining the strays *brevi manû*, without a sentence, for twenty-four hours; and thereafter, in the event of no claim being made by the owner, getting their value apprised, and retaining so many as should indemnify the captor for his 'skaith.' He was not entitled to use the poinded animals, and he was bound to keep them in a poind-fold, or other place where they might have fodder and water.[4] After the crop was cleared, the land was either—like the Lammas land of more modern times—free to the cattle of the whole community, or the owner had to herd his own ground, and 'turn off his neighbour's goods without wronging them, but could 'not put them in the poind-fold.'[5] Waste-land never cultivated had to be similarly protected, if at all, all the year round. A step in the break-up of this primitive system of land rights is marked by the statute 1686, c. 11,[6] which extended the protection, thus afforded by the common law to hained lands, to land of every sort and at every season. This Act, after narrating specially the damage caused to young trees and hedges by the not herding of bestial, enacts that 'all heritors, liferenters, tenants, cottars, and 'other possessors of lands and houses, shall cause herd their horses, 'nolt, sheep, swine, and goats the whole year, as well in winter as 'in summer, and in the night-time shall keep the same in houses, 'folds, or enclosures, so as they may not eat or destroy their neigh-'bours' ground, woods, hedges, or planting; certifying that such 'as shall contravene, they shall be liable to pay half a merk, *totics* '*quoties*, for ilk beast they shall have going on their neighbours' 'ground, by and attour the damage done to the grass or planting; 'and that it shall be lawful to the heritor or possessor of the ground 'to detain the said beasts until he be paid of the said half merk 'for ilk beast found upon his ground, and of his expenses in keep-'ing the same.'

1686, c. 11.

Interpretation of Act.

This statute is in observance, and has been liberally construed.[7] It applies to trespasses by bestial on subjects so different as a garden[8] and a Highland sheep-walk;[9] whether the ground invaded is open or is enclosed by a fence, either common to both parties and kept up at their joint expense,[10] or proper to the owner of the

[4] St. 1.9.24; Ersk. 3.6.28; Duncan *v.* Kids, 1676, M. 10514; Bethune *v.* Hume, 1679, M. 14751.

[5] St. 2.3.67.

[6] See St. 2.1.7; Bankt. 4.41.16.

[7] It seems to have been intended to supersede the penultimate clause of 1661, c. 41; see also the last clause of 1685, c. 39.

[8] M'Arthur *v.* Miller, 3d Dec. 1873, 1 Ret. 248.

[9] Pringle *v.* Rae, 31st Jan. 1829, 7 S. 352.

[10] Loch *v.* Tweedie, 1799, M. 10501, and the last two cases.

straying beasts; whether the trespass has occurred from a total absence of herding, or from negligence on the part of the servant employed or of the employer himself;[11] and whether the land be under crop, in grass, or in wood.[12] The statutory mode of enforcing the claim for penalty and expenses by detention of the strays seems to have been extended in practice to securing indemnification for the actual damage done.[13] Whether this be so or not, it has been decided that the detainer cannot be required to give up possession until he has received a tender of the statutory penalties.[14] He is not bound to intimate the fact of his having poinded the beasts to their owner, even if aware of the ownership.[15] If the detention be unreasonably prolonged, through the non-appearance of the owner or his refusal to comply with the conditions of the statute, the party poinding may apply to the sheriff for warrant to sell for behoof of all concerned. But the remedy of poinding is only one suitable statutory mode of enforcing payment of a debt which is due, whether the cattle have been seized or not. Thus, where there was no seizure, nor notice given *de recenti* of the trespassing, but the complainer took a note of the number of sheep which had strayed, and the number of occasions, and then brought an action for the statutory penalties due for the whole invasions of his property together, the Court found that the action was relevant, and that it was only necessary to have such evidence as the nature of cases of this sort admitted of—*i.e.*, parole evidence of the number of animals and of trespasses, not with absolute precision, but *at least* to the amount decerned for.[16] The detention mentioned in the close of the statute is only lawful when the cattle have been seized before leaving the captor's land.[17]

Planting and enclosing statutes.

While the state of Scotland was such as to justify the assertion that down to the middle of the seventeenth century there was no such thing as a march-fence in existence,[18] a series of statutes, beginning in 1424, was passed for the preservation of wood, and for the encouragement of planting and enclosing. In so far as these penalised the destruction of plantations and fences, they have been already referred to.[19] In so far as they attempted to compel the plantation of timber proportionally to the acreage of each proprietor, they were temporary or are in desuetude. But

[11] Not decided in Govan *v.* Lang, 1794, M. 10499; but in Loch *v.* Tweedie, [10]; Turnbull *v.* Couts, 23d Feb. 1809, F.C.; and Shaw *v.* Ewart, 2d March 1809, F.C.

[12] Govan *v.* Lang, [11].

[13] Ersk. 3.6.28.

[14] M'Arthur *v.* Miller, [8].

[15] Ibid.

[16] Shaw *v.* Ewart, [11].

[17] M'Arthur *v.* Jones, 18th Oct. 1878, 6 Ret. 41.

[18] Strang *v.* Steuart, *infra*, [49], *per* L.J.-C. Inglis, 2 Macph. 1030.

[19] *Supra*, p. 124.

two very useful provisions remain, which still regulate the erection of boundary fences at the common expense, and the straightening of marches.

1661, c. 41.

Erection of march-fences at common expense.

The first of these objects is provided for by the closing part of the Scots Act 1661, c. 41,[20] as follows: 'Where enclosures fall 'to be upon the border of any person's inheritance, the next ad- 'jacent heritor shall be at equal pains and charges in building, 'ditching, and planting that dike which parteth their inheritance.' The enforcement of the Act is recommended 'to all lords, sheriffs 'and bailies of regalities, stewarts and stewarties and justices of 'peace, bailies of burghs, and other judges whatsoever.' An exception is made, earlier in the statute, of 'burgh and incorporate 'acres, which are no ways to be parked and enclosed, unless the 'heritors thereof shall think it meet and expedient;' and, also in a preceding part of the Act, the enclosing is to be 'done upon the 'equal charges of the liferenter and heritor,' or fiar. In the interpretation of this statute it has been determined that the provisions now cited are perpetual; and that the continuance of the statute for nineteen years by the later Act 1685, c. 39, applied only to the temporary clauses.[21] The exception of burgh and incorporate acres, though referring specially to one of the temporary clauses, extends to the enactment now under discussion; and the same considerations which led to its introduction—the probable disproportion between the value of the subjects and the cost of the fence—will deter the Court from compelling the owner of patches of ground of five or six acres or less, though not coming strictly under the exception, to concur in erecting a fence. The tenor of the Act shows that it was meant to apply to landward estates only.[22] A similar train of reasoning would perpetuate the clause concerning the allocation of expense between liferenter and fiar and apply it to the half of the cost of a common fence which falls on each of the conterminous proprietors. There might be cases in which the rule of the statute would cause gross injustice; and in any case the statutory rule could be an equitable adjustment only by chance. This part of the Act has never come before the Court,[23] but it is believed to be discarded in practice, in favour of the obviously juster mode of charging the estate with the expense.

Perpetual.

'Burgh and 'incorporate 'acres.'

Liferenter and fiar.

Notice

In order to found a claim for repayment of half the expense of forming a march-fence, the conterminous heritor must have been called

[20] Ratified 1685, c. 39; St. 2.3.75, 4. 27.2; Ersk. 2.6.4, 4.4.39; Hutchison, Tait, Barclay, *sub voce* 'Planting and Inclosing;' B. Pr 958-9.

[21] 1669, c. 17; Dunbar *v.* Gordon, 1713, M. 10476; Riddel *v.* Ms. Tweeddale, 1769, M. 10489.

[22] Penman *v.* Douglas, 1739, M. 10481.

[23] It was not reached in the late case of Pollock *v.* Ewing, *infra*, [28].

on in a competent process to concur, or have actually concurred; otherwise he might be made liable for expenditure of the most injudicious or wasteful kind in which he had no voice.[24] The statute applies to those cases only in which mutual, though not necessarily equal, advantages will accrue to the conterminous tenements, and will in no instance authorise an act of oppression or of injustice to an individual. Accordingly, it was held not applicable to a case where the respondent's property, though of large extent, was mountainous and barren, yielding but a small rent, and incapable of bearing the burden of the cost of a fence which would be no melioration to it.[25]

Disproportion of expense.

With these limitations, the Act applies to march-fences in every sort of locality in which a fence is actually required, whatever be the nature of the boundary. If the boundary coincide with the edge of a precipitous cliff, the ground below will be sufficiently guarded against the passage of stock from it to the upper subject; and the only interest to have a fence erected will be that of the upper heritor, to get rid of the necessity of herding his stock against straying, or even against destruction. There is thus an absence of that community of advantage which the statute demands.[26]

Fence unnecessary.

On a cliff.

Again, if the march be a stream of sufficient size to form a reasonable barrier against trespass throughout the year in ordinary seasons, it is not to be supposed that the necessity of herding during extraordinary drought would entitle either proprietor to invoke the aid of the statute. But if the boundary stream be a small burn easily crossed, the Act will be enforced under the modifications rendered necessary by the peculiar nature of the march. This was the first point decided in construing its provisions. To an objection that the Act could not be understood but of dry marches, it was replied that the meith betwixt the lands was an inconsiderable strip of water, often dry, and capable of having a stone dike built in its channel. The reply was found relevant, and the strip of water was ordained 'either to be wholly 'without the dike [that is, on the objector's side of the dike], or 'if the objector pleased, that it run a space within the dike and 'a space without the dike, that either party might have the benefit 'of watering thereat.'[27] This precedent was followed in a recent case, by which it was made clearer than appears in the above

Along stream.

[24] Ord. *v.* Wright, 1738, M. 10479, overruling Seaton *v.* Seaton, 1679, M. 10476. See 3 B.S. 226.

[25] E. Peterborough *v.* Garioch, 1784, M. 10497. See similar cases under 1669, c. 17, *infra*, p. 514.

[26] See L. Adv. *v.* Sinclair, 26th Nov. 1872, 11 Macph. 137.

[27] E. Crawford *v.* Rig, 1669, M. 10475. See Seaton *v.* Seaton, 1679, M. 10476, 3 B.S. 226, explained in the next case.

judgment that the benefit of watering will be reserved to the petitioning heritor, whichever alternative be adopted.[28] In that case the march-stream was a small burn flowing through a hilly district, in which burn there was a considerable quantity of water after heavy rains, and very little in dry weather. It varied in width from five to fifteen feet, and the average width was ten feet. Two remits were made to a man of skill, the later of which required him to report on what were substantially the alternative modes of the case of the *Earl of Crawford*. As to these, he reported 'that 'a wire fence can be constructed at an average distance of four 'feet from the margin or edge of the burn wholly on the side on 'which the pursuer's property is situated, and, if required, con-'venient watering-places can be got by merely making a small 'cut under the wires to the burn; and that a similar fence can 'be equally well constructed, partly on the margin or edge of the 'burn on the pursuer's side, and partly on that of the defender's, 'with water-gates across the burn, without involving any material 'change in the possession.' The defenders declined to exercise their option of adopting this second alternative, and the Court accordingly authorised the first mode of fencing to be carried out at the sight of the man of skill. If the only practical mode of fencing without material change of possession had been by constructing a wire fence in the *alveus* at large cost—as would have been the case had the stream been a considerable river—the Court would not have sanctioned the application.

Court of Session not excluded.

The following other points were decided, or taken for granted, in this the only recent case which has arisen on the Act of 1661: Applications under the Act may be competently brought before the Court of Session; it is not excluded expressly or by implication, and may come under the recommendation to 'other judges 'whatsoever.' Under such applications the Court has no power to straighten the marches; on the contrary, it must do as little as the circumstances will permit to alter the possession. Lastly, the Court will inform itself, by calling in the aid of an expert, not only of the nature of the march, but also of the most suitable sort of fence in the circumstances, and that though the Act speaks only of 'building, ditching, and planting a dike,' meaning apparently a *feal dike* only.[29] In these days the Court will not be satisfied, as it was in the *Earl of Crawford's* case, with replying to the objection that at one part the mossy state of the ground made a dike impracticable—that if none were built none would

[28] Pollock *v.* Ewing, 25th May 1869, 7 Macph. 815.

[29] See Penman *v.* Douglas, [22], and 1669, c. 17, next page.

require to be paid for. The question of maintenance of march-fences will be noticed on a later page.[30]

Moved partly, no doubt, by the difficulty which has just been noticed as having arisen in the *Earl of Crawford's* case, and partly by other and wider views of expediency, the Scotch Estates passed, in the same year in which that case was decided, an Act—1669, c. 17[31]—'anent enclosing of ground,' which, after narrating the statute of 1661, and the difficulty of putting the closing section of it into operation 'where the marches are crooked and 'unequal, or where any part of the bordering ground is unfit or 'uncapable of bearing a dike or receiving a ditch, or hinders the 'completing of the enclosure in an equal line,' enacts 'that when-'soever any person intends to enclose by a dike or ditch upon 'the march betwixt his lands and the lands belonging to other 'heritors contiguous thereunto, it shall be leisom to him to require 'the next sheriffs or bailiffs of regalities, stewarts of stewartries, 'justices of the peace, or other judges ordinary, to visit the marches 'alongst which the said dike or ditch is to be drawn, who are 'hereby authorised, when the said marches are uneven or other-'wise uncapable of ditch or dike, to adjudge such parts of the 'one or the other heritor's ground as occasion the inconveniency 'betwixt them from the one heritor in favour of the other, so as 'may be least to the prejudice of either party; and the dike or 'ditch to be made in all time thereafter the common march 'betwixt them; and the parts so adjudged *respectivé* from the 'one to the other being estimate to the just avail and compensed '*pro tanto*, to decern what remains uncompensed of the price to 'the party to whom the same is wanting. And it is hereby 'declared that the parts thus adjudged *hinc inde* shall remain and 'abide with the lands or tenantries to which they are *respectivé* 'adjudged, as parts and pendicles thereof in all time coming.'

1669, c. 17, straightening marches.

This pattern statute has been extremely useful, but has, perhaps for that very reason, come very seldom before the Supreme Court. It differs from the Act of 1661 only in the mode of attaining the same object—the convenient enclosing of land. The earlier statute merely drew a fence along a known boundary; the later remodels a known boundary: neither, like the old brieve of perambulation or the modern declarator of marches, determines a disputed boundary. The procedure of the two Acts is also different. The earlier of the two contemplates action before the

Object of statute.

Jurisdiction.

[30] *Infra*, p. 516.

[31] Ratified by 1685, c. 39; Erskine, 1.4.3, 2.6.4; Hutchison, Tait, Barclay, on J.P.'s, *sub voce* 'Planting and Inclosing;' B. Pr. 958-9.

Court of Session, as well as before the judge ordinary, and is worked by means of a remit to an expert; the later Act makes the judge ordinary the only competent Court of first instance, and peremptorily orders the judge to visit the ground, as had been the case in perambulations. An application contained in a petition under the Act of 1669, for a remit to a man of skill instead of for a visit by the judge ordinary, so vitiates the petition that it cannot be cured by failure on the part of the respondent to object at once, or by general knowledge of the locality on the part of the judge.[32] The same objections of want of community of benefit, or disproportion of benefit and expense, which are given effect to in applications under the earlier statute alone,[33] are equally of weight when the later Act is also invoked. Thus, in a case where such objections were held to be unfounded, it was nevertheless observed that the statute (meaning primarily the Act of 1661) had been confined to lands that could be enclosed with mutual advantage, and that in every case the nature of the ground and facilities of building and repairing the dike must be looked to, and the expense thereof compared with the benefit.[34] And in a very recent case already cited,[35] it was held to be out of the question to apply the Acts where one of the patches of ground was a long strip running along the sea-shore, with the landward boundary which was sought to be rectified running along the face of a cliff, only here and there passable, and where the value of both the patches together amounted to two guineas a-year, while the expense of the proposed operations was estimated at £70 or £80. It has further been decided that the later statute is available for a rectification of march so considerable as the adjudication, from the proprietor of an estate of ninety acres, of three and a half acres thereof which lay into another person's land, in return for a corresponding piece of ground; and that a tenant has a title to object though his landlord consents.[36] It is no bar to the operation of the Act of 1669 that either of the contiguous estates is entailed. There is no contravention, seeing the proceeding is compulsory: the land adjudged falls under the fetters; and if there be a surplus, as contemplated by the Act, 'it behoves to be tailzied or employed 'on land.'[37]

Visitation.

Mutual advantage.

Such is the purely statutory origin of march-fences in the law

[32] L. Adv. *v.* Sinclair, 26th Nov. 1872, 11 Macph. 137.

[33] *Supra*, p. 511.

[34] E. Cassilis *v.* Paterson, 28th Feb. 1809, F.C.

[35] L. Adv. *v.* Sinclair, [33].

[36] Pew *v.* Miller, 1754, M. 10484; cf. the next case in Mor., which was treated apparently as one of runrig.

[37] Ramsay *v.* Primrose, 1702, M. 10477.

of Scotland. But while it is a mistake to suppose 'that what- March-fences originating in agreement. Express,
'ever is *de facto* a division-fence is *de facto* a march-fence, and
'at common law a subject which the proprietors on each side are
'jointly bound to maintain,'[38] it is equally wrong to suppose that
march-fences, properly so called, can originate in no other way
than by proceedings under these statutes. 'Without applying to
'the sheriff, heritors may agree and contract with each other
'to erect a fence upon their properties at the mutual expense.
'Further, it may be that, without express agreement or contract, or tacit.
'a march-wall or other fence by which adjoining properties are
'*de facto* divided has for time immemorial been held and recog-
'nised and treated as if it had been originally erected under the
'statutes or under express agreement, and then by implied con-
'tract the same obligations may attach to the heritors or to their
'successors in their several properties.'[39] This express agree-
ment will be respected, and this implied contract may be gathered
from the conduct of the parties, even where it can be conclusively
proved that the fence in question was not originally a march-
fence, but only a division between two fields at the time of its
erection belonging to the same owner.[40] 'It is quite natural that
'when an heritable estate is split into two portions the parties
'should adopt that as their march-fence which originally was
'nothing more than a boundary between two fields.'[41] In the
same way the operation of the statutes may be simulated by
implied or express agreement to adopt a fence which is not along
the actual boundary, but on one side of it.[42]

The march-fence, however it may originate, is usually the com- Ownership of march-fence.
mon property of the conterminous landowners. A belt of soil,
held in common, of the width required by the fence, is supposed to
separate the two estates held in severalty, at least in cases where
the actual boundary-line is otherwise unascertainable.[43] If the
law of common gables[44] may be trusted as affording an analogy, it
would appear that the same will be the case where the boundary
is known and the fence is erected partly on each side of it. It
would seem, however, to be more in accordance with the para-
mount rule *inædificatum solo cedit solo*, to suppose that in this
latter case each party holds the several ownership of the part
situated on his soil, with cross rights of common interest over that

[38] *Per* L.J.-C. Inglis in Strang *v.* Steuart, *infra*, [49], 2 Macph. 1030.
[39] Ibid., *per* L. Cowan, p. 1024.
[40] Lockhart *v.* Sievewright, 1758, M. 10488; Strang *v.* Steuart, *infra*, [49].
[41] *Per* L.J.-C. Inglis, *loc. cit.* [38].
[42] Ibid.
[43] It is the same in England—Wiltshire *v.* Sidford, 1 M. and Ry. 403; Cubitt *v.* Porter, 8 B. and C. 257.
[44] *Infra*, pp. 537, 542, esp. Rodger *v.* Russell, 10th June 1873, 11 Macph. 671.

part which lies beyond.[45] Whichever be the sound theory, the result in practice is the same. For the common ownership in a fence differs very materially from common ownership in any ordinary heritable subject; and mainly in this respect, that a fence is not liable to partition at the will of either of the owners. Its nature is to be and remain undivided.[46] It will further appear, in treating of certain sorts of fences, that each of the owners has special interests in his own side of the barrier which find no analogy in the ordinary form of common property. There is, however, one respect in which all sorts of common fences and all sorts of common property agree, and that is in the obligation of the parties to concur in necessary repairs and maintenance.

Obligation to maintain.

This obligation arises out of the common ownership or common interest, more especially in a subject which is in its own nature of a permanent character. Thus, where the boundary of lands on that side where they marched with ground which remained with the seller was described in the purchaser's disposition as a stone dike, which was declared to be then and in all time coming the boundary between the lands, the seller was found liable to contribute one-half of the expense of upholding the march-dike. The action was properly brought before the sheriff, and from him advocated to the Court of Session.[47] The Act of 1661 is read as authorising not only the original erection and repair of a march-fence, but also of its reconstruction, where to attempt repair would be false economy, and the Court will, in fixing the mode of rebuilding, look to economy and to the efficiency of the structure as a fence, not as bield to stock or at least more especially to stock on one side only.[48] As in the case of the original erection, so in the repair or reconstruction of the fence, neither party will be justified in putting hand to the work without the consent of the other or an order of the judge ordinary, and then demanding payment of half the expense; since the other might have been able to prove no necessity, and has had no opportunity of checking gross extravagance or injudicious outlay.

Repair implying common right.

Contribution in common to the repair of a division-fence is so characteristic of common property or common interest, that a long-continued course thereof is the ordinary, if not the only, proof of that implied contract by which march-fences, as has been said

[45] See obs. of L. Benholme in Strang *v.* Steuart, *infra*, [49], 2 Macph. 1027. See in English law a note to Wiltshire *v.* Sidford, [43], Matts *v.* Hawkins, 5 Taunt. 20; Watson *v.* Gray, 14 Ch. D. 192; Brooks *v.* Curtis (1872), 10 Amer. R. 545.

[46] Pardessus calls this the 'servitude 'd'indivision,' p. 216.

[47] Lockhart *v.* Sievewright, 1758, M. 10488, noticed 2 Macph. 1023.

[48] Paterson *v.* MacDonald, 16th June 1880, 7 Ret. 958.

above, are frequently constituted. In a recent case,[49] in which the whole of this subject was very fully treated, the facts were these: One of two farms which anciently formed part of the same property, and were then separated by a hedge and ditch, was sold. The ditch was on that side of the hedge next the retained portion of the property. The portion sold was described as bounded by the retained lands, 'presently possessed by' a tenant, without mention of a march. The possession at that time was on both sides up to the roots of the hedge. Both farms came into the hands of singular successors. After the separation of the farms the history of the fence was, that it at first served as a means of enclosing the lands, though in an inefficient way, since herding also was found necessary; that no scouring of the ditch ever took place; that the only repairs made on the hedge were by placing stakes and paling in the gaps; that the hedge and ditch together had not constituted an efficient fence for any long period after its formation, certainly not for forty years; and that the cost of repairing the dilapidated structure would be little short of the expense of a new one. In these circumstances, the Court[50] and the House of Lords found that there were no elements sufficient to establish, as by implied contract, that the hedge and ditch formed an existing march-fence, the common property of the parties, entitling one of them to insist on the concurrence of the other in upholding it at their joint expense. *Strang* v. *Steuart.*

Instead of the common-law obligation to herd against trespass, and the statutory or conventional obligation to be at equal pains to maintain a march-fence, an obligation may be incurred by one of the owners, and transmitted against all his successors in the land, to make and uphold the march-fence at his own sole expense. In Scotland, no case of such a stipulation has come before the Court; but there can be little doubt that it would be enforceable as a real burden or condition, if constituted in the mode proper to such rights,[51] and that it would make the burdened landowner liable for any injury to his neighbour arising from neglect of the obligation. In England[52] this spurious easement, as it has been called,[53] has given rise to many decisions. It may there be constituted by prescription;[54] while in Scotland a usage of repairing a division-fence would probably, in the absence of Several burden.

[49] Strang *v.* Steuart, 31st March 1864, 2 Macph. 1015, affd. 4 Macph. H.L. 5.

[50] L. Benholme dissented on the import of the proof.

[51] *Supra*, chap. 27.

[52] See Hunt on Boundaries, p. 49.

[53] Gale, p. 516; see Boyle *v.* Tamlyn, 6 B. and C. 329, 339, *per* Bayley J.

[54] Lawrence *v.* Jenkins, L.R. 8 Q.B. 274 (consequent liability for poisoning of cattle).

express stipulation, be referred to a vindication of sole ownership, a *res meræ facultatis*, done for the owner's own convenience. In other respects, the English decisions may be usefully noticed. The obligation renders the obligor and his successors in the land liable for any injury sustained by his neighbour's own cattle,[55] or by cattle lawfully on his neighbour's adjacent land,[56] but not by cattle which are not lawfully there, but are trespassing.[57] The party under an obligation to fence must, in case of cattle straying into his premises on account of his own neglect, put them back into the place whence they came, and is not justified in driving them into a highway and leaving them there.[58] The obligation is extinguished by unity of ownership, and does not revive on subsequent severance.[59]

Such are the rules applicable to fences generally. Before proceeding to the peculiarities of different sorts of fences, it will be well to notice the special rules which obtain regarding fences in certain localities, and those which relate to trees near a boundary.

Railway-fences.

By the 16th section of the Railways Clauses Consolidation (Scotland) Act,[60] it is made lawful for the company to construct, *inter alia*, fences. By the 60th section[61] the company is bound to make, and at all times thereafter maintain, certain works for the accommodation of the owners and occupiers of land adjoining the railway; and among these are posts, rails, hedges, ditches, mounds, or other fences for separating the land taken from the adjoining lands not taken, with gates opening towards the adjoining lands and all necessary stiles—provided these can be made without obstructing the use of the line. The company may get rid of this obligation by agreement. It exists only as between the company and the adjoining owners or occupiers. Therefore the company will not be liable, either under this clause or at common law, for injury to cattle which, before straying through a defective fence along the line, had trespassed on the adjoining land.[62] Nor has the clause

[55] Case in 1 Vent. 264; Powell *v.* Salisbury, 2 Yo. and Jerv. 391.

[56] Rooth *v.* Wilton, 1 B. and Ald. 59.

[57] Dovaston *v.* Payne, 2 Hy. Bl. 527, 531, *per* Heath J.; and see authorities quoted in an American case—Rust *v.* Low, 6 Mass. 90. See Sneesby *v.* L. and Y. Ry., 1 Q.B.D. 42.

[58] Carruthers *v.* Hollis, 8 A. and E. 113, *per* L. Denman.

[59] Boyle *v.* Tamlyn, *supra*, [53].

[60] 8 & 9 Vict. c. 33.

[61] Which seems to supersede an earlier enactment, 5 & 6 Vict. c. 55, sect. 10; *per* Jervis C.J., in Manchester, &c., Ry. *v.* Wallis, 23 L.J.C.P. 85, 87. In America it is justly held not to be contributory negligence to put animals in a field, knowing it to be insecurely or not at all fenced off—Wilder *v.* Maine Central R. R. (1876), 20 Amer. R. 698.

[62] Ricketts *v.* E. and W. India Docks, 21 L.J.C.P. 201; cf. cases in note [57],

anything to do with the duty of the company to its passengers. If any of these are injured through a collision with cattle straying on the line on account of defects in the fences, they must found on the ordinary obligation of the company as carriers to take due care that no accident shall happen.[63] The fences must be such as are suitable, looking to the actual, not to any prospective, use of the adjoining land at the date of their erection.[64] There is, moreover, no obligation on the company to fence one part of its premises off from another;[65] nor in all cases to fence bridges on which the line runs.[66] If any difference arise respecting the kind of fence, or the dimensions, sufficiency, or maintenance thereof, the same shall be determined by the sheriff or two justices, who are also to fix the time for the execution of the works (sect. 61). On default for seven days after the time fixed for commencing, or in case of failure to execute the works in a sufficient manner, the party aggrieved may execute them himself, provided he do not thereby obstruct or injure the railway for a longer time than is absolutely necessary; and the expense is to be settled by the same tribunal (sect. 62). Additional works may be made at the expense of the owner or occupier, as authorised by the sheriff or justices, if necessary, and under the superintendence of the company's engineer (sects. 63, 64). That no agreement has been come to between a heritor and the company with reference to such accommodation-works is no ground for interdict to prevent the company from entering on the lands and proceeding with construction.[67] The jurisdiction of the sheriff or justices is exclusive, and is quite apart from the compensation proceedings under the Lands Clauses Act.[68] The company shall not be compelled to make any further or additional fences after the period prescribed in the special Act, or, if no period be prescribed, after five years

supra. See Monklands Ry. Co. *v.* Waddell, 21st June 1861, 23 D. 1167, on a special statute. As to the difference between cattle straying and cattle being driven on a public road, whence they escape into a railway through a defective fence, see Manchester, &c., Ry. *v.* Wallis, [61], and Midland Railway *v.* Daykin, 17 C.B. 126.

[63] Buxton *v.* N.E. Ry., L.R. 3 Q.B. 549. See obs. in Monklands Ry. Co. *v.* Waddell, *supra*,[62], where the above-cited 5 & 6 Vict. c. 55, sect. 10, although it starts with the preamble of safety to the public, was construed in the same sense.

[64] R. *v.* Brown, L.R. 2 Q.B. 630. See a case of making use of a railway-fence as one side of a sheepfold—Bessant *v.* G.W. Ry., 8 C.B.N.S. 368.

[65] Roberts *v.* G.W. Ry., 4 C.B.N.S. 506, 520; see Waugh *v.* City of Glasgow Ry., 19th May 1883, 20 Sc. L.R. 585.

[66] Clark *v.* Caledonian Ry., 30th Nov. 1877, 5 Ret. 273.

[67] Black *v.* Formartine, &c., Ry., 20th Feb. 1861, 23 D. 600.

[68] Fife, &c., Ry. *v.* Deas, 12th July 1859, 21 D. 1205 (*ad factum præstandum*); S. Wales Ry. *v.* Richards, 6 Railw. Ca. 197 (compensation for heritor, himself making an accommodation-bridge).

from the opening of the railway for public use (sect. 65), provided the fences were originally sufficient.[69] A penalty not exceeding forty shillings is imposed on any person who omits to shut and fasten any accommodation-gate at either side of the railway as soon as he and the carriage, cattle, &c., under his care have passed through (sect. 68).[70] An arrangement with a landowner relieving the railway company from its obligation to fence does not absolve it from its statutory liability in a question with the occupier, though he holds only from year to year.[71]

Road-fences.

Public roads stand in a very different position with regard to fencing. The owners of the land through or past which the road goes, whether it be subject to the control of the road authorities or not, are under no obligation to erect fences; nor are the authorities bound to do so, except at the sides of bridges, embankments, or other dangerous parts.[72] At the same time, it is usually for the interest of landowners to erect a barrier between their ground and the highway, were it for no other reason than that there is no penalty for depasturing cattle or other beasts on the sides of roads not enclosed;[73] and it is equally in their interest to keep their fences in repair. The only sort of fence of whose repair the law takes cognisance are hedges, and that not in the interest of the landowner, but in order that the road may not be prejudiced by the shade of overgrown hedgerows. Penalties are accordingly imposed on the owner or occupier who refuses after certain procedure to trim them.[74] Gates are to be so constructed as not, when open, to project over any part of the road or footpath; since the public is entitled to the whole space between the fences without obstruction.[75] The drains and ditches which

[69] Brown *v.* E. and G. Ry., 15th March 1864, 2 Macph. 875 (on a special Act).

[70] As to gates, &c., at level crossings, see Deas on Railways, p. 404 *et seq.*, and the Railways Clauses Act, sects. 39-41, 52-54; 26 & 27 Vict. c. 92, sect. 5 *et seq.* The cases are collected in Deas, p. 407. Addison on Torts, 5th ed., 569; Hodges on Railways, 6th ed., p. 357; and add Sneesby *v.* L. and Y. Ry., 1 Q.B.D. 42.

[71] Corry *v.* G.W. Ry., 7 Q.B.D. 322.

[72] Sect. 94 of Act of 1832, in Appx. to Roads and Bridges Act, 1878, *infra*, Appx. No. 12. Even if they have been in the habit of so doing for a long period, a special clause in their Act is necessary—R. *v.* Landillo, 2 T.R. 232. As to fences between private railways and roads, see Matson *v.* Baird, 9th Nov. 1877, 5 Ret. 87, affd. 5th July 1878, 5 Ret. H.L. 211.

[73] See ibid. sect. 103. At common law, the owner of cattle driven along a highway, and escaping or being by a stranger driven on unfenced land, would not be liable in damages if he made reasonable efforts to remove them and prevent injury, Hartford *v.* Brady (1874), 19 Amer. R. 377. See the rules as to liability for damage done by animals driven along a road in Tillett *v.* Ward, 10 Q.B.D. 17.

[74] Ibid. sects. 88-9.

[75] Ibid. sect. 105, and see R. *v.* Wright, 3 B. and Ad. 681; R. *v.* U.K. Telegraph Co., 31 L.J.M.C. 166.

the road authorities have powers to construct are meant for the benefit of the surface, not as fences.[76]

Reparation for injury occasioned by insufficient fencing.

An interesting section of the law of reparation is concerned with the liability of owners of heritages for injury caused through insufficient fencing of pits or other depressions in the ground. There are two sorts of cases. The first, being part of the law of neighbourhood, belongs more strictly to the scope of the present work than the other, which belongs to the more general doctrine of indemnification for wrongs.

By mineral to surface-owner.

1. As stated by Lord Chief-Justice Cockburn, 'The question is this, whether, when the ownership of 'minerals below the surface of the ground has been separated 'from the ownership and occupation of the surface, with a licence 'to the person to whom the minerals are let to sink a shaft 'through the surface, it is incumbent on the last-mentioned person 'to fence off the shaft so as to protect the owner of the surface 'from injury, or whether such owner must take steps for securing 'himself from injury, there being no statutory enactment on the 'subject, no stipulation between the parties, and no evidence of 'any mining custom.'[77] There is no Scotch case, but the conclusion arrived at in the English decision here cited seems consistent with principle—viz., that he who does the work which is the cause of the danger should avert that danger by doing all that is reasonably necessary, more especially as the owner of the soil does not know when or in what way or to what extent the shaft will be sunk and kept open.[78] Supplementary to this common-law obligation are the enactments of the Coal and Metalliferous Mines Regulation Acts of 1872,[79] which provide, in the interest both of the surface owner or occupier and of the public for the secure fencing of the top of the shaft and of any side entrance from the surface when any mine is abandoned or its working discontinued.

Injury to public.

2. The second case is that of injury to the life, limb, or property of members of the public who have no right of ownership or occupancy in the soil in which the pit or hole unfenced or insufficiently fenced exists. The liability of the owner of the soil arises from the general principle that if a man causes or allows to exist on his premises where all members of the public are entitled,

[76] Ibid. sects. 84-5.

[77] Williams *v.* Groucott, 4 B. and S. 149—death of a horse through falling into a shaft.

[78] See also Churchill *v.* Evans, 1 Taunt. 529, where the question arose; Sybray *v.* White, 1 M. and W. 435, where the law as stated above was taken for granted; and the obs. of Byles J. in Marfell *v.* S. Wales Ry., 8 C.B.N.S. 525, 537.

[79] 35 & 36 Vict. c. 76, sects. 41 and 51 (13); 35 & 36 Vict. c. 77, sects. 13 and 23 (6).

or to which he invites or habitually allows members of the public, to resort, anything fitted to be injurious, he is held as taking the risk of the natural consequences of his conduct. No attempt will be made to explain fully in this place the rules regarding negligence. It will be enough to refer to the decisions which bear more directly on the present subject. Thus, the public bodies which are responsible for the management of public roads or streets are liable for injuries occasioned by faulty fencing or lighting of dangerous obstructions, such as holes,[80] trestles,[81] or heaps of stones or rubbish.[82] In the same way the owner of an area, or other depression in the soil, immediately adjoining a public road or street, is liable for the consequences of its being unfenced or inadequately fenced[83]—however long it may have been in that condition,[84] and whether any one else is bound to fence the road or not;[85] but not if the area, pit, or sewer was in existence before the highway, for in that case the public must be held to enjoy it subject to the inconvenience.[86] The same rules apply where, though the road is private, members of the public have been invited to use it for a particular purpose, or allowed to use it as matter of fact without objection.[87] With respect to pits or excavations not immediately adjoining a road of either of these kinds, there is no fixed common-law limit to the distance therefrom at which a landowner will cease to be liable for the consequences of insufficient fencing. In the earliest Scotch case, a man riding on a dark tempestuous evening along a road which, though private, was frequently used by persons in the neighbourhood, was, along with his horse, drowned by falling into a disused coal-pit situated about four feet from an unfenced part of the road, and itself surrounded by a wall which at its lowest part was only eighteen inches high.

[80] Innes *v.* Mags. of Edinburgh, 1798, M. 13189.

[81] Virtue *v.* Alloa Comrs., 12th Dec. 1873, 1 Ret. 285.

[82] Duncan *v.* Findlater, 18th July 1837, 15 S. 1304, 19th June 1838, 16 D. 1150, revd. M'L. and Rob., 911, overruled in Virtue, [81]; Stephen *v.* Thurso Comrs., 3d March 1876, 3 Ret. 535; Kent *v.* Worthing Local Board, 10 Q.B.D. 118. See a case of liability for injury from a dangerous machine on a street—Campbell *v.* Ord and Maddison, 5th Nov. 1873, 1 Ret. 149.

[83] Chapman *v.* Parlane, 25th Feb. 1825, 3 S. 585 (N.E. 401); Barnes *v.* Ward, 19 L.J.C.P. 195; Beck *v.* Carter (1877), 23 Amer. R. 175 (10 feet from street).

[84] Coupland *v.* Hardingham, 3 Camp. 397; cf. Daniels *v.* Potter, 4 C. & P. 262.

[85] Wettor *v.* Dunk at *Nisi Prius*, 4 F. and F. 298; but see, as between landlord and tenant, questions of liability to third parties injured, Pretty *v.* Bickmore, L.R. 8 C.P. 401; Gwinnell *v.* Eamer, L.R. 10 C.P. 658. The latter case settles that it is not a misuse of a grating fixed in a public footpath to stand on it instead of moving on. Contrast King *v.* Thompson (1878), 30 Amer. R. 364.

[86] Fisher *v.* Prowse, 2 B. and S. 770, 780.

[87] Black *v.* Caddell, 1804, M. 13905; Corby *v.* Hill, 4 C.B.N.S. 556.

In an action of damages brought by the children of the deceased, the Court assoilzied a former proprietor of the ground, but found the proprietor at the date of the accident liable.[88] The decision is undoubtedly sound, since nothing that could fairly be considered trespass was committed, and the landowner ought to have anticipated the probable result of his failure to fence sufficiently in such a situation. The next case went further. A young woman, just recovered from sickness arising from intoxication, on her way home alone on a dark night, was drowned in a disused coal-pit, to reach which she must have left a private road leading to a farm-house, and turned aside at a path which branched off just at the point where the pit was situated. There was conflicting evidence as to the sufficiency of the fencing. The defender alleged suicide or recklessness, especially as no stranger could have been at the place except by what was at best a tolerated trespass. The presiding judge, among other observations, left it to the jury to consider what effect should be given to the circumstance that the deceased had strayed out of her way in getting to the coal-pit. The verdict was for the pursuer, the deceased's father;[89] and can only be justified on the supposition that the use of the private road by the public had been so habitual as to infer consent on the part of the defender.[90] Again, where the road between a brick-work and cottages which had by permission of the landlord been erected by the tenant of the work for his workmen passed within twelve feet of an unfenced quarry on the same estate, the landlord was held liable in damages to one of the workmen who was injured by falling into the quarry in the dark. The road had been made under special permit in the lease; a similar accident had happened before; the defender had been warned; and the quarry was constantly being enlarged.[91] The statutory provisions for fencing pits not in use are cited above.[92] Generally, while there will be no liability for injury to a person occurring in a place where he has no right to be,[93] the owner of an unfenced or insufficiently fenced and dangerous locality will be liable for injury arising therefrom

[88] Black *v.* Caddell, [87].

[89] Hislop *v.* Durham, 14th March 1842, 4 D. 1168.

[90] Cf. the English cases Bolch *v.* Smith, 7 H. and N. 736; Gautret *v.* Egerton, L.R. 2 C.P. 371; Hounsell *v.* Smyth, 7 C.B.N.S. 731.

[91] M'Feat *v.* Rankin's Trs., 17th June 1879, 6 Ret. 1043; (L. Gifford *dub.* on the ground that the tenant was more directly in fault).

[92] *Supra*, [79].

[93] Lumsden *v.* Russel, 1st Feb. 1856, 18 D. 468; Balfour *v.* Baird, 5th Dec. 1857, 20 D. 238. See Fraser *v.* Younger, 13th June 1867, 5 Macph. 861; Galloway *v.* King, 11th June 1872, 10 Macph. 788; Blyth *v.* Topham, cited in Hardcastle *v.* S. Yorkshire Ry., 4 H. and N. 67, 75, and followed in Graulich *v.* Wurst, 27 Amer. R. 684.

to one who is lawfully on the spot by invitation,[94] or as a voluntary visitor not committing a trespass,[95] or of common right, as in several of the cases already cited.[96] A dangerous fence may be as bad as none.[97]

Trees on boundary.

There is very little authority in the law of Scotland regarding the ownership and management of trees on or near the march between two estates. While highways are protected from detriment through the shade cast by adjoining trees by a duty incumbent on owners and occupiers to lop the branches of trees, bushes, and shrubs growing near the fences adjoining the road (but only such ornamental trees, bushes, or shrubs as overhang the road, so as to impede passage); and while railway companies are entitled to have trees removed on compensation by order of two justices, if in danger of falling so as to obstruct the traffic,[98]—all other disputes are left to be determined according to the general rules of the common law. Only one case seems to have reached the Court of Session.[99] There the abstract question was argued between conterminous owners of garden-ground, whether the one was bound to allow his premises to be overshadowed by trees growing on the land of the other. The latter pleaded the absolute provisions of the Act 1661, c. 41, for the encouragement of planting, a denial of there being anything contrary to his right in the common law, and the necessity of special enactments, both in regard to highways and in the Roman jurisprudence. The complainer relied on the position of the branches being an encroachment which he could stop, whether he could prove injury or not; on his right to raise his fence as high as he chose, and to cut the roots of the trees in forming a trench on his own side; and on the greater similarity of our climate to that of Holland, where the law was as he now pleaded, than to that of Italy. The Court had no doubt of the principle, and found the owner of the garden in which the trees grew bound so to prune them that they should not overhang the mutual wall, and thereby be of prejudice to the

[94] Indermaur *v.* Dames, L.R. 2 C.P. 311; Cairns *v.* Boyd, 5th June 1879, 6 Ret. 1004 (cellar in public-house); not if, being invited in for a special purpose, he wanders about in the dark, Pierce *v.* Whitcomb (1875), 21 Amer. R. 120; see the general rule in the U.S. Sup. ct. case Bennett *v.* Railroad Co. (1880), 12 Otto 577. Unless, perhaps, it be as a guest—Southcote *v.* Stanley, 1 H. and N. 247.

[95] M'Martin *v.* Hannay, 24th Jan. 1872, 10 Macph. 411—child falling down a badly fenced common stair; contrast Ferguson *v.* Laidlaw, 8 Sc. L.R. 33.

[96] As to fencing off a navigable river under a local Act, see Kerr, Anderson, & Co. *v.* Lang, 1st June 1877, 4 Ret. 779, affd. 5 Ret. H.L., 65.

[97] Lax *v.* Darlington Corpn., 5 Ex. D. 28 (cow impaled on low fence).

[98] Act cited, [73]; 31 & 32 Vict. c. 119, sect. 24.

[99] Halkerston *v.* Wedderburn, 1781, M. 10495.

complainer's fruit and garden. Trees in the line of a division-hedge follow the ownership of the hedge.[100]

In this paucity of authority, it is well to resort to other systems of law for further light. In the first place, in regard to the ownership, the rule of the Roman law was, that the tree was his in whose land it took its origin, even although nourished by roots stretching into neighbouring soil.[101] If it was planted on the very verge of the estate, it was common.[102] The French Code[103] gives no rules for determining the ownership, but presupposes the existence both of several and common property. The Prussian Landrecht follows the Roman law.[104] The New York Civil Code seems to look to the actual position of the trunk.[105] There is some confusion in the English cases, some of which proceed upon proof of the original planting, others on the position of the trunk.[106] As a general rule, the two criteria will lead to the same result; and in any case, the mere fact that roots or branches stretch beyond the boundary cannot alter the ownership of a tree which is determined by either of the two to belong in severalty to the adjacent estate. Secondly, in regard to the treatment of the roots and branches, the Roman law ordered the owner of a tree to cut down all the branches which overhung his neighbour's urban tenement, and the branches, up to fifteen feet from the ground,[107] which overhung his rural tenement—failing which, the neighbour was allowed to cut down and appropriate the encroaching timber.[108] There seems to be no rule extant with reference to encroaching roots. In the French Code[109] there is a prohibition against planting nearer to the march than the local custom allows; and failing any custom, nearer than two metres for trees of lofty trunk, and nearer than half a metre for others. The neighbour may demand that all which transgress this rule should be felled, and that overhanging branches should be cut away, and he may himself cut the roots in his own soil. If the trees are common, each may demand their removal. In the Prussian Code,[110] it is provided that no one is compelled to suffer encroachment by branches or roots; but if they are cut down, the timber must be given up to the owner. In English as in Roman and Scotch law,

In Roman law and other systems. Ownership of tree.

Treatment of roots and branches.

[100] See L. Mackenzie (1st) in Wilson *v.* Laing, 14th June 1844, 7 D. 113, 115.

[101] 6 § 2 D. (47.7).

[102] 31 I. (2.1), and the parallel passage, 7 § 13, D. (41.1), as explained by Pothier Comment. *apud loc.*

[103] Art. 671-3; Fournel *s.v.* Arbres.

[104] I. 9, 285-6.

[105] Arts., 270-1, and see Wood on Nuisance, p. 113.

[106] The cases are noticed in Gale, p. 524; Hunt, p. 199.

[107] See the controversies about this in Vangerow, s. 297 (4).

[108] 1, 7-9 D. (43.27).

[109] *Ubi supra*, [103]; Pardessus, p. 290.

[110] I. 9, 287-8.

there is no authority as to cutting the roots; but encroachment by branches is a private nuisance, which may be abated *brevi manu*, but only after notice if the land of the owner of the tree must be entered for the purpose.[111] There seems no reason why the complainer's argument as to cutting the roots in *Halkerston's* case should not prevail, since there is encroachment exactly similar to that of overhanging branches. Trees which are common property, not being necessary for fencing, will be treated by Scotch in the same way as by French law. Thirdly, in regard to the fall of fruit or of the tree itself across the march, if the tree be common, the timber will be equally divided, and the fruit either be appropriated where it falls or follow the same rule. If the tree be proper to one of the parties, the Romans allowed the owner of the fruit to gather what fell beyond his march every second day.[112] By French law the ownership of the fruit follows that of the tree, and infers access on paying compensation for injury.[113] The Prussian Code contains a series of anxious regulations, in which the old common law of Germany supersedes the Roman rules.[114] If the neighbour suffers the branches—which he might cut down—to overhang, he takes the fallen fruit, which the other could not collect without (himself or by means of implements) entering his land or grappling the branches across the march. He even takes fruit cast by the wind from branches on the owner's side of the boundary. To the tree itself, if it falls across the march, and to the fruit then on it, he has no claim; but the owner must remove it without delay, on paying for any damage caused in the removal, and such, caused by the fall, as can be traced to his negligence. In the English law the fruit follows the tree: the owner may, on giving notice, enter to retake it, waiting only a reasonable time and breaking no fence;[115] and rules similar to those of the Prussian Code seem to apply to fallen timber.[116] The Scotch Courts will probably follow, in this respect, the Roman law, without its specialty, and the English and French in preference to the Prussian rules, and

Fall of fruit and of tree itself.

[111] Norris *v.* Baker, 1 Roll's Rep., 393; see Penruddock's Ca. 5 Rep. 100.

[112] Un. D. (43.28), *tertio quoque die*—not 'every third day'; nor 'before the 'third day' (Gesterding, p. 24). See the authorities in Vangerow, § 297 (3).

[113] The general rule of Code Nap. 547, is followed, Pardessus, p. 297, Fournel *s.v.* Arbres.

[114] I. 9, 289-297.

[115] Viner's Abr., Trespass, L.a.6., and Trees, E.; Anthony *v.* Haneys, 8 Bing. 186.

[116] Viner's Abr., Trespass, H.a.2., and case in Smith *v.* Kenrick, 7 C.B. 563. In America, assault on a woman who, being on the fence, *undertook* to pick cherries on branches, overhanging a neighbour's ground, of a tree standing on and wholly drawing nourishment from the other side, held unwarranted — Hoffman *v.* Armstrong (1872), 8 Amer. R. 537.

in so doing adhere to the fundamental rule *accessorium sequitur principale.* A landowner who allows a poisonous tree to encroach on his neighbour's land will be liable for injury thereby caused to stock which are lawfully there.[117]

Particular fences.

In applying the general rules above detailed, relating to fences on or near a boundary, to particular sorts of barriers, there is little difficulty with respect to some of these. Thus, wood paling requires such frequent renewal, and wire fences have come into use in times so recent, that their history, from the original erection downwards, may be easily proved. It will thus appear whether they were originally erected on a boundary, and whether, in that case, the expense was incurred in common; or whether they became boundary fences by severance of the estate subsequently to their being put up, in which case their later history will show the relation of the parties, while there will be a strong presumption in favour of common ownership. Again, a sunk fence, without any structure above the level of the upper ground, is not a march fence in the statutory sense, since it only benefits the lower proprietor, who will not, consequently, be entitled to claim a contribution towards its maintenance, any more than the upper owner to be aided in raising that barrier on the top of the sunk wall which is necessary for his premises alone; and the latter would have no right to compel his lower neighbour to maintain the sunk fence for the purpose of supporting his own.

Paling.

Wire fence.

Sunk fence.

Ditch with bank, dike, or hedge.

The group of fences of which a ditch or ditches form a part may be considered together. There may be a ditch only, or one ditch with a bank or feal dike made out of the materials, either surmounted by a hedge or not; or there may be two ditches, with a bank or feal dike, bare or planted, placed between them. In every case the titles, if express, are decisive.[118] Therefore, an express boundary 'by' an earth dike excludes the ditch beyond it, though the dike was formed from materials taken out of the ditch.[119] 'Enclosed by' may mean, and will probably be presumed to mean, an inclusion of the fence. Thus, the north boundary of a field was described in the titles as 'a loan'—which loan had disappeared—and the field was declared to be 'enclosed by a ditch and feal dike.' The ditch was outside the hedge. The possession was unimportant. Both parts of the fence were held to belong to the field, partly because of the terms of the last-cited clause, partly because the adjacent heritor could

Expressly mentioned in the titles.

[117] Crowhurst *v.* Amersham Burial Board, 4 Exch. D. 5; cf. Lawrence *v.* Jenkins, L.R. 8 Q.B. 274.

[118] *Supra*, p. 98.

[119] Smyth *v.* Allan, 1813, 5 Pat. 669.

have had no motive in reserving an interval between the field and the loan, and partly because of the presumed relation of the two parts.[120]

Not expressly mentioned.

If, on the other hand, there be no express boundary by local features, the Court is left to deal with presumption and possession. A ditch without a bank exists only in exceptional spots where the material dug out is more valuable as peat than as a fence. A single ditch and bank (surmounted by a hedge or not) is a very common fence. The presumption in that case is, that both ditch and bank belong to the field which lies over the bank from the ditch. The process supposed to take place is thus described by an English judge: 'No man making a ditch can cut into his 'neighbour's soil, but usually he cuts it to the very extremity of 'his own land. He is, of course, bound to throw the soil which 'he digs out upon his own land; and often, if he likes, he plants 'a hedge on the top of it.'[121] So, in Scotland, 'it is unknown to 'plant a hedge without a ditch; and as there is [in the case before 'the Court] no ditch in the inside, that on the outside must have 'been made on the ground' of the owner of the hedge.[122] It was the constant practice so to fence small subjects, such as burgh acres, when only one of the two conterminous owners was enclosing at the time.[123] The presumption thus raised will only be overcome by proof of statutory procedure or of original or subsequent agreement, express or tacit, to make or adopt the whole structure or either part of it as a common fence.[124] The possession may show a practice of maintenance inconsistent with the notion of several property, or consistent only with abandonment of the ditch as part of the fence—or it may be such as to keep up the original state of ownership. There seems to be no presumption of fact, and the Court will be guided entirely by the state of possession, in cases where there is a bank or hedge without a perceptible ditch, or a ditch between two artificial banks, or a bank between two ditches.[125]

Division-walls.

The most usual and most efficient fences are division-walls.[126] To them apply more especially the observations already made

[120] See next paragraph.

[121] Lawrence J., in Vowles *v.* Miller, 3 Taunt. 138. See Doe d. Pring *v.* Pearsey, 7 B. and C. 307, *per* Holroyd J.

[122] *Per* L. Cringletie in Girvan *v.* Smith, 3d Dec. 1829, 8 S. 173 (*Girvan's*, in the 1st line of p. 175, should be *Smith's*); and obs. of L. Mackenzie in Wilson *v.* Laing, [100]. See Code Nap. 667; Pardessus, p. 271, Fournel, *s.v.* Fossés.

[123] Girvan *v.* Smith, [122].

[124] See Thomson *v.* Purves, 9th June 1829, 7 S. 730 (a case between tenants), and Strang *v.* Steuart, explained *supra*, p. 517.

[125] See *per* Bayley J. in Guy *v.* West, 2 Selwyn's Nisi Prius (13th ed.), p. 1244.

[126] As to the difference between these and gables, see *infra*, p. 532.

regarding the question whether, in cases where the ownership of the soil is accurately known, a fence erected on each side of the march should not ensue the ownership of its base with cross rights of common interest, rather than be taken as common property. In either case the result is the same: for, on the latter theory, in contrast to common ownership generally, there can be no compulsory division; while, on the former theory, the common interest is potent enough to preserve the division-wall for its function as a fence, and to prevent its being turned to uses inconsistent therewith.[127] The question whether a division-wall is common in either of these senses will be determined by the same rules as those which have been already detailed in regard to march-fences generally. Common right may arise, therefore, from procedure under the old statutes, from express agreement, from tacit consent, or from conveyance by a common author, severing his estate already fenced, and giving out or reserving a similar right with either portion.

Maintenance.

Considering the frequency of disputes about the boundaries of estates, the animosity thereby engendered, and the prevalence of common or party or division walls, there is a strange paucity of reported decisions. The earliest case, already referred to, settled the principle of joint liability for the maintenance of a march-wall,[128] in accordance with the general rule of common ownership.

Alterations.

The other cases all refer to unwarrantable uses of or operations on the party-wall. A common division-wall six feet in height, fronting the complainers' cottages, was allowed by the Dean of Guild, on the petition of the neighbouring owner, to be raised two feet higher at his sole expense; but the complainers obtained an interdict, on the ground that no alteration could be made on the common property without their consent, especially when it would have the effect of darkening their cottages.[129] This specialty was, it is thought, unnecessary for the decision, since no interest had to be shown. A similar attempt was restrained in a later case where a sufficient 'mutual' division-wall between two feus given out by a common author was stipulated in the feu-rights to be built by the feuars, each of them paying, or relieving the other of, half the expense. It was further provided that the whole walls should not exceed eight feet in height, except by consent of the feuars, and in no case ten feet. One of the

[127] See Mr Justice Fry's definitions of the four possible sorts of party-walls in Watson *v.* Gray, 14 Ch. D. 192.

[128] Lockhart *v.* Sievewright, 1758, M. 10488; B. Pr. 1075.

[129] Warrens *v.* Marwick, 13th June 1835, 13 S. 944.

feuars, before the other took his feu, built a division-wall six and a half feet high, finishing it off in the ordinary way with a copestone. After the other feu had been taken, he proceeded to raise the wall to eight feet. It was held by the Second Division that the other feuar was entitled by the maxim *melior est conditio prohibentis* to prevent any such alteration; since the original wall of six and a half feet was obviously a sufficient wall, to which the superior could not have objected, and had been plainly intended to remain permanently at that height. Lord Benholme was of opinion that at the date of the original erection either party, if both had been in the field, might have prevented the other from raising the wall to eight feet, on proving that six and a half feet were sufficient. Lord Neaves, agreeing with the sheriff, read the titles differently.[130] Lastly, it is an unwarrantable use of an ordinary fence-wall to convert it into the gable of a house.[131]

Permissible uses.

These have been cases where the maxim of the civil law applies. There are, however, other operations performed by each of the conterminous owners on his own side which, as being *innocuæ utilitatis*, the other cannot prevent. These are such as walls in the particular circumstances of each case are commonly subjected to, and such as do not injure them in their primary use as fences. The most familiar cases are those of sustaining fruit-trees, bushes, or creepers in gardens and clothes-ropes in washing-greens, painting, and rough-casting.

II.—Common or Mutual[132] Gables.

Origin.

Common gables are the creatures of an expediency which rose almost to a necessity in the days when towns had to be protected by walls, and when a large population crowded for safety within the narrow space so secured. In Rome, from which most of our law on this matter is derived, the tradition was, that after the sack of the city by the Gauls, the 'ambits'[133] which had till then surrounded the blocks or 'islands' of houses within the walls became irrecognisable, and were, in the hurry of rebuilding, disregarded.[134] It is undoubted that an order of Nero's to return to the old provision of the XII. Tables, after the great fire in his reign, was

[130] Dow and Gordon *v.* Harvey, 9th Nov. 1869, 8 Macph. 118.

[131] Jack *v.* Begg, *et e contra*, 26th Oct. 1875, 3 Ret. 35. See this case noticed *infra*, p. 532.

[132] This misuse of the term 'mutual' is too familiar to be ignored.

[133] Varro de ling. lat. 5, § 22; Festus, s.v. ambitus; Isidor. Orig. 15, c. 16.

[134] Livy, 5, c. 55.

equally unattended to,[135] and that the '*paries communis*' which had long separated the closely packed houses that remained unburnt was also adopted in restoring those which had been destroyed. Similarly, in the towns of Scotland a device was welcome which admitted of the erection and safe enjoyment of one wall, where, without such a device, two of equal thickness in juxtaposition would have been required. Each proprietor would have been constrained to build his gable of sufficient strength to resist the thrust of his joists, to admit of fireplaces and vents being slapped out with safety, and to carry the roof. The desideratum was to simulate as a matter of right the plan which would be adopted as a matter of course by the owner of two adjacent building-stances in erecting the wall dividing the houses built by him thereon, or the plan which might be adopted as matter of agreement between two adjoining proprietors who should happen to build simultaneously and consent each to build half of the dividing wall on his own land.

Nature.

The device alluded to, which has been elevated into a rule of law, was thus described in a recent case: 'Where adjoining lots 'of ground are feued or sold for the purpose of building a contin-'uous street, the owner of any one of the lots, in building his 'tenement, constructs its gables one half upon the adjoining lots, 'so as to be mutual gables, and then when these gables are taken 'advantage of or used by the neighbouring proprietors they be-'come bound to pay to the first builder half the value of the 'mutual gables so used by them. Very often, or in general, the 'builder of the first tenement builds upon his neighbour's ground 'without the express consent of that neighbour, or, as it is ex-'pressed by the Lord President,[136] "behind the back of the neigh-'"bour," who takes for granted that the mutual gable will be all 'right; and the want of express consent will not preclude the 'builder of the mutual gable from claiming half its value from 'his neighbour who comes to use it. But all this proceeds upon 'a tacit or implied contract, inferred, either from a feuing plan 'according to which the line of street is to be built, or from the 'special circumstances of each case. Where there is no room for 'such implied contract and implied consent, the rule does not 'hold, and the builder of a tenement must build it, gable and all, 'entirely upon his own ground, unless he gets the consent of his 'neighbour.'[137] One of the circumstances here alluded to as im-

[135] Tacitus, Annal. 15, c. 43.

[136] L. P. Inglis in Lamont *v.* Cumming, 11th June 1875, 2 Ret. 784, 787.

[137] *Per* L. Gifford in Jack *v.* Begg, 26th Oct. 1875, 3 Ret. 35, 41. See also the obs. of L. Deas in Lamont *v.* Cumming, [136], 2 Ret. 790; and cf. Cæpolla, 1.40.33.

plying consent is the custom of all burghs.[138] The law relating to a right so anomalous as to enable one proprietor to encroach on the premises of his neighbour for the eventual or prospective mutual benefit of both, has received much elucidation in a series of decisions—none of which, however, go further back than the beginning of the present century.

Differ from division-walls.

After what has just been said, it is obvious that common gables differ very materially from the ordinary division-walls which were discussed a few pages back. These latter are fences only; common gables are fences and something more. Division-walls may be erected at the common expense against the will of one of the parties, in accordance with the old Scots Acts 1661 and 1669, if the judge ordinary is of opinion that a wall is the proper sort of fence in the circumstances—and they cannot be enforced except in certain rural subjects; while common gables do not come under these Acts, and can only be set up in opposition to a neighbour under the circumstances mentioned in last paragraph. A division-wall has only to bear its own weight, while a common gable not only sustains the floors and roof, but must be strong enough to admit vents and fireplaces. Consequently it is not allowable to convert an existing common division-wall into a gable without the consent of the neighbouring owner; and the latter will not be mulcted in damages if he *de recenti* removes the innovation.[139]

Not convertible. *Begg* v. *Jack.*

The proprietor of a suburban piece of ground, without the consent of the conterminous proprietors, and pending unsuccessful negotiations, which lasted two months, not as to the lawfulness of his operations, but as to the terms on which consent should be given, took down an old common garden-wall and erected on its site a gable four storeys high. The conterminous proprietors at length applied for an order on the builder to restore the wall to its former height, and for interim interdict against his proceeding with the building. The application was refused, as not having been timeously brought, but no opinion was given as to the right to convert the wall into a gable.[140] The conterminous proprietors then raised an action of declarator that the old division-wall was mutual, and that the defender was not entitled to remove it or make other erections in its place without their consent; and they craved that he should be ordained to restore it to its original height and condition, or to remove the new gable so far as of greater height than the old wall on their side of the centre line, or to pay damages.

[138] Lamont *v.* Cumming, *supra, loc. cit.*, [136].

[139] Watson *v.* Gray, 14 Ch. D. 192.

[140] Begg *v.* Jack, 10th Jan. 1874, 1 Ret. 366.

The Court found that in the especial circumstances of the case the pursuers were not entitled to have the new gable pulled down, and that the defender's original offer to build the gable as a mutual gable, without charging any part of the cost against the pursuers, was full indemnification to the pursuers for the use the defender had taken of a portion of their land without agreement. This mode of settling the rights of the parties had the merit of discouraging an undoubted encroachment *in mala fide*, of not immediately burdening the pursuers who were not *lucrati* as not having yet taken advantage of the gable, and of embodying a compromise at one time suggested by the pursuers.[141] But apart from the special circumstances there was no doubt of the law. Lord Gifford, in the passage following that already quoted, says: 'It 'was hardly contended that in proper rural subjects where the 'lands of the parties are divided by mutual fences, whether walls 'or hedges, the proprietor of one of the subjects can at any point 'he pleases, and without his neighbour's consent, remove the 'mutual fence or wall, and insist on erecting a gable one half 'upon his neighbour's property. I think he has no such right, 'and that he cannot without mutual consent convert a mere 'garden or field division-wall into a mutual gable.' After taking the case of villa feuing as an example, his lordship proceeds: 'In like 'manner, where even in a street a church has been built entirely 'within its own ground, I do not think that adjoining proprietors, 'apart from contract express or implied, can insist upon building 'the gables of their houses one half upon ground belonging to the 'church, although the church and its proprietors can never take 'any benefit from such gables as mutual gables.'[142]

Jack v. *Begg* examined.

This decision was noticed in 1882 by Lord Watson[143] in one of the ablest judgments of recent years, as being one of the three solitary cases in the books,[144] in which, there being no facts sufficient to raise a plea in bar of the action, the Court had nevertheless, in exercise of the equitable jurisdiction of a superior Court, denied to the pursuer the remedy to which in strict law he was entitled. It was pointed out that 'in order to justify the exercise 'of such a discretionary power there must be some very cogent 'reason for depriving litigants of the ordinary means of enforcing 'their rights,' and that no such reason existed in this case for giving 'the wrongdoer compulsory powers to acquire part of his

[141] Jack *v.* Begg, *et e contra*, 26th Oct. 1875, 3 Ret. 35.

[142] Ibid. p. 42.

[143] In Grahame *v.* Kirkcaldy Mags., 26th July 1882, 9 Ret. H.L. 91, 92. The judgment in *Jack* v. *Begg* was gravely doubted by the profession at its date.

[144] The others were Macnair *v.* Cathcart, M. 12832, *supra*, p. 331, and Sanderson *v.* Geddes, *infra*, p. 539.

'neighbour's property, which, in spite of remonstrance, he had 'illegally appropriated.'

At common expense. Claim for half —real.

Most of the cases which have arisen regarding common gables have related to the nature of the claim, already alluded to, for one half of the expense or value. The earlier cases are all examples of special stipulation. In the first reported decision,[145] the superiors had bound all purchasers of building-stances in Heriot Row, Edinburgh, to build mutual gables, with right of recourse to each against his neighbour on the latter beginning to build on his own site. The pursuer built a house and gable, but the purchaser of the adjoining lot became bankrupt before commencing any erection thereon. The Court held that the pursuer had a preferable claim on the price of the bankrupt's stance, being of opinion that this right arose not from any contract between the conterminous heritors, but from the necessity of the situation; that the ground on which the mutual gable stood was common, mutual, and indivisible; that there was therefore no room for the maxim *inædificatum cedit solo;* and that the gable was the sole property of the pursuer till paid for. Again, where recourse was to be had against the feuar of a lot adjoining a mutual gable already built, 'so soon as 'the same shall be feued, for one half the expense thereof,' and the feuar first in the field erected a mutual wall suitable for a house of four storeys, and his neighbour then made use of it only to the extent of three storeys, the latter was, nevertheless, on the express words of the feu-rights, found liable for one half of the whole expense; and the custom of the burgh was not allowed to interfere with the operation of the clause.[146] In a case of very special circumstances, there was no obligation laid on adjoining feuars to pay, but only a claim in each feu-right for the half expense, payable within one month after the feu was taken. This would not have been binding on the defender had he not also signed the pursuer's feu-contract as a consenter.[147] An obligation to pay within one month after the lots are feued is not got rid of by renouncing the feu before making use of the gable.[148] The next case[149] was 'exactly the converse and counterpart' of the case of *Wallace*, since the bankrupt was the builder of the mutual wall.

[145] Wallace *v.* Brown, 1808, M. Appx. Personal and Real, No. 4.

[146] Ness *v.* Ferries, 13th May 1825, 4 S. 7 (N.E. 7).

[147] Mackenzie *v.* Mackenzie, 18th Nov. 1829, 8 S. 74. Another *ratio*—the common-law liability—was called in aid, *infra*, [151]. The superiors were found liable to relieve the pursuer of his expenses in this action, Mackenzie *v.* Morison's Trs., 23d Nov. 1830, 9 S. 44.

[148] Thorburn *v.* Pringle, 11th July 1832, 10 S. 822. See Risidge *v.* Baker, 15 Amer. R. 475.

[149] Hunter *v.* Luke, 2d June 1846, 8 D. 787.

He was entitled by express stipulation to repayment of half the expense, as soon as the building of the gable was begun, if the adjoining stance was then already sold; or as soon as it was sold, when that had not already taken place. He built the tenement and common gable; granted the respondents an *ex facie* absolute disposition of part of the tenement, on which they were infeft; and then became bankrupt. It was held that the claim was real and not personal, and that it passed, in the proportion of the value of this part to that of the whole tenement, to the respondents without being specially assigned to them, and that they must be preferred accordingly. In the latest case, the feu-contract bound the feuar to build one half the thickness of his gables on his own, the other on the adjoining feus, and stipulated that they should be common to him and the adjoining feuars respectively. The cost was to be borne equally; provision was made for recovery of the shares, but nothing was said as to the date at which the claim was to emerge. A later feu-contract, in disponing the stance to the west, referred to the west gable of the first feu as already made, one half across the march, and provided that the second feuar should pay to the first half the cost, nothing being said of the date of payment or of obligation to make use of the gable. It was held on the terms of the deeds that the claim emerged at the date of the second feu-contract, and therefore whether the wall ever came to be used or not.[150]

Emergence of implied claim.

Where there is no express obligation in the titles to pay one half of the expense or value of a common gable, there is an implied obligation, which cannot, however, be enforced till the second builder actually takes advantage of the wall. This was one of the points in the case of *Mackenzie*, already cited,[151] where the sole use the defender had made of his ground was to build a narrow strip of wall to the front and next the gable—at the request, as was alleged, of the pursuer. The law was very carefully considered a quarter of a century later. A feuar built his house in a street with a common gable, one half thereof resting on the adjoining stance which at that time was still unfeued, without express permission so to build, or stipulation as to the expense, but with the cognisance of his neighbour. Thereafter, both subjects passed into the hands of singular successors, and the owner of the stance adjoining the house proceeded to build, making use of the gable. In a question between the two neighbours, it was held—

[150] Sinclair *v.* Brown Bros., 17th Oct. 1882, 10 Ret. 45.

[151] *Supra*, [147]. It is thought that the use here shown was really insufficient to raise the common-law right to indemnity.

(1) that the original builder was entitled to pass over the boundary without encroachment; (2) that the right to claim half the expense of the gable required no express agreement, but inhered in the subjects; (3) that being a real right, it was available to and against singular successors;[152] but (4) that, though it came into existence with the original building of the gable, it only emerged as an active claim for payment when the adjacent site actually came to be built upon and the gable appropriated.[153] The same principles were given effect to in a recent case,[154] where the special stipulation was such as to leave the matter of payment to the common law, and where, as in *Wallace's* case, the second builder became bankrupt before payment was made. It makes no difference that the gable was built when both stances belonged to the same proprietor, so long as there is no discharge of the inherent claim in the title of the purchaser of the house already erected; and this claim will then hold good, whether the vacant stance be retained by the original owner or conveyed to a third party.[155] The erection on a vacant stance of temporary buildings, whose roof rested wholly on pillars within the stance and only touched the gable by a rone in front, is not a use of the gable involving liability to share the cost.[156]

Nature of the various rights.

In some of these cases attempts were made to define the anomalous rights of ownership which affect a common gable and the soil on which it rests in the different stages of their history. We have seen that in the case of *Wallace*[157] the *solum* was regarded as common property, and the wall as the sole property of the builder till paid for. Lord Jeffrey thought that till then 'he is the sole proprietor, with a kind of conventional servitude 'provided in favour of the party who comes to build on the 'adjoining stance to have right to one half on paying the party 'who built it or the party to whom he may have conveyed it.'[158] This *dictum* is loosely expressed in the use of the term 'servitude,' but the doubt left open whether the half is held in severalty or *pro indiviso* is solved in favour of the latter alternative by the rest of his lordship's remarks. The first Lord Curriehill, while pointing out that after use has been taken of the gable there is a *pro*

[152] There is diversity of view on this matter in different States of the Union, Cole *v.* Hughes (1873), 13 Amer. R. 611; Richardson *v.* Tobey (1877), 23 Amer. R. 283. As to the effect of acquiescence, Day *v.* Caton (1876), 20 Amer. R. 347.

[153] Law *v.* Monteith, 30th Nov. 1855, 18 D. 125.

[154] Rodger *v.* Russell, 10th June 1873, 11 Macph. 671.

[155] Glasgow Royal Infirmary *v.* Wylie, 15th June 1877, 4 Ret. 894.

[156] Sinclair *v.* Brown Bros., *supra*, [150].

[157] *Supra*, [145].

[158] In Hunter *v.* Luke, [149], 8 D. 790.

indiviso right over the whole wall, expressly reserved his opinion as to whether this common ownership extended to the *solum*.[159] Lord Justice-Clerk Moncreiff held that it followed from earlier decisions, 'first, that the builder of the gable is the feudal pro-'prietor of it without any specific title to part of the *solum* on 'which it rests; secondly, that the *pro indiviso* right to it may 'be acquired by the adjacent feuar without any written title, 'excepting that to the one half of the *solum*; and third, that the 'right is at once transferred by the use taken of the gable, along 'with payment of half the expense of erecting it.' 'Probably the 'right [of the builder prior to use and payment] may be correctly 'defined as a right of property qualified by an implied trust for 'the adjacent feuar, with an obligation to denude on payment of 'the price.' The claim 'is not properly a real burden, but a 'right of property, and therefore subsists against all who make 'use of the gable till the price is paid.'[160] Lord Cowan, on the other hand, in deciding the same case, thought that the claim for payment was a real condition affecting the ownership of the adjoining stance and the building erected thereon; and that the *pro indiviso* ownership commences with the actual use of the wall, and does not require payment to have been made. Both he and Lord Neaves thought that the *solum*, occupied or destined to be occupied by a common gable, is common property.[161]

Presumed discharge of claim for half expense.

Two questions have been raised, but not decided, in the course of these cases: First, the question whether a singular successor in a house built with a common gable before his purchase is entitled to assume that the claim for payment of the half expense has been discharged, and whether he will be liable if it has not been so in fact;[162] and secondly, the question just noticed by Lord Cowan, at what date the *pro indiviso* ownership commences. In view of the foregoing observations, the former question seems, it is thought, to demand the answer that the real burden will be kept up against him, unless he be able to plead abandonment of the claim. Thus, it will not do for him to point to a prior use of the gable as one wall of temporary buildings, situated on the stance he has acquired.[163] The other point was raised, but not decided, in a

[159] In Law *v.* Monteith, [153], *supra*, 18 D. 131.

[160] In Rodger *v.* Russell, [154], 11 Macph. 673.

[161] Ibid. pp. 674-5. This was also the view of the judges in Wallace *v.* Brown, [145]. It is supported by the Roman law, which seems to contemplate a belt of common property running between the stances —see 4 § 10 D. (10.1); 25 § 1 D. (8.2); and by the French law—Pardessus, p. 254; but opposed to the English law when the exact boundary is known, *supra*, p. 515.

[162] Law *v.* Monteith, [153], *per* L. Deas; Rodger *v.* Russell, [154], *per* L. Shand.

[163] Glasgow Royal Infirmary *v.* Wylie, [155].

(1) that the original builder was entitled to pass over the boundary without encroachment; (2) that the right to claim half the expense of the gable required no express agreement, but inhered in the subjects; (3) that being a real right, it was available to and against singular successors;[152] but (4) that, though it came into existence with the original building of the gable, it only emerged as an active claim for payment when the adjacent site actually came to be built upon and the gable appropriated.[153] The same principles were given effect to in a recent case,[154] where the special stipulation was such as to leave the matter of payment to the common law, and where, as in *Wallace's* case, the second builder became bankrupt before payment was made. It makes no difference that the gable was built when both stances belonged to the same proprietor, so long as there is no discharge of the inherent claim in the title of the purchaser of the house already erected; and this claim will then hold good, whether the vacant stance be retained by the original owner or conveyed to a third party.[155] The erection on a vacant stance of temporary buildings, whose roof rested wholly on pillars within the stance and only touched the gable by a rone in front, is not a use of the gable involving liability to share the cost.[156]

Nature of the various rights.

In some of these cases attempts were made to define the anomalous rights of ownership which affect a common gable and the soil on which it rests in the different stages of their history. We have seen that in the case of *Wallace*[157] the *solum* was regarded as common property, and the wall as the sole property of the builder till paid for. Lord Jeffrey thought that till then 'he is the sole proprietor, with a kind of conventional servitude 'provided in favour of the party who comes to build on the 'adjoining stance to have right to one half on paying the party 'who built it or the party to whom he may have conveyed it.'[158] This *dictum* is loosely expressed in the use of the term 'servitude,' but the doubt left open whether the half is held in severalty or *pro indiviso* is solved in favour of the latter alternative by the rest of his lordship's remarks. The first Lord Curriehill, while pointing out that after use has been taken of the gable there is a *pro*

[152] There is diversity of view on this matter in different States of the Union, Cole *v.* Hughes (1873), 13 Amer. R. 611; Richardson *v.* Tobey (1877), 23 Amer. R. 283. As to the effect of acquiescence, Day *v.* Caton (1876), 20 Amer. R. 347.

[153] Law *v.* Monteith, 30th Nov. 1855, 18 D. 125.

[154] Rodger *v.* Russell, 10th June 1873, 11 Macph. 671.

[155] Glasgow Royal Infirmary *v.* Wylie, 15th June 1877, 4 Ret. 894.

[156] Sinclair *v.* Brown Bros., *supra*, [150].

[157] *Supra*, [145].

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indiviso right over the whole wall, expressly reserved his opinion as to whether this common ownership extended to the *solum*.[159] Lord Justice-Clerk Moncreiff held that it followed from earlier decisions, 'first, that the builder of the gable is the feudal pro-'prietor of it without any specific title to part of the *solum* on 'which it rests; secondly, that the *pro indiviso* right to it may 'be acquired by the adjacent feuar without any written title, 'excepting that to the one half of the *solum;* and third, that the 'right is at once transferred by the use taken of the gable, along 'with payment of half the expense of erecting it.' 'Probably the 'right [of the builder prior to use and payment] may be correctly 'defined as a right of property qualified by an implied trust for 'the adjacent feuar, with an obligation to denude on payment of 'the price.' The claim 'is not properly a real burden, but a 'right of property, and therefore subsists against all who make 'use of the gable till the price is paid.'[160] Lord Cowan, on the other hand, in deciding the same case, thought that the claim for payment was a real condition affecting the ownership of the adjoining stance and the building erected thereon; and that the *pro indiviso* ownership commences with the actual use of the wall, and does not require payment to have been made. Both he and Lord Neaves thought that the *solum*, occupied or destined to be occupied by a common gable, is common property.[161]

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[162] Law *v.* Monteith, [153], *per* L. Deas; Rodger *v.* Russell, [154], *per* L. Shand.

[163] Glasgow Royal Infirmary *v.* Wylie, [155].

Commencement of common ownership.

very special case, in which there was an express stipulation to pay half the expense within one month of the purchase of the unbuilt stance. The feuar of the said stance, after building cellarage and pavement and paying the feuar of the next stance (already built upon) for the common gable, by agreement with the superior renounced his feu and assigned to him all claim to the common gable. Ten years later the superior conveyed the feu so resigned to another party, without any stipulation as to the common gable or as to the existence of any claim under the assignation. Meanwhile the other feu had been purchased from the original builder of the gable; and to the purchaser the new feuar of the unbuilt stance paid one half of the value of the gable on beginning to make use of it. The superior then raised an action for payment thereof against each feuar alternatively, but was held to have no title to sue, since he had made no express stipulation or reservation in the new feuar's charter, and since he could only claim against the builder of the gable through him. All questions between the feuars themselves were, of course, reserved.[164] Lord Benholme,[165] as Lord Ordinary, put the question —when the *pro indiviso* real right begins;[166] and replied that it will not wait till actual use of the gable when there is an express stipulation to pay and payment has been made prior to the use being taken; while Lord Cowan regarded the use of the gable as the point at which the real right of property begins; for if not, the party who has only a prospect of using it would be liable for all the risks of a co-owner if the gable were burnt or blown down. It may be answered that this is merely the ordinary risk—*rei venditæ necdum traditæ*. The other case of the gable being used before payment is made presents greater difficulty; but there also the date of payment or discharge, express or implied, seems decisive, since the position of sole proprietor and the exclusive right[167] thus afforded to the first builder are mainly useful in securing this payment.[168]

Built wholly on one side of boundary.

Walker v. *Shearer*.

Before passing to the use or enjoyment of a common gable, it is necessary to notice two cases in which what were determined by the Court to be common walls were situated entirely within the bounds of one of the adjoining properties. Dispositions from the same author to different feuars of conterminous subjects declared that if the one should build on the extremity of his feu, the

[164] E. Moray *v.* Aytoun, 30th Nov. 1858, 21 D. 33.

[165] Ibid. p. 37.

[166] Ibid. p. 43.

[167] L. Mackenzie in Hunter *v.* Luke, [149], 8 D. 790.

[168] Cf. the views of L.O. Shand and L.J.-C. Moncreiff with those of L. Cowan in Rodger *v.* Russell, [154].

other should be entitled to 'take band' in the same on paying an equivalent to be determined by arbiters. One of the feuars built a church entirely within, but up to the verge of, his own land; and the other, after purchasing the privilege of taking band to a depth of four and a half inches, sunk the lintels of an adjacent pend into the wall of the church to that distance. His successor in the subjects thereafter took band for nine inches, and built, moreover, on the top of the church gable to that width. It was the custom in the burgh (Aberdeen) that, when four and a half inches of a 'mutual' wall were paid for, the privilege of banding to the extent of four and a half inches more was acquired; and that banding included right to build on the top of the gable. The operations complained of were found to be lawful, 'since it was 'intended by the titles that the party building should either 'build partly on his neighbour's ground or entirely on his own;' and that the wall was in either case to be a mutual wall, to which the custom of the burgh would apply. If the first feuar were so foolish as to give up the use of a strip of land by not building on it *sibi imputet.*[169] The other case went further. Two cottages in a town, built apparently at different times, came into the hands of the same owner, who disposed of them to different parties. The owner of the westmost took down the four-feet thick clay gable which divided the cottages and replaced it with a stone gable two feet thick, wholly built on the eastern side of the *medium filum* of the old gable. This was done with the knowledge of the proprietor of the eastmost cottage, who made no objection. The Court held—(1) that it did not matter which of the cottages was first built, for, by being granted out by a common author, the clay gable must be taken to have been mutual; (2) that the owner of the eastmost cottage was precluded from demanding the demolition of the new gable, though wholly situated on his property, by his own acquiescence, inferred from his proved knowledge of the alterations during their progress, and his non-interference; (3) that so long as the latter used the new gable only as a wall for his own cottage, no claim could be made out against him for any part of the expense, but that he would become liable for half the value or expense on using the gable for any new building he might erect on the same site; (4) that he was entitled to receive the value of the space appropriated by his neighbour; and (5) that the *medium filum* of the old wall was to regulate as before, the boundaries of the plots of ground attached

Sanderson v. *Geddes.*

[169] Walker v. Shearer, 4th Feb. 1870, 8 Macph. 424.

to the cottages.[170] This judgment seems to reach an equitable result in the circumstances, and no exception was taken to it in a recent decision; the ground being that the acquiescence of the owner to the east did not deprive him of his property in the *solum* on which the eastern half of the old wall stood, but merely deprived him of the exclusive use and possession of his property until the new gable became ruinous or was pulled down.[171]

Gables—how enjoyed.

Leaving now the rules relating to the constitution of a common gable, and passing to its use or enjoyment when erected, it speaks well for the peaceableness or forbearance of the neighbouring co-owners to find that there is only one case, and that a very recent one, which has any direct bearing on the matter. The points there decided were, that when use came to be taken of a common gable on the unoccupied side of which no fireplaces, vents, or other conveniencies usual in gables, except one recess, were left, the following operations were lawful—to insert joists, to turn the recess into a fireplace, to slap out a vent therefrom to the chimney-head, and to raise the height of the gable so as to suit the second builder's loftier house, although in doing so he had to remove temporarily a few of the slates from the roof of the existing house. These operations were well executed, did no damage to, and did not endanger the gable or any other part of, the said house.[172] The opinions of the judges are very instructive. The pursuer founded on the veto of a common proprietor,—*in re communi melior est conditio prohibentis.* On this the Lord President (Inglis) remarks: 'That proposition lies at the foundation of the 'pursuer's case. It appears to me to be stated much more broadly 'than the authorities warrant; and indeed, when so stated, to be 'repugnant both to common-sense and everyday practice. When 'the second builder comes to erect his house, if he constructs it 'in the ordinary way he must insert joists, and drive in dooks 'for the purpose of supporting the woodwork of the lathing. In 'that way he necessarily interferes with the substance, the stone 'and lime, of the gable-wall. Therefore the rule contended for 'by the pursuer cannot be applied absolutely. But the truth is 'that a gable is the subject of common property in a somewhat 'different way from any other thing, in this respect, that when it 'is originally built the party who builds has the only beneficial 'enjoyment.' When the other comes to build, 'then for the first

[170] Sanderson *v.* Geddes, 17th July 1874, 1 Ret. 1198.

[171] *Per* L. Watson in Grahame *v.* Kirkcaldy Mags., 26th July 1882, 9 Ret. H.L. 91, 92.

[172] Lamont *v.* Cumming, 11th June 1875, 2 Ret. 784.

'time the rights of the two parties come to be adjusted. If the 'second party finds that the wall is so built that it cannot be 'used for a gable, there must be some remedy, because it has been 'built half on his land.' 'There can be no common property in 'this gable unless there be an equality of rights. But the parties 'cannot have equality of rights if the one has vents and the other 'has none.'[173] With regard to the heightening of the gable, his lordship, after showing that to refuse a right to heighten it would enable the first builder in a street to settle the height of all the houses for all time, proceeds thus: 'The only mode of reconciling 'the two rules,—the first, that the gable is common property and 'cannot be interfered with by one party without the consent of 'the other; the second, that the owner is entitled to raise a 'building on his property to any height,—is to hold that the second 'proprietor may raise the wall to any height to which he wishes 'to build his own houses, always provided he does not injure the 'gable or his neighbour's property.'[174] As Lord Deas pointed out, there is here a marked distinction between gables and ordinary division-walls which are merely fences.[175] 'A mutual gable 'must be presumed to be intended to serve the purposes of a 'gable for each of the properties, to bind into it the front and 'back walls of the houses, to receive the chimneys and flues of 'each in fair proportion, and to afford supports essential to the 'interior construction and utility of each of the buildings. In 'making these particular uses of the gable, I can see no principle 'of restriction, except that the one proprietor must not injure the 'property and rights of the other, nor endanger the mutual pro-'perty of both. But the sole reason why I think these uses may 'be made of the gable is because they are the very purposes for 'which a mutual gable is intended. It does not follow that either 'of the joint proprietors can operate upon it for purposes not 'inherent in its nature—for instance to make wall-presses, which 'certainly could not be struck out without mutual consent. Nor 'do I by any means say that the gable may be raised to what-'ever height the strength of it will bear, however unusual and 'invidious that height may be. On the contrary, I think there 'must always be judicial control in this respect as well as in 'other respects, so that nothing may be done but what is fair and 'reasonable.'[176] It has been held in the Outer House, and

[173] Ibid. pp. 787, 788.

[174] Ibid. p. 788. The operation is at the innovator's risk; he must ensure its safety—see Brooks *v.* Curtis, (1872), 10 Amer. R. 545.

[175] Case of Lamont, p. 790; and see case of Dow and Gordon *v.* Harvey, *supra*, [130].

[176] Ibid. p. 790. His Lordship reserves

acquiesced in, that the outer co-owner of a denuded gable may, without the consent of his neighbour, use it for painting up business signs or advertisements.[177]

In other legal systems.

It thus appears that of the two leading rules relating to common property generally, that of compulsory division is altogether inapplicable, as being inconsistent with the nature of the subject; and that of the veto applies only to such operations as are incompatible with the ordinary purposes of a gable-wall, or such as will be injurious to the wall, by establishing a lawful use in an unwarrantable way. Were it not, therefore, for the uniformly accepted view of our judges that a common gable is common property, it might be thought more consistent with principle to regard it as held by each in several ownership as to one half of its width across, with cross rights of common interest over the other half. Whichever be the true theory, the result is the same. Little light is thrown on the question what is a lawful use of a mutual gable by the law of other countries, where house arrangements differ from those now existing in Scotland. It will be sufficient to refer to some authorities in the Roman[178] and French[179] systems. The rules regarding repair and rebuilding are not in the same way affected by climate, and are the same as those which have been already described as applicable to common property generally,[180] since the Roman law allowed the action *communi dividundo* to be used in regard to an indivisible subject to that extent.[181] This matter has been carefully developed by the French jurists on general principles. Each owner is obliged to look after the preservation of the wall with the same care as if it were his sole property, and to avoid injuring it himself; and he is entitled to prevent anything being done by the other which goes beyond his rights. If repair[182] or reconstruction becomes indispensable through age or mere accident, though the wall be not actually ruinous, each must contribute; and, in case of urgency only, each may put hand to the work without consulting the other. The inconvenience caused by repair must be borne without indemnification, since it results from the nature of things.

opinion as to whether the powers of the sheriff in rural districts would be as great as those of the Dean of Guild or magistrates in burghs.

[177] *Per* L. Currichill (2d) in Allan & Co. *v.* Glasgow Union Ry., winter session, 1876-7.

[178] 8, 13 pr. and § 1, 19 D. (8.2). 27, § 10 D. (9.2).

[179] See the whole law of 'murs mitoyens' in Code Nap. 653 *et seq.*; and as to this, Pardessus, p. 256, Fournel *s.v.*

[180] *Supra*, p. 490.

[181] See 8 D. (8.2); 35-37, 39-41 D. (39.2); 12 D. (10.3); 27, § 10 D. (9.2); Paul, Rec. Sent. v. 10.2.

[182] Party-wall of a pend—Colebeck *v.* Girdlers' Co., 1 Q.B.D. 234.

If, on the other hand, the 'degradation' has been caused by the ault of one of the parties, he must bear all the consequences. If, on reconstruction, the old wall is proved to have been unfit for its work, either may demand that the new one shall be made fit for it. The case of a gable is an exception to the rule that a co-proprietor may rid himself of the obligation to repair by renouncing the subject, since it is necessary to the existence of his house.[183]

A case has been cited[184] in which it was decided, on the express words of a stipulation, that the second builder had to pay half of the expense of the gable, although he did not use it for his house all the way up. Proof was offered that the custom of Edinburgh was to pay the half expense only of that part which was actually made use of. This custom is undoubtedly reasonable in cases where the second builder is under a restriction not to build so high as his neighbour.[185] It may be doubted whether it will equally apply where there is no restriction, and the second builder merely chooses to build a house lower than his neighbour, —at all events, in cases where the first building is not of an unusual height. But if the second builder, in making use of the gable at first, or if either thereafter, for his own convenience, raise the wall higher than it was before, he will not be entitled to claim half the expense until the other proceeds to take advantage of the increment.

Heightening gables.

[183] See the whole law in Pothier, Contr. de Société, n. 215-223; Pardessus, p. 249 *et seq.*; and the review thereof in Washburn, 4, 3, 19 *et seq.* The American law seems to be the same, ibid. §§ 9, 10. As to the care required in repairing boundary-walls, see *supra*, p. 312; and Bradbee *v.* Christ's Hosp., 4 M. and Gr. 761.

[184] Ness *v.* Ferries, [146].

[185] It seems the general rule in France that the mutuality ceases with the *héberge*, the point up to which both buildings profit—Pothier, Contr. de Société, n. 203; Pardessus, p. 240.

CHAPTER XXXIII.

LIMITED ESTATE—*continued.*

COMMON INTEREST.

Common interest.

THE technical term 'common interest' has already appeared in these pages in connection with the rights of riparian proprietors in running water and in the fishings therein.[1] It is also used to designate certain rights which bear a close relation to, but are quite distinct from, the common property in gables, which has just been examined. These are the rights, *inter se*, of the separate owners of those flatted houses which are so frequent in Scotland, where one person may own the cellar, another the ground-floor, others the floors above, and another still the garret or attic. But before examining the law thereanent in its present development, it will be necessary to trace it to its source, and in doing so to fill up a gap which was left in setting forth the law of servitude.[2]

In flatted houses.

Serv. tigni immittendi.

Two servitudes of support of buildings by buildings are recognised by all the writers on the law of Scotland,[3] as derived from the Roman jurisprudence. The first is the right to let a beam or other structural part[4] of the dominant into the wall of the servient tenement, and to keep it there (*s. tigni immittendi*). The beam might be renewed when necessary.[5] It seems the better opinion that this was not properly a servitude of support at all, but only a right to immit[6] or thrust a beam across the boundary (as for

[1] *Supra*, chap. 29.

[2] *Supra*, p. 380, and especially Support, p. 420.

[3] Forbes, 2.4.3.2; Mackenzie, 2.9.6.7; St. 2.7.6; Ersk. 2.9.7; Bankt. 2.7.7; B. Pr. 1003. For the Roman law, see Cæpolla, i. 30 and i. 37; Westphal. s. 593 *et seq.*; Vangerow, § 342; Molitor, p. 342; Elvers, 55 *et seq.*, and 430 *et seq.*; Glück, Comment. x. 1.

[4] 'Tignum' is so defined—29 I. (2.1); 62 D. (50.16).

[5] 14 pr. D. (8.5) cannot refer to this servitude, being inconsistent with the requirement of a 'perpetua causa,' and with 6 D. (8.2).

[6] Cf. the phrase 'fumum immittere,' 8, § 5 D. (8.5).

the purpose of obtaining a better grip of the dominant heritor's own wall), and that it only differed from the *s. projiciendi* and the *s. protegendi*[7] in the circumstance that the beam, when first introduced, rested on a wall, and was not merely thrust into a void space belonging to the neighbour.[8] At all events, the support—if support there were—was of the most precarious kind; for the dominant owner could not compel the servient to upkeep his wall: and there is no authority, except the general rule of repairs in case of servitude, for saying that the dominant owner could invade his neighbour's dwelling—that *tutissimum cuique refugium atque receptaculum*[9]—for the purpose of repairing it himself.

Serv. oneris ferendi.

The other[10] servitude—*s. oneris ferendi*—was really a right of support. At first it may have been, in practice, only a right to rest the beams of the dominant on the adjacent wall of the servient tenement without making it a *paries communis;* but in later times it extended to the case of whole rooms lying within one house, but belonging to and entered from another.[11] This is the embryo of the modern flatted house. This servitude differs essentially from its congener,[12] and from all other servitudes as well,[13] in carrying with it an inherent obligation on the servient owner to keep up the servient tenement. Whether this peculiarity arose from the words of the formula,[14] as Erskine thinks, or from the general law of caution *damni infecti,* or in the interests of the servient owner to preserve his *lares* and *penates* from intrusion, or for some other reason, has been the subject of much controversy.[15] The obligation did not extend to shoring up the dominant during the repair of the servient tenement, and might be got rid of by relinquishment of the latter subject.[16]

As applied in Scotland.

In regard to the authority of these texts in Scotland, Lord Stair distinctly lays it down, that here the obligation to repair may be made 'a part of the servitude passing with the servient tenement, 'even to singular successors,' but only if expressly granted or set up by custom; and that if not so constituted, the dominant owner has only a right to repair and a claim for recompense against the servient owner *in quantum lucratus est.*[17] Mr Erskine and Mr Bell[18] agree with their illustrious predecessor in requiring a special

[7] 2 I. (4.6); 1 pr. D. (8.2); 2 D. (8.3); 29, § 1 D. (9.2).

[8] 242, § 1 D. (50.16).

[9] 18 D. (2.4).

[10] The two are not kept rigidly distinct—see 8, § 1 D. (8.5).

[11] 47 D. (39.2).

[12] 8, § 2 D. (8.5).

[13] 6, § 2 D. *eod. tit.*

[14] *Paries oneri ferundo, uti nunc est, ita sit*—33 D. (8.2); Ersk. 2.9.7.

[15] See Vangerow, Molitor, Elvers, and Glück, *supra*, 3.

[16] 6, § 2, 8 pr. D. (8.5).

[17] St. 2.7.6.

[18] Ersk. 2.9.8; B. Pr. 1003.

contract; and they cite a case[19] which is worthy of notice as being the only decision on a pure question of servitude of support, all the other cases being instances of the more complicated right of common interest. The defender having taken down a ruinous gable of which he was sole owner, burdened with a servitude in favour of the neighbouring house of supporting its joists and laid-to chimneys, and being now about to build it anew, the pursuer, the owner of the dominant tenement, sought to compel him to re-build the laid-to chimneys as before at his own expense. The defender pleaded the nature of servitudes as lying *in patiendo non agendo*, and the necessity of repair on account of the ruinous nature of the house. The Court at first found against him out and out, that there was a servitude *oneris ferendi* both of joists and chimneys, and that he must not only build the wall in its old condition, but also build and lay-to the chimneys as before, at his own expense. But after an elaborate argument on the Roman texts, the extent of the burden was so far modified as to apply to the case only of demolition for the convenience of the servient owner. If he could prove the former condition of the gable to have been ruinous, and its demolition therefore necessary, he would be liable in the expense of taking down both it and the laid-to chimneys, but not to the expense of re-erecting the chimneys. The equity of this decision, in the case of necessity not being proved, is clear enough. But what the Roman texts treat of is the case of necessity, and of that alone. And in looking narrowly into the decision, it will at once appear to have no bearing on the law as stated there and in our institutional writers. For, in the first place, it was not a case of repair at all, but of reconstruction; and it may well have been that the Court regarded the necessity for this as lying equally at the door of both parties. And secondly, there was no question as to enforcing the repair or rebuilding of the servient tenement—which is the only case contemplated in the authorities—for the servient owner was willing and anxious for his own ends to restore his gable. The whole question was as to the chimneys which had to share the fall of the gable and were part of the dominant tenement; and whether they were to be restored to their old form, just as the joists had been propped up by the servient owner during the operations. It thus appears that the *dicta* of Stair are neither supported nor shaken by this decision. They are, however, recommended by those general principles of the law of servitudes which ought to prevail over an unexplained peculiarity in a foreign

[19] Murray *v.* Brownhill, 1715, M. 14521.

system. It should be added, however, that if the express (not the customary) obligation to repair, thus separable from the servitude, is to be enforced against singular successors, it must be kept up in the titles, like other real burdens or conditions.[20] It will be found in practice that most cases of lateral support of buildings by buildings resolve into questions of common gable, which formed the subject of last chapter; and that most cases of subjacent support are examples of common interest. But if rights not reducible to these categories do appear, it will be sufficient to refer back to the general rules applicable to positive servitudes.[21]

Flatted houses —'lands,' 'tenements of land.'

There is, however, a certain class of buildings which gives rise to a set of rights too complicated to be explained by the simple servitude of support, or even by the law of common property. These are the houses so often found in Scotland, called technically 'lands,' or 'tenements of land,'—terms which have been defined as applicable to 'a single or individual building, although containing several dwelling-houses, with, it may be, separate means of access, but under the same roof and enclosed by the same gables or walls.'[22] When the different parts of such buildings, whether wholly or only partially, or not at all, occupied as dwellings, have from the date of their erection downwards been the property of different owners, or, after being the property of one person, have been divided among two or more persons, there arises an intermingling of several ownership and common interest which will form the subject of the present chapter. That something more than the simple rules of servitudes was required to explain the relations of these owners *inter se* was recognised early in the history of our law by Lord Stair, who puts the institute on its proper footing. 'If it be objected,' he says, in dealing with the obligation to repair in cases of servitude of support, 'that, within burgh, the owners of the inferior and supporting tenements are obliged to repair for behoof of the superior tenements, the owners whereof may legally enforce reparation, yet it inferreth not this to be the nature of a servitude, but a positive statute or custom of the burgh for the public good thereof, which is concerned in upholding tenements. But mainly the reason of it is because, when divers owners have parts of the same tenement, it cannot be said to be a perfect division, because the roof remaineth roof to both, and the ground supporteth both; and therefore, by the

Rules enunciated by Lord Stair.

[20] See *supra*, p. 385; and see Nicolson *v.* Melvill, 1708, M. 14516.

[21] *Supra*, chap. 25.

[22] Scott *v.* Police Comrs. of Dundee, 18th Dec. 1841, 4 D. 292, 303, on the construction of a local Act.

'nature of communion, there are mutual obligations upon both—'viz., that the owner of the lower tenement must uphold his 'tenement as a foundation to the upper, and the owner of the 'upper tenement must uphold his tenement as a roof and cover 'to the lower, both which, though they have the resemblance of 'servitudes, and pass with the thing to singular successors, yet 'they are rather personal obligations, such as pass in communion 'even to the singular successors of either party.'[23] Erskine adds nothing to this statement, except the corollary that if the garrets are divided, the owner of each must uphold its part of the roof.[24] That which was first introduced as a convenient arrangement of the rights and obligations of house-owners within burghs, has now come to be a rule of law applicable to all cases of buildings divided horizontally among different owners.

Common interest:

The sum of the rights and obligations which thus pass to and against singular successors *sub silentio*, and affect the right of several ownership of each proprietor in his own part of the tenement, is termed 'common interest'—an expression which seems to have been almost on the lips of our lawyers at the beginning,[25] but not actually uttered till near the end, of last century.[26] It differs from servitude in entitling the holder to demand the performance of certain acts—*in faciendo;* and from common property in being a limited right not extending to the whole control of the subject.[27] In an important case of water-rights, already discussed,[28] the question arose whether the maxim *in re communi melior est conditio prohibentis* applied to a case of common interest. Lord Justice-Clerk Inglis was of opinion that the rule was applicable to common property, and 'not properly 'applicable to any other kind of property.'[29] Lord Benholme was inclined to apply the maxim to erections *in alveo*, in respect that though the channel was not common property, it nearly resembled it;[30] and Lord Westbury observed that the maxim had been applied in the law of Scotland in the sense that 'where you have an 'interest in preserving a certain state of things in common with 'others, and one of the persons who have that interest in com-'mon with you desires to alter it, *melior est conditio prohibentis*—

differs from servitude, and from common property.

[23] St. 2.7.6.

[24] Ersk. 2.9.11; also Bankt. 2.7.9. The same law seems to prevail in England and America. See three American cases in Gale, 534, note; Washburne, 564 *et seq.*

[25] In Nicolson *v.* Melvill, [20], there is mention of 'the interest of the whole land 'from top to bottom.'

[26] First used in Robertson *v.* Ranken, 1784, M. 14534.

[27] B. Pr. 1086.

[28] *Supra*, p. 445. Morris *v.* Bicket, 20th May 1864, 2 Macph. 1082, affd. 4 Macph. H.L. 44.

[29] 2 Macph. 1087, 1089.

[30] Ibid. p. 1099.

'that is, you have a right to preserve the state of things unimpaired 'and unprejudiced in which you have that existing interest.'[31] The principle stated in these words has, as we shall see in this chapter, been undoubtedly recognised in our law; but it would seem to be more accurate to confine the maxim to cases of common property, in order to express that veto which is absolute, except where repair is imperatively required. The rule properly applies to cases in which no reason need be given and no interest shown for exercising the veto; and that can only be where the remedy of division or division and sale is competent. That remedy is not available in any of the known cases of common interest.

'The law of 'the tenement.'

In expiscating the rights of the different owners in a 'land,' the Court is guided of course, in the first place, by the titles. If these are express and unambiguous in regard to the point at issue, there is an end of the matter, even though the relation therein disclosed be at variance with the ordinary rules regarding such subjects. By means of the original titles, and of the possession had thereon, the Court will endeavour to ascertain what has been called the 'law of tenement'[32]—that is, the intention of the original builder as modified, if such be the case, by subsequent agreement. But in the absence of specialties, the correlation of the parties will be presumed to be that which is explained in the following paragraphs. If there be any aberration from what is thus presumed to be the normal state of reciprocal rights and obligations, as by the imposition of an unusual burden, it will not be enough to show that this burden was constituted in the original titles; it must also be retained in the titles of the singular successor against whom it is alleged.[33] It should further be premised that a stricter rule against alterations in such subjects applies in cases between landlord and tenant than in cases between different owners;[34] and that in so far as the relations of owners of flats do not depend on common property or common interest, they are left to the general law of negligence.[35] It will be convenient to take the parts of a composite house in the following order—the *solum*, walls other than gables, roof, gables, floor and ceiling, and common passages and stairs.

[31] 4 Macph. H.L. 52.

[32] Gellatly *v.* Arrol, 13th March 1863, 1 Macph. 592, 597, 601.

[33] Nicolson *v.* Melvill, [20] (repair of roof by lower owners).

[34] Alexander *v.* Couper, 12th Dec. 1840, 3 D. 249; Blanc *v.* Greig, 18th July 1856, 18 D. 1315; see Deans *v.* Abercromby, 1681, M. 10122, 12774.

[35] *Supra*, chap. 23, esp. Campbell *v.* Kennedy, 25th Nov. 1864, 3 Macph. 121; Moffat & Co. *v.* Park, 16th Oct. 1877, 5 Ret. 13.

Relating to—
1. The *solum*.

'Area.'

Back-green.

Several ownership and common interest presumed.

1. *The Solum.*—As a general rule the *solum* on which the tenement of land is built, that space which is technically called the *area* or ground not occupied by the house yet part of the subject of the grant, and the back-green which frequently extends behind the building, are the property of the owner of the lowest part of the house. If there be more than one owner on the lowest floor, he holds the property covered by his portion of the building, and so much of the other ground as lies *ex adverso* thereof, failing any express boundary in his titles. It will appear further on, that if part of the *solum* is occupied by a common passage and stair, this part will itself be the common property of the owners of the rest. With this exception, the *solum* is usually several property, and the upper proprietors have nothing more than a common interest in it for the protection of their ownership above. This common interest is controlled by rules similar to those which have received much elaborate treatment in cases of operations on the walls.[36] Thus, in a recent case, the proprietor of a dwelling-house consisting of four storeys, one of which was a sunk storey with an area in front, converted the street flat into a shop and the two flats above into separate dwelling-houses. He sold the upper flats to one person, giving 'a right, in common with the other proprietors, 'to the area on which the same stands.' He afterwards sold to a different person the street and area flats, with the cellarage, and 'with right, in common with the other proprietors of the tenement 'of which the subjects hereby disponed form part,' to the *solum* of the ground on which the same is built. Singular successors of the second disponee proposed to cover the area by extending their shop to the outside wall thereof, but were stopped by the magistrates, who, looking to the similar terms of the rights of the parties, held the area to be the common property of the upper and lower proprietors, on which no innovation could be made except of consent. But the Court recalled this judgment, and found that the *solum* was the property of the lower heritor only, subject to a right of common interest in the upper heritor, which entitled him to complain only of such operations as would be injurious to the upper flats.[37] The terms of the dispositions were not so explicit as to overturn the presumption in favour of the state of right here laid down. The question of what would be sufficient prospective injury to give the upper proprietors an interest to prevent the alterations was not reached, but Lord Deas referred to an unreported case, in which a man of skill had, in similar circumstances, made certain suggestions, the adoption of which would have obvi-

[36] See *infra*, p. 553.

[37] Johnston *v.* White, 18th May 1877, 4 Ret. 721.

ated the risk of danger to the upper storeys, but had added that the operations would diminish their value. The case was compromised, but his lordship remarked that his impression was against authorising the alterations on this ground. He observed, also, that the deterioration in value of the upper floors would greatly depend on whether the proposed projection on the lower floor was sufficiently strong to admit of being continued upwards by the upper heritors. A still more recent case was decided on similar principles. The disposition of a main-door house, surmounted by flats, conveyed the house, together with the plot of ground in front thereof, and in common with all the owners in the tenement, a right to the *area* of ground on which this and the adjoining main-door house and their flats were built, in proportion to their respective feu-duties. The disponee was taken bound to pay the whole expense of maintaining the parapet and railing between the front plot and the street. Certain of the flat proprietors in their feu-contracts—which were earlier in date—were taken bound to share with all the other proprietors, higher and lower, the expense of maintaining this fence. They now attempted to prevent its being removed and the plot being flagged over so as to accommodate a shop, into which the main-door owner proposed to convert his premises; but the attempt failed. They had no right of property in the plot: their obligation to repair the fence was superseded by the later disposition, and even if it had subsisted, could have given them no right to demand the continued existence of the fence; the *area* meant was only that space which was actually built upon; and loss of amenity gave no title to object.[38]

Superstructure on a projection.

There had been an earlier case, in some respects the converse of the above, raising the question of building above a projection situated on the lower flat. A tenement, originally the property of one individual, but at the date of the action belonging to two owners, upper and lower, was described in the titles of both as bounded by a street, although in point of fact an area intervened between its front wall and the street. Before the severance the area had been paved over and the frontage of the street-floor had been projected for some distance towards the line of the street. The upper proprietor now proposed to throw out a bow-window from his wall above this projection, but was met by pleas that the lower heritor had not only a possessory right but such ownership in the area of the building as constituted the proposed alterations encroachments. The Court had no difficulty in holding that

[38] Barclay *v.* M'Ewen, 21st May 1880. 7 Ret. 792. (L. Ormidale recognised common ownership in the plot, but denied the inevitable *veto*).

the lower heritor had never possessed the space above his projection, and as little in finding that the maxim of ownership *a centro usque ad cœlum* did not apply to such a space interjected between the building and the line of the street, which was equally the boundary of both.[39] Such a right of ownership would enable the lower proprietor to build up the windows of the upper storeys. The actual relation of the lower heritor to the unoccupied space above his balcony was one of common interest, in virtue of which he could prevent his neighbour from doing anything *in suo* to increase the risk, or impose a greater servitude or burden, or cause him injury. 'I do not see,' said Lord Rutherfurd, 'why a supe-'rior heritor is in a worse position as regards the inferior heritor 'than the inferior heritor is in regard to the superior heritor. A 'reasonable view must be taken. You shall not make overhanging 'balconies, or do anything to cause a serious obstruction or incon-'venience to the lower tenement.'[40] The right of the lowest heritor in the *solum* was described by Lord Glenlee, in an opinion which has since been quoted with approval, as 'not a right of 'absolute and exclusive property, burdened with a servitude *oneris* '*ferendi;* and though the *solum* may not be, strictly speaking, joint 'property, yet there is in it a joint interest *sui generis* which pre-'vents any one of the proprietors of the house from doing any-'thing to the prejudice of the rest.'[41]

Back-ground.

A recent case deserves detailed notice as presenting a typical instance of a flatted tenement. The owner of the ground-floor and street-floor was under his titles proprietor also of the area at the back, the area in front, and certain cellars under the street, with free access to the roof by a common stair. He was taken bound to maintain the cellarage, communication with the common sewers, the pavement and front railing, but not the roof or the common stair. The owners of the upper flats were severally vested in these, with a cellar, an equal share and privilege of an office-house in the front area, with the benefit of a common water-pipe and communication with the common sewers, with free ish and entry to their flats and access to the roof, cellar, water-pipe, and office-house by the common stair and area stair. The expense of maintaining the roof and each cellar was the only exception from the common liability of upkeep. The question was whether the inferior heritor was entitled to cover his back area with buildings, and the judgment was that there was nothing to prevent him in the titles; and

[39] Urquhart *v.* Melville, 22d Dec. 1853, 16 D. 307.

[40] Ibid. 311, 312.

[41] Stewart *v.* Blackwood, 3d Feb. 1829, 7 S. 362; see Gellatly *v.* Arrol, 13th March 1863, 1 Macph. 592, 599, *per* L.J.-C. Inglis.

(after remit to a man of skill) that as no injury to light, except to so inappreciable an extent as not to affect the value of the upper floors, would take place through the erection of buildings in the mode recommended by the reporter, he was entitled to proceed.[42] It may be gathered, that the only restrictions at common law on the use of such a back-green are embraced in the law of nuisance and of servitudes of light.

2. *Walls other than common Gables.*—The general rule regarding the ownership of a flatted house is, that each owner of a flat has sole property in the space enclosed by the walls, the *solum* or floor, and the ceiling or roof, of his flat, with sole property in such walls as he does not hold in common property with his neighbours laterally, subject to a right of common interest in favour of the other proprietors above and below. The *solum*, the roof, and this sort of wall afford the simplest cases of the action of common interest, since there is no division of the ownership. The walls to which attention is now to be directed are almost in every case the front and back walls of houses built streetwise; and the principal controversies have arisen regarding alterations proposed to be made in the front walls of the street-floor. But the earliest case seems to have been one of an external gable, not the subject of common property. The proprietor of the street-floor proceeded to construct a chimney in his part of the tenement, and proposed to strike out a hole in his own portion of the gable, and thence to carry the 'lum' up outside. The upper proprietrix complained; and the Dean of Guild stopped the making of the hole, as requiring her consent. The Court (rightly or wrongly on the facts) negatived this *ratio*, seeing that, 'unless 'prejudice be instructed, one may do in his own what he pleases;' but sustained the decree on the ground of 'apparent hazard by 'weakening the wall.'[43] The doctrine thus early recognised has been given effect to in all the later cases. Thus the owner of the ground-floor of a tenement obtained an order from the Dean of

2. Walls other than common gables.

Front and back walls,

and external gables.

Dangerous operations.

[42] Boswell *v.* Mags. of Edinburgh, 19th July 1881, 8 Ret. 986. (The proposal was to carry a saloon back from the front building 21½ feet to a higher building fronting the back lane. The restrictions recommended were—(1) that there should be no windows in the wall of the back building facing the front tenement; (2) that this wall should be of white enamelled brick (for light); (3) that the roof of the saloon should be no higher than the lowest floor of the upper flats, have no cupola or skylight nearer than 6 feet, and be made of concrete, laid with bright-coloured tiles (against fire, and for amenity); and (4) that the height of the back building roof should be only about 18 feet higher than the roof of the saloon).

[43] Hall *v.* Corbet, 1698, M. 12775. If he had carried up the 'lum' outside the complainer's gable, her consent would have been required. If he had stopped at the hole, she might have complained of smoke-nuisance.

Guild for a visitation of tradesmen to ascertain whether it would be attended with danger to the building to strike out new doors and windows. The upper proprietors conceived that these operations, if not justified by necessity, required their consent; but their contention was repelled by the Court, and the visitation allowed to proceed.[44] A lower proprietor proposed somewhat extensive alterations, in order to turn the dining-room floor of a dwelling-house into a shop, by striking out a door in the partition-wall of the lobby and turning round a screen of columns situated in the centre of it; by widening the front windows; lowering the sill to the floor; converting a window into an arched door; and forming doors in the internal walls. The upper heritors objected reasonable alarm for the safety of their property, and the necessity for their consent. An architect, to whom the Court remitted the matter, reported that the alterations might be carried into effect, due caution being used, without danger to the property above; and the Court allowed the alterations to proceed at the sight of the reporter, being of opinion that the consent of the upper heritors was not necessary, and that in such cases the sole question was, whether the alterations were of a nature to be productive of danger to the upper floors.[45] The *onus* lies on the party proposing the alterations to show that they can be performed 'without 'apparent risk or any reasonable apprehension of danger.'[46]

Amount of danger.

In these cases the Court was satisfied, by the reports of men of skill, that no risk of danger existed, and allowed the alterations to proceed, There have, however, been circumstances in which referees have reported safety, and yet the alterations have been disallowed. Thus, where a tenement was a century old and six storeys in height, and the proprietor of the ground-storey, in order to improve his shop, proposed to widen the door six inches and the windows three to five inches, to remove the stone lintels in favour of wooden ones flush with the ceiling, to slap out a door five feet wide in the back wall, and to lower the floor of his shop—and three architects, to whom the matter was remitted, reported that, with certain modifications, these alterations could be safely performed—the Court refused the powers, on the ground that the common interest of the upper heritor entitled him to object to any material alteration in the fabric which might occasion even the apprehension of danger, although not to small

[44] Robertson *v.* Ranken, 1784, M. 14534.

[45] Dennistoun *v.* Bell, 10th March 1824, 2 S. 784 (N.E. 649).

[46] Gray *v.* Greig, 18th June 1825, 4 S. 104 (N.E. 105); see also Murray *v.* Gullan, 10th March 1825, 3 S. 639 (N.E. 448); Brown *v.* Boyd, 13th July 1841, 3 D. 1205.

alterations.[47] The height and age of the tenement were important elements in the decision.[48] In a case three years later, two judges were of opinion that there was a title to object only when there was no proof that the operations could be performed without danger; while three judges thought it enough if there were reasonable apprehension of the house falling, or even of injury to the fabric by the cracking of the plaster.[49] And in a case already cited, the Court did not confine the interest to be protected to the risk of danger to the integrity of the upper floors, but extended it to all such injurious consequences as materially affected the comfort, amenity, and therefore the value, of these.[50] If the lower proprietor makes alterations in his premises which have the effect of weakening or endangering the upper floors, he will be compelled to put them in a state of absolute security, at no matter what expense.[51] In the case cited, the lower heritor commenced working without judicial sanction; but the same rule would apply to a case of carelessness, perhaps even of unavoidable injury, in carrying out a plan which had been duly approved.

Alterations *in alieno.*

These were all cases of operations *in suo;* in which case all that requires to be shown is, that there is no infringement of the common interest. If any of the heritors wishes to make alterations *in alieno*—as, for instance, on a wall of the house at a part not belonging to him—he must of course get the consent of the owner.[52] The owner of the second floor of a tenement—which floor, being intended for a wareroom, had been constructed without any fireplace or vent—cut out a fireplace and led up a vent in the inner wall as high as his ceiling, and having pierced the joisting and outer wall, carried an iron smoke-pipe along the ceiling out at the hole and up the outside of the outer wall close to the windows of the upper heritor. He further claimed right to continue the vent within the upper heritor's wall into a flue there existing. There was evidence that no injury would be done to the strength of the fabric. The Court found on a proof that there was no evidence that the vent had been left out by a mistake of the masons, and that the upper heritor had never agreed to the formation of a vent; and held that the lower heritor had no right, without his consent, to slope the wall either for making the vent or for annexing an outside pipe; and ordered the pipe to be

[47] Fergusson *v.* Marjoribanks, 12th Nov. 1816, F.C.

[48] See obs. in Dennistoun *v.* Bell, *supra*, [45].

[49] Pirnie *v.* Macritchie, 5th June 1819, F.C.; see M'Kean *v.* Davidson, 12th Nov. 1823, 2 S. 480 (N.E. 426).

[50] Johnston *v.* White, *supra*, [37].

[51] M'Nair *v.* M'Lauchlan, 10th March 1826, 4 S. 546 (N.E. 554).

[52] See Hall *v.* Corbet, *supra*, [43].

removed.[53] So also the owner of the street-floor has no right to affix a show-window to the wall of a common stair leading to the upper storeys.[54] But right to perform certain operations, or to preserve a certain state of matters in the wall of another, may be set up by prescription; and in one case it was found that thirty-eight years' admitted acquiescence in the periodical withdrawal of a moveable stone from the wall of an upper heritor, for the purpose of cleaning out a horizontal part of a flue which started from the lower flat, was sufficient to bar objection for the future.[55]

3. Roof and uppermost storey.

3. *Roof and uppermost Storey.*—As the *solum* is necessary for the foundation of the tenement, so is the roof for its protection from the weather. As the one is the sole property of the lowest, so is the other the sole property of the highest heritor. As the one owner must do nothing to endanger the stability of the foundation, so the other must do nothing to injure the covering of the house, and neglect nothing that is necessary and proper for the maintenance and upholding of the common shelter; and the lower proprietors have a common interest in the roof, entitling them to enforce the obligation thus inherent in the ownership.[56] In the same way, again, as questions have arisen[57] regarding the right of the owner of the *solum* to interpose a sunk storey beneath the lowest he originally possessed — which can as a rule only happen on the occasion of a rebuilding of the tenement—so there have been disputes as to the power of the highest heritor to add a storey, or to remodel his garret or attics,—operations which, of course, may be set about at any time. In the earliest case, the owner of the upper storey and garrets proposed, by raising the walls and altering the shape of the roof, to convert the garret into an attic storey; and the Dean of Guild, on proof that the lower walls would not be injured, gave her liberty to proceed on finding caution *de damno infecto*. On advocation, a proof before answer of 'prejudice or benefit' to the inferior heritors was allowed by the Lord Ordinary; but the Court recalled the order, and gave judgment against the alterations[58] on the principles adopted in two earlier cases relating to common passages.[59] This decision was expressly followed in similar circumstances to the extent of pass-

Garret converted into attic.

[53] Walker *v.* Braidwood, 1797, Hume, 512; see 1 Macph. 600.

[54] Graham *v.* Greig, 6th Dec. 1838, 1 D. 171; see also Taylor *v.* Dunlop, 1st Nov. 1872, 11 Macph. 25, *infra*, p. 557.

[55] Munro *v.* Jervey, 23d Nov. 1821, 1 S. 161 (N.E. 154).

[56] St. 2.7.6; Ersk. 2.9.11.

[57] *Infra*, p. 563, Stewart *v.* Blackwood, there.

[58] Sharp *v.* Robertson, 1800, M. Appx. Property, No. 3.

[59] Anderson *v.* Dalrymple, 1799, M. 12831; Reid *v.* Nicol, 1799, M. Appx. Property, No. 1.

ing a bill of advocation of a judgment of the Dean of Guild ordering inquiry into the risk of injury to the lower flats, and that for the purpose of trying the question whether the consent of the lower heritors was essential. The case went no further.[60] The question of the rights of the uppermost heritor did not again rise till very recently, and then the case was special. The proprietor of a house containing two square storeys and an unoccupied space between the upper storey and the roof, conveyed the 'second 'or upper flat,' together with access thereto by a street-door, with an obligation on the purchaser to maintain and uphold the roof without relief. He then sold the lower flat to another purchaser, with an obligation to maintain the pavement. The upper heritor now proposed to erect a wooden stair from the upper flat to the garret, to convert the latter into dwelling-rooms and a laboratory with fireplaces, and to fix sky-lights in the roof. The Dean of Guild, after an inquiry which established that no injury would be caused to the lower heritor, authorised the operations, and the Court by a majority adhered. In the leading opinion, Lord Deas said: 'If the operations are in any way dangerous or injurious to 'Mrs Dunlop's property, they ought not to be sanctioned, to whom-'soever the property of the roof may be held to belong, because 'there exists undoubtedly a common interest in all lower pro-'prietors to object to such operations. As to the argument that 'by increasing the accommodation Mr Taylor was changing the 'character of the building, I can give no weight to that view. 'He was in that respect simply exercising the ordinary rights of 'a proprietor. He might equally have increased the number of 'persons using the staircase by letting each of his previously 'existing rooms to a separate family, as by increasing the number 'of the rooms and letting the new ones.' After expressing his opinion that the space between the roof and the second square storey was the property of the upper heritor, his lordship went on to say: 'All this is not conclusive in favour of the operations in 'the upper storey, because there is to some slight extent an inter-'ference with the roof, although not of an injurious kind; and if 'the appellants have a right of common property in the roof, they 'may stand upon that right as entitling them to object without 'alleging any injury. It appears to me, however, that the pro-'perty of the roof, as well as of the upper portion of the walls, 'is vested in the proprietor of the upper storey. This does not 'appear to have been made matter of express decision. But I 'rather suppose the reason of this is, that it has always been taken

[60] Cuddie *v.* M'Kechnie, 1804, Hume, 516.

'for granted. . . . The nature of the materials of which the roof 'was composed would not vary the nature of the right to it vested 'in the proprietor of the upper storey, nor the nature of the burden 'of maintaining and upholding it which always attaches to him[61] '—where there is no provision to the contrary—just because he is 'the proprietor.' Lord President Inglis dissented from the judgment, on the ground that on the titles the owner of the 'second 'or upper storey' had nothing more; but he did not object to the general rules thus enunciated.[62] It thus appears that the Court, in the above cases of *Sharp* and *Cuddie*, went wrong in demanding that consent which is only required in cases of common property. It will appear further on, that in relying on the earlier cases there cited they were proceeding on a halting analogy.

Amount of injury thereby caused.

The only question to consider is, whether there be reasonable apprehension of injury to the lower premises. Injury would probably be presumed if the operations were so extensive as actually or practically to add another storey to the house, since this would inevitably increase the burden upon the walls below, even if the increased risk of fire and possible detriment to amenity had to be left out of account.

4. Common gables of flats.

4. *Common Gables of flatted Houses.*—The cases of common gables treated of in last chapter related to such as separated houses, each of which was held in several property. It was there found that they are regarded as the common property of the neighbours. Applying the rules then and now enunciated to the next simplest case—that of gables separating houses, one of which is held in several ownership, the other in flats—it will then appear that the owner of the first tenement has common property along with each of the owners of the several parts of the second *quoad* these portions of the wall, and that the latter have *inter se* rights of common interest in the portions not vested in them as property. In the more complicated case of a common gable separating two flatted houses a new element must be introduced. For not only will each owner in the one tenement have common ownership in the wall with the owner or owners in the other, where and in so far only as it bounds his flat; and not only will each owner in the one house have an interest in that portion of the gable which in no way belongs to him, in common with the others on his own side; but the owners on each side of the gable will have cross rights of common interest *inter se*. It is true that there is no

[61] See O'Humora Lodge *v* Lewis (1871), 11 Amer. R. 135; Tenant *v.* Goldwin, 2 L. Raym. 1091; Anon. 11 Mod. 7.

[62] Taylor *v.* Dunlop, 1st Nov. 1872, 11 Macph. 25.

authority for this proposition, and that it extends the sphere of common interest beyond the 'single tenement of land,' which has been the sole subject of the decisions. But it seems to follow from the principles laid down in the last chapter and in this, and to suggest the only just solution of such a problem as this: Suppose to be separated by common gables, furnished with vents, &c., two flatted houses each two storeys in height, and suppose that A and C hold the ground-floors, B and D the second flats—A and B being in the one tenement, C and D in the other. A proceeds to cut a deep press into his side of the gable, obviously endangering the safety of the wall. B and C have been bought off or are indifferent to the risk. But D complains, and is ready to prove peril to his property. Being higher up than A, he has no common ownership in the gable with him. Being on the opposite side of the wall, there is none of that community of interest with A which has been explained in this chapter. There is no question of servitude. And therefore the only possible ground left for an undoubtedly just complaint must be sought in the cross rights of common interest produced by the peculiarity of a common gable in such a situation. Other cases of the same sort may easily be figured.

Gellatly v. *Arrol.*

The only reported case of operations on an internal gable did not raise questions of so complicated a nature. The proprietor of the upper storeys of a tenement forming part of a continuous line of street without the consent of the lower heritor opened doorways in both of the gable-walls, for the purpose of connecting his property within the tenement with separate houses on each side which also belonged to him. It was admitted that one of these doors actually interfered with the chimneys of the lower heritor; as to the other, there was a doubt as to the fact of interference, but none as to there being a great risk thereof. It was held that the upper heritor was not entitled to open up or use the doors, and he was ordered to build them up and to restore the chimneys to their former condition.[63] It thus appears that the gables were in no sense common or mutual gables, at the point at least where the doors were knocked out, since there the innovator was owner of the houses on both sides; but the case is instructive as illustrating the law relating to walls containing chimneys, as do most common gables. Lord Justice-Clerk Inglis remarked: 'In the 'construction of this building the gables were devoted, among 'other purposes, to the purpose of furnishing vents for all the fires 'in the building. It appears to me that that gives to the whole

[63] Gellatly v. Arrol, 13th March 1863, 1 Macph. 592.

'proprietors an interest in the gables over and beyond the right 'of property which each has in that particular part of the gable 'which forms the boundary-wall of his own separate estate. . . . 'It may be difficult to say what the nature of this right is, 'whether it is a right of common property or a common interest. 'I am not sure that the line between these different rights is 'very well defined; but if it be necessary to determine that point 'I am inclined to lean to the opinion that it is common interest 'and not common property.[64] After referring to the *dicta* of Lord Glenlee and Professor Bell,[65] his lordship continues: 'But 'the application of the principle is of much greater importance 'than to determine whether the right is of the nature of common 'property or common interest, and the application appears to me 'to be this: No one of the proprietors of any of the floors is en- 'titled to interfere with the gable in which the joint right exists. 'I do not say so as to cause danger, but in such a way as may 'interfere in any degree with the security or interest of the other 'proprietors.'[66] Lord Cowan regarded the right as a right of property rather than of common interest, in regard to the latter of which he thought that danger must be shown before the Court will interfere; yet his lordship founded his judgment not so much on the absence of consent as on the operations causing a breach of the integrity of the building, increasing the traffic on the common stair, to which the lower heritor had also a right of access, interfering with the chimneys, and enhancing the risk of fire. Lord Benholme also relied on the risk to the chimneys and the interference with the privacy of the stair. And Lord Neaves so far admitted a difference between the rights of the heritors in the wall, that operations *innocuæ utilitatis* made by a party in that part of the tenement in which he had the principal interest would not be prevented merely because the other proprietors interposed a veto.

5. Floor and ceiling.

Line of boundary therein.

5. *Floor and Ceiling.*—While the rights and obligations relating to the boundaries of a flatted tenement earthwards, skywards, and laterally have thus been the subject of frequent discussion, the intermediate horizontal divisions have passed unnoticed. It has been decided, no doubt, that the line of demarcation between two intermediate flats is an ideal plane drawn through the centre of the joists, to the effect at least of preventing either of the pro-

[64] The same learned judge afterwards said this case was decided on common interest alone—Morris *v.* Bicket, 20th May 1864, 2 Macph. 1082, 1089.

[65] Stewart *v.* Blackwood, 7 S. 362, *supra*, p. 552; B. Pr. 1075, 1086.

[66] 1 Macph. 599.

prietors whose premises it separates from affixing a sign on any part thereof beyond this line,[67] or on a belt of stone used to indicate it externally.[68] But there is no explanation in the books of the rights of the upper and lower neighbours in the floor or ceiling itself. It may, however, be laid down with some confidence that the analogy of common gables must be followed, and that the parties holding property on each side of a floor or ceiling have a right of common property therein, enabling them to prevent each other from performing any operations on it or making any use of it incompatible with, or other than such as are, the ordinary uses and operations to which it is subject, without requiring to prove danger, or anything more than that they do not consent. The ordinary functions of a ceiling or floor are of course different from those of a common gable, but they and no others will be protected from the veto of the common owner—under the same qualification as in common gables that operations proved to be *innocuæ utilitatis* may be performed by each on his own side. The burden of necessary repair will, in the absence of custom, be borne in common. Neither party will be entitled to weaken the barrier, as by cutting away any part of the joisting[69] or by removing bearing partition-walls,[70] or to expose it to the risk of fire by carrying a flue along the upper or lower surface. But the insertion of gas-pipes and the suspension of chandeliers have become part of the ordinary uses.

Alterations and repair.

6. *Common Passages and Stairs.*—The common passage and common stair leading usually only to the flats above the ground-floor and to cellars beneath it are ordinarily, and in the absence of anything to the contrary in the titles, to be regarded not simply as a joint servitude of access, but as the common property of the parties interested, and of them only. This right of common ownership, and the uses it involves, will not be affected by the existence of another access. Thus the access to cellars appropriated to the several flats of a tenement was by means of a prolongation downwards of the common stair; and the owner of the sunk storey, with the exception of these cellars, desiring to turn it into dwelling-houses, opened an access to the common stair. He had an express conveyance of 'the common stair leading to the said sunk floor.' It was held to be no answer that his

6. Common passages and stairs.

[67] Dickson *v.* Morton, 23d Nov. 1824, 3 S. 310 (N.E. 220); Alexander *v.* Butchart, 24th Nov. 1875, 3 Ret. 156; cf. M'Arly *v.* French, 8th Feb. 1883, 10 Ret. 574.

[68] Murray *v.* Mackenzie, 1812, Hume, 520. Cf. the boundary of garden-ground in Sanderson *v.* Geddes, *supra*, p. 540.

[69] Walker *v.* Braidwood, 1797, Hume, 512.

[70] Gray *v.* Greig, 18th June 1825, 4 S. 104 (N.E. 105).

proper access to the sunk storey was by a different stair from the shop above. Though the comfort of the upper proprietors might be diminished, they were not protected by their titles.[71] It has never been decided whether an attic stair within the upper flat may be replaced by a prolongation of the common stair, so as to convert the attics into separate dwellings.[72]

Walls thereof.

In general, the walls enclosing the passage and stair will be regarded as part thereof, to the extent of being held as the common property of the co-owners and of the several proprietors of the different portions of the tenement bounded thereby; and that consequently no operations on them can be performed without the consent of all the parties. This seems the only explanation of two cases decided near the end of last century, in which the owner of the ground-storey, past which a common passage ran, to which he had no access, was held not entitled to cut out a door in the wall separating it from his premises without the consent of the upper heritors, on the ground that the latter parties had 'a 'right of common property in the passage,' and not merely a servitude *oneris ferendi* in the wall.[73] This is the intermediate and common case. But it may be shown on the titles, on the one hand, that a proprietor in the tenement has no right either to the common stair or passage, or to the walls that enclose it; or, on the other, that he has the sole ownership of the stair, or of one or both of the walls. In the first case he can do nothing *in alieno*, however innocuous. Thus, where the joint property of a stair and staircase was expressly vested in the upper heritors, the heritor on the ground-floor, who had no title to either, was not entitled to affix a show-window connected with his shop on the front main wall of the staircase.[74] Lord Jeffrey, who was the Lord Ordinary, was of opinion that the inner walls of the stair would probably have to be regarded as common *positu;* but it is difficult to reconcile this with the express words of the titles. An example of the second state of circumstances is afforded by a case in which two contiguous tenements in burgh, consisting each of several storeys, had one entry from the street, and one staircase in common, both of which were within one of the tenements, the staircase running up alongside the common gable. The proprietor of a flat in that tenement struck out a new

[71] Anderson *v.* Saunders, 9th March 1831, 9 S. 564.

[72] Sandy *v.* Innes, 15th Feb. 1823, 2 S. 221 (N.E. 195). See the obs. in Taylor *v.* Dunlop, [62].

[73] Anderson *v.* Dalrymple, 1799, M. 12831; Reid *v.* Nicol, 1799, M. Appx. Property, No. 1.

[74] Graham *v.* Greig, 6th Dec. 1838, 1 D. 171.

door through the wall dividing his house from the staircase; and the proprietor of the corresponding flat of the contiguous tenement objected. It was held that the former was entitled to make the door, in respect that the wall in which it was opened was not common property nor part of the common stair, and that the objector had not shown any material interest to have been encroached upon by the operations.[75] The same result was reached in a later case by a different route. The owner of the second storey of a tenement had in his titles the right and privilege of opening up and using at any time a door or entry, from the common stair of the upper storeys, which was originally opened and intended for the use of the second storey, but at the date of the conveyance and of the action shut up; and this reservation was also contained in the titles of the upper heritors. The Court, looking to the fact that a doorway was said to be actually in existence, held that it was part of the first owner's property, and that the right to open it up and use it was *res meræ facultatis*, against which the negative prescription could not run, and not a mere servitude; but the right did not extend to any other part of the wall.[76]

Operations therein.

The right of common property in all interested entitles each of the common owners to forbid any operations on the stair or staircase which are not usual or necessary for its efficiency as a mode of access to his premises. Thus it will not be permitted to one of the co-owners, or to one who has only a right of access, to erect a flue in the staircase without the consent of the others.[77] Ordinary repairs will be done at the common expense, or according to the custom of the place; but an obligation to repair is not involved in a mere licence to use a stair in order to reach the roof with clothes to dry.[78] Cleaning and lighting are regulated by Local or the General Police Acts.[79]

7. Rebuilding.

7. *Rebuilding.*[80] — If on account of its ruinous condition a flatted tenement requires to be pulled down, and the parties cannot agree as to the plans of the building to be put in its place, the rule is, that it must be so constructed as not to interfere with the common interest as before subsisting; but that, if this be attended to, strict conformity to the old plans cannot be demanded. Thus it is a question whether the lowest heritor has a right to interject between the ground storey and the *solum* a sunk storey which

[75] Ritchie *v.* Purdie, 21st June 1833, 11 S. 771.

[76] Gellatly *v.* Arrol, 13th March 1863, 1 Macph. 592.

[77] Taylor *v.* Dunlop, 1st Nov. 1872, 11 Macph. 25.

[78] Ivay *v.* Hedges, 9 Q.B.D. 80.

[79] *Infra*, p. 564.

[80] As to compulsory repair or rebuilding, see *infra*, p. 567.

had not before existed. The Lord Ordinary (Mackenzie) was of opinion in the negative—it seems, justly.[81] Where a lower heritor built her part of the new tenement according to the old plan, and sought to prevent the owner of the old top storey and garret from building instead a single square storey, the Court ordered an inquiry whether the alteration would increase the burden on the inferior property, whether the chimneys would be sufficient to carry off the smoke, or whether 'any other inconvenience whatever' would be produced. The Court refused to interdict the change till satisfied on these points.[82]

Cautio damni infecti.

8. *Cautio damni infecti.*—In sanctioning any of the operations which have been noticed in this chapter, it lies in the discretion of the Court to demand caution from the innovator, before allowing him to proceed, for all loss, injury, and damage which may be caused in the progress or on account of the operations.[83] This form of security is derived from the Roman law;[84] but there is nothing to show how far the Court in Scotland will follow the very technical rules of that system, which demanded caution, not only for injury threatened to any one through the dangerous state of any piece of ground or of erections thereon, but also as a preliminary to allowing entry on the estate of another in the exercise of a right of servitude or other right therein.

General Police Act.

Besides the restrictions on house-ownership in town, constituted by special limitations in the titles,[85] or connected with common property and common interest, there are many more instituted for the benefit of the community, and contained in Local Acts, or in the General Police Acts of 1850 and 1862.[86] It is impossible to do more here than simply refer to those parts of the latter statute which relate to matters cognate to the subject of this chapter. Among the ordinary police purposes which form the subject of Part IV. of the Act are the drainage of houses[87] (sect. 199 *et seq.*), the regulation of soil-pipes and water-closets (sect. 210 *et seq.*), and water-supply (sect. 216 *et seq.*) Among the

[81] Stewart *v.* Blackwood, 3d Feb. 1829, 7 S. 362.

[82] Young *v.* Cuddie, 24th Feb. 1831, 9 S. 500; see Murray *v.* Brownhill, 1715, M. 14521, *supra*, p. 546.

[83] See, *e.g.*, Sharp *v.* Robertson, 1800, M. Appx. Property, 3; M'Kean *v.* Davidson, 12th Nov. 1823, 2 S. 480 (N.E. 426); Gray *v.* Greig, 18th June 1825, 4 S. 104 (N.E. 105).

[84] D. (39.2). The edict is to be found in 7 pr. D. h.t. See Westphal, § 202 *et seq.*; Vangerow, § 687; Hesse, Grundstücks-Nachbarn, i. 1-183.

[85] *Supra*, p. 385, on Building Conditions.

[86] 13 & 14 Vict. c. 33; 25 & 26 Vict. c. 101.

[87] See Smeaton *v.* St Andrews Comrs., 3 Macph. 816, 5 Macph. 743, 7 Macph. 206, revd. 9 Macph. H.L. 24; Currie *v.* M'Gregor, 16th Nov. 1871, 44 Sc. Jur. 68; Macknight *v.* Oman's Tr., 29th Nov. 1872, 11 Macph. 154.

general police regulations which occupy Part V. are the precautions to be adopted during repairs, the demolition or securing of ruinous houses, the sale of such of these as belong to two or more owners, and of such as belong to one owner who cannot be found or refuses to rebuild or repair (sect. 233 *et seq.*);[88] the infliction of penalties for wilfully or accidentally setting a chimney on fire; the enforcement of a rule to have party-walls carried up through the roof, and to have them and all external walls in incombustible material (sect. 344 *et seq.*); the use of cellars as dwellings, the ventilation and cleansing of common stairs,[89] and the cleansing of filthy houses (352 *et seq.*)

Edilic jurisdiction

It was at an early period of our law recognised that the collocation of houses, especially in large towns, demanded the exercise of some supervision in their erection and management similar to that which was intrusted to the Roman ediles. This could be done without interfering with the jurisdiction, till 1877 privative, of the Court of Session in questions of heritable right; and it was accordingly committed to inferior local courts. The ordinary powers of the sheriff were found to be sufficient in counties. In police burghs constituted under the above-mentioned Act of 1862 and its predecessors, the commissioners have certain powers conferred on them, as above stated, for the public interest; while the sheriff, or in royal burghs the Dean of Guild, if such an official exists, takes cognisance of private interests.[90] In most royal burghs the magistrates wield the edilic power; in others, by ancient custom, and in Greenock, by special statute, one member of Council, called the Dean of Guild, is specially appointed for this purpose. The late Courts of Law Commission thus described this ancient tribunal: 'The jurisdiction of other inferior 'courts is for the most part concurrent with that of the sheriff; 'but the Dean of Guild Court, wherever it exists, excludes that of 'the sheriff's.[91] The Dean of Guild is one of the burgh magis- 'trates, an elected officer, whose tenure of office varies from one 'to three years. His Court at one time had a large jurisdiction 'in questions arising between merchants, but that has long fallen 'into desuetude; and its functions have now reference to ques- 'tions of boundary within burghs, and to questions of the erection, 'alteration, repair, and pulling down of houses.[92] In practice it

Sheriff.

Police Commissioners.

Magistrates.

Dean of Guild.

[88] Also sect. 161.

[89] Stewart *v.* Edwards, 8th Dec. 1875, 3 Ret. (Just.) 14.

[90] See sect. 438; and under a local Act, More *v.* Bradford, 22d Dec. 1873, 1 Ret. 208.

[91] Mags. *v.* Sheriff of Stirling, 1752, M. 7584. It is different in disputes between landlord and tenant—Alexander *v.* Couper, 12th Dec. 1840, 3 D. 249. See E. Kintore *v.* Lyon, 1802, M. 7673.

[92] See 1593, c. 184, where the Edin-

'has been found necessary, to a considerable extent, to resort to 'authority other than that of the Dean of Guild. In some towns 'building has extended over an area far beyond his jurisdiction, 'which originally extended only to the ancient royalties.[93] In 'these cases, and also in towns which never were royal burghs, 'and in which there is no Dean of Guild authority, the ordinary 'powers of the sheriff have been called into action and found 'sufficient to supply the public wants. In other places, even 'within the jurisdiction of the Dean of Guild,[94] cases have been 'found to arise calling for more rapid interference than the forms 'of his Court permit. The new jurisdiction required as to matters 'connected with buildings has been generally conferred on the 'commissioners of police.'[95] The only towns in which the Dean of Guild Court flourishes are Edinburgh, Glasgow, Dundee, and Greenock.[96] The Dean is assisted by trade and legal assessors, but he need not take their advice, and the decree is his alone.[97]

Its scope. In voluntary operations.

This edilic jurisdiction, by whomsoever exercised, extends in the first place to the sanctioning of plans for the erection, repair, alteration, and pulling down of houses, and to the general superintending of these operations. It has to do with structural alterations only,[98] and only with operations prospective or very recently performed;[99] and has nothing to do with the use to which buildings may be put;[100] nor with internal alterations (such as taking down partition walls or disturbing the flooring) which, not interfering with any boundary or street walls, do not affect conterminous proprietors or threaten danger to the public.[101] If a competition of heritable rights arises, the Dean of Guild process will be sisted, so as to allow of its being determined in

burgh Court is made the model in matters of merchandise, and the 'good towns of 'France and Flanders' are referred to; 1594, c. 226; Bankt. 4.20; Ersk. 1.4.24; 2.9.9; 1 B. Com. 784; 1 Jur. Styles (4th Ed.), 580; Milne *v.* Melville, 27th Nov. 1841. 4 D. 111; L. Deas in Lamont *v.* Cumming, 11th June 1875, 2 Ret. 784.

[93] See Johnston *v.* White, 18th May 1877, 4 Ret. 721; Adamson *v.* Paterson, 1631, M. 7483.

[94] The magistrates seem to have a co-ordinate but not appellate jurisdiction—Milne *v.* Melville, *supra*, [92].

[95] Law Courts Commission, 4th Report, p. 36. The most important evidence will be found in answers 6307-53, 7677-7790, 9284-9361, 15249-75, 15913-16091, 16193-262.

[96] Ibid.

[97] Dunlop *v.* Dean, 12th Nov. 1824, 3 S. 268 (N.E. 188).

[98] Donaldson *v.* Pattison, 14th Nov. 1834, 13 S. 27. Nuisance in the use of a house was at one time held a competent subject of inquiry—Fleming *v.* Ure, 1750, M. 13159; but this would not now be followed — Carruber's Close *v.* Reoch, 1762, M. 13175.

[99] Graham *v.* Greig, 6th Dec. 1838, 1 D. 171.

[100] Murison *v.* Wharrie, 17th July 1883, 20 Sc. L.R. 820; Colville *v.* Carrick, 19th July 1883, ibid., p. 839.

[101] Speed *v.* Philip, 16th March 1883, 10 Ret. 795. More extensive powers are conferred by some Local Acts.

the competent court.[102] If neither party to an application sets forth a good *ex facie* title to a disputed subject, there is no such competition.[103] In his own province the edile will not be ousted except by the express words of a statute.[104] He has no power at common law to prevent a proprietor building up to his boundary;[105] but in superintending the above-mentioned operations, he is bound to enforce any restrictions as to form, height, stability, or the like, that are established by statute[106] or by local custom. The mode of obtaining authority is by presenting a petition along with relative plans. A visitation by the Dean and the trade members of his council is made and objections heard. To proceed without a *decree of lining* may involve a fine, and, failing payment thereof, imprisonment;[107] satisfaction for damage thereby caused to a neighbour;[108] and *restitutio in integrum*.[109] Many examples of the activity of the Dean of Guild in this first part of his functions have been already noticed in their proper places.

In compulsory operations.

The second part of the edilic function relates to the compulsory repair, demolition, or sale of ruinous tenements. In burghs under the General Police Act of 1862, as has been already noticed, certain powers are conferred on the commissioners by sections to which it will be enough here to refer.[110] In counties these functions are left to the ordinary powers of the sheriff at common law. In burghs-royal the magistrates or Dean of Guild have a common-law jurisdiction to examine into the condition of suspected buildings; to charge the inhabitants, if necessary, to remove—which sentence entitles them to relinquish possession—and to order the building to be taken down.[111] Further, they have power to declare, by *judge and warrant*, the expense of repairing or taking down and rebuilding ruinous tenements to be a charge or real burden thereon. This happens in cases where there is some defect in the titles, or the tenement belongs to a number of owners, among whom disputes might arise, or where it is in the

[102] Smellie *v.* Thomson, 9th July 1868, 6 Macph. 1024.

[103] Pitman *v.* Burnett's Trs., 7th July 1881, 8 Ret. 914.

[104] Ed. and Glasgow Ry. *v.* Dymock, 27th Nov. 1847, 10 D. 158.

[105] Smellie *v.* Struthers, 1803, M. 7588; Buchanan *v.* Bell, 1774, M. 13178; Dougall *v.* Hutchison, 19th Jan. 1827, 5 S. 224 (N.E. 208); and the converse case, Michie's Trs. *v.* Grant, 8th Nov. 1872, 11 Macph. 51.

[106] *E.g.*, the old Act, 1698, c. 8, as to Edinburgh, Buchan *v.* Freebairn, 1760, M. 13173; P.F. of Edinburgh *v.* Dott, 1789, M. 13187.

[107] This is then a criminal complaint—Lang *v.* Allan & Mann, 3d Feb. 1869, 7 Macph. 473.

[108] Robertson *v.* Hamilton's Trs., 12th May 1825, 4 S. 6 (N.E. 6).

[109] Christie *v.* Wilsons, 4th June 1825, 4 S. 71 (N.E. 74); M'Nair *v.* M'Lauchlan, 10th March 1826, 4 S. 546 (N.E. 554).

[110] Sects. 238-247.

[111] Procedure in 1 Jurid. Styles, p. 581 (4th Ed.)

hands of adjudgers or other real creditors. The person who obtains the jedge and warrant in his favour will be entitled to possess the subjects until he is fully reimbursed by his intromissions for the expenses he has properly incurred.[112] A special statute was required for the case of conjunct fiars and liferenters.[113] And by the Act 1663, c. 6, the magistrates of a burgh-royal—in practice the Dean of Guild, if there be one—are authorised, in cases of ruinous tenements left uninhabited on that account for three years, to demand repair; failing which, to sell, after a valuation. If the persons in right of the price are known, it is paid to them; if not, it is consigned. The purchaser gets a title from the magistrates which is indefeasible. If there be no purchaser, the magistrates may rebuild and then sell as before. On this statute it has been held that the magistrates, in accounting for the price, may deduct the expenses of the valuation, sale, charter, and process, and the purchaser's composition, and that they have a preferable claim for the feu-duties due to them.[114]

[112] 1 B. Com. 784; 1 Jur. Styles, p. 585 (4th Ed.); Gregory *v.* Burts, 1788, M. 13186.

[113] 1594, c. 226. See 1551, c. 10, as to tenements burnt by the English.

[114] Pollock *v.* Mags. of Edinburgh, 16th Feb. 1861, 23 D. 555. The deduction of the composition and expense of the character was put on special circumstances.

CHAPTER XXXIV.

LIMITED ESTATE—*continued.*

ENTAIL.

Introduction.

PASSING, in a discussion of the restrictions produced by limitation of title, from the many forms of common property and common interest, we now proceed to consider the position of an heir in possession of an estate under a strict entail. It has now been settled that, even in questions *inter heredes*,[1] the only mode (apart from common property) of restricting a liar in the enjoyment of his estate, over and above the limitations which are common to all classes of heritable ownership, is by affecting the estate with the fetters of a strict entail. This is not the place to discuss the purely conveyancing question of how that may be accomplished. The object of this chapter is different. Taking the case of an heir of entail in possession on a completed title and under a tailzie duly recorded in the register of tailzies, it is proposed to inquire how far he is restrained in the use or disposal of the estate. This inquiry again resolves itself principally into the further questions—first, what was the original scope of the three cardinal prohibitions of the Entail Act 1685, c. 22; and next, how far these prohibitions have been relaxed in practice, or by subsequent entail statutes, without (in name at least) destroying the strict settlement.

Entail, when binding.

Regarding cases which do not fall under the above description, it is only necessary to remark here—(1) that entails defective in any one of the three cardinal prohibitions are now invalid as regards all;[2] (2) that an unrecorded strict entail, though regarded as non-existent in questions with creditors, is binding *inter heredes*, so as to bar acts of gratuitous alienation, such as *mortis causâ* dispositions or provisions to younger children and wives in excess of

[1] D. Hamilton *v.* Hamilton, 20th Nov. 1868, 7 Macph. 139, affd. 8 Macph. H.L. 48, and cases there.

[2] Act 1848, sect. 43, *infra*, Appx. No. 21.

powers, and that it may be recorded at the demand of any substitute; (3) that where the heir in possession is also heir of line of the entailer, it is necessary, in order to protect the estate against his debts, that he should make up titles under the entail, as well as that the entail should be recorded; and (4) that where the heir has no other title than a personal entail, the fetters are binding on third parties dealing with him.[3]

Entailable subjects.

A strict entail, binding between the heirs and on third parties, can be constituted only of feudalisable subjects, since to these alone does the Act of 1685 apply. Thus there may be a strict entail of lands, whether held feu or burgage,[4] houses,[5]—even a theatre, which was burdened with annuities to about 100 persons, with a high insurance premium, and a stipulation that it was to be kept open for half the year[6]—teinds, salmon-fishings, reversions,[7] adjudications completed by infeftment, even before the expiry of the legal,[8] and the radical right remaining after the execution of a trust-disposition for behoof of creditors.[9] A *pro indiviso* share of a feudal subject is equally patient of a strict entail;[10] the entail is not destroyed by decree of division, which alters the possession, not the ownership; and mutual conveyances, since they are not necessary for the alteration, do not require to enter the register of tailzies.[11] Heritable rights, which are incapable of being feudalised, such as leases, may be entailed by assignation, but only so as to be binding *inter heredes*.[12] It would appear that moveables cannot be entailed even to that effect.[13] But funds

[3] See the authorities collected in Sandford, Entails, p. 143 *et seq.*; B. Pr. 1736 *et seq.*; 1 B.C. 47; M'Laren, i. 555 *et seq.*; and add Howden *v.* Fleeming, 14th Feb. 1867, 5 Macph. 658, revd. 6 Macph. H.L. 113. The powers of the Rutherfurd Act are available whether the entail is recorded or not, and whether the heir is infeft or not (sect. 42).

[4] Maclauchlan *v.* Maclauchlan, 1768, M. 15421; Dillon *v.* Campbell, 1780, M. 15432; 31 & 32 Vict. c. 101, sect. 14; cf. Pitcairn, 1710, M. 15590; Steele *v.* Coupar, 15th Feb. 1853, 15 D. 385, 386, L. Cunninghame's op.

[5] Last note.

[6] Brown *v.* Soutar, 15th March 1870, 8 Macph. 702.

[7] Chisholm *v.* Chisholm—Batten, 9th Dec. 1864, 3 Macph. 202.

[8] *Semble.* Dalyell *v.* Dalyell, 17th Jan. 1810, F.C. See Leslie *v.* Dick, 1710, M. 15358.

[9] M'Millan *v.* Campbell, 4th March 1831, 9 S. 551, affd. 7 W.S. 441. See a case of outlawry, Macrae *v.* Macrae, 22d Nov. 1836, 15 S. 54, affd. M'L. and Rob. 645.

[10] Stirling *v.* Dun, 21st Dec. 1827, 6 S. 272, affd. 3 W.S. 462; Stewart *v.* Nicolson, 2d Dec. 1859, 22 D. 72; Howden *v.* Rocheid, 31st Jan. 1868, 6 Macph. 300, affd. 7 Macph. H.L. 110.

[11] Last two cases.

[12] Authorities in Hunter, i. 221; Sandford, 252 *et seq.* See Act 1848, sect. 49.

[13] E. Leven *v.* Montgomerie, 1683, M. 3217, 5803, referred to by L. Balgray in Maule *v.* Maule, 4th March 1829, 4 F.C. p. 704, and 7 S. Appx. 6, and in Sandf. p. 251, seems to be overruled by Veitch *v.* Young, 1808, M. Service and Confirmation, Appx. 4; Baillie *v.* Grant, 21st May 1859, 21 D. 838; Kinnear *v.* Kinnear, 17th Feb. 1876, 4 Ret. 705, *per* L. Shand. See also Cameron's Trs. *v.* Cameron, 14th

destined to be laid out in the purchase of land to be entailed are treated in the same way as entailed land, and funds obtained by the sale or surrender of entailed lands are regarded as surrogates for these.[14]

An heir in possession under a strict entail is not a liferenter, but a limited fiar—restrained by the fetters of the deed of entail, but no further.[15] The difference which thus exists in many respects between the position of an heir of entail and a liferenter will appear on a comparison between this and the following chapter. The rule that the heir in possession is unrestrained in the use and disposal of an entailed estate, except in so far as he is controlled by the express words of the entail, was, before 1848, illustrated by many cases, in which it was held that if a flaw in the fetters existed it could only be taken advantage of by a *bonâ fide* exercise of the liberty conferred by it, not by a simulate transaction intended to evade some other restriction.[16] This has been altered by the 43d section of the Rutherfurd Act, and now the heir must be bound effectually by all the three cardinal prohibitions, if he is to be fettered at all.[17] The doctrine that the heir is a limited fiar is thus preserved. It is the key to many of the rules which fall within the scope of this chapter, and further explains the freedom from fetters, or, in other words, the fee-simple ownership, which accrues to heirs of entail who succeed under a clause of 'heirs whomsoever,' or as heir of entail immediately before that clause, or as heirs-portioners without a provision against division.[18]

Limited fee.

The three cardinal prohibitions, the existence of which, properly fenced, either expressly or in the form of the equivalent provided by statute,[19] is essential to a strict entail, are the prohibitions against alienating, against contracting debt, and against altering the order of succession. Of these only the last has been left standing by recent legislation, since, under the Entail Act of 1882,

Cardinal prohibitions.

Dec. 1860, 23 D. 167; Kinnear, 5th June 1875, 2 Ret. 765. The question did not arise in Ms. Bute *v.* Ly. Bute's Trs., 3d Dec. 1880, 8 Ret. 191, since the object was to attach heirlooms to an English estate in tail.

[14] See Act 1848, sects. 25-28; Act 1853, sect. 8; Act 1882, sect. 23; Lands Clauses Act, sect. 67 *et seq.*, *infra*, Appx. Nos. 21, 22, 26, 13.

[15] Agnew *v.* Gillespie, 23d June 1813, F.C.; Mags. of Dysart *v.* E. Rosslyn, 27th Nov. 1832, 11 S. 94; M'Leod *v.* M'Leod's Tr., 1st Feb. 1851, 13 D. 575, 580, 582, 586; L. Brougham in Montgomerie *v.* E. Eglinton, 2 B. Ap. 185; E. Breadalbane *v.* Jamieson, 16th March 1877, 4 Ret. 667, and cases there cited.

[16] The best illustration is Cathcart *v.* Cathcart, 12th Feb. 1830, 8 S. 497, affd. 5 W.S. 315.

[17] Cf. Cathcart *v.* Cathcart, 31st March 1863, 1 Macph. 759.

[18] See the authorities in 1 M'Laren, 515 *et seq.*

[19] Act 1848, sect. 39, and note, *infra*, Appx. No. 21.

the heir in possession has uncontrolled power of sale, and his creditors may now attach the estate for recovery of debts contracted by him after the 18th of August in that year.[20] All of these prohibitions are necessary to attain the two main ends of an entail —the keeping of the estate (in the strict sense of the word) intact, and the transmission of it in a prescribed line of succession.

Additional conditions.

If they exist, the entailer is at liberty to add any other conditions or restrictions he pleases; and if these are fenced with irritant and resolutive clauses, and are, moreover, not contrary to morality or to general policy, or to the policy of the Entail Acts, they will be enforced in the same way as the cardinal prohibitions. Of this sort are obligations (1) to use the name and arms of the entailer;[21] (2) to record the entail, obtain infeftment and possess under it, and thereby comply with the regulations of the statute of 1685;[22] (3) to pay off the entailer's debts;[23] and (4) to surrender the estate on succeeding to a peerage or to some other estate, or on the occurrence of some other event specified in the destination. The last-mentioned condition demands a passing notice.

Clauses of devolution.

There have been a great many decisions regarding the construction of such shifting clauses, but these belong more to the law of succession than to that of ownership.[24] In respect to the question which falls more properly within the scope of this chapter—viz., how far an heir of entail possessing subject to a clause of devolution is restricted in his use or disposal of the subject to a greater extent than other heirs of entail—a distinction has been drawn which was of more importance prior to the passing of the disentailing sections of the Rutherfurd Act than now. On the one hand, there was the case of an heir in possession who was indisputably the nearest possible heir under the entail, but who held under the condition of having to relinquish the estate (or of having to elect whether to relinquish it or not) on succeeding to a peerage or to another property, or on the birth of a second son, or on some similar event happening. In such a case, until the event

[20] 45 & 46 Vict. c. 53, sects. 18-28.

[21] Stevenson *v.* Stevenson, 1677, M. 15475; Moir *v.* Graham, 1794, M. 15537 (if an entailer's coat of arms do not exist, it must be got); Cuming's Trs. *v.* Cuming, 10th July 1832, 10 S. 804; B. Pr. 1725; Munro *v.* Munro, 15th Feb. 1826, 4 S. 467 (N.E. 472), affd. 3 W.S. 344; Hunter *v.* Weston, 31st Jan. 1882, 9 Ret. 492 (name, unless expressly prohibited, may be used along with other surnames, and need not be the last: a declarator of contravention is not the proper way of challenging a coat armorial granted by the Lyon King).

[22] B. Pr. 1727, 1 M'Laren, 555. These statutory conditions may be enforced by any substitute without being expressed in the deed of tailzie.

[23] *Infra*, p. 580.

[24] See 1 M'Laren on Wills, p. 501, and add Campbell *v.* Campbell (Boquhan), 10th July 1868, 9 Macph. 1035.

happened he was regarded as holding the estate not as a fiduciary fiar merely, but as an ordinary heir of entail; and he was therefore entitled to take advantage of any flaw in the entail so as to sell, contract debt, or alter the order of succession, as the case might be.[25] On the other hand, there was the case of an heir in possession subject to the possible event of the emergence of a nearer heir *in spe*. In that case it has been repeatedly held that, till the existence of the condition has become impossible, the remoter heir possesses, first, with all the equities of a *bonâ fide* possessor; but, secondly, in a fiduciary capacity, to preserve the estate for the nearer heir. He cannot, therefore, take advantage of any defect in the entail or in its concomitants, so as, for instance, to sell the estate, unless it were for the purpose of preserving a part by the necessary loss of the rest.[26] Since 1848, it has been held that the expression, 'heir of entail in possession of an entailed estate 'by virtue of a tailzie,' in the disentailing sections of the Rutherfurd Act, applies to an heir occupying either or both of these positions, and that he may therefore 'acquire the estate in fee-'simple,' with or without consents, as the case may be.[27] And it seems a necessary deduction that the similar expressions in the 43d section of the same statute in regard to imperfect entails will be similarly construed, and that, in this respect at least, the distinction above referred to is now antiquated. A similar construction of the words of the Aberdeen Act, and of the 10th section of the Act of 1875,[28] would confer on the devolver in either case indefeasible powers of making provisions for widows and children;[29] but he would not be entitled, either under powers in the entail or under the statutes, to grant provisions exigible only in case of devolution.[30] After the event contemplated in the clause of devolution has occurred, the devolver, if he continues to possess, does so merely as trustee for the devolvee. This change occurs *ipso facto*, without the necessity of any declarator, since the clause contains a condition, not an irritancy properly so called; and if there be refusal to relinquish possession, the proper course is to

[25] E. Eglinton *v.* Hamilton (Bourtreehill), 3d June 1847, 9 D. 1167, 1177, 1183, 1185, affd. 6 B. Ap. 136.

[26] Bruce *v.* Melville, 1677, M. 9321, 14880, 14890; Mountstewart *v.* Mackenzie, 1707, M. 14903-14926; Mackinnon *v.* Mackinnon, 1756, M. 6566, 14938, 5 B.S. 848; 1765, M. 5279, 5 B.S. 904, affd. 2 Pat. 252; Stewart *v.* Nicolson, 2d Dec. 1859, 22 D. 72.

[27] Bruce, 6th March 1874, 1 Ret. 740. See as to the effect of the disentail on the clause of devolution itself, pp. 753, 764, 768, 775, and notes to Act 1848, sect. 37, *infra*, Appx. 21.

[28] *Infra*, Appx. Nos. 19, 24.

[29] E. Kinnoull's Trs. *v.* Drummond, 26th Feb. 1869, 7 Macph. 576. See obs. of L.O. Shand in Bruce, [27], 1 Ret. 745.

[30] E. Cassilis *v.* Hamilton, 1745, Elchies, Provisions to Heirs, No. 6, 1 Pat. 381.

raise an action of denuding and adjudication in implement of the condition.[31] This is the case even if the entail has never been recorded: the devolvee will be preferred to the bankruptcy trustee of the devolver; but there is this obvious distinction, that the devolvee takes subject to liability for the debts of the devolver, since the estate was not protected against these.[32] In one case it was held, by a majority of two to one in the Second Division, that where an entail was declared invalid after the event involving devolution had occurred, the shifting clause flew off, on the ground that it was ancillary to the strict entail, and was not intended to apply to an unprotected destination;[33] and a doubt was expressed as to whether such a clause could have any effect in a simple destination.[34] There seems, however, to be little doubt that it would be enforced as part of the subsisting investiture till validly altered.[35] If the heir in possession of one entailed estate succeed to another under an entail containing a clause of devolution making the holding of both incompatible, he is not entitled, before making his election between the two, to make up titles to and disentail the latter. The necessity for election arises at once; its exercise must not be unreasonably delayed, and during the interval only acts of ordinary administration can be performed.[36] If, after a conveyance necessitated by a shifting clause, an heir nearer than the disponee comes into existence, the latter must denude, since the conveyance was merely a renunciation by the disponer, which gives the disponee no better right than he had under the entail.[37]

Declarator of irritancy.

The three cardinal prohibitions, if duly fenced by irritant and resolutive clauses, or the equivalent for express fetters which has been furnished by recent legislation,[38] and any other prohibitions which require to be so fenced,[39] are enforced[40] by means of a declarator of irritancy, which, proceeding on a narrative of the act of contravention, seeks to have it declared that all right, title, and interest of the contravener is now, and in all time coming shall

[31] Vs. Hawarden *v.* Howden, 2d Feb. 1866, 4 Macph. 353.

[32] Howden *v.* Fleeming, 14th Feb. 1867, 5 Macph. 658, revd. 16th July 1868, 6 Macph. H.L. 113.

[33] Munro *v.* Johnstone, 18th Dec. 1868, 7 Macph. 250, *per* Ll. Cowan and Neaves, diss. L.J.-C. Patton.

[34] *Per* L. Cowan, p. 255.

[35] See the other opinions in this case, and the law as to clauses of return in Mackay *v.* Campbell's Trs., 13th Jan. 1835, 13 S. 246.

[36] Home *v.* Home, 15th March 1876, 3 Ret. 591.

[37] Home *v.* Logan, 13th July 1880, 7 Ret. 1137.

[38] *Supra*, [20].

[39] *Supra*, p. 572.

[40] On contravention, see Ersk. 3.8. 30-32; B. Pr. 1761; Sandford, p. 428; 1 M'Laren, p. 564; the Queensberry Leases cases, noticed in 1 Hunter, 106 *et seq.*

be, void and extinct; and that the lands, with the rents, maills, and duties of the same, have fallen, devolved and accresced to the next heir;[41] and also, where the act or deed which causes the contravention requires to be annulled, by an action of reduction libelling on the restrictions of the entail.[42] There is also an express provision in the Act of 1685[43] that, if the fetters are not repeated in the titles possessed on, the said omission shall import a contravention against the person making the omission and his heirs. But the closing words are construed, not as necessarily striking at the right of the contravener's heirs, but as signifying 'a contravention of the same extent and effect with any other contravention of the entail, operating against heirs, if the entail expressly forfeits heirs, but not otherwise.'[44] The declarator of irritancy and the action of reduction may be laid either together or separately, but in either case decree of irritancy must be obtained before insisting in the reduction.[45] It is therefore of the first importance to ascertain the rules applicable to the declarator of irritancy, which is the leading action or conclusion. 'The only measure of right and liability between the heir in possession and the next succeeding heir is to be found in the express prohibitions of the entail, and the only way in which the obligation of the heir in possession can be enforced, and the only remedy competent to the next heir and any succeeding heir, is a declarator of irritancy; but beyond what is secured to the succeeding heirs by the prohibitions of the deed of entail, they have no right and no claim whatever against the heir in possession or his executors.'[46]

Action of reduction.

Such a declarator may be raised by any substitute, however remote, without the consent of and without calling intermediate substitutes.[47] It depends on the terms of the entail whether the forfeiture extends to the descendants of the contravener[48]—except

Title to sue.

[41] Act 1685, c. 22, *infra*, Appx. No. 17; decree in Bontine *v.* Graham, 2d March 1837, 15 S. 711; 3 Jur. Styles, 190. See an action relating to an anticipated contravention, Murray *v.* L. Elibank, 22d May 1829, 7 S. 641.

[42] 3 Jur. Styles, 230, and the Queensberry cases against tenants, *passim*.

[43] *Infra*, Appx. No. 17.

[44] Bontine *v.* Graham, 2d March 1837, 15 S. 711, 723. See obs. of Sandf. p. 447.

[45] Bontine *v.* Dunlop, 15th Jan. 1823, 2 S. 115 (N.E. 106), during the contravener's life. But action of reduction is competent after his death, differing therein from the declarator—D. Queensberry's Exrs. *v.* Hyslop, 6th July 1820, F.C., affd. 1 S. Ap. 59; Agnew *v.* Gillespie, 23d June 1813, F.C.; Turner *v.* Turner, 1 Dow, 423.

[46] In E. Breadalbane *v.* Jamieson, 16th March 1877, 4 Ret. 667, 672, *per* Inglis L.P.

[47] Simpson *v.* E. Home, 1697, M. 15353 (a case of devolution); Irvine *v.* Irvine, 1723, M. 15369; Dundas *v.* Murray, 1774, M. 15430.

[48] See Gordon's Creds. *v.* Gordon, 1749, M. 15384, 5 B.S. 774.

in the case of forfeiture to the Crown for treason, when the English rule is adopted, and the traitor's descendants, being heirs of entail, are involved in his forfeiture, and the Crown possesses in their stead so long as they survive and are otherwise capable of inheriting.[49] Whether the forfeiture involved in a contravention extends to descendants or not, the action of declarator cannot be raised after the death of the contravener.[50] It may be brought against a contravener who possesses merely on apparency.[51] The ordinary legal irritancies contained in the Act of 1685, whether specially inserted in the titles or not, may be purged before decree, provided *restitutio in integrum* can be effected; and that, whether the contravention was occasioned through a breach of the fetters, or through failure to engross the fetters in the titles on which the estate was possessed.[52] Even a failure to comply with conditions not contained in the statute, such as an obligation to bear a certain name or certain arms, may be purged on an undertaking to conform with the obligation in future.[53] There has even been a case of purgation by third parties whose interests would have been affected by the irritancy.[54] The effect of an irritancy on securities and other deeds granted by the contravener, at one time a matter of controversy, is now fixed by statute.[55]

Purgation.

Such being the machinery by which the restrictions, necessarily or occasionally imposed by a strict entail, are enforced against the heir in possession, it is now proper to explain the scope of the three cardinal prohibitions, and the relaxations which have been introduced by practice or by statute. The cumulative effect of

Effect of the cardinal prohibitions.

[49] Gordon *v.* L. Adv., 1750, M. 4728, Elchies, 'Tailzie,' No. 39, 5 B.S. 782, revd. 1 Pat. 508. See Kinloch *v.* L. Adv., 1751, M. 15389. Gordon's case overruled the decision of the Court of Session in the earlier cases of Cassie, cited M. 4732, and noted in Sandf. p. 432, and Grierson, revd. on a question of jurisdiction—Robertson's App. p. 298. But the alienage as well as the death of the descendants lets in the next substitute—Gordon *v.* L. Adv., 1751, M. 4737, revd. 1 Pat. 558. See E. Perth *v.* De Eresby's Trs., 11th March 1869, 7 Macph. 642, affd. 9 Macph. H.L. 83; 9th March 1875, 2 Ret. 538, affd. 5 Ret. H.L. 26.

[50] Gordon *v.* Gordon, [48]; Maxwell *v.* Maxwell, 15th Dec. 1843, 6 D. 255, affd. 5 B. Ap. 165; and the cases of Park and Bargany there cited.

[51] Stewart *v.* Denholm, 1726, M. 7275, revd. on a different point, 1 Pat. 233. A similar action was raised in Gordon *v.* Murray, 1765, M. 16818, and the law here stated does not seem to have been disputed.

[52] Abernethie *v.* Gordon, 20th June 1837, 15 S. 1167, affd. 1 Rob. Ap. 434, where the whole question of purgation is elaborately discussed.

[53] Ibid., and cases of Gordon, Ross, there cited.

[54] Price, referred to in Abernethie *v.* Gordon, [52], Sandf. p. 461. Purgation has no place in reductions of the contravening acts—Stewart *v.* Nicolson, 2d Dec. 1859, 22 D. 72.

[55] Act 1848, sect. 40. See cases in note thereto, *infra*, Appx. No. 22.

these prohibitions is to retain the estate in the line of succession pointed out by the entailer; and each of them is necessary for the attainment of that result. The prohibition against alienation strikes at any deed executed or act done *inter vivos*, whether gratuitous or onerous, whose effect would be directly to withdraw the estate or any part of it from the prescribed line.[56] An alienation which extends only to the life-interest of the heir in possession, does not fall under the prohibition;[57] nor does a propulsion of the estate to the next heir *alioqui successurus*.[58] Propulsion enables both parties to it to grant provisions for wives and children;[59] it must extend to the whole entailed estate, there having been no case of several heirs of entail in possession simultaneously;[60] and the propelling deed does not require to enter the Record of Tailzies.[61] The prohibition against contracting debt[62] strikes at acts which indirectly would bring about a withdrawal of the estate from the prescribed line. It consequently does not prevent the mere contraction of personal debt, which never is allowed to become the ground of an adjudication,[63] nor the pledging of the life-interest of the heir.[64] The prohibition against altering the order of succession[65] strikes more particularly at direct innovations on the line of successions by *mortis causâ* act, either in the form of addition or suppression, or by imposing new restrictions.[66]

Against alienation.

Against contracting debt.

Against altering succession.

[56] See a case of sale for a merely formal end, M'Lauchlan *v.* M'Lauchlan, 1768, M. 15421.

[57] See the terms of an interlocutor of sale of a life-interest in Scottish Union Ins. Co. *v.* Graham, 19th Jan. 1839, 1 D. 532; cf. Graham *v.* Hunter, 14th Nov. 1828, 7 S. 13; Fairlie's Trs. *v* Fairlie, 31st Jan. 1860, 22 D. 632.

[58] Gordon's Credrs. *v.* Gordon, 1749, M. 15384; M'Leod *v.* M'Kenzie, 17th Nov. 1827, 6 S. 77, esp. at p. 84; Duff on Entails, p. 53; cf. B. Pr. 1749.

[59] Craigie *v.* Craigie, 4th Dec. 1817, F.C. See further as to powers, Act 1853, sect. 22; 1868, sect. 13, *infra*, Appx. Nos. 22, 23.

[60] *Semble.* In V. Dupplin *v.* Hay, 15th Nov. 1871, 10 Macph. 89, the propellee of a portion was not allowed to record a deed of disentail; Steel *v.* Buchanan (1879), 7 Ret. 15.

[61] Turnbull *v.* Newton, 29th June 1836, 14 S. 1031. For other cases of propulsion see Dalrymples *v.* Cs. Glencairn, 1783, M. 15433, affd. 6 Pat. 807; L. Wharncliffe, 1852, 24 Sc. Jur. 553.

[62] Duff on Entails, p. 54; B. Pr. 1756; Sandf. 436.

[63] Scott *v.* Creditors, 1722, M. 15553; Denham *v.* Denham, 1737, 5 B.S. 200. See Mackenzie *v.* Mackenzie, 23d May 1823, 2 S. 331 (N.E. 298); Nisbet *v.* Moncreiffe, 10th June 1823, 2 S. 381 (N.E. 339); Munro *v.* Munro, 15th Feb. 1826, 4 S. 467 (N.E. 472), affd. 3 W.S. 344; Nairne *v.* Gray, 15th Feb. 1810, F.C.; Haggart *v.* Agnew, 19th Dec. 1820, F.C.; Douglas & Co. *v.* Glassford, 14th Nov. 1823, 2 S. 487 (N.E. 431), affd. 1 W.S. 323.

[64] Nairne *v.* Gray, [63]; Bontine *v.* Graham, 2d March 1837, 15 S. 711; Ferrier *v.* Gartmore Credrs., 11th July 1835, 13 S. 1121.

[65] B. Pr. 1759; Duff on Entails, p. 47.

[66] Menzies *v.* Menzies, 1785, M. 15436; rem. 4 Pat. 242, affd. 5 Pat. 522; Douglas *v.* Johnston, 1804, M. Fiar, Absolute, Appx. No. 1; Meldrum *v.* Maitland, 29th June 1827, 5 S. 857. See Munro *v.* Munro, 13th Feb. 1810, F.C.; Urquhart *v.* Urquhart, 20th Feb. 1851, 13 D. 742,

If new restrictions are now required to make an entail valid, the heir may impose them by taking advantage of the 43d section of the Rutherfurd Act, and re-entailing as fee-simple proprietor.[67]

Relaxations.

These being the general disabilities which necessarily beset an entailed proprietor, it now remains to describe the relaxations thereof which are introduced by statute, or are not unfrequently contained in deeds of entail. In so doing, it would serve no useful purpose to follow the order of the prohibitions as above stated, and attempt to show to which of them each power or relaxation effeirs. The due explanation of the present law demands, further, a departure from the chronological order of the progressive emancipation of the land from the more irksome and economically indefensible restrictions which were originally inherent in entails, since the leading (though no longer important) division of strict entails into old and new, which must be explained at the very outset, dates no further back than the Rutherfurd Act of 1848.

I. Power to disentail.

I. *Power to Disentail.*—It had been held, previous to that year, that a clause permitting of the sale of any part of an entailed estate, except the mansion-houses, on condition of the prior or simultaneous purchase and entailing of a similar estate on the same heirs, was not inconsistent with the old Act of 1685.[68] But the power of an heir of entail in possession to disentail, or, more properly, 'to acquire' his 'estate in whole or in part in fee-simple,' is purely statutory. The conditions under which this power may alone be exercised depend primarily on the question whether the entail is an old or a new entail, in other words, dated before or after 1st August 1848; but the greater facilities provided in the Rutherfurd Act for getting rid of old entails have now been extended to all entails.[69] The only difference now left is that, for the purposes of the Entail Acts, a new entail is regarded as dated on its actual date, while an old entail is taken as dated on 1st August 1848. The mode in which a disentail may be effected, and the object and rules of the Rutherfurd Act and its successors in respect to the duration of settlements, may be best studied in the Acts themselves, as annotated in the Appendix.[70] In certain

affd. 1 Macq. 658; Cochrane *v.* Baillie, 9th March 1855, 17 D. 659, affd. 2 Macq. 529; Scott *v.* Scott, 6th Dec. 1855, 18 D. 168; Stewart *v.* Nicolson, 2d Dec. 1859, 22 D. 72; Haig *v.* Haigs, 14th Feb. 1857, 19 D. 449. As to reserved power of nomination of heirs, see *infra*, p. 593.

[67] *Infra*, Appx. No. 21.

[68] Baird *v.* Baird, 10th Feb. 1844, 6 D. 643, affd. 25th Feb. 1847, 6 B. Ap. 7.

[69] Act 1882, sect. 3; Black *v.* Auld, 5th Nov. 1873, 1 Ret. 133.

[70] Act 1848, sects. 1-3, 6-11, 38, and Schedule; Act 1853, sect. 4; Act 1875, sects. 4 and 5; Act 1882, sects. 3, 13, and 18. As to money, &c., in trust, see Act 1848, sects. 26-29.

circumstances creditors or the bankruptcy trustee of the heir in possession may force a disentail.[71]

II. *Power to Sell.*—This is bestowed in various circumstances. II. To sell.

1. By two Acts which were intended mainly for the pacification of such parts of Scotland as were in rebellion in 1745, but which were not confined to that region, it was made lawful for heirs of entail to sell any part of their estate to the Crown for the erection of buildings, or making of settlements, or fostering civilisation;[72] and likewise, to sell entailed superiorities.[73] In every case the purchase-money is to be applied in payment of entailer's debts or other real charges on the estate, or in the purchase of other lands to be similarly entailed. This sale does not carry minerals held along with the superiorities;[74] and the lands so substituted and settled are affected by a trust, validly to entail the same, which binds all who take any estate or interest in them.[75] 1. Under Clan Acts.

2. *Power to Sell for redemption of the Land-tax.*[76]—Redemption of the land-tax, introduced by Pitt in 1798,[77] to diminish the pressure of the public debt in the market, and now regulated by a Consolidation Act of 1802,[78] as amended by later statutes,[79] was at one time taken advantage of by a large number of proprietors; but of late years the amount of the tax redeemed has been insignificant,[80] averaging only about £1000 a-year. The privilege was extended to entailed proprietors, and the exercise thereof is still regulated by certain sections of the Act of 1802, to which it will be enough to refer.[81] The entailed owner may obtain the funds required for redemption by sale of a part of the estate,[82] or by borrowing money on the security of the estate. In either case, the procedure is by petition to the Court of 2. For redemption of land-tax.

[71] Act 1882. sect. 18, *infra*, Appx. No. 26.

[72] 20 Geo. II. c. 50, sects. 14, 15; 20 Geo. II. c. 51, sects. 2, 3.

[73] 20 Geo. II. c. 50, sects. 16, 17. See Ersk. 3.8.33; Sandf. p. 357; B. Pr. 1763; Campbell *v.* Muir, 1760, M. 7783; Houston *v.* Ferrier, 1781, M. 8794.

[74] Fleeming *v.* Howden, 21st May 1868, 6 Macph. 782.

[75] Howden *v.* Fleeming, 20th March 1867, 5 Macph. 658, revd. 16th July 1868, 6 Macph. H.L. 113.

[76] 1 B. Pr. 1773; Sandford on Entails, p. 348.

[77] 38 Geo. III. c. 60. There were several statutes on the same subject in the three following years.

[78] 42 Geo. III. c. 116.

[79] Those which affect the present matter are—43 Geo. III. c. 51; 53 Geo. III. c. 123; 54 Geo. III. c. 173, sects. 12-14; 57 Geo. III. c. 100; 16 & 17 Vict. cc. 74 and 117, and see *infra*, chap. 41.

[80] 'The total amount of tax redeemed 'from July 1798 to the end of 1799 ex- 'ceeds by more than £100,000 the aggre- 'gate redeemed from that year to the pre- 'sent time (1870).'—Bourdin on the Land Tax, p. 85.

[81] 42 Geo. III. c. 116, sects. 61-66, 101, 102. It has not been thought necessary to cumber the Appendix with these enactments, which are now little used.

[82] It is doubtful whether necessarily part of *the same* estate—Lawrie *v.* Lawries, 1806, M. Appx. Public Burden, No. 2, affd. 2 Dow, 556.

Session. In the case of a sale, the Court approves of the articles of sale,[83] and a trustee is appointed to receive and apply the price in the ordinary mode prescribed by the Act in case of property held under unlimited titles; and provision is made for the employment of surplus money.[84] Power is expressly given to the Court to fix whether the part proposed to be sold is suitable in the circumstances.[85] The sale will not be reducible on account of an error of the Court in exercising its duty under the statute,[86] but only if it has not executed the statute at all, or has travelled out of the statute, or if the transaction is tainted with fraud.[87] Fraud on the part of the heir in possession will not affect a stranger purchasing, if the terms of the Act have been observed; otherwise it will be fatal, even as against a stranger.[88] If the transaction be rescinded, matters are as far as possible restored to their position before the sale; and in particular, if the land-tax has been redeemed, the estate will be made liable for an annual corresponding payment, redeemable on payment of a specified sum.[89]

3. Under Lands Clauses Act.

3. *Power to Sell to Public Bodies.*—The law relating to the sale by heirs of entail of lands and other subjects to public bodies, on which compulsory powers have been conferred by Act of Parliament, and the disposal of the proceeds, is contained in the Lands Clauses Act, the Rutherfurd Act, and in the Entail Act of 1853, which are all printed in the Appendix.[90] It will be sufficient to refer to the provisions therein contained, as explained by the notes appended.

4. In same way as to disentail.

4. *General power to 'sell, alienate, and dispone'* on the same conditions as in disentailing.[91]

5. For payment of debt.

5. *Special power to Sell in payment of (a) Entailer's Debts and (b) other Debts affecting the Fee.*

Entailers' debts.

(*a*) In order to understand in what cases entailers' debts do, and in what cases they do not, affect the estate in the hands of sub-

[83] They cannot then be altered by the party—Malcolm *v.* Malcolm, 4th Dec. 1821, 1 S. 183 (N.E. 174).

[84] See Scott *v.* Allnutt, 16th Nov. 1827, 6 S. 62, affd. 5 W.S. 416; Anderson, 18th Nov. 1814, F.C.

[85] Sect. 61—Colquhoun, 1803, M. 15089. Sect. 63—Eliott *v.* Wilson, 9th Feb. 1826, 4 S. 429, affd. 3 W.S. 60.

[86] E. Wemyss *v.* Montgomery, 1824, 2 Sh. Ap. 1 (omitting grassum in estimating rent); cf. next case.

[87] Hamilton *v.* Millar, 10th Dec. 1830, 9 S. 165; Baird *v.* Neill, 12th June 1835, 13 S. 927 (where see also as to procedure).

[88] Baird *v.* Neill, [87].

[89] Cleghorn *v.* Eliott, 18th Jan. 1833, 11 S. 259, 2d June 1837, 3 D. 1, 19, affd. M'L. and Rob. 1033. See Lawrie's Trs. *v.* Donald, 1st June 1825, 4 S. 56.

[90] 8 & 9 Vict. c. 19; see *supra*, p. 300, and Appx. No. 13, especially sects. 7-9, 67 *et seq.*; Act 1848, sect. 26; and Act 1853, sects. 14-16, Appx. Nos. 21, 22.

[91] Act 1848, sect. 4; Act 1875, sect. 6; Act 1882, sect. 4, Appx. Nos. 21, 24, and 26.

sequent heirs, it is necessary to stray for a moment beyond the bounds of this work into the law of succession. The rules cannot be more succinctly stated than as laid down by Lord M'Laren in his treatise on Wills and Succession:[92] '(1) Where the deed of entail 'divests the granter of the fee and leaves him only a liferent of 'the estate, then as long as the entail remains personal, it can 'only be binding *in obligatione*, and may be discharged with the 'consent of the institute;[93] but after registration and infeftment, 'it is a complete entail, incapable of being defeated by the debts 'or deeds either of the granter or the institute.[94] (2) Where the 'granter is not divested, but the entail is onerous and the re-'straining clauses are directed against the entailer as institute, 'the entail, while it remains personal, is effectual to bar gratuitous 'alienation; after registration in the register of tailzies, it is 'effectual in respect of its onerosity against the personal creditors 'of the institute whose claims are subsequent in date to the 'registration of the deed; after registration and infeftment, it is 'effectual against all creditors whatsoever, except those whose 'claims "had become real charges upon the estate before the in-'"feftment."[95] (3) Where the granter is not divested and the 'entail is not onerous, the settlement may be made binding *inter* '*heredes* by compliance with the requisites of the statute; but 'the estate continues to be liable for the debts and obligations of 'the entailer to the time of his death.'[96]

Under Rosebery and Rutherfurd Acts.

Prior to the year 1836, though the creditors in right of the entailer's debts were entitled to adjudge the entailed estate as if it were free of the fetters, the heir could not sell any part of the estate for the purpose of operating payment, except under special powers in the entail,[97] or by obtaining a private Act of Parliament.[98] But by the Rosebery Act, passed in that year,

[92] I. 577. See also B. Pr. 1743, 1747, and 1 B.C. 46; Sandford, 206 *et seq.*, 403 *et seq.*

[93] Scot *v.* Scot, 1713, M. 15569.

[94] Moray *v.* Ross, 1743, note to Sandford, p. 225; Gordon *v.* Dewar, 1771, M. 15579.

[95] Stewart *v.* Vans Agnew, 1784, M. 15435, rem. 29th July 1814, 6 Pat. 60, adhered to 2d June 1818, F.C., revd. 31st July 1822, 1 S. Ap. 320; Houston *v.* Schaw, 1715, M. 15572, affd. Robertson's App. 203.

[96] E. Lauderdale *v.* Heirs of Entail, 1730, M. 15556; Dickson *v.* Dickson, 1786, M. 15534, 3d March 1829, 7 S. 503, affd. 5 W.S. 657. For the order of liability among the entailer's executors, heirs in fee-simple, and heirs of entail, see 2 M'L. p. 473 *et seq.*; and for cases of express burdening or exoneration of particular estates, see 2 M'L. 490, and Mackintosh *v.* Mackintosh's Trs., 2d March 1870, 8 Macph. 627, revd. 19th May 1873, 11 Macph. H.L. 28.

[97] L. Kilburny *v.* Schaw, 1669, M. 15347; Scot *v.* His Heirs of Tailzie, 1751, M. 15394.

[98] Mackenzie *v.* Stewart, 1752, M. 7443, 15396, 15459, revd. 1 Pat. 578 (fraudulently obtained); M'Culloch *v.* M'Kenzie, 17th May 1826, 4 S. 598 (N.E. 605), affd. 3

'heirs of entail in possession of an entailed estate liable to be ad-'judged or evicted for the debts or obligations of the maker of the 'entail' were enabled to apply to the Court of Session for power to sell so much of the said lands as should produce a sum adequate to discharge these debts.[99] The procedure pointed out by the Rosebery Act, though still available, has been superseded in practice by that which is furnished by the 25th section of the Rutherfurd Act, as extended and amended by later statutes.[100] This section applies to all cases in which it is made competent by the Act for an heir in possession to charge the estate with debt by granting bonds and dispositions in security; cases in which such charge is made competent by any Act of Parliament without power of sale; and cases in which the fee is validly charged with debt: and the Amendment Act of 1853 (sect. 9) applies the same provisions to entailer's personal debts.

Other debts.

(*b*) The other debts affecting the fee, and therefore in the same position as entailers' debts, will be discussed in the sequel.[101]

6. Absolute power of sale.

6. *General power of Sale without Consents.*—It is now lawful for the heir of entail in possession of any entailed estate, or, where an entailed estate consists of land held in trust for the purpose of being entailed, for the person who, if the land had been entailed, would have been the heir in possession, or for the tutors, curators, or administrators of such heir or other person, to apply to the Court for an order of sale of the estate, or part of it.[102] This puts the favoured person in exactly the same position as a fee-simple proprietor in regard to selling the estate.[103] The only restriction on his power, if *sui juris*, is that the Court must be satisfied that no patrimonial interest will be injuriously affected by the sale; but if the application be made by or on behalf of a married woman, minor, pupil, or other person under disability, the Court must be further satisfied that the sale will be for his or her benefit.[104] Minute regulations are enacted regarding the mode of sale and disposal of the price, which, so far as not required for payment of encumbrances and improvement expenditure, is tied up in one or

W.S. 353; Hope *v.* Moncreiffe, 26th Jan. 1833, 11 S. 324 (prescribed preliminaries must be strictly observed); Agnew *v.* E. Stair, 1 S. Ap. 333; Lockhart, 9th Feb. 1837, 15 S. 498 (do.); Caddell *v.* Caddell's Trs., 11th July 1845, 7 D. 1014; Maxwell, 6th March 1850, 22 Sc. Jur. 362; Cumming *v.* Cumming, 16th July 1858, 20 D. 1280.

[99] 6 & 7 Will. IV. c. 42, sect. 7 *et seq.* See the Act annotated in Appx. No. 20.

[100] Act 1848, sect. 25; Act 1853, sect. 9; Act 1868, sects. 9, 10. See Appx. Nos. 21, 22, 23.

[101] *Infra*, pp. 586, 588, and see the section of Act 1848 just cited, and notes thereto, Appx. No. 21.

[102] Act 1882, sect. 19, Appx. No. 26.

[103] Ballantine, 30th June 1883, 20 Sc. L.R. 718.

[104] Act 1882, sect. 21.

other of certain specified modes for behoof of the line of heirs in the entail, and of parties entitled to provisions.[105] Lastly, money or other estate, held in trust for the purchase of land to be entailed, may, by warrant of the Court, be dealt with (itself or its proceeds) as if it were the price of land sold as above.[106]

III. To excamb.

III. *Power to Excamb.*—Power to exchange entailed land and other subjects for corresponding subjects to be brought under the fetters of the entail, may be validly granted in a deed of tailzie, being nowise inconsistent with the Act of 1685.[107] A general power is not likely to be met with, and would probably be construed so as to be restricted to the ordinary case of excambion, and so as not to extend to the whole or even to an unreasonably large part of the estate.[108] A special power 'to excamb such parts 'of the tailzied lands and estate as they [the heirs in possession] 'shall think expedient' can 'only be exercised, according to the 'fair meaning of the clauses, to such a limited extent as may be 'consistent with the subsistence of the entail over the great body 'of the estate.'[109] But the ordinary sort of excambion is that which is authorised by statute. A general power, which is controlled by no such restrictions as those just alluded to, is conferred by the 5th section of the Rutherfurd Act[110] on the same conditions as power to disentail. And powers of a more limited kind are conferred by the old Act 1667, c. 17, relating to the straightening of marches,[111] and by the Montgomery, Rosebery, Rutherfurd, and later amending statutes.[112]

IV. To feu.

IV. *Power to Feu.*—During the controversy which raged at the beginning of this century concerning the competency of granting leases long or short, there never was any doubt that feus were struck at by the prohibition against alienation, whether the reddendo did or did not represent the fair annual value of the land feued at their date. The obvious advantage, however, of possessing power to feu in the development and administration of many estates, especially of those which were situated near populous places, suggested the addition in many tailzies of some relaxation to the strictly prohibitive clause. Two of these cases have come

Greenock case.

[105] Act 1882, sects. 22-25.

[106] Act 1882, sect. 26.

[107] Baird *v.* Baird, 10th Feb. 1844, 6 D. 643, affd. 6 B. Ap. 7.

[108] The policy of the statutes now in force would otherwise be evaded—*e.g.*, by an excambion of the mansion-house and its accessories, or by isolating it from the bulk of the estate.

[109] Ibid., *per* L. Moncreiff, 6 D. 655; see also the opinion of L.J.-C. Hope, p. 653.

[110] See in Appx. No. 21 this section amended as stated in the notes thereto.

[111] *Supra*, p. 514.

[112] Act 1770, sects. 32, 33, Appx. No. 18, amended as there noted; Act 1836, sects. 3-4, Appx. No. 20, and notes; Act 1848, sect. 37, Appx. No. 21, and notes.

before the Court, and both of them were carried to the House of Lords. The *Greenock* case is very inadequately reported.[113] The interlocutor of the Court—which was affirmed—reduced a 'feu-'right of the several farms of the Wester Barony of Greenock,' another feu-right of a piece of ground on the south side of the town, and four feu-rights of even date of the mansion-house, office-houses, gardens, and court. The ratio of the judgment regarding the first (and probably in regard to the second) feu-right was thus set forth by Lord Eldon in the *Roxburghe Feu* case:[114] 'The words of the power in the *Greenock* case were—" reserving '" always, &c., full power and liberty to the said Sir John Schaw '" &c., to grant feus or long tacks for such spaces as they shall '" think fit of any portion of the said lands, the feu or tack duty '" not being under twenty shillings Scots for each fall of dwelling-'" houses, and five shillings for the fall of offices." The chief 'question there was as to the feu of the Western Barony, and it 'was held that it could not be feued, as the nature of the reser-'vation showed that only such parts were to be feued as were 'fitting for dwelling-houses and other buildings, and as it was not 'probable that the town of Greenock should extend to that 'length. But it had been said in that House that if ever the 'time came when the town of Greenock should extend to the 'Western Barony, then the heirs of entail might grant feus of it. 'The town of Greenock had now extended that length, and at 'this day the lands of the Western Barony were properly applied 'to the purposes of feuing. What was the meaning of that if it 'was not this, that the power was to be construed with a view to 'the object for which it was given? Or, in other words, that it 'was to be exercised with a view to the rational administration 'of the estate.'

Roxburghe case.

The same principles of construction were given effect to in the *Roxburghe* case,[115] where the relaxation was in these terms: 'Re-'serving always liberty and privilege to our said heirs of tailzie 'to grant feus, tacks, and rentals of such parts and portions of 'the said estate and living as they shall think fitting,' without diminution of rental. William Duke of Roxburghe on coming

[113] Cathcart *v.* Schaw, 1755, M. 15399, affd. 1 Pat. 618. The object of the heir in possession was the same as in the next case—viz., to divert the whole estate from the heirs under colour of feuing.

[114] 2 Dow, 227; cf. 5 Pat. 782.

[115] Innes *v.* Ker, 1807, M. Appx. Tailzie, 13-18, rem. 6th July 1812, 5 Pat. 609, adhered to 17th July 1813, F.C. (opinions in F.C. Sess. Papers, vol. 119), affd. 18th Dec. 1813, 2 Dow, 149, 5 Pat. 768. L. Eldon 'protested to God that he 'had endeavoured to come to a just con-'clusion upon this case with an anxiety 'which he had never before felt in his 'life,' 2 Dow, 228; cf. 5 Pat. 783.

into possession in 1804, executed a number of deeds *unico contextu*, the admitted object of which was to divert the entailed estate into a line of succession different from that under which he himself had succeeded. One of these deeds—a new entail—was nullified by a decree of the House of Lords finding that the old entail, from which the above reservation is quoted, was binding on him. The other deeds were intended to provide for this event. They consisted of sixteen feu-dispositions—which exhausted the *dominium utile* of the whole estate, except the principal mansion-house and forty-seven acres adjoining—under conditions which made the feu-rights to all intents *mortis causâ* deeds, and a contract providing for the entail of the feus in the favoured line of succession. The final judgment of the House of Lords, reducing the feus, was rested on the two grounds—(1) that they were not granted in the due exercise of the power, or with any view to the rational and fit management of the estates; and (2) that, having regard to the whole circumstances, they were alienations altering the order and right of succession under colour of creating feu-rights.[116] It will always be a matter of circumstances to determine in each case what is or is not rational management, just as in the case of grants of leases or of 'competent' provisions.[117] The Court of Session judges, as directed by an earlier remit, had entered into a detailed discussion and had pronounced a long interlocutor, dealing with questions regarding diminution of rental where the whole or part of the lands in a feu-right had not been formerly let,[118] feus of mansion-houses and their accessories,[119] the taxing of casualties,[120] and the including of minerals and timber;[121] but all these specialties were expressly reserved by the House of Lords, which held that the general doctrine above stated applied to all the feu-rights without distinction.[122]

Under Entail Acts.

By the Rutherfurd Act and the later entail statutes[123] important facilities have been conferred on heirs in possession as regards feuing, at the sight of the Court of Session or of the sheriff. By a series of statutes special provision has been made for feuing land for churches, schools, and the dwelling-houses and other premises connected therewith;[124] and for a scientific purpose or other pur-

[116] 5 Pat. 785.

[117] 2 Dow, 213.

[118] As to which, see 5 Pat. 776, 2 Dow, 164, 166, 222.

[119] 2 Dow, 164, 228; 5 Pat. 784.

[120] See Greenock ca., *supra*, [113].

[121] 2 Dow, 165, 226; 5 Pat. 782.

[122] 5 Pat. 785.

[123] Act 1848, sects. 4, 24; Act 1853, sects. 6, 13; Act 1868, sects. 3-5; Act 1882, sects. 4, 6, Appx. Nos. 21, 22, 23, 26.

[124] 1 & 2 Vict. c. 87 (repealed by 36 & 37 Vict. c. 53, sect. 5); 3 & 4 Vict. c. 48; 4 & 5 Vict. c. 38; 7 & 8 Vict. cc. 37 and 44; 12 & 13 Vict. c. 49; 14 Vict. c.

pose of public utility.[125] In all cases where the Land Clauses Act has been incorporated, the conveyance may now take the form of a feu-right, or contract of ground-annual, in consideration of an adequate feu-duty or ground-annual without grassum.[126]

V. To lease.

V. *Power to Lease out.*—In accordance with the plan of this work, it is here sufficient to refer to Mr Hunter's Treatise,[127] and, as regards statutory powers, to the Acts printed in the Appendix hereto,[128] and the Acts cited in last paragraph.[129]

VI. To charge improvements. No such right originally.

VI. *Power to charge Improvements.*—An heir of entail in possession is not entitled at common law to burden either the entailed estate or the succeeding heirs with the expense of improvements, however beneficially laid out.[130] Thus, where an heir of entail in possession dies, leaving an unfulfilled obligation to pay a tenant the value of meliorations made by him on his leaving his farm, the obligation transmits at common law against the executors of the deceased, not against the next heir of entail.[131] It is the same with an unimplemented obligation of the heir in possession to his tenant to execute improvements himself.[132] The obligation may import, however, no liability beyond improvements made during the obligor's possession;[133] and on the other hand, liability may be made out against the succeeding heir by proving his homologation or adoption.[134] While an entailer's obligations will be binding on succeeding heirs, the aid of statute is required for the burdening of the estate or succeeding heirs by one who is only an ordi-

24; see 31 & 32 Vict. c. 44. The earlier of these Acts are noticed in 1 Hunter, 92. The partial incorporation of the Lands Clauses Act in the Education Act of 1872, sect. 37, deprives them of much of their importance in respect to schools.

[125] Act 1882, sect. 6, Appx. No. 26.

[126] Act 1853, sects. 14-16, and notes, Appx. No. 22.

[127] 1 Hunter, 83 *et seq.*

[128] Act 1770, sects. 1-8; Act 1836, sects. 1, 2; Act 1848, sects. 4, 24; Act 1853, sects. 6, 13; Act 1868, sects. 3-5; Act 1882, sects. 4, 5, 6, 8, 9.

[129] *Supra*, p. 565. There is invariably the alternative of feuing or leasing out.

[130] 1 B.C. 71; B. Pr. 1256, 1766; Sandford, p. 327; 2 Hunter, 220.

[131] Dillon *v.* Campbell, 1780, M. 15432; Webster *v.* Farquhar, 1791, M. 15439, Bell, Oct. Ca. 207; Taylor *v.* Bethune, 1791, Bell, Oct. Ca. 214; Moncreiff *v.* Skene, 14th Jan. 1823, 2 S. 113 (N.E 104), affd. 1 W.S. 217; Fraser *v.* Fraser, 7th June 1825, 4 S. 73 (N.E. 76), 5 S. 722, 8 S. 409, affd. 5 W.S. 69. See Campbell *v.* Dundas, 20th Feb. 1812, F.C.

[132] Mackenzie *v.* Mackenzie, 15th Feb. 1849, 11 D. 596; see Runcie *v.* Lumsden's Reprs., 10th July 1857, 19 D. 965. *Semble, contra*, where the obligation rests on custom, not paction—Learmonth *v.* Sinclair's Trs., 23d Jan. 1878, 5 Ret. 548. Where an obligation in a lease is neither *inter naturalia* of the contract, nor regarding improvements, it is still a question if the succeeding heir is liable, Waterson *v.* Stewart, 22d Nov. 1881, 9 R. 155 (here a renunciation freed him and *mora* freed the granter's representatives).

[133] Ross *v.* Hawkins, 14th June 1848, 10 D. 1288.

[134] Jolly *v.* Graham, 24th Feb. 1824, 2 S. 730 (N.E. 611), 2d July 1829, 7 S. 824, affd. on this point 5 W.S. 280; cf. Barclay *v.* E. Fife, 5th June 1829, 7 S. 708.

nary heir in possession, in favour of himself.[135] Still less can the heir-disburser without statutory powers keep up the expense of meliorations against succeeding heirs, in favour of his own representatives.[136]

It will, however, be the disbursing heir's own fault if he leave his personal representatives burdened with obligations relative to improvements on land or houses, or unbenefited by his outlay during his possession of the estate. The first danger is provided for by the Duke of Argyll's Act of 1878, sects. 1 and 2.[137] The second is guarded against by a series of statutes, beginning in 1770 and ending in 1882, having for their object the encouragement of land-improvement by enabling the heir-disburser to charge the estate or heirs-substitute in their order with part or the whole of the outlay fairly laid out in certain sorts of works. The progressive tendency of legislation has been towards a wider extension of the administrative discretion of the heir for the benefit and at the expense of the estate. The provisions of the general statutes are given at length in the Appendix.[138] The special Improvement of Land statutes are referred to in a note.[139] The Glebe Lands Act of 1866[140] entitles an heir in possession to burden the entailed lands with the price of adjoining glebe-lands purchased in exercise of his right of pre-emption; and Sir James Graham's Act of 1844 authorises, subject to certain consents, the charging of an entailed estate for the endowment and upholding of *quoad sacra* parish churches.[141]

Act of 1878.

Montgomery and later Acts.

VII. *Power to grant Provisions.*[142]—Out of heritage, a husband has, at common law, a right to his courtesy, a widow to her terce, and younger children to no share of the succession. Consequently, unless made under relaxations contained in the deed of entail or authorised by statute, every provision for a younger child, and such provisions for widows and husbands as exceed the common-law liferents, are regarded as contraventions.[143] The effect

VII. To grant provisions.

[135] Fletcher *v.* Fletcher's Trs., 4th July 1826, 4 S. 788 (N.E. 795).

[136] See a blundered agreement, under which neither the personal representatives of an heir-apparent who never succeeded, nor his heir who did, were liable for improvement expenditure, Sinclair's Trs. *v.* Sinclair, 7th June 1881, 8 Ret. 749.

[137] 41 & 42 Vict. c. 28, sects. 1, 2, Appx. No. 25.

[138] Act 1770, sects. 9-31; Act 1848, sects. 13-20, and amendments there noted; Act 1875, sects. 3, 7, 8, 9, 11, 14; Act 1882, sects. 4, 7, 23.

[139] Note to Act 1875, sect. 14, Appx. No. 24.

[140] 29 & 30 Vict. c. 71, sect. 17; Imrie, 29th Jan. 1868, 6 Macph. 284; Fogo, 9th Nov. 1868, 7 Macph. 88; Gloag *v.* Rutherford, 6th Jan. 1873, 11 Macph. 251; Campbell *v.* Morison, 18th Nov. 1872, 11 Macph. 80; cf. Macleod, 4th July 1870, 8 Macph. 955.

[141] 7 & 8 Vict. c. 44, sect. 11.

[142] B. Pr. 1772; Sandf. p. 366.

[143] Ersk. 3.8.30.

is only to cut down immoderate provisions to the dimensions warranted by the deed or by statute. The existence of such relaxations of this sort, as are temporary or sufficiently limited, is not inconsistent with a complete entail, even under the system introduced by the 43d section of the Rutherfurd Act.[144] They are regarded in the same light as entailers' debts—in other words, the estate is held to be unentailed to the effect of satisfying these provisions.[145] The provisions introduced by statute are contained and explained in the Appendix.[146] The following paragraphs will be occupied with the express provisions which are frequently to be found in deeds of entail. It need scarcely be said that in each case the purport of such clauses will vary with the particular terms used. But some general doctrines may also be extracted. First, as to widows and husbands; second, as to younger children.

Express provisions.

To widows or husbands.

The ordinary but not invariable mode of providing for a widow or husband of an heir of entail in possession is by liferent locality or by bond of annuity. It is usual to exclude terce and courtesy,[147] and to substitute liferent rights of a value definitely limited, or indefinitely described as proper, competent, or such as the estate can conveniently bear. In the latter case, the amount will depend on the circumstances as they appear to the Court;[148] in the former case, the maximum must be strictly observed, and provisions in excess will be restricted accordingly.[149] Where the terce is not excluded, any express provision will be effectual which does not exceed this common-law liferent, which in such cases is regarded as a suitable provision.[150] In the case, formerly more common than now, of a provision by liferent locality, the husband or widow profited or suffered from the rise or fall of

[144] Catton *v.* Mackenzie, 19th July 1870, 8 Macph. 1049, affd. 1st March 1872, 10 Macph. H.L. 12; Rogerson *v.* Rogerson, 17th May 1872, 10 Macph. 698; Malcolm *v.* Kirk, 21st June 1873, 11 Macph. 722 (express power of sale).

[145] Cs. Glencairn *v.* Grahame, 1800, M. Appx. 'Heir-Apparent,' No. 1, affd. 5 Pat. 134; Kennedy *v.* Kennedy, 11th Feb. 1829, 7 S. 397; Erskine *v.* E. Mar, 7th July 1829, 7 S. 844; Howden *v.* Porterfield, 17th June 1834, 12 S. 734, affd. 1 S. and M'L., 739; Ds.-Dowager *v.* D. Richmond, 2d Dec. 1837, 16 S. 172.

[146] Act 1824, *infra*, Appx. No. 19, amended as stated in notes thereto.

[147] Gibson *v.* Reid, 1795, M. 15869; Makgill *v.* Law, 1798, M. 15451. This exclusion is ineffectual as to liferents due on the death of the entailer, or one in an equivalent position—Kennedy *v.* M'Lachlan, 26th Jan. 1839, 1 D. 430.

[148] Bruce *v.* Carstairs, 1773, 2 Pat. 329; Ds.-Dowager *v.* D. Roxburghe, 11th Jan. 1820, F.C.; cf. E. Rothes *v.* Cs.-Dowager, 21st Jan. 1823, 2 S. 135 (N.E. 125); E. Mar *v.* Ly. Erskine, 3d Dec. 1830, 9 S. 126, affd. 5 W.S. 611.

[149] Makgill *v.* Law, [147]; Gibson *v.* Reid, 1796, M. 15442.

[150] Ersk. 3.8.30; Cant *v.* Borthwick, 1726, M. 15554; see Borthwick *v.* Borthwick, 1730, M. 15556; Noble *v.* Dewar, 1758, M. 15606; Strachan *v.* Baldwin, 1736, M. 3227.

the rent of the locality subjects after the date of the locality.[151] On the other hand, a bond of annuity restricted by rental refers to the rental at the death of the granter.[152] If no powers are contained in the deed, or if those which are therein contained or are by statute conferred have not been exercised, the succeeding heir is not liable to furnish any provision or aliment,[153] unless the claimant be the husband or widow of the entailer,[154] or be within the degrees of relationship which entitle him or her to demand aliment *ex debito naturali* at common law.[155] In the last case, the aliment will not necessarily be restricted to the maximum allowed by the deed.[156] It may be here remarked, that while the heir in possession will be bound to aliment an expectant heir who stands within these degrees, and his wife as long as her husband survives,[157] the only course open to an expectant heir beyond these degrees is to contract a *post obit*.[158] Divorce obtained by the wife is equivalent to the death of her husband,[159] and conversely.

For younger children.

The form[160] adopted usually, though not invariably,[161] where deeds of entail provide for younger children, is by bond for a sum whose amount depends on the number of children and on the rental of the entailed estate at the death of the appointer, and payable as at that date out of the rents or proceeds of the estate. In the case of a strict entail,[162] the younger children, having no interest in heritable property at common law, must look for their provisions only to the deed of entail or to statute.[163] The term

[151] Agnew *v.* Agnew, 12th Dec. 1810; note to 16 F.C. 161; Malcolm *v.* Malcolm, 21st Nov. 1823, 2 S. 514 (N.E. 453). As to the terms of payment, see Gooden *v.* Chisholm, 2d Dec. 1829, 8 S. 165; Cruikshanks *v.* Sandeman, 16th Feb. 1843, 5 D. 643.

[152] Douglas *v.* Douglas, 15th May 1822, 1 S. 408 (N.E. 382).

[153] Campbell *v.* Campbell, 16th Dec. 1818, F.C.; cf. Lauder *v.* Baird, 1744, M. 15378 (mournings and 'interim aliment').

[154] Lowther *v.* M'Laine, 1786, M. 435. This sort of claim is not likely to arise, as the widow would be enabled to claim her terce and *jus relictæ*, failing marriage-contract provisions. The case cited was brought under the old law of year and day.

[155] Campbell *v.* Campbell, 25th Feb. 1809, F.C.; Jackson *v.* Gourlay, 24th Dec. 1836, 15 S. 313; Fletcher *v.* Fletcher, 11th July 1838, 13 F.C. 888.

[156] Campbell *v.* Campbell, [155]; Jackson *v.* Gourlay, [155].

[157] Adam *v.* Lauder, 1762, M. 398; 1764, M. 400.

[158] Miller, 26th Nov. 1836, 15 S. 147; E. Buchan, 16th Dec. 1837, 16 S. 238. The heir-presumptive being a pupil, power was granted by the Court to the tutors or *factor loco tutoris* to contract for an annuity.

[159] Fairlie *v.* Fairlie, 15th June 1819, F.C.; cf. Bs. Gray, 14th July 1870, 8 Macph. 990.

[160] See discussion as to the form in Crawford *v.* Hotchkis, 11th March 1809, F.C.; Cleghorn *v.* Eliott, 18th Jan. 1833, 11 S. 259.

[161] Thus, in Rogerson *v.* Rogerson, 17th May 1872, 10 Macph. 698, the form was a liferent locality redeemable at ten years' purchase.

[162] See Lockhart *v.* Lockhart, 1761, M. 12345.

[163] Ersk. 3.8.30.

'younger children,' like the statutory phrase[164] 'children who 'shall not succeed' to the entailed estate, cannot be construed till the date of the appointer's death;[165] but he is entitled, in the marriage-contract of a child at its date not entitled to succeed, to grant a provision which shall not be defeasible by the predecease of that child,[166] though in doing so he should exhaust the power.[167] The term does not apply to the children, elder or younger, of one whose issue are not called in the destination, since it means posterior in destination, not younger in age.[168] But where the appointees were described as the 'daughters and 'heirs-female' of the entailer, his daughter was found entitled, though she was not his presumptive heir.[169] A power to provide for the children of the 'eldest sons' of heirs in possession is construed to mean the children of the heir next entitled to succeed, though in point of seniority the second son.[170]

Who are 'younger children.'

It has been decided, apparently on specialties, that an heir in possession was entitled to exercise a power contained in an entail by providing for the younger children of his eldest son, who predeceased him;[171] and even for the children of a younger son deceased at the date of the bond.[172] That this would not have been held till lately in regard to the powers and provisions usually contained in entails, may be gathered from the tenor of the Aberdeen Act[173] and the Act of 1875.[174] The last-mentioned Act (sect. 10) introduces the rule of representation in regard both to statutory powers and to powers in a deed of entail. In no case will the appointer be entitled to pass over a surviving younger child entirely in favour of issue of the latter, or partially by giving him only a life-interest and settling the remainder. In the latter case the life-interest alone will stand.[175] But it is no objection that the form of provision is a conveyance to trustees.[176] Pro-

[164] 5 Geo. IV. c. 87, sect. 4, *infra*, Appx. No. 19.

[165] Catton *v.* Mackenzie, 19th July 1870, 8 Macph. 1049, affd. 1st March 1872, 10 Macph. H.L. 12.

[166] Oswald *v.* Oswald, 20th Dec. 1821, 1 S. 225 (N.E. 215); Antrobus *v.* Innes, 25th Nov. 1830, 9 S. 70; Maxwell *v.* Grierson, 12th Dec. 1843, 6 D. 203.

[167] Antrobus *v.* Innes, [166].

[168] Dickson *v.* Dickson, 4th July 1851, 13 D. 1291; 3d Feb. 1852, 14 D. 432, affd. 13th June 1854, 1 Macq. 729.

[169] Watson *v.* Glass, 1742, M. 2306, Elchies, 'Provision to Heirs,' No. 7, affd. 1 Pat. 372.

[170] Erskine, 2d Feb. 1850, 12 D. 649.

[171] E. Wemyss *v.* Traill, 23d Nov. 1810, F.C.

[172] Smollet of Bonhill in note to last case; cf. Bs. Gray, 14th July 1870, 8 Macph. 990, 2d point.

[173] Appx. No. 19, and the two Breadalbane cases, and the case of Grierson there cited.

[174] Appx. No. 24; cf. on the English law, 2 M'Laren on Wills, 290.

[175] Macgregor *v.* D. Northumberland, 20th May 1840, 2 D. 840, affd. 5 B. Ap. 396. See the cases on the Aberdeen Act referred to *supra*, [173].

[176] Macgregor *v.* D. Northumberland, [175].

visions to the wife and children of heirs-apparent, which could formerly only be justified by special powers,[177] or attained by virtue of the *jus superveniens*[178] or the device of propulsion,[179] are now authorised by statute.[180]

Conditional provisions.

Conditions may lawfully be annexed, and will be enforced, if not inconsistent with the object of the relaxation. Thus, a provision granted by an heir in possession, payable 'in case allenarly 'of the failure of heirs-male of my body,' was held to be due by the first heir who did not possess that character, though he did not succeed for twenty years after the death of the appointer, and by subsequent heirs, with interest from the date on which it fell due.[181] A condition that the appointee should pay certain debts out of his provision will be binding on him and his assignee, though it might be doubtful whether the provision would stand if challenged by the succeeding heir or substitutes.[182] It has been seen that a provision valid only in part will be allowed to stand as far as regards that part, provided it be separable from the rest.[183]

Rules applicable to both kinds of provisions.

There are certain rules of much importance which apply to both sorts of provisions. Thus, arrears of rent or interest, and provisions unpaid by any heir by whom they were due, are exigible from the succeeding heir, he having recourse against the defaulter by action of relief.[184] They are entailers' debts.[185] The case of provisions granted by an heir possessing subject to a clause of devolution has been already noticed.[186] Provisions warranted by the entail or by statute, and granted by an apparent heir in possession, were regarded as such debts and deeds, in the sense of Act 1695, c. 24, as were binding on succeeding heirs who passed him over in making up their title;[187] but the necessity or competency of resorting to that Act is now superseded in most

[177] Erskine, [170]; E. Wemyss, [171].

[178] Houston *v.* Nicolson, 1756, M. 2338.

[179] Craigie *v.* Craigie, 4th Dec. 1817, F.C.

[180] Act 1868, sect. 6, Appx. No. 23.

[181] Howden *v.* Porterfield, 17th June 1834, 12 S. 734, affd. 1 S. and M'L. 739; Bs. Gray, [172].

[182] Campbell *v.* Campbell, 13th Dec. 1860, 23 D. 159.

[183] Macgregor *v.* D. Northumberland, [175], and cf. cases there referred to; Bs. Gray, [172].

[184] Erskine *v.* E. Mar, 7th July 1829, 7 S. 844; Ds.-Dowager *v.* D. Richmond, 2d Dec. 1837, 16 S. 172; cf. Boyd *v.* Boyd, 5th July 1851, 13 D. 1302 (under Aberdeen Act); Sands *v.* Brisbane, 4th July 1835, 13 S. 1040. This is allowed in the statutory bond and disposition in security of the Rutherfurd Act, sect. 21.

[185] Campbell *v.* Campbell, 29th Nov. 1815, F.C.

[186] *Supra*, p. 574.

[187] Cs. Glencairn *v.* Graham, 1800, M. Appx. 'Heir-Apparent,' 1, affd. 5 Pat. 134; Kennedy *v.* Kennedy, 11th Feb. 1829, 7 S. 397; Corbett *v.* Porterfield, 20th June 1839, 1 D. 1038; 12th Feb. 1840, 2 D. 573, affd. 1 B. Ap. 476.

cases.[188] If any heir in possession, instead of leaving entail provisions secured upon the estate or its rents, or paying them by selling part of the estate, defrays them out of his own funds, the presumption is against extinction *confusione*, since he possesses two distinct characters in the transaction;[189] but this presumption yields if a contrary intention be proved. An obligation by an heir-apparent to grant bonds of provision to the extent allowed by the entail, in the event of his succeeding, which was implemented by him while possessing on a personal title (the feudal title being in trustees) could not be discharged by granting bonds, as in full implement, for a sum which turned out to be inadequate, the trustees having in the interval conveyed the estate to him; the entail being the same, and there being merely a miscalculation of the value of the estate. The younger children were not even deprived of a legacy, since the maxim *debitor non presumitur donare* did not apply, the provision being a burden on the entailed estate, the legacy a burden on the testator's own.[190]

Free rent.

The amount of all these provisions is usually made to depend on the free yearly rent or value of the entailed estate, whether it consists of land already entailed, or includes land to be entailed, or money to be invested in land to be entailed.[191] In determining what is the yearly rent or value, there seems to be no distinction between cases of provisions allowed by the entail and those authorised by statute.[192] It includes rents actually drawn and the fair yearly value of unlet subjects, including in both cases the rent or value of shootings[193] and fishings[194]—but not of the mansion-house and its accessories[195]—feu-duties,[196] and the profits of going mines, whether obtained in the form of rent or of lord-

[188] Conveyancing Act 1874, sect. 9; M'Adam *v.* M'Adam, 15th July 1879, 6 Ret. 1256; Fleming's Trs. *v.* Fleming's Tutors, 30th June 1882, 9 Ret. 1013.

[189] Crawford *v.* Hotchkis, 11th March 1809, F.C.; Welsh *v.* Barstow, 11th Feb. 1837, 15 S. 537.

[190] Hope Johnstone *v.* Hope Johnstone, 19th May 1880, 7 Ret. 766.

[191] For cases of such composite estates, see Houston *v.* Nicolson, 1756, M. 2338; Macpherson *v.* Macpherson, 24th May 1839, 1 D. 794, affd. 5 B. Ap. 280; Dickson *v.* Dickson, 8th June 1855, 17 D. 814; Irving *v.* Irving, 22d Feb. 1871, 9 Macph. 539 (compensation money).

[192] See notes to Aberdeen Act, sect. 1, Appx. No. 19.

[193] Sinclair *v.* L. Duffus, 24th Nov. 1842, 5 D. 174; Macpherson *v.* Macpherson,[191], and 16th Feb. 1843, 5 D. 651; Leith *v.* Leith, 10th June 1862, 24 D. 1059. Similarly the value of these, let or unlet, is added on in estimating the amount of locality lands — Menzies *v.* Menzies, 10th March 1852, 14 D. 651, 10th July 1855, 17 D. 1090, var. 29th July 1861, 23 D.H.L. 16 (without adding speculative rise of value consequent on erecting shooting-lodges).

[194] Leith *v.* Leith, [193].

[195] Leith *v.* Leith, [193]; Macpherson *v.* Macpherson, [193].

[196] Wellwood *v.* Wellwood, 12th July 1848, 10 D. 1480; 20th Dec. 1848, 11 D. 248.

ship.[197] Where the profits are subject to variation year by year, an average is taken of the proceeds for such a series of years as the Court thinks right;[198] in other cases the value is estimated as at the date of the death of the granter.[199] In determining what is the *free* rent, the deductions which have to be made from the gross revenue of the estate will depend in great part on the special terms of the provision; while the Aberdeen Act is careful in detailing the allowances which must be made in fixing the amount of statutory provisions.[200] As cases of the former class throw little light on each other, or on cases under the statute, it will be sufficient to indicate the points treated of in a note.[201]

Under Entail Acts.

The statutory enactments relating to provisions, and the mode of securing and clearing them off, are to be found in the Appendix.[202] The relation which the provisions there authorised bear to those which are specially allowed by a deed of entail is sufficiently explained in the notes to the Aberdeen Act.

VIII. To nominate heirs.

VIII. *Power to nominate Heirs.* — The prohibition against altering the order of succession may be relaxed by a general or limited power reserved by the entailer to himself to nominate heirs in place or to the exclusion of the prescribed series in whole or in part, or in addition to the same;[203] or by a power conferred on succeeding heirs in certain circumstances—such as the emergence of heirs-portioners—to innovate on the prescribed line to a limited extent.[204] The points which have been decided in regard to such powers have related to the form in which they

[197] Ibid., Douglas *v.* Douglas, 15th May 1822, 1 S. 408 (N.E. 382); Douglas *v.* Scott, 17th Dec. 1869, 8 Macph. 360.

[198] Macpherson, [195]; Wellwood, [196]; Douglas *v.* Scott, [197].

[199] E. *v.* Cs.-Dowager Rothes, 21st Jan. 1823, 2 S. 135 (N.E. 125), 29th Jan. 1829, 7 S. 339.

[200] Act 1824, and notes, Appx. No. 19.

[201] Lee *v.* Lee, 1698, M. 15552; Elliott *v.* Elliott, 17th Nov. 1813, F.C. (property-tax, house and window duty, rebuilding manse); Douglas *v.* Douglas, 15th May 1822, 1 S. 408 (N.E. 382), (widows' life-rent); Macdonald *v.* Lockhart, 18th May 1836, 14 S. 785 (widows' and children's provisions *inter se*, Montgomery expenditure); Macpherson *v.* Macpherson, 24th May 1839, 1 D. 794, affd. 5 B. Ap. 280 (improvement debt, expense of embanking, repairing church, factor's wages); Corbett *v.* Porterfield, 12th Feb. 1840, 2 D. 573, affd. 1 B. Ap. 476 (real debts); Paterson *v.* Paterson, 17th July 1849, 11 D. 1420 (entailer's debt); Bs. Gray, 14th July 1879, 8 Macph. 990 (widow's annuity, salmon assessment, feu-duties, abatement of rent, Montgomery expenditure); Irving *v.* Irving, 22d Feb. 1871, 9 Macph. 539 (drainage rent-charge); cf. Bs. Keith, 9th July 1850, 13 D. 43; Hope, 1853, Dunc. 380.

[202] Aberdeen Act (1824), *passim;* Act 1848, sects. 4, 21-23; Act 1853, sect. 7; Act 1868, sects. 6, 8; Act 1875, sect. 10; Act 1882, sects. 10, 24; and the other sections referred to in the notes appended to these, Appx. Nos. 19, 21-24, 26.

[203] Cases in note, [205]

[204] Martin *v.* Kelso, 19th July 1853, 15 D. 950; cf. Fraser *v.* L. Lovat, *infra.*

must be exercised in order to be effectual, and fall, consequently, within the province of pure conveyancing.[205]

Absentee heirs.

Provision is made in the latest Entail Act for the case of an absentee heir in possession of an entailed estate, and for the case of an absentee substitute whose consent is required or must be dispensed with in the course of an application to the Court.[206] These provisions are a necessary supplement to the Presumption of Life Limitation (Scotland) Act, 1881,[207] and may be studied in the Appendix.

Mansion-house.

In regard to some of the foregoing powers, whether conferred by the deed of entail or by statute—such as the power of sale for the payment of debt, of excambion, of feuing, leasing, and charging for improvements, and the valuation of the estate in estimating the amount of provisions—the mansion-house and its accessories are treated in a different way from the rest of the estate. The presumption is, that the mansion-house or houses are suitable in size and number to the character and magnitude of the entailed property. Nothing can be done—except under compulsory powers, or in virtue of a private Act, or by obtaining the consents required by the Acts of 1848 and 1875, or (probably) under the absolute powers of sale conferred by the closing part of the Act of 1882, to divert this part of the estate from its proper use as the residence of the heir for the time being.[208] And since the heir, though he lets the mansion-house, must reside somewhere, presumably in a dwelling equally suitable to his station, its yearly value, let or unlet, is not to be included in estimating the 'free ' rent.' These propositions are illustrated in many parts of the law of entail powers, as set forth above, and in the relative statutes.[209] Some other points in regard to the relation of an heir in possession to the mansion-house have been decided. Thus, he is not entitled to pull it down and sell the materials, on the double ratio that this would not be an ordinary use of the subject, like winning minerals, and that it would be an evasion of the prohibition against alienation by the simple expedient of converting the materials of the house into

[205] L. Reay *v.* Mackay, 25th Nov. 1823, 2 S. 520 (N.E. 457), affd. 1 W.S. 306; Porterfield *v.* Stewart, 15th May 1821, 1 S. 9 (N.E. 6), rem. 2 W.S. 369, adhered to, 18th Nov. 1829, 8 S. 16, affd. 5 W.S. 515; E. Strathmore *v.* E. Strathmore's Trs. 16th Feb. 1830, 8 S. 530, 1st Feb. 1837, 15 S. 449, affd. 1 Rob. App. 189; Fraser *v.* L. Lovat, 28th Feb. 1842, 1 B. Ap. 105, 22d Feb. 1854, 16 D. 645; Gammell *v.* Cathcart, 13th Nov. 1849, 12 D. 19, affd. 13th Dec. 1852, 1 Macq. 362; L. Forbes *v.* Gammell, 14th May 1858, 20 D. 917; Padwick *v.* Stewart, 4th March 1874, 1 Ret. 697.

[206] Act 1882, sects. 14-16, Appx. No. 26.

[207] 44 & 45 Vict. c. 47.

[208] See as to Leasing, cases in 1 Hunter, 117.

[209] See also next paragraph.

moveable property.[210] In a case where the only special stipulation was that the heir for the time being should reside in and maintain in repair the mansion-house, it was decided on general principles that 'he was entitled to take down the mansion-house 'and offices, provided he *bonâ fide* immediately built a house 'equally as good, and that either on the present site or any other 'equally suitable on the estate.'[211] The obligation contained in this proviso does not transmit against the personal representatives of the demolishing heir; and if the work be unfinished at his death, the next heir of entail has no action against them. His only remedy is against the demolishing heir during his life, by a declarator of irritancy; and that remedy only applies to cases which amount to alienation, such as demolition for the purpose of selling the materials, or demolition with no intention to rebuild, or where the purpose of rebuilding has been wrongfully abandoned.[212] For the same reason, the succeeding heirs have no remedy against the heir in possession allowing the mansion-house to fall, unchecked, into disrepair, or even into a ruinous condition.[213] The heir is not bound, except by special clause in the entail, to enter into or keep up a policy of fire-insurance. If he does so, and an accidental fire happens, the next heir cannot demand that the proceeds of the policy should be laid out in building anew.[214] In an early case, the expense of repairing and improving a house which had been deteriorated by fire was thrown on the fee of the estate.[215]

Growing timber.

It has been already pointed out as the leading rule of entail law that the heir in possession is a fiar during his possession, unfettered in his use and disposal of the estate, except by the conditions of the deed of tailzie; and that the only remedy of the next heir or other substitutes is by declarator of irritancy in case of a contravention committed, or by interdict in case of a contravention threatened. In regard to two sorts of subjects—growing timber and minerals—some difficulty has arisen as to what may be regarded as the ordinary administration of an unfettered fee-simple proprietor, and what partakes more of the character of an alienation designed to prejudice succeeding heirs. Trees may be

[210] Gordon *v.* Gordon, 24th Jan. 1811, F.C.

[211] Moir *v.* Graham, 20th June 1826, 4 S. 730 (N.E. 737); see L. Deas's obs. in Boyd *v.* Boyd, 2d March 1870, 8 Macph. 637, 644.

[212] E. Breadalbane *v.* Jamieson, 16th March 1877, 4 Ret. 677. The corresponding prevention, by interdict, is illustrated in Gordon *v.* Gordon, [210].

[213] Sandford, p. 281.

[214] English cases—Seymour *v.* Vernon, 21 L.J. Ch. 433; *In re* Skingley, 3 M. and G. 221; and the cases of landlord and tenant, 2 Hunter, 257 *et seq.*

[215] Temple *v.* Gairns, 1706, M. 15355.

regarded either as *partes soli* or as fruits. In the one character, they would be inalienable by an heir of entail; in the other, they might be disposed of by him like any other crop. The rules, which have been fairly well established, for the purpose of reconciling as far as possible the free *arbitrium* of the heir in possession with the reasonable expectations of his successors, are these:[216] Duly constituted and fenced prohibitions relating to the disposal of timber will, as far as possible, be enforced according to their tenor.[217] In the absence of such express stipulations, the heir in possession will be restrained from cutting down such trees as are 'required for the reasonable enjoyment of the 'mansion-house by persons in the rank of life which the inmates 'of such a house may be supposed to hold.'[218] In applying this rule, there may be some of the wood near the house, none of which will be allowed to be cut down; while other parts at a greater distance may be wholly or partially removed.[219] With the exception of timber connected with the mansion-house, all wood on the estate may be cut down by the heir in possession, provided it be ripe: to anticipate the date of maturity would be to depart from the rules of ordinary administration.[220] Thinning —conducted, if necessity be shown, under the eye of a man of skill appointed by the Court—is an act of necessary or ordinary administration.[221] A clause in the deed of tailzie directing the 'beating up' of cleared ground, or more generally the maintenance of the existing acreage under wood, will be enforced, even though the proportion of planted land be unusually large.[222] Each heir in possession has absolute ownership only in that part of the wood which has ceased to be part of the soil, by severance from it, during his tenure; so that if he dies during the execution of a contract for cutting timber, his executors or assignee can only claim the value of the wood which has actually been cut down before his death.[223] If the heir in possession or his assignee has been

[216] Ersk. 3.8.29; 1 B.C. 51; B. Pr. 1754; Sandf. p. 276; 1 Hunter, 114. Contrast the powers of a liferenter, in next chapter.

[217] Moir *v.* Graham, 20th June 1826, 4 S. 730 (N.E. 737); Boyd *v.* Boyd, 2d March 1870, 8 Macph. 637.

[218] Boyd *v.* Boyd, [217]; *per* L. Deas, p. 644. The vague word 'amenity' was studiously avoided. Mackenzie *v.* Mackenzie, 6th March 1824, 2 S. 775 (N.E. 643); Bontine *v.* Carrick, 16th June 1827, 5 S. 811 (N.E. 750); see obs. in Gordon *v.* Gordon, 24th Jan. 1811, F.C.

[219] Boyd *v.* Boyd, [217].

[220] Hamilton *v.* Vs. Oxfurd, 1757, M. 15408, must be read along with the other cases — Cathcart *v.* Schaw, 1755, M. 15403, 5 B.S. 818, affd. 1 Pat. 618; Ker *v.* Graham's Trs., 17th Nov. 1827, 6 S. 73, 21st Dec. 1827, 6 S. 270; Bontine *v.* Graham's Trs., 17th Nov. 1827, 6 S. 74; Boyd *v.* Boyd, [217], where see obs. by L.O. Mure on the sequel of Bontine's case.

[221] Boyd *v.* Boyd, [117].

[222] Ibid.

[223] Cathcart *v.* Schaw, [220]; Stewart

prevented till the death of the former from proceeding to cut timber by an interdict which turns out to have been unjustifiable, the proper remedy will be an action of damages.[224] It would appear that the purchaser or lessee or assignee of the right to cut the timber is not entitled to proceed after his author's death, though willing to account to the heir then succeeding.[225] But this rule would probably be inapplicable to *silvæ cæduæ*, allotted in haggs for annual cutting.[226] The powers of the heir in possession may be exercised by a trustee for creditors;[227] and it is thought that individual creditors may attach the faculty by adjudication, at least in regard to the last-mentioned sort of timber.[228]

Minerals.

The working and winning of minerals is, on the one hand, an undoubted alienation of part of the entailed estate, and, on the other hand, the only mode in which that part of the estate can be put to use. It is doubtful if an express prohibition against such a use would be supported:[229] in practice it is unknown. It is matter of public concern that the wealth of the nation should not be locked up for an indefinite period by family settlements, and the rule has been established that the heir in possession is entitled to work the minerals himself[230] or to lease them:[231] and mining leases have been recognised by statute in the 1st section of the Rosebery Act.[232] It has been said to be an open question 'whether an heir of entail in his own person, by his own capital 'and exclusive operations, can exhaust the minerals to the effect 'of destroying the value of one-third or one-half of the entire entailed estate.'[233] It must be evident, however, that to answer this question in the negative would be to throw on the Court the duty of determining what, looking to the size and value of the estate and of the mineral-field respectively, and perhaps to the state of the markets, should be held to be a fair mode and rate of working—an inquiry which would necessarily be arbitrary in the highest degree. It would also be inconsistent with the rules relating to mineral leases—rules which may be briefly stated

v. Stewart's Exrs., 1761, M. 5436; L. Elibank *v.* Renton, 15th Jan. 1833, 11 S. 238. The important date is that of the heir's death, not that at which the event came to the knowledge of the assignee—Veitch, note to 1 B.C. 51.

[224] L. Elibank *v.* Renton, [223].

[225] Veitch, [223]; Pringle *v.* Scott, note to 1 B.C. 51.

[226] See as to the liferenter's right, in next chapter.

[227] Ker *v.* Graham's Trs., [220].

[228] In 1 B.C. 51, the learned author is doubtful on this matter; but the tendency of the decisions since his time has been in the direction indicated in the text.

[229] *Per* L. Pres. M'Neill in Muirhead *v.* Young (2), 13th Feb. 1858, 20 D. 592, 602.

[230] 1 B.C. 52; L.P. Blair in Gordon *v.* Gordon, 21st May 1811, F.C.; Sandf. p. 276.

[231] 1 Hunter, 113.

[232] *Infra*, Appx. No. 20.

[233] *Per* L. Deas in Muirhead *v.* Young, [229], 20 D. 606.

thus: To warrant a reduction of such leases at the instance of an heir of entail succeeding to the lessor, 'there must be some 'unfairness, some fraud, or some gross culpable negligence operat- 'ing as mischievously as fraud would operate.'[234] And it is irrelevant, in an action of damages at the same instance against the tenants, to aver that they were rapidly working the minerals to exhaustion.[235] The fraud or unfairness, which will be fatal to such a contract, may have been perpetrated for behoof of favoured tenants, or in favour of the lessor alone, as by a stipulation for a grassum, which would be a wrongful *præcipuum*, secured to him though he should die the day after the lease was signed. In neither case is there any analogy to the case supposed of an heir working the minerals himself, indifferent to the chance of their being exhausted during his tenure. It has never been seriously suggested that the proceeds of mineral workings should be funded or applied for the improvement or enlargement of the estate, as is done in cases of minerals being wrought under glebes.

[234] Muirhead *v.* Young (1), 13th June 1855, 17 D. 875, adopting the language of L. Eldon in the Tinwald case.

[235] Muirhead *v.* Young (2), *supra*, [229].

CHAPTER XXXV.

LIMITED ESTATE—*continued.*

LIFERENT AND FEE.

Nomenclature.

THE last sort of limited estate is that which is indicated by the correlative terms 'Liferent and Fee.' These, 'while subsisting 'together, are mutual restraints on each other, and so are neces- 'sarily both of them limited estates, conferring on each of the 'holders relative rights. But not only does a liferent not exclude 'a fee; it implies the existence of a fee independent of it.'[1] This relative use of the term Fee must be carefully distinguished from its absolute use, as denoting the full right of ownership, unlimited in respect of title. Our institutional writers,[2] following Roman law methods of classification,[3] regarded the more immediately beneficial, and therefore the more practically important, right of liferent as a mere burden on the fee, as a personal servitude amenable to the same principles as predial servitudes, with this difference, that the dominant subject was, not a tenement but, a definite person. However praiseworthy such a classification may be in point of history or logic, there can be little doubt that it must yield in matter of convenience to the more modern view (which has been all along that of the English law) that liferent and fee are independent estates mutually limiting each other. The force of this view is admitted by Mr Erskine,[4] who, while

Liferent—a personal servitude, or a limited estate.

[1] 1 B.C. 52.

[2] St. 2.6. pr.; Mack. 2.9.34; Forbes, 2.4.4; Bankt. 2.6.2 *et seq.*; Ersk. 2.9.39.

[3] I. (2.4); Vinnius, *apud loc.*; D. (7.1-9); Voet, *apud loc.* The principal modern civilians on usufruct may here be referred to—Westphal, de Libertate, &c., p. 403; Elvers's Servitutenlehre; Pellat, sur la Propriété; Glück's Commentar, ix. 1-427; Weiske's Lexicon, xi. 867; Molitor, La possession, &c., p. 364; Vangerow, § 344. The irregular forms of personal servitudes—*usus, habitatio, operæ servorum*—have no analogues in our law.

[4] Ersk. 2.9.41; cf. 1 B.C. 52; B. Pr. 1037. Even in Roman law predial and personal servitudes seem to have had a distinct genesis. The former sort arose at first out of *inter vivos* agreement; the latter out of *mortis causâ* settlement: cf. I. (2.3 and 4): Cic. pro Cæc., 4.11; Cic. Top. 3.15.17; 4.21.

adopting the time-honoured classification of the civil law, adds that 'a liferent of lands, though it be doubtless a burden upon 'the subject liferented, is truly a feudal right, much resembling 'property, which constitutes the liferenter *interim dominus* or 'proprietor for life.' In point of fact, the analogy between predial servitudes and liferent is surrendered in our practice in the rule of conveyancing that a liferent can be constituted a real right only by an infeftment already applicable to it, or specially taken out.[5]

Liferent defined.

Liferent is the right to use and enjoy a subject during life, without destroying or wasting its substance.[6] The holder of the right is called the liferenter. The remainder of the full estate of property is the fee. The fee confers, pending the liferent, certain minor rights of enjoyment, and certain powers to enforce the maintenance of the integrity of the estate, and, after the expiry of the liferent, the right to enter into the full use and enjoyment of the estate. The party so entitled is the fiar. Though the term 'liferent,' like the Roman 'usufruct,' is most frequently found to apply to a right whose only natural termination occurs at the death of the liferenter, the true doctrine is, that that event marks only the furthest limit of the right, and that the term is quite properly applied to cases in which the right may terminate on the occurrence of some intervening and uncertain event, such as a second marriage. It is now proposed to inquire into the rights of the liferenter, and how far these are limited by the nature of his estate. It will be found that in so doing we shall be at the same time investigating the correlative rights of the fiar.

How constituted.

It would lead too far from the present subject into the law of the domestic relations, succession, and pure conveyancing, to attempt, however succinctly, to detail the modes in which liferents may be constituted. And it would be unnecessary, seeing that the rights and powers of a liferenter, however his estate may have been constituted, must belong to one of three classes,—(1) the rights incident to a liferent by constitution; (2) those incident to a liferent by reservation; and (3) those which are determined by the intention of a testator. To the first class belong the legal liferents[7]—terce and courtesy—and liferents of special subjects, constituted in favour of parties other than the grantor in marriage-contracts or other deeds of conveyance.[8] To the second belongs

[5] *Supra*, p. 353; *infra*, p. 601. But see the form of renunciation, *infra*, p. 623.

[6] Pr. I. (2.4); 1 D. (7.1); and authorities in note [3], *supra*.

[7] The latest statement of the law relating to these is in Fraser, H. and W., 2d ed. p. 1079 *et seq.*

[8] St. 2.3.42; Ersk. 3.8.35; B. Pr. 1708, 1953; Fraser, H. and W. 1440; 1 M'L. on Wills, 636; 1 B.C. 54.

the case of a reservation of his own liferent use by a proprietor in disposing of his property; and the same rules which obtain in this case apply also to the case of conjunct fee and liferent vested in man and wife.[9] To the third belong cases of *mortis causâ* settlement, in which the dominant rule of looking to the intention of the testator may override the ordinary presumptions which obtain in other cases of liferent by constitution. It will also be necessary to notice, for the purpose of avoiding, the cases of liferents to which has been superadded *fictione juris* a fiduciary fee; and liferents with powers of disposal, of appointing provisions, and of division.

And secured.

It may be added, in explanation of a remark already made, that there are important differences in the modes in which the various liferents known to the law are feudally secured. Of the legal liferents, 'courtesy, needing no partition, is completely vested *ipso* '*jure* upon the wife's death, without any service, kenning, de-' clarator, or other legal form.'[10] It rests on the deceased wife's infeftment. Terce also is a real right, constituted by the husband's sasine and the wife's survivance: but it becomes an active right to a *pro indiviso* share of the heritage only on service; and an exclusive right of possession, natural or civil, only after the tercer has been kenned.[11] Of the conventional liferents—that is to say, those which originate, not by force of the law, but *provisione hominis*—a reserved liferent depends on the granter's existing sasine, being truly a limitation of his right from an absolute fee to a part thereof, and requires no further infeftment.[12] All the other conventional liferents, on the other hand, demand a special infeftment in order to their ranking as real rights.[13]

Rights involved.

Such being the different kinds of liferent rights and the modes in which they originate, we now proceed to inquire, first, what are the rights and powers of a liferenter in the enjoyment of his limited estate so long as it lasts; and secondly, what are the rights of his representatives in questions with the fiar when the liferent expires. We shall then turn to a consideration of the liabilities and burdens which fall on the liferenter's right.

I. Rights of liferenter.

I. *Rights of Liferenter.*—The general rule is, that a liferenter may make every use of the subject liferented, and ingather and appropriate its fruits, natural, industrial, and civil, with the sole limitation that he shall not thereby waste or destroy its substance

[9] Ibid.; Cr. 2.22.4 *et seq.*

[10] Fraser, H. and W. 1124, and authorities there cited.

[11] Ibid. p. 1105 *et seq.*

[12] St. 2.6.5, 11: Mack. 2.9.37; Bankt. 2.6.6; Ersk. 2.9.41; 1 B.C. 52; B. Pr. 1040; Duff, F.C. 318.

[13] Ibid.; B. Pr. 1041.

(*salvâ rei substantiâ*).[14] In regard to liferents of land and other heritages, the main difficulty is to distinguish between what are to be regarded as fruits, and what are more properly part and parcel of the substance of the subject. In regard to liferents of moveables, the main difficulties arise in connection with such—embracing nearly all moveables—as cannot be used without deterioration of their substance; and with those others—such as money—which cannot be put to use without disposing of the substance. The latter case does not concern us.[15] The former, however, is of some importance here, since the grant of liferent may be wide enough to extend to a composite subject, including heritage and moveables.

Salvâ rei substantiâ.

In cases of grants of special moveables, such as certain specific furniture, cattle, or machinery, the granter is necessarily aware that during the subsistence of the liferent these subjects will certainly deteriorate by the mere tear and wear of ordinary use, and may possibly perish without any fault of the liferenter. The result is, that the liferenter or his representatives are not liable to account for the original value, nor for the effects of such tear and wear, nor for the articles themselves, excepting in so far as these are at the date of his death extant and available for use.[16]

Tear and wear.

Another principle, however, steps in when there is a settlement in liferent of a composite estate, more especially where this forms part of the *universitas* of the testator's succession, the whole being subjected to the same liferent. Thus, the widow of a testator whose property consisted mainly of a stocked farm kept in his own hands was entitled under his settlement to 'the whole free residue' of his estate, heritable and moveable, and to have actual possession, if she should so wish it, of the subjects to be so liferented. She farmed the land, accordingly, for eighteen years, during which she replaced the stocking and implements from time to time as required for the purposes of the farm. After her death, in a question between the fiars and her representatives, the Court held that it was an implied condition of her occupation of the farm that she should keep up and maintain the stock originally taken over by her, and leave the same at the termination of her right substantially of the same description, value, and extent as she received it. This general rule was applied to the special case by setting the growing crops of turnips, winter wheat, and young

In case of a *universitas.*

[14] It seems a fanciful interpretation of this phrase to hold it to import *also* the preservation of the integrity of the fee. See Elvers, p. 449.

[15] Ersk. 2.9.40; B. Pr. 1042. On *quasi* usufruct, see Elvers, p. 578.

[16] See L.O. Jerviswoode's interlocutor in Rogers *v.* Scott, 19th July 1867, 5 Macph. 1078, 1081; B. Pr. 1043; Bankt. 2.6.5; cf. Ersk. 2.9.40.

grass, and the horses, cattle, live-stock, and implements, at the two dates against each other. As to grain stacked or stored at each date, that part only had the same rules applied to it which was fairly applicable to the maintenance of the live-stock in the ordinary course of management. The surplus at the commencement of the liferent was capital; the surplus at the end of it belonged to the representatives of the liferenter. Any material difference discovered either way was to be equalised.[17] 'Exactly the same 'principles are applicable which would apply to the case of a 'man leaving a mill to be liferented by his wife, or to the case 'of a person taking a liferent lease of a farm with the moveables 'accessory to it. . . . The general result is, that we are not to 'weigh in too nice scales whether the stocking which is left is 'exactly the same as was received, but, unless there is a palpable 'difference, we are just to set the one against the other.'[18] It has been decided that a grant of 'the liferent of the house of 'C. and household furniture,' included only furniture in use, not some very fine table-linen which had been kept as a curiosity; and prevented the furniture being removed from the house or used elsewhere.[19] A widow, authorised under her husband's settlement to occupy and possess a particular house belonging to him, at a rent equal to its value as appearing on the Valuation Roll, was held entitled to have it put in proper habitable condition and kept so, she, however, being liable for ordinary tenant's repairs.[20]

In cases of pure heritage.

Passing now to the case (which more immediately concerns us) of liferent of heritable property unaccompanied with plenishing, furniture, or other moveables, the main question to be solved, as has been already observed, is this—what are and what are not fruits or produce in the sense that the ingathering and appropriation of them are lawful acts on the part of the liferenter. In other words, to what extent is he limited, in his use and enjoyment of the subject liferented, by the condition of his right—*salvâ rei substantiâ?* It may at first sight appear that the latter form of the question is the more comprehensive of the two; and so it is, strictly speaking. For it is easy to conceive of such a use of the subject (*uti*), as distinguished from appropriation of its produce (*frui*), as would give the fiar a right to interfere for the protection of his reversion. Thus the liferenter might, for a freak or

Abuse of substance.

[17] Rogers *v.* Scott, [16].

[18] Ibid., *per* L.P. Inglis, p. 1084.

[19] Cochran *v.* Cochran, 1755, M. 8280. But Mr Bell's obs. (2 Ill. 141) seems to be justified, that the giving of the liferent of the furniture of a house is only demonstrative, and that it may be carried thence; and that the case of a mansion-house, such as the house of C., was an exception.

[20] Kinloch's Trs. *v.* Kinloch, 24th Feb. 1880, 7 Ret. 596.

out of ill-will to the fiar, deliberately miscrop the land to the point of sterility, or bring to the surface a poor subsoil, or demolish a house, or fill up a salmon-pool, or tear down an embankment. But acts such as are here figured, being contrary to the real interest of the liferenter himself, can only very seldom occur; and in point of fact, no case of the sort has ever come before the Court. Or, again, the liferenter may, from mistaken views of administration, make alterations in the subject liferented which change its character and may turn out to be prejudicial to the reversion, and yet no question of appropriation of what is not lawfully his may be raised. Many examples of this sort of use are to be found in the Pandects;[21] and it must be regarded as a strong proof of the moderation of fiars or liferenters in Scotland, or of both, that here again our books are silent. The remedy in such cases will be a demand on the part of the fiar that caution shall be found, since none of his active and present rights have been or may ever be infringed.[22]

Enjoyment of fruits or produce.

It thus appears that the only questions which have arisen in practice have been concerned with the right to the enjoyment of the fruits of the land or other heritable property. So long as the liferent subsists, there is no distinction between the different sorts of fruits—natural, industrial, and civil; it is only on its expiry that any difference of treatment appears. The general rule is, that the liferenter is entitled to ingather and appropriate all natural or industrial produce which has been separated from its connection with the soil during the subsistence of his right, and all civil fruits (such as rents and other recurring payments) which are due for the period covered by his right. Being entitled to the 'detention' or natural possession of the subject liferented, he is also entitled to the returns payable for the right of detention acquired from him by third parties. The right expands with any extensions or meliorations of the subject—in consequence, for instance, of the erection of buildings, agricultural improvements, and such adventitious circumstances as the formation of a railway, canal, road, bridge, or populous place on the land or in the neighbourhood. In all cases (with a single exception) where this increment of value arises after the right has vested, but before it is reduced into possession—as in cases of locality-lands, or rights of

[21] 27, § 1 D. (7.1.)—'abutatur vel 'contumeliose injurioseve utatur'—7 § 3, 8, 13 §§ 4-7, 44, 61 D. h.t.; Paul Rec. Sent. 3.6.21. Mark the distinction between buildings and building-sites on the one hand, and fruit-bearing land on the other. As to alterations by way of repair, &c., see *infra*, p. 619. See the English law of voluntary and permissive waste—Co. Lit. 53a, 58a; Williams on Real Property, 23.

[22] *Infra*, p. 619.

conjunct fee and liferent, before the death of the husband—as well as in all cases of meliorations made pending the liferent, the liferenter takes the advantage of this enhancement of the estate, without any liability for recompense, and conversely suffers from any diminution in value.[23] The exception referred to occurs when the fiar is able to set up the plea of *bonâ fide* possession;[24] and this can be done only when, prior to the opening of the liferent right, the fee has, subject to it, been disposed of to a third party, and this party has for his own sole benefit enhanced the value of the subject. The liferenter is then entitled to reap the advantage, by possessing subject 'to the annual interest of the meliorations'[25]—that is, to the interest of the sum expended so far as proved to be *in rem versum;* or alternatively, to receive the annual value of the premises as they stood prior to the improvements.[26]

The only rights of liferenters, in respect to the fruits of the subject liferented, which have given rise to controversy are rights of superiority, right to timber, and right to minerals.[27]

1. Rights of superiority.

1. *Rights of Superiority—Title-deeds.*—When the subjects liferented, or a part of them, consist of the *dominium directum* or superiority of heritage, or of a right to ground-annuals, the ordinary yearly returns—whether feu-duties or ground-annuals—belong to the liferenter as they accrue,[28] whether he hold his right by constitution or reservation. A distinction, however, is drawn between these two sorts of liferent in respect to the right to enter vassals and to demand casualties.[29] The right to enter vassals has now been confined to the granting of charters of *novodamus*, precepts and writs of *clare constat*, and writs of acknowledgment.[30] This surviving right, like the more important rights in existence before 1874, is competent only to liferenters by reservation,[31] and, by parity of reasoning, to conjunct fiars.[32] But no alteration is

[23] See Campbell *v.* Stirling, 1666, M. 27, 8241; Mitchell's Creds. *v.* Wardlaw, 1733, M. 8275; B. Pr. 1052; and the cases of localities under entails, *supra*, p. 589; Agnew *v.* Agnew, 12th Dec. 1810, note to 16 F.C. 161; Malcolm *v.* Malcolm, 21st Nov. 1823, 2 S. 514 (N.E. 453).

[24] *Supra*, p. 78; but the cases are not true examples of the plea.

[25] Laird *v.* Fenwick, 1807, M. Liferenter, No. 3.

[26] Hacket *v.* Watt, 1672, M. 13412.

[27] In regard to the legal liferents, there are special rules for calculating the extent of terce, excluding the mansion-house, offices, and feu-duties, as well as casualties—2 Fraser, H. and W. 1096.

[28] Except in the case of terce—Ly. *v.* E. Dunfermline, 1628, M. 14707; L. Lamington, 1628, M. 8240, 15840; 1 B.S. 246; A. *v.* B. 1628, M. 15840; Nisbett *v.* Nisbett's Trs., 24th Feb. 1835, 13 S. 517.

[29] Cr. 2.22.5.21.34; St. 2.6.11.16; Mack. 2.9.38.39; Forbes, 2.4.4; Bankt. 2.6.6; Ersk. 2.9.42; B. Pr. 1040, 1048, 1055; Duff, F.C. 319.

[30] 37 & 38 Vict. c. 94, sect. 4 (1).

[31] Clark *v.* Wemyss, 1596, M. 8251; Crawfordjohn *v.* Glaspen, 1611, M. 8252.

[32] Cr., Mack., Bankt., Duff, *supra*, [29].

made by the statute just quoted in the relative and more beneficial right to demand payment of the casualties in feu-rights,[33] and grassums stipulated for in contracts of ground-annual. To these, being extraordinary returns, paid not so much for the possession of the feu as for the right of renewal, a liferenter by constitution has no claim,[34] unless in virtue of a special clause in his infeftment.[35] They go to the fiar. The opposite is true of a liferenter by reservation[36] and conjunct fiar, who had till recently in every case, and still retain in the few excepted cases, the exclusive right to enter vassals. Similarly, the liferenter by reservation and conjunct fiar have,[37] while the liferenter by constitution has not, a right to the custody of the title-deeds of the estate;[38] but the other party interested is entitled to have access to them when necessary.[39]

2. Cutting wood.

2. *Cutting Wood.*[40] — A considerable controversy has raged, since the earliest recorded period of our law, round the questions, in what circumstances growing wood can be considered as produce which a liferenter may lawfully appropriate, and what difference ought to be admitted in this respect between reserved liferent and conjunct fee on the one hand, and liferent by constitution on the other. The further question, what effect the intention of a testator in conveying the liferent of the *universitas* of his means and estate may have upon the ordinary rules in this matter, now to be set forth, has not yet arisen, and will be more conveniently considered after treating of the rules regarding minerals.

Underwood. Windfalls.

The dominant rule is, that growing trees are *partes soli*,[41] part of that 'substance' of the subject liferented which the liferenter has to preserve; and that, far from having a right to appropriate them to his own use, he can only ingather their produce, such as fruit in the narrower sense, shed leaves, mast, and fallen branches.[42] But this rule is subject to several exceptions. In the first place, mere underwood or brushwood, and ordinary windfalls,[43] may be

[33] Statute cited [30], sect. 4 (3).

[34] Ewing *v.* Ewing, 20th March 1872, 10 Macph. 678; and authorities in [29], *supra*.

[35] A special power to enter vassals granted to a liferenter by constitution is valid — Gibson-Craig *v.* Cochrane, 10th July 1838, 16 S. 1332, affd. 2 Rob. 446— and would imply even now, it is thought, a right to the casualties. See also Ly. Forbes *v.* L. Forbes, 1760, 2 Pat. 36; Redfearn *v.* Maxwell, 7th March, 1816, F.C.

[36] Authorities, *supra*, [29], *passim*.

[37] Wallace *v.* Deas, 17th Dec. 1831, 10 S. 164; B. Pr. 1055.

[38] Dickson *v.* Dickson, 24th Jan. 1823, 2 S. 152 (N.E. 138).

[39] Ibid.

[40] Cf. entail cases, *supra*, p. 595, and the statutes regarding caution, *infra*, p. 621.

[41] See Paul *v.* Cuthbertson, 3d July 1840, 2 D. 1286.

[42] 9 pr. 59 D. (7.1); 13 D. (7.4); 22 pr. D. (7.8); Cr. 2.8.17; Dirl. and Stew. 337; St. 2.3.74; Ersk. 2.9.58; Bankt. 2.6.6; 1 B.C. 61; B. Pr. 1046, 1058; 2 Sandf. Succ. 120; 1 Hunter, 120.

[43] Ersk. 2.9.58; see Stonebraker *v.* Zollickoffer, 36 Amer. R. 364.

appropriated by the liferenter, partly because of the petty nature of the subject, partly because their use may be presumed to be necessary for the maintenance and repair of the buildings and fences. But windfalls caused by an exceptional storm go to the fiar.[44] Secondly, mature wood and extraordinary windfalls may be claimed by the liferenter, so far as necessary for the purposes just mentioned,[45] seeing that this employment of the timber goes to the preservation rather than to the waste of the 'substance' of the estate. But the right can only be exercised after intimation to and at the sight of the fiar.[46] Thirdly, the liferenter has also a right of appropriation, when the trees are cut down more as an ordinary crop than in the usual course of arboriculture. The strongest example of this would be the grant of a liferent of a nursery-garden.[47] A more common case is that of coppice-wood, which is usually cut down at regular intervals as it ripens, and then shoots up again from the roots—*silva cædua*, in the narrow sense of the phrase.[48] A distinction, at one time unknown,[49] was introduced into our law before the middle of last century,[50] between the powers of liferenters by reservation and liferenters by constitution, according to which the former were entitled to this sort of wood, at whatever periods it was cut, so long as they conformed to the use and wont of the district or estate in the date of cutting; while the latter were only entitled to copse which was divided into 'haggs' for annual cutting.[51] But this distinction has disappeared in modern times, and the right of the latter is now as extensive as that of the former.[52] It does not improve the liferenter's position that he himself planted the wood he claims.[53]

Timber required for the estate.

Nursery-garden.

Coppice.

With these exceptions, timber growing, fallen, or felled, is the

[44] Macalister's Trs. *v.* Macalister, 27th June 1851, 13 D. 1239. This appears also to be the sense of 12 pr. D. (7.1).

[45] Stanfield *v.* Wilson, 1680, M. 8244 (part reserved for this purpose); E. Dunfermline *v.* E. Callander, 1683, M. 8244; Ds. *v.* D. Hamilton, 1723, Robertson, 443; Cred. *v.* Children of Mousewell, 1683, M. 8253, 4 B.S. 138; Dickson *v.* Dickson, [38]; Macalister's Trs. *v.* Macalister, [44]; Tait *v.* Maitland, 2d Dec. 1825, 4 S. 247 (N.E. 253); Ersk., Bell, Sandf., *supra*, [42]. The case of Ly. Borthwick, 1696, M. 8245, is not really *contra*.

[46] Dickson *v.* Dickson, [38]; Tait *v.* Maitland, [45].

[47] The case has not occurred; but see Begbie *v.* Boyd, 15th Dec. 1837, 16 S. 232.

[48] The term is thus alternatively defined—'*Silva cædua est (ut quidam 'putant) quæ in hoc habetur ut cæderetur; 'Servius eam esse quæ succisa rursus ex 'stirpibus aut radicibus renascitur.*' 30 D. (50.16); cf. 9 § 7, 10, 48 D. (7.1).

[49] Credrs. *v.* Children of Mousewell, [45].

[50] Ferguson *v.* Ferguson, 1737, M. 8254.

[51] Gray *v.* Seton, 1789, M. 8250; see Lang *v.* D. Douglas, 1752, M. 8246.

[52] Dickson *v.* Dickson, [38]; Macalister's Trs. *v.* Macalister, [44].

[53] Gray *v.* Seton, [51].

Necessary for comfortable enjoyment of mansion-house.

property of the fiar,[54] unless there be some special extension of the liferenter's right.[55] But the fiar for the time will not be entitled to cut down timber which is necessary for the comfortable enjoyment of the liferenter's dwelling-house;[56] nor, apparently, so to go to work as to leave no timber for the ordinary requirements of the estate.[57] Thinning is part of the ordinary administration of woods; and the produce, like extraordinary windfalls, also goes to the fiar.[58] But the liferenter is entitled to timeous notice of proposed operations on the woods, so as to have an opportunity of protecting the rights above detailed, and of claiming compensation for surface-damage done in the prosecution of these operations.[59] The beneficial fiar may be excluded from the exercise of these rights by the intervention of trustees.[60]

Thinning.

3. Minerals.

3. *Mines, Quarries, and Minerals.*—Minerals, in the widest sense of the word, are, even more obviously than standing timber, part of the substance of the land; and it might have been conjectured that the rule of excluding a liferenter from any interest in a *pars soli* would here be more rigidly enforced. But another consideration interferes. While woods may be useful for other purposes than for felling when ripe—such as for shelter, game-coverts, or amenity to a mansion-house—minerals are capable of no other use than to be won from the earth and converted into industrial products. This distinction, and the marvellous increase in the value and working of minerals in modern times, must be borne in mind in tracing the course of the law regarding the rights of liferenters. Among the Romans, the working of minerals was scarcely known, and their value was insignificant; so that the law had little difficulty in conferring extensive powers on the usufructuary, not only of keeping going mines at work, but of breaking ground himself.[61] The main conditions were, that he should not diminish the revenue of the estate, and not commit a nuisance. Our earlier law went so far at least as to give even a simple liferentrix—a tercer—right to the profits of a 'going coal,' not merely for her own use, but also for sale.[62] Even in Lord Stair's time it was thought that all liferenters had this right, so far as 'not exceeding

In Roman law.

In early Scots law.

[54] Authorities in note [42].

[55] Dingwall *v.* Duff, 14th Dec. 1833, 12 S. 216.

[56] Dickson *v.* Dickson, [38]; Tait *v.* Maitland, [45]. Probably this was the ratio of the reversal in Ds. *v.* D. Hamilton, [45].

[57] Stanfield *v.* Wilson, [45].

[58] Macalister's Trs. *v.* Macalister, [44].

[59] Ds. *v.* D. Hamilton, [45]; Tait *v.* Maitland, [45]; Dingwall *v.* Duff, [55].

[60] Tait *v.* Maitland, [45].

[61] 9 §§ 2 and 3, 13 § 5 D. (7.1).

[62] Case of L. Seatoun in Cr. 2.8.17. This is the opinion also of Stewart, though Dirleton's inclination is *contra*, so far as regards power to sell, pp. 28, 29. Dirleton suggests capitalising the proceeds.

'the measure and method accustomed by the fiar.'[63] But it may be now regarded as settled law, that apart from any disturbing element of intention a simple liferenter of a specific subject has no right either to work or to appropriate the proceeds of a mine already in operation at the opening of the liferent, nor to break ground himself, nor, consequently, to let the minerals in either of these cases.[64] Mr Erskine is of opinion that there is no distinction between simple and reserved liferents, either in regard to woods or to mines. It has been found that this is the case in regard to woods; but the case of mines seems to be different. Where the minerals are being worked at the commencement of a reserved liferent or conjunct fee, it will be presumed that no change was contemplated in the state of possession, and the liferenter will be entitled to carry on the work,[65] at least if there be no immediate risk of exhaustion. There is, moreover, as in the case of woods, a general exception to the rule excluding liferenters from any interest in the minerals. If the mines are being worked, liferenters are entitled to such minerals as are necessary or proper for their domestic use and the requirements of the estate—coal for the house, lime for the fields and for building.[66] It would appear that the liferenter may even open workings for this supply[67]—probably only after having called on the fiar to set to the work, and always under liability to account to him.[68] With these limitations, it is in the ordinary case the fiar, and he alone, who is entitled to work minerals; for which purpose he may lawfully enter the lands liferented and erect the necessary machinery, under the condition that he shall pay all surface-damages and have due regard to the amenity of the houses occupied by the liferenter or his tenants.[69]

In later law.

Simple and reserved liferent.

Necessary for estate and mansion-house.

These are the general rules which apply to cases in which the element of intention does not intervene. On the other hand, where it is the duty of the Court to arrive, if possible, at the desire or

Rules varied by intention of a testator.

[63] St. 2.3.74. The case of Preston *v.* Preston, 1677, M. 8242, may have been held by Lord Stair to have proceeded on the alternative of an annuity.

[64] Ersk. 2.9.57.58; Bankt. 2.6.6; 1 B.C. 61; B. Pr. 1042, 1070; 2 Sandf. Succ. 120; 1 Hunter, 121; La. Lamington *v.* Her Son, 1682, M. 8240; Preston *v.* Preston,[63]; Belschier *v.* Moffat, 1779, M. 15863; Swinton *v.* Ds.-Dow. of Roxburghe, 1st Feb. 1814, F.C.; (a plea of *bonâ fide* consumption by the liferentrix was in the circumstances with difficulty sustained, D. *v.* Ds.-Dow. of Roxburghe, 17th Feb. 1815, F.C.); Dickson *v.* Dickson, 24th Jan. 1823, 2 S. 152 (N.E. 138); Campbell's Trs. *v.* Campbell, 15th March 1882, 9 Ret. 725, affd. 6th July 1883, 20 Sc.L.R. 748, 8 App. Cas. 641.

[65] Eiston *v.* Eiston, 10th June 1831, 9 S. 716; Bankt., [64].

[66] Cr. [64]; Lamington, [64]; D. *v.* Ds.-Dow. of Roxburghe, 19th Jan. 1816, F.C.; Dickson *v.* Dickson, [64].

[67] D. *v.* Ds.-Dow. of Roxburghe, [66].

[68] Obs. of Fountainhall, 3 B.S. 114.

[69] D. *v.* Ds.-Dow. of Roxburghe, [66]; Dickson *v.* Dickson, [64].

intention of the granter—and this is the case more especially in construing *mortis causâ* settlements—the ordinary rules may be refused application. Each case will then be determined according to its circumstances, and according to the ordinary rules of construction of settlements. It will therefore be enough to state briefly the nature of the cases which have been adjudicated on. In the earliest case, there was in a general disposition and settlement a conveyance of the liferent of the testator's whole lands, and a conveyance to the same lady of all debts due to him and every moveable subject belonging to him. Before the date of his settlement he had granted a mineral lease for 999 years. It was held to be his real intention that the liferentrix should be in the same situation as himself in regard to the profits to be drawn, and that she had right to the rents of the minerals during her life.[70] The proprietor of a clay-field left a settlement conveying to trustees the *universitas* of his estate, with directions to hold the residue, after payment of debts and legacies, for behoof of a certain person in liferent, and of other parties in fee. The trustees were prohibited from selling the heritable estate until the youngest beneficiary had reached majority. It was held, on a construction of the settlement, that the rents of the clay-field were intended to be included in the liferent, more especially since the removal of the clay from the surface in no way impaired the value of the estate for its ultimate destination as feuing-ground.[71] A testator, in his general disposition and settlement, left his estate—the minerals in which had been wrought during his life and were let at his death—to his two daughters one-third each *pro indiviso* in fee, and to his granddaughter the liferent allenarly, and to the heirs of her body the fee, of the remaining third. It was held, again proceeding on intention, that the liferentrix was entitled to a share of the mineral rents during her life, and to concur with the two daughters in renewing the lease when necessary, provided there was no danger of exhaustion.[72] In regard to the last point it was remarked, that 'if the mineral be in danger of exhaustion, and be shown to be 'so, that element may indicate a contrary intention on the part 'of the granter. The measure of the former workings is a much 'more slender presumption; and in the general case it is much 'more easy to presume that the granter contemplated the letting 'of his minerals for what they would bring, assuming that there 'is no danger of exhaustion, than that the liferenter was to lose

[70] Waddell *v.* Waddell, 21st Jan. 1812, F.C.

[71] Guild's Trs. *v.* Guild, 29th June 1872, 10 Macph. 911.

[72] Wardlaw *v.* Wardlaw's Trs., 23d Jan. 1875, 2 Ret. 368.

'the accruing benefit which a better market and enhanced prices 'would give.'[73] But this liberal construction of the liferenter's right will not, unless by virtue of express disposition, be allowed to confound the distinction between capital and income. Thus a testator directed his trustees to pay to his widow the free annual income of the residue of his estate, and after her death to invest the residue in the purchase of lands to be entailed. He left property worth £200,000, and two mineral leases, which had then five years to run. His trustees carried on the mines, and made a profit of £30,000 in three years. The Court held that this sum was not free annual income, but part of the residue[74]—the rule being, 'that where a widow or other person is entitled to the life-'rent of the *universitas* of a mixed estate left in trust, the right 'of the liferenter is to be considered as being just in the same 'position as if she was entitled to the interest accruing upon a 'capital sum.'[75] This was the case of a lessee's settlement. The parallel, in the case of a proprietor, would be a similar settlement coming into operation at a date when the testator must have known that his minerals would be exhausted at the accustomed rate of working in five years, or some other short period; and the result would probably be the same.

Campbell's Trs. v. Campbell.

The law was maturely considered in a recent case, in which there was a trust by a husband to pay to his wife if she survived, 'the whole annual produce and rents of the residue and remainder 'of his means and estate, heritable and moveable, during all the 'days and years of her life,' and the question was whether the widow was entitled to income derived from a mineral field not opened up till after the truster's death. It was held both in the Court of Session and in the House of Lords, that she was not so entitled, there being nothing in the deed to extend to newly wrought minerals, the 'irresistible indication of intention' which entitled the widow to the proceeds of mines opened by the truster himself. Lord Watson was of opinion that, if there had been an express or implied direction to the trustees to work the new field, it would have been held to be also in the truster's contemplation that his widow should enjoy the rents and lordships.[76]

[73] *Per* L.J.-C. Moncreiff, p. 372. His lordship's *dicta* in the passage preceding that here quoted must be read as applying to *general* settlements only, not to grants of specific subjects. See L. Gifford's obs. p. 376, and Guild's Trs. *v.* Guild, [71]. The rent seems to have been chiefly a lordship.

[74] Ferguson *v.* Ferguson's Trs., 23d Feb. 1877, 4 Ret. 532, and authorities there quoted.

[75] *Per* L.P. Inglis, p. 537.

[76] Campbell's Trs. *v.* Campbell [64]. There was no extension of the trustees' powers under the Trust Act of 1867. See obs. of Ll. Watson and Blackburn.

Miscellaneous rules.

As a general rule, the powers of a liferenter cease and determine with his life, and the fee remains unaffected by anything that he has done at his own hand, and without obtaining the co-operation of the fiar. Thus, even a liferenter by reservation cannot grant a feu [77] or lease,[78] or impose a servitude for any period beyond his own lifetime. The liferenter [79] may competently sue or be sued in questions relating to the right of ownership and the mode of its enjoyment;[80] but the judgment will not, unless in very exceptional circumstances,[81] be *res judicata* against the fiar. But the interests of public safety, which at one time tended only to a curtailment of the liferenter's caprice,[82] the enhancement of the food-supply, and other public considerations, have induced the Legislature in modern times to confer on liferenters powers which affect the estate after his death. In many statutes the word 'owner' is interpreted to include 'liferenter.' The chief enactments which require to be here noticed are those sections of the General Police Act, 1862,[83] which make it lawful for the sheriff, on the application *inter alios* of any owner or party interested, to order a sale, subject to a right of pre-emption, of any houses or other buildings within a police burgh which have become ruinous, receptacles for nuisances, or unsafe and unfit for occupation, and which belong to two or more joint owners; those provisions of the Improvement of Land Act, 1864,[84] which enable a liferenter to charge the estate with improvement-money by way of rent-charge; and the Agricultural Holdings (Scotland) Act, 1883.[85]

II. Such are the liferenter's rights pending his tenure. At its

[77] Redfearn *v.* Maxwell, 7th March 1816, F.C.

[78] See the authorities in 1 Hunter 119. Why should not the entailed proprietor's powers, or similar powers to those of the English and Irish Acts, 40 & 41 Vict. c. 18, sects. 4, 46, and 45 & 46 Vict. c. 38, be conferred on Scotch liferenters?

[79] Hardie *v.* Mags. of Port-Glasgow, 23d Feb. 1864, 2 Macph. 746, as to necessity for infeftment in certain cases.

[80] Wemyss *v.* Stuart, 1633, M. 2197, 8253. In England the costs of protecting the estate may be charged on the estate or paid out of it, 40 & 41 Vict. c. 18, sect. 17, 45 & 46 Vict. c. 38, sect. 36.

[81] Denovan *v.* Johnstone, 19th Jan. 1832, 10 S. 206. He cannot remove their common tenant — M'Christie *v.* Fisher, 14th May 1825, 4 S. 11 (N.E. 11).

[82] 1594, c. 226, *infra*, p. 621.

[83] 25 & 26 Vict. c. 101, sect. 242 *et seq.*

[84] 27 & 28 Vict. c. 114, sects. 8, 49 *et seq.* (as to railways), 78 *et seq.*; see *infra*, Appx. No. 24, *ad fin.* It is necessary to pass by, as more properly belonging to the law of succession, the additional powers which may be reserved along with, or adjected to, a right of liferent. These are mainly powers of disposal, of appointing provisions, and of division. See 2 M'L. on Wills, 267 *et seq.* That hybrid offspring of the feudal law, the fiduciary fiar, as possessing the double character of liferenter and trustee, has greater powers than a mere liferenter. It has been conjectured that he might grant leases beyond his own life, but not exceeding the usual period of letting—2 Fraser, H. and W. 454; and see Emslie *v.* Fraser, 13th Feb. 1850, 12 D. 724.

[85] 46 & 47 Vict. c. 62, sects. 24, 33, 42.

II. Questions between fiar and liferenter's representatives.

expiry, questions frequently arise between his representatives and the fiar regarding their respective claims to the fruits—natural, industrial, and civil—growing or accruing at that date. All fruits—even forehand rents[86]—already ingathered by the liferenter or in arrear, belong to him without risk of recall or claim for indemnification. Natural fruits, which are depastured or cropped annually (such as natural grasses), and natural and industrial fruits, which do not possess that character—such as woods[87] and minerals—go to the liferenter or to the fiar according as they have or have not been actually separated from the soil and thus become moveable at the date of the liferenter's death. If the liferenter's representatives continue to pasture the grass, or cut down and remove the trees or minerals, after that date, they lay themselves open to an action at the instance of the fiar.[88] But annual industrial fruits (such as grain crops) still attached to the soil are governed by the rule *messis sementem sequitur*, and go, without liability to recompense, to the representatives of the liferenter who has sowed them. Hay, however, of the second crop sown out with a white crop is heritable, and goes to the fiar.[89] Profits not arising out of the produce of land, but earned through the daily labour of workmen, as in fishings, mines, and salt-works, follow the rule of natural fruits, and vest *de die in diem*.[90] The rules are the same as those which hold in questions between the executors and heir of a fee-simple proprietor.[91]

Natural fruits.

Industrial fruits.

Since the passing of the Apportionment Act of 1834 the same remark as to vesting *de die in diem* applies to civil fruits, such as feu-duties and the rents of subjects not occupied by the liferenter. And since 1870 the rights of personal representatives are the same, whether ownership has been held under a limited or under an unlimited title. Rents of land, of houses above the humblest sort, and of other heritable subjects, are usually payable by terms, the term-day being the last day of the preceding period.[92] In the

Civil fruits.

[86] Campbell *v.* Campbell, 1745, M. 15908; Petley *v.* Mackenzie, 1805, Hume, 186; M. Queensberry *v.* Montgomery, 18th Feb. 1814, F.C.

[87] Lang *v.* D. Douglas, 1752, M. 8246; and see *supra*, p. 607.

[88] Ersk. 2.9.65; Bankt. 2.6.34; B. Pr. 1044.

[89] St. 2.1.2; Ersk. 2.2.4; 2 B.C. 2; Guthrie *v.* Mackerston, 1671, M. 15891; Cockburn *v.* Brown's Trs., 1748, M. 15911; M. Tweeddale *v.* Somner, 19th Nov. 1816, F.C.; Wight *v.* Inglis, 1796, M. 5446; see Keith *v.* Logie's Heirs, 3d Dec. 1825, 4 S. 267 (N.E. 272); Gordon *v.* Gordon, 1806, Hume, 188.

[90] Ersk. 2.9.66; B. Pr. 1497.

[91] Blaus *v.* Winraham, 1631, M. 15881; More's Notes, 214; Ersk. 2.9.64 *et seq.*

[92] Ly. Brunton, 1642, M. 15885; Paterson *v.* Smith, 1704, M. 15902; Ly. Tolquhoun's Exrs. *v.* Creditors, 1740, M. 15907; Wright *v.* Cunningham, 1802, M. 15919.

case of rents due for the use of premises employed in the prosecution of industrial enterprises such as those just mentioned, with the exception of grist-mills,[93] the rule seems all along to have been that the rent, though payable termly, vests *de die in diem*.[94] In the case of arable land, on the other hand, the rent depends on the crop of the year; and the right of the liferenter used to be determined by his surviving, no matter for how long or short a period, the term of Whitsunday or of Martinmas. If he survived the one term,[95] he was entitled to one-half of the rent due for the crop of that year, and no more; if he survived the other, he was entitled to the whole.[96] There was an exception when the rent was forehand, but not when the conventional term of payment was postponed.[97] 'The maxim that the legal and not the conventional 'terms are the rule between heir [or fiar] and executor is no other 'than this, that the postponing the legal term by the convention 'of parties does not deprive the executor of the benefit of the 'legal term. But if payable before the legal term, the executor 'will have the benefit of that convention.'[98] In the case of grass farms[99] the rule of looking to the crop is adhered to, even though the usual term of entry is at Whitsunday, not, as in arable farms, at separation or Martinmas, to the crop-land. The rent is legally due, and vests one-half at the Whitsunday of entry, the other at the Martinmas following; and postponement makes no difference on the liferenter's right.[100] Similarly, house-rents vest in the landlord, one-half at the date of entry, and the other at the succeeding term.[101] In all these cases the survivance of a part of

[93] West-Nisbet *v.* Swinton, 1635, M. 15883; Guthrie *v.* Mackerston, 1671, M. 15890-2.

[94] Ersk. 2.9.66; B. Pr. 1497. See Mr Hunter's obs. 2, 316; and Weir's Exrs. *v.* Durham, 17th March 1870, 8 Macph. 725.

[95] *I.e.*, any part of the term-day—Merchiston Tenants *v.* Napier, 1609, M. 15877; Ly. Brunton, [92]; Paterson *v.* Smith, [92]; Ly. Tolquhoun's Exrs. *v.* Creditors, 1740, M. 15907 — settling earlier doubts—Cr. 2.9.13; St. 3.8.57; Ersk. 2.3.9; Bankt. 2.6.24; 2 Hunter, 309 *et seq.*

[96] Cr., St., Ersk., Hunter, *supra*, [95]; 2 B.C. 8; B. Pr. 1499. See Kames Eluc., 60 *et seq.*; Blaus *v.* Winraham, [91]; Laurie *v.* Maxwell, 1711, M. 15905.

[97] St., Ersk., Hunter, [95], B. Pr., [96], *supra*; Lockhart *v.* Lockhart, 1st Feb. 1839, 1 D. 443.

[98] *Per* L. Kilkerran in Kynnynmond *v.* Cathcart, 1739, M. 15906; Ms. Queensberry *v.* Montgomery, [85]; L. Herries *v.* Maxwell's Cur., 6th Feb. 1873, 11 Macph. 396.

[99] Where the cultivation is mixed, the value of the farm is determined by the source of greatest profit—Campbell *v.* Anstruther, 1836, 9 Sc. Jur. 163.

[100] Ersk., [95], B.C., [96], *supra*; B. Pr. 1501; 2 Hunter, 314; Johnston *v.* Ma. Annandale, 1729, M. 15913; Pringle *v.* Pringle, 1741, M. 15907; Elliot's Trs. *v.* Elliot, 1792, M. 15917; Swinton *v.* Gawler, 20th June 1809, F.C.; Campbell *v.* Campbell, 18th July 1849, 11 D. 1426.

[101] Binny *v.* Binny, 28th Jan. 1820, F.C.; King *v.* Jaffray, 24th Jan. 1828, 6 S. 422.

a term, however large a part, gave no additional right to the life-renter's personal representatives.

So stood the law till the year 1834, when the first apportionment Act was passed.[102] Its second section, though conceived in terms peculiar to English law, was found to be applicable to Scotland,[103] but only on the death of a person—such as a liferenter, heir of entail, or annuitant—whose death caused a determination of his interest.[104] The statute is now practically superseded, and it will be sufficient to state its purport in the words of Lord Westbury: 'It simply amounts to this, that with respect to all rents 'reserved or rent-charges granted, after passing of this Act, by any 'person having a limited interest or a determinable interest, upon 'the determination of that interest the executors, administrators, 'or assigns of the person whose interest is determined shall be 'entitled to a proportional part of such rents or rent-charges, all 'just allowances and deductions in respect of charges on such 'rents being first made.'[105] In applying the Act to cases where rents and other prestations are due termly, it has been settled that it was in no case so conceived as to take away from the representatives any benefit they had previously enjoyed, and which they could draw without it, but only applied to sums 'growing due,' which they could not claim at common law; in other words, those effeiring to a broken term, looking not to the conventional but to the legal term of payment. These were the principles on which two cases were decided by the whole Court on the same day. In the one, the entailed proprietor of a grass farm died on 18th May 1846; and his executor was found to be entitled at common law to the rent due at the preceding Whitsunday—but payable by conventional postponement on the following Martinmas—and under the statute to a proportion of the next half-year's rent corresponding to the three days by which the deceased had survived Whitsunday.[106] In the other case, the entailed proprietor of an arable farm died on 14th May 1841. His executor was awarded at common law the last half of the rent for crop 1840—legally due at Martinmas 1840, conventionally payable at

Apportionment Act of 1834,

[102] 4 & 5 Will. IV. c. 22.

[103] Brydges *v.* Fordyce, 7th March 1844, 6 D. 968, affd. 6 B. Ap. 1.

[104] Campbell, [106], Blaikie, [107], *infra*; Baillie *v.* Lockhart, 1855, 2 Macq. 258, 18 D. H.L. 22; L. Adv. *v.* Stevenson, 23d Jan. 1866, 4 Macph. 322; Bannatine's Trs. *v.* Cunninghame, 12th Jan. 1872, 10 Macph. 319. In England—Browne *v.* Amyott, 3 Ha. 193, 13 L.J. Ch. 232; Beer *v.* Beer, 21 L.J.C.P. 134; *In re* Clulow's Estates, 3 K. and J. 689.

[105] In Paul *v.* Anstruther, 15th Feb. 1864, 2 Macph. H.L. 1, 5, affg. C.S. 14th Nov. 1862, 1 Macph. 14.

[106] Campbell *v.* Campbell, 18th July 1849, 11 D. 1426, esp. 1438, 1442.

Whitsunday 1841—and under the statute the first half of the rent for crop 1841, under deduction of the proportion effeiring to the one day which was required to complete the first term of 1841.[107] The proper person to uplift the whole rents of the broken term is the fiar or heir, and the claim under the Act is a claim of debt against him, and not a claim for rent against the tenant.[108] The Act only applies to rents, &c., made payable, 'under any instrument 'that shall be executed' after its date, and does not reach rents payable under leases which rested only on entries in a rental-book.[109]

and of 1870. Experience having demonstrated the value of the provisions of this statute in its restricted sphere and under its limited conditions, the Apportionment Act, 1870,[110] was passed for the purpose of enlarging the scope of apportionment to all cases of periodical payments, and under freer conditions. It enacts that 'from and after the passing of this Act all rents, annuities, divi-'dends, and other periodical payments in the nature of income '(whether reserved or made payable under an instrument in 'writing or otherwise), shall, like interest on money lent, be con-'sidered as accruing from day to day, and shall be apportioned 'in respect of time accordingly' (sect. 2). The apportioned part is to be payable or recoverable at the date when the entire portions of which it is a part become due and payable, or would have so become but for the determination of the interest (sect. 3); and the parties entitled to an apportioned part are to have the same remedies for recovering it (allowing proportionate parts of all just allowances) as they would have had for recovering the entire portions if entitled thereto, 'provided that persons liable to pay 'rents reserved out of or charged on lands or other hereditaments 'of any tenure, and the same lands or other hereditaments, shall 'not be resorted to for any such apportioned part forming part of 'an entire or continuing rent, as aforesaid, specifically, but the 'entire or continuing rent, including such apportioned part, shall 'be recovered and received by the heir or other person who, if 'the rent had not been apportionable under this Act or other-'wise, would have been entitled to such entire or continuing 'rent, and such apportioned part shall be recoverable from such

[107] Blaikie *v.* Farquharson, 11 D. 1456.

[108] Duff's Trs. *v.* Shand's Trs., 14th July 1864, 2 Macph. 1342.

[109] E. Dalhousie *v.* Crokat, 26th March 1868, 6 Macph. 659. For other decisions relating to this statute, see Riddell's Trs. *v.* Riddell, 18th June 1857, 21 D. 800; Mills *v.* Trumper, L.R. 4 Ch. 320 ('instrument'); Llewellyn *v.* Rous, L.R. 2 Eq. 27 (date); *In re* Lawton's Estates, L.R. 3 Eq. 469 (compensation money); Jodrell *v.* Jodrell, L.R. 7 Eq. 461 (timber); Paget *v.* Anglesey, L.R. 17 Eq. 283 (mortgagee not in possession); and cases cited in 1 M'L. Wills, 200 *et seq.*

[110] 33 & 34 Vict. c. 35.

'heir or other person by the executors or other parties entitled 'under this Act to the same by action at law or suit in equity '(sect. 4).'[111] The statute excepts from apportionment 'any annual 'sums made payable in policies of assurance of any description '(sect. 6),' and cases where it is expressly stipulated that no apportionment shall take place (sect. 7); and the Court of Session has further withdrawn from its operation the payment of stipend and ann to parish ministers and their representatives, since this is provided for by special statute.[112] No change has been made by this Act on the rules applicable to the right of a fiar and of the executors of a liferenter to rents accrued and accruing, legally due, forehand[113] or postponed, as set forth in the preceding paragraph; it only extends the same rules to all cases of succession to subjects which yield periodical rents. The words of the Act are even wide enough to embrace questions between vendor and purchaser who have omitted to fix expressly the term of entry.[114] It has been held in England that the Act applies to specific legacies as well as to residuary gifts;[115] and to all instruments, whether dated or coming into operation before or after the passing of the Act.[116]

III. *Liabilities of Liferenter*—1. *Of Liferenter by constitution for Debts of the Disponer.*—It has been held that this liability does not arise if the value of the fee be sufficient to satisfy the debts,[117] unless these take the form of yearly payments, such as annuities;[118] but it may be doubted whether this is universally or even generally the case. If there are burdens laid on the liferented subject,[119] or other debts which are not wiped off from the personalty,[120] the fiar is liable for the principal, but the liferenter is bound to keep down the annual charge. If the creditor proceeds to adjudication, he will direct the action against both liferenter and fiar; and the

III. Liabilities of liferenter.
1. For author's debts.

[111] See Jessel M.R. on this section in Hasluck *v.* Pedley, L.R. 19 Eq. 271.

[112] Latta *v.* Edinburgh Eccles. Comrs., 30th Nov. 1877, 5 Ret. 266. As to annuities, see Cuninghame's Trs. *v.* Duke, 18th March 1873, 11 Macph. 543: dividends on shares—Cameron's Factor *v.* Cameron, 15th Oct. 1873, 1 Ret. 21; Jones *v.* Ogle, L.R. 14 Eq. 419, 8 Ch. 192.

[113] L. Herries *v.* Maxwell's Curator, 6th Feb. 1873, 11 Macph. 396.

[114] Maxwell's Trs. *v.* Scott, 5th Nov. 1873, 1 Ret. 122, *per* L.O. Gifford, p. 126.

[115] Hasluck *v.* Pedley, L.R. 19 Eq. 271; and cases of Capron and Pollock there cited.

[116] Hasluck *v.* Pedley, [115]; *In re* Cline's Estate, L.R. 18 Eq. 213; see Constable *v.* Constable, 11 Ch. D. 681.

[117] Stewart *v.* Stewart, 1792, Bell, Oct. Ca. 220, *per* L. Braxfield (question as to interest not decided); B. Pr. 1060.

[118] Nixon *v.* Borthwick, 1806, M. Liferenter, Appx. 2, but only interest on arrears, ibid. The case was special.

[119] Ly. Forbes *v.* L. Forbes, 1763, 2 Pat. 84.

[120] Waddell *v.* Waddell, 1818, 6 Dow, 279, 305, 6 Pat. 374. The liability was here express.

reversion, if any, left after a sale, will be settled according to their respective interests.[121] If the liferenter is expressly burdened with the debts, he will be primarily liable to the extent of the benefit derived by him under the deed.[122]

2. For burdens public and private.

2. *Liability of all Liferenters for Public and Private Burdens.*—'Liferenters, as they are entitled to the profits, must also bear 'the burdens attending the subject liferented—as taxations, duties 'payable to the superior, ministers' stipends, and the other yearly 'payments chargeable on the lands which may fall due during the 'liferent.'[123] But the burden of building[124] and repairing[125] parish churches and manses, which is occasional, and is laid on 'heritors,' falls on the fiar, not on the liferenter. Lord Stair suggests that if there were a conjunct fee, and the whole estate were liferented, and the fiar took no profit, the result might be different.[126] In the ordinary case, since liferents are regarded feudally as mere burdens on the fee, casualties are due by and for the entry of the fiar: but the fifth section of the Titles Act of 1874 provides for a case in which casualties may be due by a liferenter; and the commuted annual value referred to in the 17th section will be treated in all respects like the feu-duty to which it is added.

Cases depending on testator's intention.

It frequently happens that a testator in his trust-settlement directs his trustees to allow his widow or daughter the liferent use of house-property. The incidence of burdens in such circumstances depends on his intention, expressed or implied. Thus, where trustees were directed to give the truster's widow 'the use of my 'house, with the whole furniture and effects contained therein,' it was held that she, as mere occupant, was entitled to sit free of feu-duty, of assessments payable in respect of property (property-tax, land-tax, one-half of poor's rates), and of charges for repairs on the pavement and on the building itself; but that she was liable for rates payable in respect of occupancy (inhabited house-duty, road-tax, police-taxes, water-rate, and one-half of poor's-rates), there being no analogy to the case of a lease of a furnished house, since there the landlord gets increased rent in respect of paying occu-

[121] 2 M'L. Wills, 456.

[122] Waddell *v.* Waddell, [120].

[123] Ersk. 2.9.61; B. Pr. 1061; Bankt. 2.6.30; Ly. Samford *v.* Tenants, 1686, M. 13070; Ly. Elshsheels *v.* The Laird, 1688, ibid.; Lumsden *v.* Robertson, 1704, M. 13072.

[124] Minister of Morcham *v.* Binston 1679, M. 8499.

[125] Ly. Anstruther *v.* Anstruther's Trs., 14th May 1823, 2 S. 306 (N.E. 269), disregarding the distinction suggested by Ersk. 2.10.57; Bankt. 2.6.30; Mack. Obs. p. 183.

[126] St. 2.6.19, *ad fin.* The case of a reserved liferent or conjunct fee has never arisen. It would probably be held that a different rule applies, seeing that such a one lives as a fiar and dies as a liferenter.

pant's burdens.[127] In a later case, which differed only in expressly relieving the widow of 'rent, feu-duty, ground-annual, taxes, and 'all other deductions,' the relief was held to extend much further, —to burdens on occupancy as well as on ownership, fire-premiums, pleasure-ground assessments, and house-repairs; but not to a domestic water-rate levied on occupiers in respect of water supplied, nor to gas-money payable according to consumption.[128] The difference between such cases of occupation under a trust, and cases of localities, terce, and other liferent estates of property, is obvious, and explains the difference in the incidence of the burdens.

3. *Liability for Repairs: cautio usufructuaria.*[129]—The clause saving the substance of the thing liferented was explained in the Roman law by the words of the caution, '*et usurum se boni viri* '*arbitratu et cum usufructus ad eum pertinere desinet, restituturum* '*quod inde exstabit*'[130]—that the thing should be used as an ordinarily careful paterfamilias would use it, and that so much of it as remained at the end of the liferent should be restored. The same general rule has been adopted in our law, and the main difficulty in practice has arisen in determining what in certain circumstances is the duty of the liferenter as a diligent paterfamilias in regard to the management of buildings. He is bound to provide for ordinary repairs; and for this purpose is entitled to a gratuitous use of the ripe wood and the lime and stone on the estate,[131] so as to keep the buildings in a habitable and tenantable condition, if he so received them.[132] It has been already seen in what circumstances the fiar, repairing or improving the subject liferented at his own hand, has a right to charge interest on the cost against the liferenter who reaps the benefit.[133] In proving neglect on the part of the liferenter, it will not be enough for the fiar to show the state of the premises beyond the prescriptive period—he must go to the commencement of the liferent;[134] and for this reason the Roman law recommends,[135] and in cases of suspicion our Courts would allow, an inquisition into their state to be made at that date.

3. For repairs: *cautio usufructuaria.*

Buildings.

The liferenter, in his ordinary administration as a careful house- Tear and wear.

[127] Clark, 19th Jan. 1871, 9 Macph. 435.

[128] Rodger's Trs. *v.* Rodger, 9th Jan. 1875, 2 Ret. 294.

[129] Cr. 2.22.12.44; St. 2.6.4; Mack. 2.9.45; Obs. *apud Stat.;* Bank. 2.6.27-9; Ersk. 2.9.59.60; B. Pr. 1062-4.

[130] 1 pr. D. (7.9).

[131] Stanfield *v.* Wilson, 1680, M. 8244; E. Dunfermline *v.* E. Callander, 1683, M. 8244; Ds. *v.* D. Hamilton, 1723, Robertson, 443; Creditors *v.* Children of Mousewell, 1683, M. 8253; cf. La. Borthwick, 1696, M. 8245.

[132] Scotts *v.* Haliburton, 27th June 1823, 2 S. 435 (N.E. 388).

[133] *Supra*, p. 605; and cases of Hacket, Laird, there.

[134] Cuningham *v.* Cuningham, 1733, M. 8275.

[135] 1 § 4 D. (7.9).

holder, is only liable to account for deterioration arising from his neglect, or destruction caused by his voluntary act;[136] he is not answerable for the 'waste of time'[137] or natural tear and wear,[138] nor for accidental destruction by fire, water, or other *vis major*. Nor is the fiar answerable to the liferenter to make good the loss so caused, since the servient owner is bound to nothing but *nuda patientia*.[139] Though neither is bound to rebuild or repair in such circumstances, either may. There have been two cases in which the liferenter chose to undertake the work. In the earliest, the liferenter's assignee rebuilt a tenement of houses demolished by fire; and it was found that the fee of the tenement was affected with the sum employed in reparation thereof, but that the interest of the reparations could not burden the fee during the liferenter's tenure, while he or his assignee enjoyed the rent of the tenement.[140] In the other, the roof of a mansion-house destined in liferent to a widow was at the commencement of the liferent in an entirely ruinous condition. The Court found neither fiar nor liferenter obliged to repair: but that the liferenter was entitled to do so, provided it were done at the sight of the sheriff, at a cost not exceeding a fixed maximum; and that, at the expiry of the liferent, the fiar would be liable to repay the whole expenses, conform to accounts to be made up.[141] If the fiar undertakes the work, the liferenter can only benefit by it on paying proportionally to his interest.[142] The ordinary repairs for which a liferenter is answerable do not extend to the erection of embankments on a river for the purpose of preserving the estate from encroachment.[143] It may be here added, that in cases of trust for a liferent and fee the expenses of realising the estate or changing securities must be deducted from capital; that the ordinary annual expense of management comes off the gross rents or profits; but that extraordinary expenses, such as those caused by actions of division of commonty, or of augmentation of stipend, and actions for the preservation of the estate, must be deducted from capital.[144] A

Vis major.

Rebuilding.

Embankment.

Trust-management.

[136] Wilkie *v.* Morrison, 1682, M. 8274.

[137] Ersk. 2.9.60.

[138] Except in such cases as Roger's Trs. *v.* Scott, *supra*, p. 602.

[139] Ersk., *supra*, [137].

[140] Haliday *v.* Gardine, 1706, M. 13419.

[141] Scott *v.* Forbes, 1755, M. 8278.

[142] B. Pr. 1063. See cases between landlord and tenant—Walker *v.* Bayne, 30th May 1811, F.C., revd. 3 Dow, 233, 6 Pat. 217; Drummond *v.* Hunter, 12th Jan. 1869, 7 Macph. 347; Duff *v.* Fleming, 18th May 1870, 8 Macph. 769; D. Hamilton's Trs. *v.* Fleming, 23d Dec. 1870, 9 Macph. 329.

[143] Dickson *v.* Dickson, 24th Jan. 1823, 2 S. 152 (N.E. 138).

[144] Pearson *v.* Casamajor, 6th June 1840, 2 D. 1020; Baxter & Mitchell *v.* Wood, 24th March 1864, 2 Macph. 915. This rule as to changing securities seems to apply primarily, if not solely, to the inception of the trust.

widow entitled under her husband's settlement to occupy and possess a certain house belonging to him at the rent appearing in the Valuation Roll, was entitled to have the house put in proper tenantable condition, and kept so, she, however, being liable for tenant's repairs.[145]

Cautio. Old Acts.

The proper remedy open to the fiar for enforcing the obligations of the liferenter to use the subject of his right *tanquam vir bonus*, and to restore it at the expiry of his liferent, is a demand for the *cautio usufructuaria*.[146] This remedy, rendered necessary in the Roman law by the unsuitability in such cases of the *actio Aquilia*, the *actio injuriarum*, and the interdict *quod vi*,[147] was introduced into Scotland by statute in 1491. By the 25th Act of that year, it was enacted that where lands were given in conjunct-feftment or liferent the sheriff or bailies should take surety that the liferenter should not waste or destroy the buildings, orchards, woods, stanks, parks, meadows, or dovecots, but hold them in such kind as they were when he received them, he taking his reasonable sustentation or using in needful things without destruction or wasting thereof.[148] The statute having been ill observed, it was confirmed by 1535, c. 15, which ordered caution to be found on a charge of twenty-one days, under the pain of wanting of the profit of the liferents. These Acts were in general terms confirmed by 1594, c. 226; and provision was further made for 'decayed policy within (royal) 'burghs.' If by inquest of the neighbours a tenement has been found to be wholly or partially ruinous, and actually uninhabitable, or likely within a short time to become so, and the liferenter or conjunct fiar fails, within year and day after decerniture, to repair the same, the fiar is entitled to enter into possession and dispose of it as if there were no liferent, on giving security for termly payment to the liferenter of the annual value of the subject at the date of the inquest.

Interpretation thereof.

In construing these statutes it has been held that the last Act, which relates only to ruinous houses, such as at common law a liferenter could not be compelled but had the option to repair or rebuild, does not 'prejudge' the earlier statutes, but ratifies them;[149] and an inquest with certification, as above, is not introduced by it into the procedure of the earlier Acts.[150] These apply not only to liferenters who hold by infeftment, but to a

[145] Kinloch's Trs. *v.* Kinloch, 24th Feb. 1880, 7 Ret. 596.

[146] Cr. 2.22.12.44; St. 2.6.4; Mack. 2.9.45; Obs. *apud Stat.*; Bankt. 2.6.27.9; Ersk. 2.9.59; B. Pr. 1064.

[147] 13 § 2, 15 § 3, 66 D. (7.1).

[148] The statute is inartistically drawn, having been meant to apply only to the casualty of ward, and the introduction of liferent being an afterthought.

[149] Foulis *v.* Allan, 1627, M. 8270.

[150] Bruce *v.* Sinclair, 1612, M. 8270.

liferent lessee sitting at an elusory rent, and to the donatar of liferent escheat.[151] Whatever may have been the case at one time,[152] caution is not now ordered as a matter of course, but only on proof of actual or probable mismanagement. In one case an order to find caution was refused in respect it was not alleged that the tercer was adopting any measure tending to deteriorate or injure the lands, reserving to the fiar his remedy in the event of his being able to show material injury by improper modes of culture or otherwise.[153] Except in cases where the fiar complains of an infringement by the liferenter of a present beneficial right—such as the cutting of wood[154]—the remedy pointed out by these statutes is the only course open to the fiar in order to control the liferenter's management,[155] since neither the fiar for the time being, nor, in the event of his predeceasing the liferenter, his executor, to whom any sum recovered in name of damages would fall, may be the fiar at the expiry of the liferent.[156]

4. Aliment to fiar.

4. *Liability for Aliment to the Fiar.*[157]—The old Act 1491, c. 25, already referred to in relation to the caution exigible from liferenters, while making mention of 'conjunct-feftment or liferent' in reference thereto, closes with a provision which obviously contemplates only the case of a wardatar—that being the main subject of the statute: 'And a reasonable living to be given to 'the sustentation of the heir, after the quantity of the heritage, 'if the said heir has no blench-farm nor feu-farm land to sus-'tain him on, as well of the ward lands that fall in our Sovereign 'Lord's hands as any other baron, spiritual or temporal.' Following the common practice, sometimes necessary, often laudable, and always hazardous, of our early tribunals, this provision was extended by a series of decisions to the case of a liferenter in possession and a destitute fiar. This sort of construction, being founded on no kind of principle, resulted in a number of arbitrary distinctions, which it would be useless to discuss.[158] For the protest of Sir George Mackenzie, in his observations on the statute,[159] was echoed by the House of Lords in the year 1825, in a case where it was attempted to push the analogy one step

[151] Caddel *v.* Douglas, 1635, M. 8271.

[152] Scot *v.* Forbes, 1755, M. 8278.

[153] Ralston *v.* Leitch, 1803, Hume, 293. It is the same in the Prussian adaptation of the Roman rule—Pr. L.R. 1.21. 20.

[154] Dickson *v.* Dickson, 24th Jan. 1823, 2 S. 152 (N.E. 138).

[155] Bell *v.* Bell, 7th Dec. 1827, 6 S. 221.

[156] Ersk. 2.9.59.

[157] St. 2.6.5.19; Mack. 2.9.45; Forbes, 2.4.4; Bankt. 2.6.30; Ersk. 2.9.62; B. Pr. 1065; Bell's Dict. *voce* Aliment.

[158] See the decisions in Mor. 381 *et seq.* The last case in which the claim seems to have been allowed was in 1705.

[159] Mack. Obs. p. 101.

farther—to the relation between an heir of entail in possession and his heir *alioqui successurus*.[160] And a doctrine which has not been enforced for more than a century and a half may now be held to be exploded by the stricter views, in regard to claims of aliment, which have been introduced by the Court of Appeal. More especially, a fiar subject to a subsisting liferent can scarcely be said to be destitute, since he has an immediate vested interest in the property, and may deal with it in the market.[161]

5. *Extinction of Liferent.*—It is of the essence of liferent that it is personal to the liferenter, who comes in place of the dominant tenement in predial servitudes. Consequently the liferent is intransmissible; and though the form of conveying the beneficial enjoyment of the subject liferented is by assignation of the liferent, and not merely of the rents and right of possession,[162] the assignee does not thereby become the liferenter. The only change that can take place in the liferent itself is its extinction,[163] by the death of the liferenter, by confusion (or, more technically, consolidation)[164] of the fee and liferent,[165] by discharge or renunciation[166] without the necessity for registration, or by the negative prescription.

6. *Rights of the Fiar.*—These being complementary to those of the liferenter, have been sufficiently set forth in the preceding paragraphs. It need only be added that the rule which requires the concurrence of the liferenter to any act of administration affecting his right suffers an exception in the case of leases granted by a husband of lands out of which an annuity has been granted or a locality constituted in favour of his wife. These are valid and binding on her after her right becomes operative, provided they have been granted *in bonâ fide*, and in the exercise of fair administration.[167] Rights of fiar.

[160] Maule *v.* Maule, 1st June 1825, 1 W.S. 266. See esp. pp. 284-5, 289, 294.

[161] Maidment *v.* Landers, 25th May 1815, F.C., revd. 1818, 6 Dow, 257, 278.

[162] 1 Bell, Lect. 316; St. 2.6.7; Ersk. 2.9.41; Bankt. 2.6.33; see Flowerdew *v.* Buchan, 5th March 1835, 13 S. 615.

[163] Ersk. 2.9.68; Bankt. 2.6.33; B. Pr. 1066.

[164] 3 I. (2.4); 3 § 2 D. (7.2).

[165] See Martin *v.* Bannatyne, 8th March 1861, 23 D. 705.

[166] See Pretty *v.* Newbigging, 2d March 1854, 16 D. 667; cf. Smith and Campbell, 30th May 1873, 11 Macph. 639.

[167] 1 Hunter, L. and T. 118; Cs. Moray *v.* Steuart, 1772, M. 4392, 5 B.S. 619, affd. 2 Pat. 317; Robertson *v.* Robertson, 1777, 5 B.S. 619; Cs. Galloway *v.* Mackenzies, 1778, 5 B.S. 620; Laing *v.* Denny, 6th July 1827, 5 S. 903.

PART IV.

PUBLIC BURDENS.

THE remaining chapters of this work will be taken up with the many and multiform burdens which the wisdom of remote times as well as of our own day has heaped upon the owners and occupiers of lands and other heritages, probably induced thereto at an early date by the preponderating value of these subjects in the tale of the national wealth, and nowadays by the greater facility with which rates can be imposed on immoveable than upon moveable property. It is only necessary to premise a single general remark. The expression 'burden on land' is apt to mislead. It is not intended to convey the same meaning as 'real burden' or *debitum fundi*, as applicable to such prestations as feu-duties. No public burden bears this character. They are merely personal prestations, incident to the ownership or to the occupation of land, as the case may be. This has been repeatedly decided with reference to some of the burdens now to be discussed, and has been assumed as to the rest.

Public burdens will be here classed as Parochial, County, and Imperial; and those which are leviable in burghs will be discussed under the two first heads, according to their natural affinity to each.

CHAPTER XXXVI.

PAROCHIAL ECCLESIASTICAL BURDENS.

THE parochial burdens which form the subject of this chapter are those which are involved in the provision and maintenance of parish churches, churchyards, manses, and glebes. The ground has been already partially or wholly occupied by three well-known treatises of different but recognised merit, published during the present century.[1] The author is thus relieved from the interesting but unnecessary task of tracing the history of the relation of the Church and its judicatories to the land and its owners in Scotland, and is enabled to confine himself to the present state of the law, as viewed from the stand-point of the landowner, not, as is more immediately the aim of the treatises referred to, from that of the ecclesiastic. The inquiry may be divided into these four particulars, as concerning—(1) the parties liable in the aforesaid burdens; (2) the extent of their liability in each case; (3) the mode of allocation; and (4) the mode of ascertainment of liability.

Scope of the chapter.

I.—PARTIES LIABLE.

In this respect there is no distinction at the present day between the incidence of the various ecclesiastical burdens. Whether the term employed by the Legislature in providing for the maintenance of the established religious system be 'parochin-aris,' or 'parochiners,' as in the older statutes,[2] or 'heritors,' as in the later Acts, the meaning has from very early times[3] been held

I. Parties liable.

'Parochiners.' 'Heritors.'

[1] Connell on Parishes, 1818; Dunlop's Parochial Law, 3d ed. 1841; Duncan's Parochial Ecclesiastical Law, 2d ed. 1869.

[2] *E.g.*, Act of Secret Council having the force of statute, 13th Sept. 1563, printed in the Register of the Privy Council Abridged, i. 247; and in Boswell *v.* D. Portland, 9th Dec. 1834, 13 S. 158, note; 1572, c. 54; 1597, c. 232; 1617, c. 6.

[3] Lauder *v.* Gallowshiels, 1630, M. 7913; Williamson *v.* Kirkcaldy, 1685, M. 7914.

to be identical. The term is equivalent to 'owner in fee of 'corporeal heritable property.' It includes corporations, such as railway companies,[4] and burghs, as represented by the magistrates and council in parishes partly burgal, partly landward.[5] It excludes liferenters, or at least liferenters by constitution—who are therefore not even liable in the expense of ordinary repairs, or in interest accruing during their tenure on assessments paid by the fiar for rebuilding or extraordinary repairs[6]—titulars,[7] and superiors.[8] Tenants—even though for purposes of valuation certain holders of long leases are to be taken as 'proprietors' in the sense of the Valuation Act of 1854[9]—and persons who are merely seat-holders in the parish church on some other tenure than as landowners in the parish,[10] are still more distinctly outside the category.

Not life-renters.

Not titulars, superiors, tenants, seat-holders.

Classes of parishes.

Quoad omnia.

Quoad sacra.

It should be premised, in order to a clear understanding of what follows, that parishes in Scotland are of different kinds.[11] The leading division is into parishes *quoad omnia*—parishes, that is to say, which, either existent in their present form at the Reformation, or since then united, disjoined, added to, or curtailed by the proper authority, are divisions of the country for many purposes besides the providing of religious ordinances—and parishes *quoad sacra*, which are the creatures of the Act of Parliament 7 & 8 Vict. c. 44.[12] Parishes *quoad omnia* are again divided into those

[4] Macfarlane *v.* Monklands Ry., 29th Jan. 1864, 2 Macph. 519; Sc. N.E. Ry. *v.* Gardiner, ibid. 537; Highland Railway Co. *v.* Her. of Kinclaven, 15th June 1870, 8 Macph. 858; see also M'Laren *v.* Clyde Trs., *infra*, [9].

[5] D. Argyle *v.* Rowat, 1775, M. 7921; Lockhart *v.* Lockhart, 24th Jan. 1832, 10 S. 243; M'Neel *v.* Robertson, 27th May 1836, 14 S. 849. For the peculiarities of their position as such, see Clapperton *v.* Mags. of Edinburgh, 14th July 1840, 2 D. 1385, 1412, 1417.

[6] St. 2.6.19; Ersk. 2.9.61; Bankt. 2.6.30; Mack. Obs. p. 183; Min. of Moreham *v.* L. Binston, 1679, M. 8499; Anstruther *v.* Anstruther's Trs., 14th May 1823, 2 S. 306 (N.E. 269), disregarding the distinction suggested by Ersk. 2.10. 57; see *supra*, p. 618.

[7] Practice, and the disappearance of the parsons, who were specially burdened (as still in England) with the maintenance of the quire, or of one-third part of a parish church, have made this exemption of teinds from these parish burdens general —1563, c. 76, Act of Secret Council, *supra*, [2], approved 1567, 3 Thomson's Acts, 38; 1572, c. 54; Swinton *v.* L. Wedderburn, 1663, M. 8499; Williamson *v.* Kirkcaldy, 1689, M. 7914; Shaw *v.* Cs. Winton, 1623, M. 7913; Selkirk *v.* Stuart, 1628, M. 7913; Selkrig v. D. Roxburgh, 1738, M. 7915, Elchies, 'Kirk,' No. 1, explained in Dunlop, p. 6; and Duncan, p. 167.

[8] Murray *v.* Scott, 1794, M. 15092; Dundas *v.* Nicolson, 1778, M. 8511; and cases of clauses of relief, *infra*, chap. 42.

[9] Miller *v.* Craig, Hailes, 329; 17 & 18 Vict. c. 91, sect. 6; M'Laren *v.* Clyde Trs., 17th Nov. 1865, 4 Macph. 58, affd. 6 Macph. H.L. 81.

[10] Farie *v.* Leitch, 2d Feb. 1813, F.C.; see D. Argyle *v.* Rowat, [5]. Mr Dunlop suggests, p. 9, that such parties might be liable for repairs to the church alone, or for rebuilding where their right continued in the new building.

[11] See Connell, ch. i.; Duncan, ch. i.; add 39 & 40 Vict. c. 11; Brydekirk *v.* Hoddam, 4th June 1877, 4 Ret. 798.

[12] Annexations to parishes of lands *quoad sacra tantum* were known before

which are purely burgal, being confined within the limits of a royal burgh, or of a community which, by custom or special statute, controls its ecclesiastical affairs by means of its civic authorities; or landward, embracing parishes in which no burgal element, as thus understood, is present; or parishes in which both elements appear.[13] The special points in which these various sorts of parishes differ will appear in the sequel, it being borne in mind that the normal district therein contemplated is the landward parish *quoad omnia*. Burgal. Landward. Burgal-landward.

II.—Extent of the Liability.

II. Extent of liability.

A. *To provide and maintain Parish Churches.*[14]—The joint effect of enactments passed soon after the Reformation[15] and practice has been to throw on the heritors of each parish in Scotland the burden of providing and maintaining a church suitable for the dispensing of religious ordinances according to the established creed. The only case in which they can be called upon to 'provide' a church—that is, to build a church in addition to existing edifices still in use—is when a new parish *quoad omnia* has been erected, for which no building has been provided from other resources.[16] Church extension having found a more convenient channel in the erection of *quoad sacra* parishes, this obligation is not likely to arise again, unless in exceptional circumstances; if it does, the same principles will apply as in cases where rebuilding is necessary. A. As to churches. Provision.

In regard to the maintenance of churches, the chief practical difficulty arises in determining whether a church, admittedly not in an efficient condition, has to be merely repaired, or to be repaired and enlarged, or to be replaced by an entirely new edifice. It must be admitted that no rule can be laid down for determining the requisite standard of comfort, since a state of things might be tolerated in remote Highland parishes which would be revolting in a town church. A state of disrepair is more obvious, and the inter- Maintenance.

this Act, but not the *erection* of parishes *quoad sacra*. See L.P. Inglis's obs. in Ms. Bute *v.* Mags. of Rothesay, 23d June 1864, 2 Macph. 1278, 1282; Connell on Parishes, p. 217 *et seq.*

[13] To this class the barbarous names 'burgal-landward' and 'landward burgal' have been applied; and this nomenclature has been imported into questions as to the rule of assessment, with which it has nothing whatever to do. Duncan, 9, 17; see *infra*, p. 641.

[14] St. 2.3.4; Ersk. 2.10.63; Bankt. 1.3.11, 2.8.187; B. Pr. 1164; Connell, Suppl.; Dunlop, p. 14; Duncan, p. 156.

[15] Already referred to, *supra*, note [2].

[16] Act 1707, c. 9; 7 & 8 Vict. c. 44, sects. 1-4.

ference of the heritors more plainly called for, when the edifice is structurally unsafe or is dangerous to the health of the worshippers. If this be the case, the only rules that can be laid down as to the extent of the operations required seemed to be these:

Repair. Nothing more than mere repair can be demanded of the heritors as matter of obligation, so long as the edifice and its contents can be made 'a safe and serviceable church by anything that could 'be truly and fairly called repairing at all,' or 'by any repair 'that could be used reasonably or would be used except for the 'purpose of evading the legal duty of enlarging the church when 'rebuilt,'[17] or by any repairs which are not substantially 'equiva-'lent to rebuilding the edifice,'[18] or in other words, building a new church of the same size.[19] A rough mode of determining whether this be the case or not, and one which it is perhaps safer to follow than a comparison of the detailed infirmities of the several churches whose condition has come before the Court with those existing in a concrete case, is afforded by a comparative estimate of the cost of putting the church into a state of thorough repair while leaving it standing, and of building a new church of the same size, making use of the materials of the old structure. If the one is only half of the other, repair will usually be sufficient;[20] if three-quarters or thereabouts, rebuilding, or repair and enlargement, will be ordered;[21] if between these fractions, the Court will be influenced one way or the other by special circumstances, such as the expectation of life of the repaired and of a new church, the attitude of the bulk of the heritors,[22] and possibly also the increase or decrease of the population.[23]

Rebuilding or enlargement. Population. If, according to the rules thus indicated rather than defined, something more than mere repair is required, a new element is introduced—that of the population of the parish.[24] The rule, first formulated near the end of last century and then declared

[17] *Per* L.O. Mackenzie in Murray *v.* Pr. of Glasgow (Kirkintilloch), 11th Dec. 1833, 12 S. 191, 196.

[18] M'Leod *v.* Carment, 9th Feb. 1830, 8 S. 475.

[19] L. Robertson—a high authority in such matters—in Cunningham *v.* Deans (Stewarton), 12th Dec. 1811, F.C., says: 'The rules to be followed in judging of 'such questions are the same as those 'by which a prudent person would be 'guided in regard to his own dwelling-'house;' but it does not seem easy to draw a parallel.

[20] Murray *v.* Pr. of Glasgow, [17] (12-24ths); and see Gordon *v.* Gordon (Kincardine O'Neil), 1846, 18 Sc. Jur. 595.

[21] M'Leod *v.* Carment, [18] (18-24ths). Hamilton *v.* Pr. of Hamilton (Bothwell), 15th Nov. 1827, 6 S. 47, was special, as the necessity for replacing part of the old church was admitted.

[22] Bertram *v.* Pr. of Lanark (Carnwath), 20th July 1864, 2 Macph. 1406, 1414 (17-24ths + £20).

[23] See L. Pitmilly in M'Leod *v.* Carment, [18].

[24] Menzies *v.* Her. of Lerwick, 1820, Conn. Suppl. pp. 44, 125; M'Leod *v.* Carment, [18].

to be general,[25] is, that a parish church should be capable of containing two-thirds of the examinable persons in the parish—that is, persons not under twelve years of age[26]—that being the number of persons who, irrespective of dissent[27] or difference of language,[28] might be expected to attend at one time. Only that part of the population is computed which has a fair prospect of being permanent;[29] and some discretion has, in exceptional cases, been allowed to the presbytery, in the way of diminishing the burden to be laid on the heritors.[30] If, on the other hand, the church be in a state of thorough repair, or can be put into such a state by ordinary repairs, as explained in last paragraph, the heritors cannot be compelled to enlarge it or build a larger one, merely on proof of an increase of population.[31]

Change of site.

If the church be beyond the reach of ordinary repair, as above described, it will be in the option of the heritors whether they will repair and enlarge it, or build a new church;[32] and they will be doubtless guided by such circumstances as the state of the less infirm part of the old fabric and the desirability of a change of site. There is a strong presumption in favour of the old site, since a change might easily unsettle old habits or might be advocated by a majority of heritors from interested motives; and this bias will not be overcome by the offer of a free site, or by the necessity, in extending the accommodation, of encroaching on adjacent graves.[33] The new site, if removal be resolved on, should be in the vicinity of the manse.[34]

Church furniture.

Besides providing and maintaining the fabric of the church, the heritors have to provide and maintain proper seats,[35] of a minimum breadth laterally of eighteen inches for each sitting,[36] and a customary width of twenty-nine inches, including the thickness of the

[25] Min. of Tingwall *v.* Heritors, 1787, M. 7928.

[26] Ibid.

[27] Connell, Suppl. p. 34; Dunlop, p. 18; M'Neill *v.* Nicolson (Barra), 24th Jan. 1828, 6 S. 422, 425.

[28] Though the Gaelic and English speaking sections of the congregation attended at different hours — M'Leod *v.* Carment *supra*, [18].

[29] Menzies *v.* Her. of Lerwick, [24]; L. Lynedoch *v.* Smythe, *infra*, [31].

[30] M'Neill *v.* Nicolson, [27]; Hamilton *v.* Presb. of Hamilton (Bothwell), 15th Nov. 1827, 6 S. 47, sequel in 8 S. 196, 9 S. 167, 796.

[31] Cunningham *v.* Deans, [19], *supra*; L. Lynedoch *v.* Smythe (Methven), 14th May 1828, 6 S. 791; E. Glasgow *v.* Miller, 1st Feb. 1831, 9 S. 370, affd. 7 W.S. 185, appealed as a test case; overruling Min. of Dunning *v.* Heritors, 1807, M. Appx. *v.* Kirk, No. 4. The Lerwick case, [24], was a very narrow one, if not wrongly decided.

[32] There is no case in point; but see the cases of Lerwick, Dunning, and Methven, *supra*, [31].

[33] Falkirk, Conn. Suppl., 63; Gordon *v.* Gordon, 1846, 18 Sc. Jur. 595 (Kincardine O'Neil).

[34] L. Cringletie in M'Neill *v.* Nicolson, [27].

[35] E. Home *v.* E. Marchmont (Eccles), 1777, 5 B.S. 558.

[36] Harlow *v.* Her. of Peterhead, 1802, 4 Pat. 356; Bothwell case, *supra*, [30].

wood,[37] the permanent sacramental furniture by special statute,[38] a church-bell,[39] and some sort of belfry,[40] but not a steeple.[41]

In burgal parishes.

These rules, regarding the provision and maintenance of churches, apply to landward parishes and to burgal parishes with a landward district. In this latter case the corporation, as represented by the Council, will, it is thought, be regarded as a heritor with power, apparently, to assess the community, so far as repair of a church allocated according to valued rent is concerned; while for other operations the whole proprietors of the parish will be assessed according to their real rent.[42] Other rules apply to purely burgal parishes, where the churches have been originally erected by burgh funds, or by private contribution, or under a local Act, and are maintained out of the seat-rents, which are lawfully and usually levied for this and cognate purposes. In case of dispute, the Court is guided principally by 'established usage or practice,' 'either 'general or special.'[43]

Highland churches.

The Acts[44] which provide for the erection of parliamentary churches in the Highlands and Islands throw the ultimate liability for the upkeep of the edifice (after exhaustion of the pew-rents in this way, and in maintaining the minister's house and offices) on the heritor or heritors who applied to the Commissioners for the erection and their successors, but that only to the extent of one per cent on the original cost of the building. No alteration in this respect is made by converting the district attached to such a church into a *quoad sacra* parish; but by erecting it into a *quoad omnia* parish, the burden flies off.[45] In regard to *quoad sacra* parishes generally, which have sprung up so luxuriantly of late years under the last-cited Act, the question has been raised, whether the heritor of lands included within such a parish is still liable for the maintenance of the church of the old parish from which they have been disjoined *quoad sacra tantum*. The main-

Quoad sacra churches.

[37] Bothwell, *supra*, [30].

[38] 1617, c. 6; not the kirk-session out of the poor's-money—Hamilton *v.* Min. of Cambuslang, 1752, M. 10570. But Erskine suggests a doubt as to the meaning of 'parochiners' in the statute, which doubt seems to be unfounded, looking to the authority given to stent themselves—Ersk. 2.10.63.

[39] Inverkeithing *v.* La. Rosyth, 1642, M. 7914. As to the management of bells in burghs, see Min. *v.* Mags. of Montrose, 1730, M. 7915; M'Naughtan *v.* Mags. of Paisley, 7th Feb. 1835, 13 S. 432; Mags. of Peebles *v.* K.S., 10th July 1874, 1 Ret. 1139, affd. 7th June 1875, 2 Ret. H.L. 117.

[40] E. Home *v.* E. Marchmont, [35].

[41] Ibid.

[42] 17 & 18 Vict. c. 91, sect. 33; Annan Hers. *v.* M'Lean, [136]; M'Neel *v.* Robertson, 27th May, 1836, 14 S. 849; failing assessment by the burgh, the presbytery may grant warrant to attach—*per* L.O. Moncreiff.

[43] *Per* L.J.-C. Boyle in Clapperton v. Mags. of Edinburgh, 14th July 1840, 2 D. 1385, 1406; see also pp. 1394-5, 1418 foot, 1425 top.

[44] 4 Geo. IV. c. 79; 5 Geo. IV. c. 90, sect. 18.

[45] 7 & 8 Vict. c. 44, sects. 14, 15.

tenance of the *quoad sacra* church to which he is relegated for religious ordinances is provided for in the original endowment and out of the pew-rents, and is no burden on the land of the parish.[46] Where lands have been disjoined from one *quoad omnia* parish and annexed to another *quoad sacra*, it has been decided that the heritor is not bound to contribute to repair the manse of the latter,[47] but that he may become liable for repairing its church by attending it for the prescriptive period and intermeddling with the fabric.[48] In the *Jedburgh* case,[49] where there had been, not a mere disjunction and annexation of lands *quoad sacra* but, the erection of a *quoad sacra* parish out of lands formerly belonging to three *quoad omnia* parishes, it was pointed out that the fact that the church of the newly erected parish was to be maintained from other sources than heritors' assessment took the case out of the ratio on which the *Monzie* decision appeared to have been partly founded—viz., that the lands disjoined did not escape but only transferred their burden.[50] The majority of the judges in the Court of Session, while denying to the heritors of the *quoad sacra* parish what has been sometimes treated as the correlative right[51] to hold seats in the old church, reserved their opinion as to whether the obligation to maintain the latter still subsisted;[52] while Lord Deas insisted on the subsistence of both. The same difficulty was avoided in the *Duddingstone* case,[53] where it was held that in a question of liability for mere repairs, the governing element was a long-continued and peculiar state of possession and management of the area of the church. But in the *Fortrose* case, a characteristically elaborate judgment of Lord Curriehill (II.) was acquiesced in, which decided that disjunction of lands *quoad sacra* under the Act of 1844 does not have the effect of relieving the owners from any of their liabilities for the parochial ecclesiastical burdens of the old parish;[54] and there appears to be no doubt that this is sound law.

[46] Ibid. sects. 8, 9.

[47] Park *v.* Maxwell, 1748, M. 8503, Elchies *v.* Manse, No. 3; Bankt. 2.3.50; Ersk. 2.10.64.

[48] This seems the result of L. Deas's examination of Drummond *v.* Her. of Monzie, 1773, M. 7920, in 3 Ret. 741.

[49] D. Roxburghe, 1st June 1876, 3 Ret. 728, revd. 29th June 1877, 4 Ret. H.L. 76.

[50] *Per* L. Neaves, 3 Ret. 749; L. Ormidale, 754.

[51] Feuars *v.* Her. of Crieff, 1781, M. 7924, 2 Hailes, 892; Reid *v.* Comrs. of Woods, &c., 10th July 1850, 12 D. 1211; D. Abercorn *v.* Pres. of Edinburgh (Duddingstone), 17th March 1870, 8 Macph. 733, 742.

[52] L. Neaves, 3 Ret. 750, L. Ormidale, p. 754, and L. Gifford, p. 757, seem to lean towards the affirmative. The House of Lords reserved the question, and decided on the specialty of excambion. See *supra*, p. 163.

[53] D. Abercorn *v.* Presb. of Edinburgh, *supra*, [51]; and 11th June 1869, 7 Macph. 875.

[54] Mags. of Fortrose *v.* Maclennan, 26th Nov. 1880, 8 Ret. 124.

B. As to churchyards.

B. *Providing and maintaining Churchyards.*—By custom since the Reformation[55] the duty of providing,[56] and, when necessary, enlarging,[57] and by statute the duty of 'reparrelling and upholding,'[58] churchyards, sufficient for the decent burial of the parishioners, rests on the heritors. The same general rules apply here as in the case of churches,[59] with some exceptions in points of detail—such as the rules that want of accommodation for the whole population is a sufficient reason for demanding enlargement, without decay or disrepair in the churchyard or its appurtenances, and that the heritors are not compelled to allocate the area as a whole, but only to furnish lairs when needed. It may therefore be a question whether they are entitled to restrict the original or enlarged ground to the actual and present necessities of the parishes, or can be compelled to look forward to future requirements.[60] The only indications of what will be a proper site are furnished by the name itself—which is statutory[61]—and by the remarks of two judges that the soil should be dry,[62] and that the convenience of the heritor who has to furnish the land should be considered.[63] The only express regulation regarding 'reparrelling' and upholding' is, that the parishioners—*i.e.*, the heritors—shall build and repair the kirkyard dikes with stone and mortar to the height of two ells, with sufficient stiles and entries;[64] but the obligation must necessarily include the task of keeping the ground in a state physically fit for its purpose, and free from anything revolting to ordinary sentiment.[65]

C. As to manses.

C. *To provide and maintain Manses.*[66]—This burden rests[67] on the Scotch Act 1663, c. 21, which comes in the place, and has been construed by the help, of the rescinded statutes 1644, c. 31,

[55] *Per* L. Hailes in his report of the Greenock case, [57], 2 Hailes, 758; So. Leith K.S. *v.* Scott, 23d Nov. 1832, 11 S. 75.

[56] *Per* L.O. Cringletie in Ure *v.* Ramsay, 5th June 1828, 6 S. 916.

[57] Asserted by the Court of Session, and not involved in the reversal, in Greenock *v.* Stewart, 1777, M. 8019 and Appx. Kirkyard, 5 B.S. 414, rev. 2 Pat. 486; and assumed by both tribunals in Walker *v.* Pres. of Arbroath, 1st March 1876, 3 Ret. 498, affd. 4 Ret. H.L. 1.

[58] 1563, c. 76.

[59] *Per* L.O. Cringletie in Ure *v.* Ramsay, [56].

[60] L. Covington in the Greenock case, [57], as reported, 2 Pat. 489, seems to point at the former view.

[61] 1503, c. 83; 1563, c. 76; 1579, c. 70; 1597, c. 232. This would now be subordinated to sanitary considerations.

[62] *Per* L.O. in Greenock case, M. Appx. Kirkyard.

[63] *Per* L. Gardenston in the same case, 2 Pat. 490.

[64] 1597, c. 232.

[65] See *supra*, p. 164; 1503, c. 83; 1579, c. 70. As to the Burial Grounds Act, 1855, see *infra*, chap. 38.

[66] St. 2.3.40; Bankt. 2.8.119; Ersk. 2.10.57; B. Pr. 1165; Connell on Parishes, ch. 2; Dunlop, pp. 92 *et seq.*; Duncan, pp. 405 *et seq.*

[67] The older Acts affected only churchmen and their assignees—1563, c. 72; 1572, c. 48; 1592, c. 118; 1612, c. 8.

and 1649, c. 45. The enactment of this Act, with reference to 'providing' manses, in the strict sense—that is, in cases where there never had been any such—is, that the heritors of the parish shall, at the sight of the 'bishop of the diocese[68] or such ministers as he shall appoint, with two or three of the most discreet 'men of the parish, build competent manses to their ministers, the 'expenses thereof not exceeding £1000 [Scots] and not being 'beneath 500 merks.'[69] Only one case[70] of the sort here contemplated seems to have come before the Court; nor is such a case likely to occur again. If it did, it would probably be held that the limit of cost has not fallen into desuetude,[71] though there has been shown a tendency in cases prior to those just cited to allow the expression 'competent' to override the express limitation.[72] The building need not, in order to satisfy this obligation, have been expressly designed by the ecclesiastical courts, provided it has been tacitly recognised as the manse,[73] and be not merely a private mortification.[74] Provision.

The really important burden laid on heritors is to maintain manses—that is, to repair, or it may be enlarge or rebuild, a house for their parish minister, in cases where a manse had at one time, however long before,[75] existed. The words of the statute are: 'And where competent manses are already built, ordains the 'heritors of the parish to relieve the minister and his executors 'of all cost, charges, and expenses for repairing of the foresaids 'manses; declaring hereby that the manses being once built and 'repaired, and the building and repairing satisfied and paid by 'the heritors in manner foresaid, the said manses shall thereafter 'be upholden by the incumbent ministers during their possession, 'and by the heritors in time of vacancy out of the readiest of the 'vacant stipend.' This enactment has been affected by construction in various ways. Maintenance.

In the first place, by collation with the rescinded statutes, the

[68] Now the presbytery, *infra*, p. 644.

[69] Further relief to the benefice is granted by the Small Stipends Act, 5 Geo. IV. c. 72, sects. 2, 3.

[70] Steel *v.* His Pars. (Lochmaben), 1712, M. 5131. The limit was here enforced. And see Cumming *v.* Thomson, [111].

[71] See the ratio of the judgment of the House of Lords in Dingwall *v.* Gardiner (Aberdour), 27th Nov. 1816, F.C., affd. 1821, 3 Bligh, 72, 1 Sh. Ap. 10, followed in Mags. of Elgin *v.* Gatherer, 17th Nov. 1841, 4 D. 25.

[72] Inverury Ca. 1760, Conn. 278, and 3 Bligh, 94, note; Mercer *v.* Williamson (Lethendy), 1786, 3 Pat. 43; Carfrae *v.* Min. of Dunbar, 13th May 1814, F.C.; L.O. Ivory in Carnegie *v.* Spied, 5th July 1849, 11 D. 1250.

[73] Her. of Cairney *v.* Pr. of Strathbogie, 1786, M. 8514; Carnegie *v.* Spied, [72].

[74] M'Aulay *v.* Auchinleck, 1751, M. 8506.

[75] In the Elgin case there had been none since the Revolution, *supra*, note [71].

In what parishes.

burden has been confined to landward parishes, and (after long litigation) burgal parishes with a landward district.[76] Purely burgal or 'burrowstoun' parishes are exempt from the obligation.[77] Again, a second or junior minister has no claim to a manse,[78] unless by use and wont—in which case his possession of one does not deprive the first minister of his statutory right.[79]

Extent of burden.

Secondly, the intendment of the Act seems to have been, that, when a manse has been once built and repaired by the heritors, the whole burden of upholding it should lie on the ministers.[80] This simple obligation has, however, been modified by a long course of practice, and the burden now laid on the heritors is twofold—first, at each change in the incumbency to provide a 'free manse;' and second, to be liable for all extraordinary repairs necessitated by inevitable decay or unavoidable mishap. As incidental to the fulfilment of each of these duties may be the rebuilding or enlarging of the manse. The burden of ordinary repairs on a free manse falls on the incumbent, but there is no known mode of enforcing the residence in it of himself or his family.[81]

'Free manse.'

A 'free manse' is the technical term, adopted from the statute itself, to denote that state of the edifice which the Presbytery of the bounds has decerned and declared to be such—that is, in every way a sufficient residence for the minister. While long acquiescence[82] by minister and Presbytery in a manse which has never been formally declared free, or the express and solemn declaration of the minister's contentment, may be equivalent to such decerniture, and bar objection by either of these parties,[83] it may not be enough for the decree to declare the manse 'sufficient' or 'competent' or 'proper' accommodation.[84] The term 'free' seems to denote both thoroughness of repair and a proper amount

[76] Settled in Min. *v.* Heritors of Dunfermline, 1805, M. *v.* Manse, Appx. 1, affd. 5 Pat. 593; and Mags. of Ayr *v.* Auld, 16th June 1825, 4 S. 99 (N.E. 101), revd. 2 W.S. 600; see also Irvine Ca. in Conn. 271; and Baikie *v.* Logie (Kirkwall), 8th March 1827, 5 S. 546 (N.E. 513). The cases thus overruled are to be found in M. 8504 *et seq.*; Conn. *loc. cit.*; and Cupar Ca., *infra*, [78].

[77] Assumed in the above cases. See more esp. in the Dunfermline Ca., *per* L. Chan. Eldon, 2 W.S. 605, note; and see Cumming *v.* Thomson, [111].

[78] Adamson *v.* Paston (Cupar), 14th Feb. 1816, F.C.

[79] Carnegie *v.* Spied (Brechin), 5th July 1849, 11 D. 1250.

[80] See L. Chan. Eldon's op. in D. Hamilton *v.* Scott (Avondale), 1813, Conn. 313, 5 Pat. 745, 3 Bligh, 88 note, 1 Dow, 393. The provision as to vacant stipend is annulled by 54 Geo. III. c. 169.

[81] Her. of Pitsligo *v.* Gregor, 18th June 1879, 6 Ret. 1062.

[82] Robertson *v.* E. Rosebery (Dalmeny), 1788, M. 8515; Eliott *v.* Hunter (Kirkton), 12th July 1867, 5 Macph. 1028.

[83] Mackenzie *v.* Mackenzie (Lochcarron), 30th Nov. 1833, 12 S. 151, 13 S. 1014.

[84] Botriphnie Ca. 1805, Conn. 309; D. Hamilton *v.* Scott, [80]. As to a 'legal' manse, see *per curiam* in M'Aulay *v.* Auchinleck, 1751, M. 8506.

of accommodation.[85] The former element is absolutely necessary; the latter is liable to qualifications similar to those which apply to the enlargement and rebuilding of churches.[86] The decree cannot be opened up—except as the result of some calamity—during the same incumbency, except after the lapse of a reasonably long period of inevitable deterioration.[87] Apart from the cases of enlargement and rebuilding to be noticed in next paragraph, there is little authority as to the details of the repairs which are required to make a manse free, or to restore it against the ravages of time. The matter is one of degree, to be determined, if necessary, by the aid of experts.

Repairs, additions, rebuilding.

The circumstances in which mere repairs, repairs and additions, and rebuilding, are respectively required of the heritors, cannot be better detailed than in Lord President Inglis's summary in a recent case:[88] 'When the repairs required on a manse to make 'it sufficient are slight and of the nature of proper repairs—that 'is, when they amount merely to the restoration of the manse 'against wear and tear—there is no doubt that the Presbytery can 'go no further than merely to order such repairs,[89] although it 'may be that the manse is not such as they would be authorised 'to order as a new manse, if the old one had fallen into ruin; 'and on the other hand, when the manse is in such a state of 'decay that the repairs will amount very nearly to the cost of 'building a new manse, the Presbytery are entitled to order a new 'manse to be built.[90] These are the two extreme cases as to 'which there is no difficulty. But there is a variety of cases be-'tween these two extremes, and many such cases have come before 'the Court. It may not be possible to reconcile all these cases,

[85] Ersk. 2.10.58.

[86] Cunninghame *v.* Deans (Stewarton), 12th Dec. 1811, F.C.; Her. of Olrig *v.* Phin, 10th July 1851, 13 D. 1332; Carmichael *v.* M'Lean (Symington), *infra*, [88].

[87] Pitsligo Ca., [81]—two years only had elapsed: a lapse of fifteen years has been pointed at in some of the cases. See note [90], and the present case.

[88] Her. of Insch *v.* Storie, 18th Dec. 1869, 8 Macph. 363, 367; cf. L.O. Moncreiff's *dicta* in Carmichael *v.* M'Lean (Symington), 25th May 1837, 15 S. 1020, 1024; and L.O. Jerviswoode's remarks in the Kingoldrum Ca., 24th Jan. 1863, 1 Macph. 325, 326, approved 8 Macph. 368.

[89] *I.e.*, a total and sufficient repair, which will place the building nearly in the same situation as to comfort and stability as if it were rebuilt, and thus lay no extra burden on the incumbent—Her. of Olrig *v.* Phin, [86].

[90] *E.g.*, Saddell and Skipness Ca., 1811, Conn. 299; Her. of Olrig *v.* Phin, [86]. (Repairs would have cost £875, and would have lasted only fifteen years; cost of rebuilding, with the same accommodation, £850: therefore not 'beneficially 'reparable.') In Hamilton *v.* Clason (Dalzell), 9th March 1826, 4 S. 543 (N.E. 551), there was the additional element of a bad site. See also the Dunnichen Ca., 1813, Conn. 300. The rule is that which a good paterfamilias would do in the circumstances—Olrig Ca., [86] *per* L. Fullerton.

'but we must endeavour to extract from them some general rule. 'It appears to me that the cases in which a Presbytery may order 'additions to a manse which is clearly unsuitable in capacity and 'accommodation for the minister, are those in which it has either 'become impossible to keep it up at all without structural altera-'tion, or in which the extent or expense of the repairs, even as-'suming that they do not involve structural alteration, are very 'large, and approach to the cost of what is necessary to convert it 'by additions and alterations into a suitable residence.'[91] It is involved in these *dicta* that additions cannot be demanded on the mere ground of insufficient accommodation when the manse is actually or constructively[92] in thorough order, or can be put into that state by ordinary repairs.[93]

Standard of comfort in new or enlarged manse.

When a manse has to be rebuilt or enlarged the question arises, what shall be deemed a 'sufficient' residence for the minister. The question is one entirely of circumstances. While 'moderation 'in dimension and simplicity in ornament must always be strictly 'observed,'[94] and the accommodation must be sufficient for the wants of a family of ordinary numbers and for proper hospitality,[95] much will depend on the standard of comfort in the district and at the time. The process whereby the luxuries of one age have become the necessities of another has not left manses any more than other middle-class residences untouched. Thus in 1858, the addition, in the case of a Lowland manse, of a porch, a butler's pantry, a room to be used as a laundry and servants' bedroom, a coal-cellar, larder, cook's pantry, water-closet, and force-pump was approved of.[96] To the ancient offices—stable, byre, and barn[97] —are now usually added a hen-house, wash-house, servants'

[91] Kirkliston Ca., 1808, Conn. 306; Anwoth Ca., 1812, ibid.; Hers. of Strathblane *v.* Hamilton, 10th July 1827, 5 S. 913 (N.E. 847), (making drains, raising floor, damp, wall insecure); Symington Ca., [88] (bad furnishings, damp floor, &c.); Kingoldrum Ca., 24th Jan. 1863, 1 Macph. 325 (defective original construction, especially in the foundations—see L. Jerviswoode's review of the cases). Ca. of Balfron there cited, reported 1 Macph. 324; and the case of Insch, [88] (deafening, insertion of an iron beam, and excavation of surrounding soil required).

[92] Mackenzie *v.* Mackenzie (Lochcarron), 30th Nov. 1833, 12 S. 151; 30th June 1835, 13 S. 1014.

[93] Greenlaw *v.* Her. of Creich, 1778, 5 B.S. 513; Robertson *v.* E. Rosebery, 1788, M. 8515; Shiells *v.* Her. of Channelkirk, 1818, 13 S. 1018 note; Eliott *v.* Hunter, 12th July 1867, 5 Macph. 1028.

[94] Carmichael *v.* M'Lean (Symington), 25th May 1837, 15 S. 1020 (terms of remit).

[95] L. Balgray in the Strathblane Case, [91], 5 S. 914, refers especially to assistants at communion services.

[96] Balfron Ca., [91], reported in 1863, 1 Macph. 324. A force-pump, as accessory to a W.-C., is not regarded as an addition — E. Glasgow *v.* Murray, 16th Oct. 1868, 7 Macph. 6. As to water-pipes, see E. Cawdor, 39 Sc. Jur. 553.

[97] Ersk. 2.10.57; Anderson, 1791, M. 5152.

privy, and pigsty.[98] A necessary adjunct is the manse-garden,[99] fenced by a wall,[100] with or without cement—in one case ordered to be five feet in height, exclusive of the coping.[101] The whole space covered by manse, offices, and garden is usually half an acre, but is not necessarily so much if less has been possessed.[102] If for any cause, such as insalubrity or discomfort, or the exercise of compulsory powers, a new manse has to be built on a different site, the only desideratum to be found in our books is that it should be placed near the church.[103] Lastly, the heritors are liable, but only *pro ratâ*,[104] for manse-maill to the minister as surrogate for possession of the manse, when either non-existent or uninhabitable.[105]

D. As to glebes.

D. *To provide Glebes.*—As in the cases of churches and manses, there can be few if any parishes wholly or partly landward in which the heritors have escaped the vigilance of the ecclesiastical authorities and have not already provided competent glebes,[106] or in which the ministers have not profited by the compensatory clauses of the Small Stipends Act.[107] It seems, therefore, unnecessary to do more than refer to the easily accessible works in which the law on the subject is collected,[108] and to state very shortly the leading points. The burden is imposed by certain Acts of the sixteenth and seventeenth centuries.[109] The parishes in which it arises are the same as those in which the minister is entitled to a manse;[110] therefore the minister of a parish wholly included within the bounds of a burgh is not entitled to a glebe, though part of the area, originally held by the burgesses in common as pasturage and moorland, has been feued out and reduced

[98] Conn. 291; Mackenzie *v.* Mackenzie (Lochcarron), [92]; E. Glasgow *v.* Murray, [96].

[99] Ersk. 2.10.57; Anderson, 1791, M. 5152.

[100] A hedge is not enough—Maxwell *v.* Pr. of Langholm, 9th Nov. 1867, 40 Sc. Jur. 13; cf. Eliott *v.* Hunter, [93].

[101] Cases in Conn. p. 293.

[102] Griersons *v.* Grant, 1778, M. 5162; Hailes, 799; Anderson, [99]; Anderson *v.* Thomas, 1814, 2 Dow, 433, 434, *per* L.O.

[103] See the old Acts 1563, c. 72; 1572, c. 48; 1594, c. 48.

[104] Dingwall *v.* Gardiner, 1st Dec. 1825, 4 S. 246.

[105] Conn. 336; Potter *v.* Her. of Kippen, 1708, 4 B.S. 691; Steel *v.* Lochmaben Pars., 1712, M. 8502; Ferguson *v.* Mags. of Arbroath, 1715, ibid.; Thomson *v.* Mags. of Dunfermline, 1747, M. 11275.

[106] There have been only three reported cases of designation of glebe within the last forty years—the Lerwick Ca., 1850, 12 D. 1262; the Brechin Ca., 1855, 18 D. 197; 1860, 22 D. 1357; and the Arbroath Case, [111].

[107] 5 Geo. IV. c. 72, sect. 3 *et seq.*

[108] St. 2.3.40; Bankt. 2.8.6; Ersk. 2.10.59; B. Pr. 1172; Conn. 337 *et seq.*; Dunlop, 115; Duncan, 474.

[109] 1563, c. 72; 1572, c. 48; 1587, c. 129; 1592, c. 118; 1593, c. 165; 1594, c. 202; 1606, c. 7; 1663, c. 21. The last has been read by the light of the rescinded Acts, 1644, c. 31; 1649, c. 45.

[110] *Supra*, p. 636; see Duncan, p. 482.

into cultivation.[111] The extent of the glebe is four acres arable,[112] failing which sixteen soums[113] pasture-land, or an equivalent share of common pasturage;[114] taken near the church, from kirk lands in a certain order—failing which (though the point is doubtful), from temporal lands,[115] with the exception of 'incorporate acres in villages or town.'[116]

Maintenance?

Where a glebe has once been provided, it is difficult to conceive of any further burden resting on the heritors by way of maintenance, unless it be to keep up the fences and access, and to provide a new glebe if the old one become, in the words of the rescinded Act of 1644, 'unprofitable by inundation, sanding, or 'any other extraordinary accident.' In the absence of decisions on these matters, it may be conjectured that there is no obligation of the former sort, and that nothing short of absolute destruction or sterility would bring the latter into play.

E. As to 'minister's grass.'

E. *To provide Minister's Grass.*[117]—It is here, for similar reasons, unnecessary to enter into detail. The burden, introduced by the rescinded Act 1649, c. 45, takes the shape, in the Act so often cited already—1663, c. 21—of a right to every minister (except ministers of royal burghs) to have grass for one horse and two kine over and above their glebe, to be designed out of church lands; and if there be none such or none lying near the manse,[118] or if they are all arable, to be paid a yearly sum of twenty pounds Scots. Much of what has been said of glebes applies equally here. The same ministers are entitled to grass, and no others.[119] The word 'arable' seems to have the same meaning, and to point to the nature of the soil, of which the best indication is actual use recently and for some period before the designation, unless there be special reasons, such as amenity, for difference of treatment.[120] Incorporate acres seem to be exempt.[121] And there seems to be

[111] Cumming *v.* Thomson (Arbroath), 7th July 1883, 20 Sc. L. R. 781, *per* L. M'Laren.

[112] As to what is arable land, see Macmillan *v.* Presb. of Kintyre, 19th Nov. 1867, 6 Macph. 36, and cases there cited, in reference to 'minister's grass.'

[113] See *supra*, p. 378.

[114] Barvas Ca., 9th March 1830, 8 S. 683.

[115] Conn. 358 *et seq.*; Dunlop, p. 116; Duncan, p. 495; doubted with much plausibility by Lord M'Laren, *supra*, [111].

[116] The meaning of this expression is not definitely ascertained—Dunlop, p. 121; Duncan, 598. See the same expression in the Inclosure statutes, *supra*, p. 510.

[117] St. 2.3.40; Bankt. 2.8.6; Ersk. 2.10.62; B. Pr. 1175; Conn. 384 *et seq.*; Dunlop, p. 128; Duncan, p. 547; sometimes also called 'grass glebe.'

[118] Not necessarily those lying nearest, but those most convenient for grazing—Anderson *v.* Thomas, 22d May 1810, F.C., affd. 2 Dow, 433.

[119] See Williamson *v.* Ramsay, 1685, M. 5121.

[120] This seems the purport of the Kilcalmonell Ca.—Macmillan *v.* Presb. of Kintyre, 19th Nov. 1867, 6 Macph. 36, and the cases there collected.

[121] Assumed by both parties in Her. of Peebles *v.* Dalgleish, 1784, M. 5163.

no room for a claim for maintenance against the heritors. On the other hand, kirk lands alone, in their order, are designable; and the alternative is a pittance of twenty pounds Scots, which the Court has refused to alter.[122] Once sanctioned by the Presbytery and time, this money alternative cannot be gone back upon.[123]

III.—Mode of Allocation.

III. Mode of allocating burden.

The liability of the heritors of a parish in respect of the foregoing burdens is of two sorts. In those cases in which land is required for any of the purposes just mentioned—such as for the site of a new or enlarged church, churchyard, or manse, or in the designation of a glebe or minister's grass—there is an obligation incumbent on the heritor whose land is most convenient for the purpose, and legally obnoxious to the burden, to surrender it. He may, of course, set up any objection to the requisition, either on the merits or on the competency of the proceedings;[124] and he has a right of relief against his fellow-heritors, so as to operate a division and allotment of the value of the land taken, as well as of the other outlay required. The other sort of liability is general, resting on all the heritors,[125] and in all cases of expenditure on these ecclesiastical subjects—that is, the obligation to pay heritors' assessment, proportionally to the value of property held in the parish, for defraying this expenditure.

Not *debitum fundi*.

This obligation, though incident to the ownership of land, is not a *debitum fundi* or real burden, and does not therefore pass, if unfulfilled, against the singular successors of a heritor originally liable, but remains the debt of himself and his representatives only.[126]

Valued on real rent.

The assessment is allotted either according to the valued rent to be found in the cess-books, or according to the real rent as set forth in the valuation roll—not according to population, nor according to the one standard in the burgal and the other in the landward part of a mixed parish.[127] The general rule is, that the

[122] Carfrae *v.* Hers. of Dunbar, 13th May 1814, F.C.

[123] Min. of Dollar *v.* D. Argyle, 1807, M. Glebe, Appx. 7; cf. Lawrie *v.* Halket, 1804, ibid. 4; Min. of Panbride, 18th May 1809, F.C.; Anderson *v.* Thomas, 118.

[124] See p. 643.

[125] Or on the owners of kirk lands in the cases where these are alone designable.

[126] Charters *v.* Pars. of Currie, 1670, M. 10165; Guthrie *v.* L. Mackerstoun, 1672, M. 10137; Hamilton *v.* Maxwell, 1675, M. 10166; Blair *v.* Fowler, 1676, M. 10168; Moir *v.* Salton, 1694, M. 10169.

[127] Feuars *v.* Her. of Crieff, 1781, M. 7924, 2 Hailes, 892; and Burgh *v.* Landward Her. of Forfar, 1793, M. 7929; overruled in Harlow *v.* Her. of Peterhead, 1802, 4 Pat. 356; Baikie *v.* Logie (Kirkwall), 8th March 1828, 6 S. 748; Mags. of Elgin *v.* Gatherer, 17th Nov. 1841, 4 D. 25; unless controlled by custom, ibid., and Her. *v.* Mags. of Kinghorn, 1761, M. 7918.

valued rent is taken in purely landward parishes,[128] and the real rent in cases of burgal parishes with a landward district. No alteration has been made in the latter respect, but in course of time the use of the real rent has been gradually extended in assessing heritors in landward parishes. The plea of expediency which determined the adoption of the valued rent[129] has now been rendered antiquated by the creation of the valuation roll; and it is now the result of a series of decisions 'that where equity as 'regards the incidence of the tax on the assessable subjects within 'the parish cannot be reached by taking the valued rent, and can 'be reached by taking the real rent as the basis of apportionment, 'this last must be adopted'[130]—as, for instance, where the parish contains a burgh of barony,[131] or a large village,[132] or a large number of feuars though not collected in any village or burgh,[133] or a railway running through it without any burgh or village or feuars.[134] If the proportion of feuars be insignificant, the Court will be justified in ignoring them.[135] In a burgal-landward parish assessed on real rent, each of the heritors within burgh is directly rated, not the community as a single heritor.[136] But though the incidence of the assessment may be thus determined in all questions between the different classes of heritors,[137] and in all questions between the heritors and the Presbytery, except in regard to mere repairs executed on a church, in this latter case it appears that the governing element in fixing liability is the present and immemorial state of possession, seeing that mere repairs are only incident to the management of the fabric, and do not entitle any one to demand a new division, and *ubi commodum, ibi incommodum*.[138] It does not appear that the same reasoning would apply to repairs executed on the manse. In the case just noticed, some observations were made on the import of the 33d section of the Valuation Act, which en-

Valuation Act.

[128] In Shetland, the number of merks-land—Bruce *v.* Bruce, 24th June 1873, 11 Macph. 755.

[129] Steele *v.* His Pars., 1712, M. 8498.

[130] *Per* L. Cowan in Highland Ry. *v.* Her. of Kinclaven, 15th June 1870, 8 Macph. 858, 861.

[131] Peterhead Ca., 127.

[132] Boswell *v.* Hamilton (Mauchline), 15th June 1837, 15 S. 1148—over three hundred houses, containing more than half the population of the parish. The same rule followed in Sc. N.E. Ry. *v.* Gardiner, 29th Jan. 1864, 2 Macph. 537—Coupar-Angus being a larger village than Mauchline.

[133] Macfarlane *v.* Monklands Ry. (Slamannan), 29th Jan. 1864, 2 Macph. 519.

[134] Highland Ry. *v.* Her. of Kinclaven, 130.

[135] Maxwell *v.* Gordon, 1816, 4 Dow. 279, 289.

[136] Annan Hers. *v.* M'Lean, 26th Oct. 1883, 21 Sc. L.R. 33; cf. Lockhart *v.* Lockhart, 24th Jan. 1832, 10 S. 243.

[137] The point is reserved in the next case.

[138] D. Abercorn *v.* Pres. of Edinburgh (Duddingston), 11th June 1869, 7 Macph. 875; 17th March 1870, 8 Macph. 733. The case was special. The parish was landward: the four valued-rent heritors managed the church, let the pews, and with the proceeds, eked out by voluntary assessment, repaired the church and manse.

acts that where any parochial assessment is authorised to be imposed or made up according to the real rent of lands and heritages, the yearly rent or value, as appearing from the valuation roll in force for the time, shall be always deemed and taken to be the just amount of real rent for the purposes of such assessment; 'and 'the same shall be assessed and levied according to such yearly 'rent or value accordingly, any law or usage to the contrary not-'withstanding: provided always, that when the area of any parish 'church heretofore erected has been allocated among the heritors 'according to their respective valued rents as appearing upon the 'present valuation rolls, all assessments for the repair thereof shall 'be imposed according to such valued rent.' The judges seemed to be all of opinion that these enactments were not intended to make any alteration in the incidence of parochial taxation, but only to furnish a convenient means of determining the amount of liability in cases where the real rent was antecedently the proper standard. They recognised, moreover, the distinction above given effect to, between the expense of repairing the church and other parochial burdens.[139] Subjects producing casual profits, such as coal-mines, are not included in the assessment.[140] In most cases the liability is general, resting on all heritors: but where a glebe is designated from kirk lands, only the owners of kirk lands are liable in relief;[141] and wherever the minister's grass is designated in kind, the same is true, and the money allowance in lieu of it seems to follow the same rule.[142] The expense of the erection, improvement, enlargement, purchase or acquisition of churches, manses, and churchyard-walls may now be raised by annual assessments extending over any period not exceeding ten years, and money may be borrowed on security of these assessments.[143]

Miscellaneous rules.

IV.—Mode of Ascertainment.

Statute and custom having thus imposed on the body of heritors the duty of providing and maintaining these ecclesiastical subjects, have therewith conferred the necessary powers for acting by meeting and resolution and through officers. The rules are very similar to those which bind other deliberative or executive bodies. It will be prudent to follow the mode of calling meetings laid down in the Ecclesiastical Buildings Act of 1868,[144] through

IV. Mode of ascertainment. Heritors' meetings.

[139] 8 Macph. 739, 740, 742, 745.

[140] Bell *v.* Wemyss, 1805, M. *v.* Kirk, Appx. No. 3.

[141] 1594, c. 202; (1644, c. 31); St. 2.3.40; and cases in Mags. of Montrose *v.* Scott, 20th Jan. 1832, 10 S. 211.

[142] Fergusson *v.* Glasgow, 1745, M. 5157; Durie *v.* Thomson, 1755, M. 5161.

[143] 25 & 26 Vict. c. 58; 29 & 30 Vict. c. 75.

[144] 31 & 32 Vict. c. 96, sect. 22. The section contemplates requisition by the

intimation by the minister after forenoon service, and circular letters to all the heritors,[145] if forty or under, twenty-one days before the meeting; or if more than forty, by advertisement in a county newspaper for two successive weeks. But all that seems to be necessary at common law to bind any recalcitrant heritor is, that he has received some formal intimation, and be otherwise well informed of the matter in hand.[146] Proxies are admitted; voting (except as to the disjunction of parishes)[147] proceeds *per capita*,[148] and the chairman has a deliberative without any casting vote.[149] Competent resolutions, arrived at without gross *culpa* or fraud by majorities at such meetings, and not brought under review, as below, are binding on every heritor, 'whether he be sane or insane, 'major or minor, present at the meetings or absent, voting with 'the majority or with the minority, acquiescing in or protesting 'against what is done.'[150]

Presbytery.

The heritors, being aware of, and willing to fulfil, their statutory duty in regard to these ecclesiastical subjects, may proceed to perform it without objection from within and without interference from without.[151] Even when this is the case, however, it is usual for them to lay the plans before the Presbytery, more especially when they desire to obtain a decree of 'free manse.' It is more usually the case that the initiative is taken by the minister and the Presbytery—a body on which, as successor to the post-Reformation prelates, has been imposed more by custom than statute the duty of superintending and controlling the heritors of parishes within its bounds in regard to the burdens now in question; and even, in case of their refusal, of taking the matter entirely into its own hands, as in their stead and place.[152] The only matter withdrawn from the cognisance of the Presbytery is the 'plant-'ing' of a church in a new parish.[153] In regard to the foregoing duties of heritors, the control of the Presbytery is confined to securing the substantiality and sufficiency in amount of the

heritors' clerk, a heritor or heritors owning one-fourth of the value of the parish, or the minister.

[145] Cf. Maxwell *v.* Gordon, 1816, 4 Dow, 279, 280.

[146] Walker *v.* Pres. of Arbroath, 1st March 1876, 3 Ret. 498, affd. 4 Ret. H.L. 1. The heritor was present at the publication of the edict in church, and had been in treaty with the body of heritors before the question was raised.

[147] 1707, c. 9; 7 & 8 Vict. c. 44, sect. 1.

[148] Robertson *v.* Murdoch, 23d Feb. 1830, 8 S. 587, citing Campbell *v.* Stirling, 4th March 1813, F.C., affd. 6 Pat. 238 (females thus voting).

[149] Last case.

[150] Boswell *v.* D. Portland (Mauchline), 9th Dec. 1834, 13 S. 148, 154.

[151] Boswell, [150]; see also Cunninghame *v.* Deans, 12th Dec. 1811, F.C.; Campbell, 19th May 1815, F.C.; Porterfield *v.* Gardner, 19th Dec. 1829, 8 S. 277, 281 note; M'Neel *v.* Robertson, 27th May 1836, 14 S. 849, 851 note.

[152] Dunbar, 1804, M. Jurisdiction, Appx. 4.

[153] 1707, c. 9; 7 & 8 Vict. c. 44.

accommodation to be afforded, and has nothing to do with the mere style or ornamentation.[154] The Presbytery,[155] usually at the instance of the minister, proceeds by visitation duly advertised; receives reports from men of skill; orders the repairs or rebuilding or enlarging, or designates the ground required, as the case may be; contracts for the work to be done;[156] prepares a scheme for allocation of the expenditure by means of a collector,[157] and decerns for payment conform to the same, its decree being put into execution by interposition of the authority of the Court of Session.[158]

Instead of the formerly existing review of the judgments of Presbyteries by advocation or suspension, there has now been substituted an appeal to the sheriff, the effect of which is to stay all further procedure in the Presbytery.[159] The Act cited applies to all the operations which form the subject of this chapter; and the appeal is none the less open, that the proceedings in the Presbytery had been incompetently issued and incompetently dealt with.[160] The appeal is by summary petition, presented by the minister or any heritor, and intimated by circular or advertisement (sects. 3, 4, 5). There is a further exclusive appeal to the Lord Ordinary on Teinds, whose judgment is final, and not subject to any review (sects. 16-20). Proceedings will take this course, though in the event of one of the parties succeeding it will appear that the Presbytery had no jurisdiction, and the Court will refuse to stop a pending suit, while reserving to the other party any right he may have to raise the point of jurisdiction before the ordinary tribunal.[161] The provisions of the Land Clauses Act are incorporated in aid of the sheriff's designations (sect. 21). The incidence of assessment at common law is restated (sects. 23 and 24).[162] And special provisions are enacted for the cases of rebuilding, repairing, and erecting a church or manse; rebuilding or repairing churchyard-walls, designing and excambing a glebe, churchyard, or site for church or manse; and declaring a free manse (sects. 7-12). The object of the statute is to put the sheriff in possession of the same jurisdiction as the Presbytery, in whose place he comes, when any party to these proceedings is dissatisfied with its determinations.

Appeal.

[154] Min. *v.* Her. of Tingwall, 1787, M. 7928; Hamilton *v.* Pres. of Hamilton, 15th Nov. 1827, 6 S. 50; M'Neill *v.* Nicolson, 24th Jan. 1828, 6 S. 425.

[155] See Cook's Styles, p. 167 *et seq.*

[156] Dunbar, [152]; Sanderson *v.* Macfarlane, 30th March 1868, 7 Macph. 701.

[157] E. Glasgow *v.* Miller, 1st Feb. 1831, 9 S. 370, affd. 7 W.S. 185.

[158] M'Neel *v.* Robertson,[151].

[159] 31 & 32 Vict. c. 96; see s. 3, and Pres. of Deer *v.* Her. of Pitsligo, 5th July 1876, 3 Ret. 975.

[160] Her. of Pitsligo *v.* Gregor, 18th June 1879, 6 Ret. 1062.

[161] Arbroath Mags. *v.* Presb., 13th March 1883, 10 Ret. 767.

[162] Cf. the similar clause in the Valuation Act, 17 & 18 Vict. c. 91, sect. 33.

CHAPTER XXXVII.

POOR-RATES.[1]

Act of 1845.

THE subsisting Poor Law Act of 1845,[2] as amended in 1861,[3] throws the burden of providing for the paupers in each parish or combination of parishes in Scotland, to the extent of one half upon the owners and the other half on the tenants or occupants of all lands and heritages within the same, rateably according to the annual value of such lands and heritages (sect. 34). The

'Owner.'

word 'owner' is defined as applying to liferenters as well as fiars, and to tutors, curators, commissioners, trustees, adjudgers, wadsetters, or other persons who shall be in the actual receipt of the rents and profits of lands and heritages (sect. 1), without any regard to the title by which they hold.[4] The term includes tenants in building-leases and other long leases.[5] In the same way, the person holding the land under the owner, and who is in

'Occupier.'

the personal occupation of it, is held to be the occupier under the statute, without regard to his title of possession.[6] The phrase

'Lands and heritages.'

'lands and heritages' is defined in the statute in nearly the same terms as in the later Valuation Act, by which the earlier definition is, so far as different, superseded or explained.[7] The two

Sole mode of assessment.

other optional modes of assessment (for which the ascertainment of means and substance was necessary) furnished by the 34th section of the Act having been gradually disused and finally

[1] The law on this subject is more fully discussed in the special treatises of Dunlop (new ed. 1854); M'Neel-Caird (6th ed. 1851); and Guthrie Smith (3d ed. 1878). Only a small part of these works, however, is occupied with assessment, which alone is the subject of the present chapter.

[2] 8 & 9 Vict. c. 83.

[3] 24 & 25 Vict. c. 37.

[4] *Per* L.J.-C. Inglis in Crawfurd *v.* Stewart, 6th June 1861, 23 D. 965, 971 (a case of shooting-tenant).

[5] Sect. 44, and Barrhead Ry. *v.* Caledonian Ry., 20th July 1855, 17 D. 1148, revd. 10th Feb. 1860, 22 D. H.L. 1.

[6] Crawfurd *v.* Stewart, [4].

[7] See the chapter on the Valuation Roll, *supra*, p. 194.

abolished in 1861, the only variation now allowed is that of the 35th section, which permits the Parochial Board, with the approval of the Board of Supervision, to keep up any system established at the date of the Act by local Act or usage. Under this section it has been held that the continuance of a custom of assessing according to gross rental, without the deductions which will be noticed below, was legal, and could not be disturbed by a ratepayer who alleged peculiar hardship.[8]

On owners as a class, and occupiers as a class.

The words of the 34th section have been authoritatively construed to import the imposition of assessment in such a way that one half of it should be imposed on the owners as a class, and the other half on the tenants or occupiers as a class; and not in such a way as to throw a uniform rate on all the ratepayers indiscriminately.[9] 'If owners and occupants necessarily represented 'the same value and paid the same amount of tax, the result' of both modes 'would be the same. But it is hardly possible that 'that should be the state of the facts. Occupancy is liable to 'many vicissitudes. Houses may be unlet and unoccupied. 'Tenants and occupants may be so poor that their taxes are 'irrecoverable.'[10]

Classification.

By the 36th section, the Parochial Board, with the concurrence of the Board of Supervision, is empowered to distinguish the lands and heritages 'into two or more separate classes, according to the 'purposes for which such lands are used and occupied, and to fix 'such rate upon the tenants or occupants of each class respectively as to such boards may seem just and equitable.' The purpose is to equalise the burden as much as possible between the occupants of dwelling-houses and the employers of many heritable subjects which are really tools of trade—such as shops, mines, and farms. The classification does not extend to owners.

'Annual value.'

The words 'annual value' in the first-cited section are thus defined—'the rent at which one year with another such lands and 'heritages might in their actual state be reasonably expected to 'let from year to year, under deduction of the probable annual 'average cost of the repairs, insurance, and other expenses, if any, 'necessary to maintain such lands and heritages in their actual 'state, and all rates, taxes, and public charges payable in respect 'of the same' (sect. 37). Nine years after the date of the statute the Valuation Act furnished an authoritative estimate of the 'gross 'annual value,'[11] without the deductions here mentioned. The

[8] Croll *v.* Sc. Central Ry., 16th March 1861, 23 D. 747.

[9] Galloway *v.* Nicolson, 19th March 1875, 2 Ret. 650.

[10] Ibid. *per* L.P. Inglis, p. 655.

[11] See obs. of L. Benholme in Steuart

subjects valued, and mode of valuation therein contained, have been sufficiently explained in an earlier part of this work. The deductions which require to be made in order to arrive at the *net* annual value, which is the basis of assessment, are peculiar to the present statute, and must in every case be made before levying the rates, except where there has been a contrary custom prior to 1845, and continued thereafter, as already pointed out.[12]

Deductions.

The deduction for repairs, insurance, and other expenses necessary to maintain the subject in its actual state, is to be calculated according to the probable annual average, and will of course vary with the nature of the property. The only subjects which have come before the Court in this relation have been public works—such as canals,[13] railways,[14] and gas-works.[15] In the first of the railway cases it was observed that the repairs already allowed in making up the gross value, under the head of maintenance of way, ought not to be again deducted; in the second, that the deductions now in question were not abrogated by the Valuation Act, and that they had nothing to do with the classification already referred to; and in the third, that the percentage to be allowed was to be the proportion borne by the average annual expenditure in repairs (including partial renewal) to the average annual value, without the addition of any percentage in respect of increased renewals, necessary on a comparison of the state of the line with the ordinary 'life' of a railway. In the gas-work case, deduction was allowed for annual depreciation, including the annual depreciation and the renewal of meters, for insurance, on the footing that the company was insuring itself, and for poor-rates, but not for feu-duties. Income-tax is not deducted, though derived from lands and heritages, being a personal burden.[16]

On whom levied.

By the 31st section of the Valuation Act it is enacted that where subjects are let separately at rents not exceeding £4, and the names of the occupiers are not inserted in the roll, the proprietor shall be charged with the whole assessments, reserving a claim for reimbursement of what was properly chargeable against the occupiers. On the other hand, the 43d section of the Poor

v. Keith Board, 16th Oct. 1869, 8 Macph. 26, 30; and E. and G. Ry. *v.* Meek, 10th Dec. 1864, 3 Macph. 229, 236.

[12] Case of Croll *v.* Sc. Central Ry., 8.

[13] See Anderson *v.* Union Canal, 7th March 1839, 1 D. 648; 12th Jan. 1847, 9 D. 402.

[14] E. and G. Ry. *v.* Adamson, 10th March 1853, 15 D. 537, 28th June 1855, 17 D. 1007; E. and G. Ry. *v.* Meek, 10th Dec. 1864, 3 Macph. 229; E. and G. Ry. *v.* Hall, 19th Jan. 1866, 4 Macph. 301.

[15] Glasgow Gas Light Co. *v.* Adamson, 23d March 1863, 1 Macph. 727.

[16] Greville *v.* Thomson, n.r., Smith's Poor Law, p. 169; E. and G. Ry. *v.* Hall, 29th June 1866, 4 Macph. 1006.

Law Act provides for the levying of the whole assessment from the tenants or occupiers, with right to them to recover the half due by the owners, or to retain the same out of their rents on production of the collector's receipt. This mode of collection is frequently adopted, but is only applicable to those cases where the assessment on owners and occupiers is an equal rate, there being in the parish no exemption on the ground of poverty, no failure to levy on account of non-occupation, and no classification of occupancy.[17]

Exemptions.

The privilege of exemption from payment of assessment in the city of Edinburgh [18] possessed by members of the College of Justice and officers of the Queen's household is abolished as regards poor-rates (sect. 50), and no exemption is introduced by the statute, except such as may be deemed proper and reasonable by each parochial board on the ground of inability to pay (sect. 42).[19] Certain subjects, however, are exempted, for various reasons. Thus, some are excluded from the valuation roll, and therefore from assessment, as being *extra commercium* and incapable of beneficial occupation—such as parish churches;[20] or as being Crown property, properly so called, and property occupied by the servants of the Crown, and property occupied for the purpose of the administration of the government of the country.[21] Again, the exemption of the manses and glebes of the Established Church which existed before the Act [22] has not been abrogated by it.[23] The same privilege has been extended to all churches, chapels, meeting-houses, or premises in Scotland exclusively appropriated to public worship, even though these, or any room or part of them, be used for Sunday or infant schools, or for the charitable education of the poor.[24] Any rating authority may now exempt Sunday-schools and ragged-schools.[25] And freedom from all local rates is now enjoyed under certain conditions by premises belonging to any society instituted for purposes of science or the fine arts exclusively, either as tenant or as owner, and occupied by it for the transaction of its business, and for carrying into effect its

[17] Galloway *v.* Nicolson, 19th March 1875, 2 Ret. 650.

[18] See 1 Mackay, Court of Session Practice, p. 85; and Morris *v.* Orr, 11th Dec. 1840, 3 D. 232.

[19] Non-occupation does not relieve the owner—Tod *v.* Mitchell, 26th Jan. 1858, 20 D. 445.

[20] Kingoldrum Ca., 123, Val. Appeals, 1877, 4 Ret. 1149.

[21] *Per* L. Westbury in Greig *v.* Univ. of Edinburgh, 8th June 1868, 6 Macph. H.L. 97, 100. This exemption has been of late waived by arrangement. See as to meliorations in certain cases, 23 & 24 Vict. c. 112; 31 & 32 Vict. c. 110.

[22] Her. of Cargill *v.* Tasker, 29th Feb. 1816, F.C.

[23] Forbes *v.* Gibson, 17th Dec. 1850, 13 D. 341, affd. 1. Macq. 106.

[24] 28 & 29 Vict. c. 62.

[25] 32 & 33 Vict. c. 40.

purposes, provided that such society shall be supported wholly or in part by annual voluntary contributions, and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members.[26] Property cannot be assessed in two parishes, as might have happened before the Poor Law Act (sect. 46);[27] nor twice in the same parish, by being, through mistake, entered twice in the Valuation Roll, which in a matter which relates to assessment rather than to valuation is not conclusive.[28]

Recovery.

Either yearly or half-yearly the Parochial Board determines the amount of assessment for the year or half-year then next ensuing, and makes up a roll of the persons liable, and of the sums to be levied from each of them; intimates, through the collector, to each the amount of the sum to be levied from him, and the time of payment; and corrects any error, omission, or surcharge (sect. 40). It may impose additional assessments in case of unforeseen deficiency (sect. 41). Misnomers in the Christian name or surname or designation of a ratepayer are to be disregarded *dummodo constet de personâ* (sect. 51). The whole powers and right of issuing summary warrants and proceedings, and all remedies and provisions enacted for collecting, levying, and recovering the land and assessed taxes, or either of them, and other public taxes, are applicable to poor-rates; and they may also be recovered in the Small Debt Court (sect. 88). The first mode refers to the Act 52 Geo. III. c. 95, sect. 13, which puts the power of issuing warrants to poind into the hands of any two commissioners of supply for the county or of the sheriff. The Poor Law Act in the last-cited section adds justices of the peace: and it has been decided that the warrant of one justice is sufficient; that it does not require to cite the statute of George;[29] and that in granting it the magistrate is acting in a ministerial capacity.[30] If, on the other hand, application is made in the Small Debt Court or in the Sheriff's Ordinary Court, the judge is called on to exercise his judicial functions, and to decide on the merits as well as the form of the assessment, more especially seeing that the Parochial Board is not, as the heritors and kirk-session under the old law were, a court of

[26] 7 & 8 Vict. c. 36. See the cases collected in Guthrie Smith, p. 184; and 9 Poor L. Mag. 393, 449 (by D. Crichton).

[27] M'Craw *v.* Cunninghame, 1837, 2 S. and M'L. 773; Burns *v.* Ewing, 17th May 1837, 15 S. 936, revd. M'L. and Rob. 435; M'Craw *v.* Allan, 15th Feb. 1839, 1 D. 503, affd. 2 Rob. 507; Allan *v.* Edinburgh and S. Leith, 14th July 1849, 11 D. 1391, affd. 1 Macq. 93.

[28] Sharp *v.* Latheron Par. Board, 12th July 1883, 20 Sc. L.R. 771.

[29] Oakley *v.* Campbell, 6th Nov. 1867, 6 Macph. 12.

[30] Ibid., M'Tavish *v.* Caledonian Canal, 3d Feb. 1876, 3 Ret. 412.

justice.[31] Any number of local rates and taxes due by the same person may be included in the same complaint, and the invalidity of one part will not affect the rest.[32] The alternative mode of recovery by action lets in a claim for interest on arrears, running from the date at which each year's rate should have been paid.[33]

Surcharges.

The remedies at law against an unjust assessment existing prior to the Act are continued, 'but to the extent and effect only 'of exempting' the party aggrieved from payment of any surcharge which may have been made upon him (sect. 40). In most cases where action is competent at all,[34] the proper form is by suspension of a surcharge[35] or by reduction.[36]

Not *debitum fundi*.

The burden of poor-rates, though levied partly in respect of ownership, is not a *debitum fundi*. It therefore does not run with the land, but rests on the representatives of the original debtor.[37] It ranks, in case of bankruptcy or insolvency, before all other debts of a private nature due by the party assessed (sect. 88). And it does not fall under the triennial prescription.[38]

Registration of births, deaths, and marriages.

The local management of the system of registration of births, deaths, and marriages, introduced in 1854,[39] is intrusted in burghs[40] to the town councils; in non-burgal parishes to the parochial board;[41] and in districts united or carved out of these,[42] and in parishes where there is no poor-rate,[43] to the heritors thereof. There are also provisions for annexing small portions of a parish to an adjoining parish,[44] and for the union of the landward and burgal parts of a parish.[45] The cost of local management is thrown in burghs on the real rent of lands and heritages within burgh.[46] In non-burgal parishes it is leviable in the same manner as, and along with, but separate from, the poor-rate. In other cases it is laid on as the sheriff may direct.[47] The rate covers the payment

[31] M'Tavish, [30].

[32] 25 & 26 Vict. c. 82.

[33] Greig *v.* Mags. of Edinburgh, 12th March 1879, 6 Ret. 801; the inspector, with the approval of the Court, restricted the claim to 2½ per cent.

[34] No action at all lay in E. and G. Ry. *v.* Hall, [14]; Steuart *v.* Keith Board, [11]; Polloks *v.* Petrie, 26th June 1851, 13 D. 1234.

[35] See E. and G. Ry. *v.* Meek, [14]; Tod *v.* Mitchell, 26th Jan. 1858, 20 D. 445.

[36] Archibald *v.* M'Intyre, 24th Jan. 1856, 18 D. 329.

[37] Allan *v.* Heriot's Hosp., 26th May 1846, 20 Sc. Jur. 1; see Macfarlane *v.* Monklands Ry. 29th Jan. 1864, 2 Macph. 519, 532 *per* L.J.-C. Inglis.

[38] Monro *v.* Graham, 21st Nov. 1857, 20 D. 72.

[39] 17 & 18 Vict. c. 80; 18 and 19 Vict. c. 29; 23 and 24 Vict. c. 85; 42 & 43 Vict. c. 8.

[40] Royal and Parliamentary, bounded as described in 2 & 3 Will. IV. c. 65, or in their constitution. Act 1854, §§ 66, 76.

[41] Act 1854, § 8.

[42] Act 1854, §§ 10, 76; Act 1855, § 4.

[43] Act 1854, §§ 13, 76.

[44] Act 1854, § 11.

[45] Act 1860, § 5.

[46] Act 1854, § 66.

[47] Act 1854, § 50; Act 1855, § 4; Act 1860, § 50.

of the registrar's account, as verified by the sheriff, according to a fixed scale of fees; such other sum as may be necessary for his remuneration, and for the expense of taking the duplicate register yearly to the sheriff;[48] his salary[49] and petty disbursements;[50] and the providing of fire-proof accommodation for the books, and, if necessary, of an office.[51]

[48] Act 1854, §§ 17, 50.
[49] Act 1854, § 51; Act 1860, § 18.
[50] Act 1860, § 17.
[51] Act 1845, § 22; Act 1860, § 8.

CHAPTER XXXVIII.

SANITARY AND KINDRED STATUTES.

We have next to consider the assessments leviable under a group of statutes which agree in the main in these two respects, that they have for their object the preservation and amelioration of the public health, physical and intellectual, and for their enforcement the same body, usually called the Local Authority.

Public Health Act, 1867.

The leading statute is the Public Health Act of 1867,[1] as amended in some minor details in 1871, 1875, 1879, and 1882.[2] Its leading objects are the removal of nuisances, the prevention and mitigation of disease, the regulation of common lodging-houses, the provision and regulation of drainage-sewers and water-supply, and the utilisation of sewers.

Local authority.

The local authorities for the execution of the Act are: in places within the jurisdiction of any town council and not subject to the jurisdiction of police commissioners or trustees, as after mentioned—the town council; in places within the jurisdiction of police commissioners or trustees exercising the functions of police commissioners under any general or local Act—the police commissioners or trustees; in any parish or part thereof over which the jurisdiction of a town council or of police commissioners or trustees exercising the functions of police commissioners does not extend — the parochial board of such parish (sect. 5). Where parishes include more than one jurisdiction, or any of these districts is situated in more than one county, the Board of Supervision is authorised to determine which of the rival bodies shall be the local authority, and to which county the district shall be held to belong (sects. 5 and 6). The

[1] 30 and 31 Vict. c. 101. The first Nuisances Removal Act—9 & 10 Vict. c. 96—was temporary. The next two—11 & 12 Vict. c. 123, and 12 & 13 Vict. c. 111—were repealed by 19 & 20 Vict. c. 103; which, again, with the exception of Part V., was repealed by the present statute.

[2] 34 & 35 Vict. c. 38; 38 & 39 Vict. c. 74; [42 and 43 Vict. c. 15, repealed]; 45 Vict. c. 11.

Board of Supervision exercises certain powers of inquisition and control (sects. 8 *et seq.*; 32 *et seq.*; 44, 53 *et seq.*; 96 *et seq.*)

Assessment on large burghs.

The rules with regard to assessments for the purposes of the Act are contained in Part VII., and are thus distinguished: The simplest case is that of burghs[3] having a population of 10,000 or upwards, according to the census last taken, or having a local Act for police purposes which makes sufficient provision for a supply of water for domestic use.[4] In such cases the assessment is to be levied along with, but as a separate assessment from, any other assessment which the local authority may be entitled to levy—that is to say, it shall be assessed, levied, and recovered in like manner and under the like powers as (1) the police assessment, where the local authority is a town council, police commissioners, or trustees—and if there be no police assessment, in the manner next mentioned; (2) the assessment for the relief of the poor, where the local authority is a parochial board, or where there is no such assessment, by an assessment levied in such manner as an assessment might have been levied for the use of the poor. Then follows the proviso that the annual value of certain subjects shall be held to be the nearest aggregate sum of pounds sterling to one-fourth of their value, as entered in the valuation roll. These subjects are: All lands and premises used exclusively as a canal or its basin or towing-path, or as a public railway, with the exception of its stations, depots, wharfs, and buildings (which shall be assessed at full value); underground water or gas pipes, or underground works of any water or gas company; woodland, arable, meadow, or pasture land, or other land used for agricultural purposes; mines, minerals, and quarries. The sheriff (or his substitute, with appeal to him alone) has exclusive cognisance of questions as to what falls within this proviso (sect. 59). In the case of burghs having a population of 50,000, the assessments shall not exceed the rate of threepence in the pound: in other burghs falling under this paragraph, a rate of sixpence is the maximum, and half-a-crown where the provisions of the Act with reference to sewerage, drainage, and hospitals have been or shall be put in force.[5]

In parishes and small burghs.

Similar rules apply to the case of burghs having a population under 10,000, and not having a local Act for police purposes, and burghs having such an Act, but one which makes no sufficient

[3] That is, burghs royal, parliamentary, and incorporated by Act of Parliament; burghs of barony and regality, and populous places having a town council, police commissioners, or trustees acting as such (sect. 3).

[4] Sect. 95, as amended, 34 & 35 Vict. c. 38, sect. 1.

[5] Sect. 95, as amended, 34 & 35 Vict. c. 38, sect. 1.

provision for a supply of water for domestic purposes,[6] and parishes, so far as subject to the jurisdiction of the parochial board. But the following distinctions appear: The proviso above mentioned applies only where the local authority is a town council, police commissioners or trustees, or a parochial board whose district includes a town possessing any of these officials (sect. 94); and for the purposes of a domestic water-rate, manufactories are put into the same category as mines, minerals, and quarries.[7] Further, where a special water-supply district has been formed (sect. 89), the expense comes out of a special assessment levied within it;[8] and where a sufficient supply of water has been so obtained and is maintained therein, the premises within the said district are not liable for the expense of supplying water for other parts of the district of the local authority (sect. 94).

Special drainage assessment.

In all cases—whatever be the character of the district under the control of the local authority—if a special drainage district has been formed, and drainage-works therein executed and maintained, similar rules with respect to special assessment and freedom from liability beyond, are applicable (sects. 93, 94, 95).[9]

Borrowing powers.

Powers of borrowing on security of the general and special assessments are bestowed on the local authority for the purpose of making, enlarging, or constructing sewers (sect. 86), constructing, purchasing, enlarging, or reconstructing water-works (sect. 89, 6), and building or otherwise providing hospitals,[10] repayable in the first two cases by instalments within thirty, and in the last case within thirty-five years. And the Public Works Loan Commissioners may lend money to the local authority for any of these purposes at three and a half per cent, repayable in fifty years under certain conditions.[11] The boundaries of any special drainage district, or of any special water-supply district, may now be altered by the local authority on the requisition of ten inhabitants of its district, after certain notices and advertisements, and subject to appeal to the sheriff.[12]

General Police Act.

In burghs which have adopted the General Police Act of 1862, there are similar alternative powers conferred on the commissioners with regard to sewers, drains, and water-supply by Part IV. Sections VII.-X.;[13] and these two statutes

[6] Sect. 94, as amended, ibid.

[7] 34 & 35 Vict. c. 38, sect. 1.

[8] See case in which the water was turned to other than domestic uses, and the local authority disconnected the pipe, Robertson *v.* Cults L. A., 11th July 1883, 20 Sc. L.R. 766.

[9] See Rules of Board of Supervision, 1874, p. 15.

[10] 34 & 35 Vict. c. 38, sect. 2.

[11] 38 & 39 Vict. c. 74, sect. 3.

[12] 45 Vict. c. 11.

[13] 25 & 26 Vict. c. 101, sect. 182 *et seq.*

repeal or render unnecessary the Sewage Utilisation Acts, which primarily related to England.[14] The correlation of the Police and Health Acts, which differ greatly as regards assessment, has given rise to some difficulty. It has been decided that the adoption of the Police Act superseded a special drainage district formed under the Public Health Act, where nothing had been done by the local authority to carry out their drainage powers, the police area including, though not being coincident with, the said district. Consequently, when the police commissioners came to assess for a drainage scheme applicable to their whole area, the old district was held not to be separately assessable, nor mines and minerals within it entitled to the fractional rating which, except as to water-supply, is only to be found in the Public Health Act.[15]

Kindred Acts.

The machinery thus furnished by the Public Health Act or by its predecessors, the Nuisances Removal Acts, has been taken advantage of for a number of kindred purposes. The earliest Act which need be here noticed is the Burial-Grounds Act, 1855,[16] passed for the purpose of closing, when necessary, existing burial-grounds, and providing new or additional accommodation. The local authority is called the 'parochial board,' which, in parishes not within burgh limits as defined by the Valuation Act,[17] is the body ordinarily known as such, or that part of it, in case of there being a combination, which belongs to the parish; and if within these limits, the town council, or the magistrates of a burgh of regality included within them (sect. 2). The sheriff has the same powers with reference to mixed parishes as the Board of Supervision in the Public Health Act (Burial-Grounds Act, sect. 3). The expenses incurred by the parochial board in carrying the Act into execution, so far as not covered by the price of lairs,[18] and fees of interment (sect. 24), are to be raised by assessment, to be levied in the same way as that which may be in force for the time being for the relief of the poor within the parish, with the like powers (sect. 26). Borrowing powers, on security of the assessments, are conferred on the board, the debt to be repaid in not more than twenty annual instalments (sect. 27); and the Public Works Commissioners may lend to it.[19] The local authority under the Public Health Act has also certain powers of initiating proceed-

Burial-Grounds Act.

[14] 28 & 29 Vict. c. 75; 29 & 30 Vict. c. 90 (repealed as to Scotland by the Public Health Act, sect. 1); 30 & 31 Vict. c. 113.

[15] Edmonstone *v.* Kilsyth Comrs., 9th June 1882, 9 Ret. 917. (Even if the old drainage system had been carried out, the proper course would have been to exclude it in adopting the Police Act.)

[16] 18 & 19 Vict. c. 68.

[17] 17 & 18 Vict. c. 91, sect. 36.

[18] Sect. 18, amended 44 & 45 Vict. c. 27.

[19] 20 & 21 Vict. c. 42.

ings against dangerous burial-grounds, and of burying bodies and providing dead-houses.[20]

The Bakehouse Regulation Act, 1863,[21] was passed for the purpose of limiting the hours of labour of young persons employed in bakehouses, and making regulations with respect to cleanliness and ventilation. The local authority to which the enforcement of the Act is committed is the same as that which once existed under the Nuisance Removal Acts, and now flourishes under the Public Health Act. The expenses incurred by it may be paid out of any rate levied by it and applicable to payment of its expenses in fulfilling its other duties (sect. 7). Bakehouse Act.

Next follow the Public Libraries Acts of 1867, 1871, and 1877.[22] The first of these is the principal Act, and has for its object the provision and maintenance of free public libraries, and, in connection with these, art galleries and museums. The local authority in a burgh (in the sense of 3 & 4 Will. IV. c. 77) is the town council; in burghs of barony and regality, and police burghs, the commissioners or trustees; and in parishes, the parochial board (sect. 2),—each body acting in the management through a standing committee (sect. 14). The adoption of the Act may be moved and resolved upon or negatived either by a meeting of householders or by means of voting papers.[23] The expenses caused thereby and in carrying the Act into execution shall, in the case of a burgh or district, be paid out of the police-rate, and be leviable and recoverable either as part thereof or as a separate rate; and, in the case of a parish, out of a rate to be made, levied, and recovered in like manner and from the same description of persons and property as the poor-rate (sect. 5). The rate is not to exceed a penny in the pound of yearly rent, and is to include the interest of borrowed money, the formation of a sinking fund, the defraying of expenses of maintenance and management, and the purchase of the contents of the library, gallery, or museum.[24] The authority has most of the powers contained in the Commissioners Clauses Act, 1847,[25] and may borrow on mortgage or on the security of the rates sums not exceeding twenty years' purchase of the maximum rate, and lay aside as a sinking fund for the extinction of loans a sum annually equal to at least one-fiftieth part of the money so borrowed.[26] Public Libraries Act.

[20] Public Health Act, 1867, sects. 16, 43, 96.

[21] 26 & 27 Vict. c. 40.

[22] 30 & 31 Vict. c. 37; 34 & 35 Vict. c. 59; 40 & 41 Vict. c. 54. The earlier Acts, 13 & 14 Vict. c. 65, and 16 & 17 Vict. c. 101, were repealed by 17 & 18 Vict. c. 64, which is itself, along with 29 & 30 Vict. c. 114, repealed by the first-cited Act.

[23] Sect. 3, amended 40 & 41 Vict. c. 54.

[24] Sect. 6; 34 & 35 Vict. c. 59, sect. 7.

[25] 34 & 35 Vict. c. 59, sect. 2; 10 & 11 Vict. c. 16.

[26] 34 & 35 Vict. c. 59, sects. 4, 5.

Artisans and Labourers Dwellings Acts. Of 1868.

The intendment of the Artisans and Labourers Dwellings Act, 1868,[27] as set out in the preamble, is to make provision for taking down or improving dwellings, occupied by working men and their families, which are unfit for human habitation, and for the building and maintenance of better dwellings for such persons instead thereof. The execution of the Act is intrusted to the local authority in places of 10,000 of a population—that is, in burghs, the magistrates and town council; in places governed under a general or local police Act, the commissioners or trustees—who, under the advice of an officer of health, may order structural alteration or improvements on premises, or their demolition. Failing performance of the works by the owner, the local authority may take the matter into their own hands, accounting for the balance after sale of the materials in case of demolition. The owner of premises may now, within three months after service of an order by the local authority to execute works or demolish, require that body to purchase the premises, the price, in default of agreement, being fixed by an arbiter appointed by the Home Secretary.[28] The expenses incurred by the local authority are to be defrayed out of a special local rate not exceeding twopence in the pound, leviable like other local rates (sect. 31 and Act 1879, sect. 21, and Sched. I. A); and the Public Works Loan Commissioners are authorised to lend money to the local authority, for purchasing sites for and building dwellings for the labouring classes, on mortgage thereof and of the local rate (Act 1879, sect. 22).

Of 1875.

The later Act of 1875[29] applies to Scotland only, and only to royal and parliamentary burghs containing, according to the last census, a population of 25,000 and upwards. The local authority is that provided by the Public Health Act, 1867, as above set forth; and its powers are much more extensive than under the Act of 1868, since they are authorised to pull down and demolish not single tenements only but whole portions of their district, and to reconstruct in an improved state. The twentieth section enacts that a separate account shall be kept by the local authority of

[27] 31 & 32 Vict. c. 130. The Act 14 & 15 Vict. c. 34, applies to England only. The Loan Act, incorporated with it (29 & 30 Vict. c. 28), is extended, so far as applicable, to Scotland by 30 & 31 Vict. c. 28, sect. 4. The Act of 1868 is amended by 45 & 46 Vict. c. 54, Part II., but except so far as it deletes a part of the next-mentioned Act, this statute seems not to apply to Scotland.

[28] 42 & 43 Vict. c. 64, sect. 5 *et seq.*, amended by 43 Vict. c. 8.

[29] 38 & 39 Vict. c. 49; amended (though not as to assessment) by 43 Vict. c. 2. The compensation clauses of the corresponding English Act 38 & 39 Vict. c. 36 were considered in Carr *v.* Metropolitan Board, 14 Ch. D. 807.

their receipts and expenditure. The original fund and deficiencies in revenue are to be supplied out of a local rate and by borrowing. The local rate is an assessment levied and recovered along with, but separately from, any of the rates mentioned in sect. 95 of the Public Health Act.[30] Power is given to borrow on the security of property acquired in executing the Act, which property the local authority may mortgage. The interest is payable out of the rate. The same power of borrowing on security of the rate is bestowed as the local authority has under the sewerage clauses of the Public Health Act; and loans may be had from the Public Works Loan Commissioners on the same terms as under that Act as amended.[31]

Rivers Pollution Act.

It is enough to refer to the 8th and 21st sections of the Rivers Pollution Act, 1876, printed for another purpose in the Appendix.[32] It there appears that the local authority under the Public Health Act is empowered to enforce the Act, and that the expenses incurred are payable as if they were incurred in the execution of the earlier statute.

Public Parks Act.

The most recent statute which falls to be noticed in this place is the Public Parks (Scotland) Act, 1878.[33] By it the local authority of any burgh under the Public Health Act is empowered to purchase or take on lease, lay out, plant, improve, and maintain lands for the purpose of being used as parks, public walks, or pleasure-grounds, and to support or contribute to the support of parks, public walks, or pleasure-grounds provided by any person whatever (sects. 2, 3), whether the lands be situated within or without their district (sect. 5). A separate account must be kept in respect of transactions under the Act; and the moneys required are to be supplied out of the local rate or out of loans. The local rate is an assessment to be levied and recovered along with, but as a separate assessment from, any one of the assessments mentioned in sect. 95 of the Public Health Act[34] (sect. 13). Money may be borrowed on security of the lands acquired, which may be mortgaged for that purpose (the interest being defrayed out of the rate), or on security of the rate, as under the sewerage clauses of the Public Health Act. There is no limit on the amount of the rate (sect. 14).

Smoke Nuisance Acts.

The Smoke Nuisance Acts[35] are so far peculiar, that while charges and expenses incurred by the local authority, and not

[30] *Supra*, p. 654; sect. 20 of this Act.
[31] *Supra*, p. 655; sect. 21 of this Act; and 38 & 39 Vict. c. 74.
[32] 39 & 40 Vict. c. 75, *infra*, Appx. No. 14.
[33] 41 & 42 Vict. c. 8.
[34] *Supra*, p. 654.
[35] 20 & 21 Vict. c. 73; 24 & 25 Vict. c. 17; 28 & 29 Vict. c. 102.

recovered from the parties, are to be defrayed out of an assessment to be levied along with and in like manner as the poor-rate, and penalties go in aid thereof, the local authority is not the parochial board, but the procurator-fiscal of the burgh or county, or of any district thereof, or the commissioners of police acting under any local or general Act of Parliament.[36]

[36] 20 & 21 Vict. c. 73, sects. 12-14.

CHAPTER XXXIX.

SCHOOL-RATES.

Education Acts.

THE only other parochial burden which calls for notice is the education assessment, introduced by the Education (Scotland) Act, 1872, as amended in 1878 and 1883,[1] in place of the burden imposed on heritors in 1696. The principal Act vests all parish and burgh schools existing at its date, with their appurtenances, in elective bodies called school boards,[2] renewable every three years, in each parish and burgh, and throws on them the duty of providing and maintaining sufficient school accommodation for all persons resident in each such parish and burgh for whose education efficient and suitable provision is not otherwise made (sect. 23 *et seq.*), of paying teachers, and generally of furnishing efficient elementary schooling for the young. The expenses of the school board, including those incident to the election thereof (but not including the expenses of any member or candidate, are to be paid out of the school-fund, to which fund are carried all moneys provided by Parliament or raised by way of loan or otherwise received by the school board for the purposes of the fund and not otherwise appropriated, 'and any deficiency shall be raised by the 'school board as provided by this Act' (sect. 43)—that is, by means of a local rate, applicable for satisfying both present and future liabilities. The school board of each parish or burgh[3] shall annually, and not later than 12th June, certify to the parochial board or other authority charged with the duty of levying the assessment for relief of the poor the amount of the deficiency. The said board or other authority must then add the same under the name of 'school-rate' to the next assessment for relief of the poor, and lay on and assess the same, one-half upon

School boards.

School-fund.

School-rate.

[1] 35 & 36 Vict. c. 62; 41 & 42 Vict. c. 78; 46 & 47 Vict. c. 56.

[2] See *supra*, p. 188.

[3] See the def. of these words, *supra*, p. 189, note.

the owners and the other on the occupiers of all lands and heritages, levy and collect the same along with the assessment for relief of the poor when that assessment is so imposed and levied, and pay over the amount to the school board. When any burgh, parish, or school district[4] with a school board shall include two or more parishes or parts of two or more parishes having separate parochial boards, the school board must certify to each parochial board the amount of the rate on each pound of rental which they shall lay on and collect as school-rate. If there be no poor-rate, or it be differently levied, the school board must itself proceed by the same rules and with the same powers of rating as a parochial board might have done. Any surplus is carried on to, and any deficiency included in the rate for, the succeeding year (sect. 44).[5] And where the parochial board is the assessing body it must pay over the sum required, or the produce of the rate, as the case may be, without any deduction on account of the cost of levying and collecting.[6] Access to the valuation roll is to be given to the clerk or other mandatory of the school board free of charge.[7] The exemption of manses and glebes from payment of poor-rates does not extend to the school-rate.[8] By sect. 69 of the principal Act, and sect. 22 of the amending Act of 1878, a parochial board is entitled, and on order by the sheriff obtained at the instance of the school board, bound to pay reasonable fees for the education of children whose parents are from poverty unable to pay them in whole or part; and this enactment applies, although the parents are not otherwise entitled to parochial relief.[9]

Borrowing powers.

To defray the expense of providing or enlarging a school-house, the school board may borrow money, so as to spread the payment over not more than fifty years, on the security of the school-fund and the school-rate, repaying the principal by equal instalments or by means of a sinking fund. For this purpose the mortgage clauses of the Commissioners Clauses Act, 1847,[10] are incorporated with the Act, and the Public Works Loan Commissioners may advance the money (sect. 45).

[4] A district is composed of portions of two or more parishes detached from the same, and united together for the purposes of the Act, sect. 17.

[5] See as to accumulating deficits—Peffers *v.* Haddington Parochial Board, 14th July 1883, *per* L.O. Fraser, n.r.

[6] 41 & 42 Vict. c. 78, sect. 32.

[7] Ibid., sect. 25.

[8] Hogg *v.* Auchtermuchty School Board, 22d June 1880, 7 Ret. 986.

[9] Ferrier *v.* New Monkland School Board, 25th Oct. 1881, 9 Ret. 30.

[10] 10 & 11 Vict. c. 16.

CHAPTER XL.

COUNTY AND SIMILAR BURGH ASSESSMENTS.

It will be convenient to examine the county burdens under these four heads—the police assessment, the county general assessment, later burdens thrown on these funds, and miscellaneous assessments; and to take up the corresponding burgh rates alongside, so as to avoid useless repetition.

I.—The Police Assessment.

I. Police assessment. A. In counties.

A. *In Counties.*—This rate is now imposed under the Police Act of 1857,[1] which repealed the earlier Act 2 & 3 Vict. c. 65, the first attempt to set up a regular constabulary force in counties. By the Act of 1857, the Commissioners of Supply of every county in Scotland[2] are bound to establish a sufficient police force, to the satisfaction of a Secretary of State (sect. 1), and to proceed in the matter by means of a police committee (sect. 2). Rules are laid down regarding the salaries and allowances of the chief constable, his deputy and other constables; the furnishing of clothing, accoutrements, and other necessaries (sects. 3-27). These and all other expenses incurred in putting the Act into execution are to be defrayed by the commissioners out of the police assessments leviable under the Act (sect. 28). This is to be imposed on all lands and heritages within the county according to their yearly value as established by the valuation roll. The rate must be sufficient to cover the expense of collection and management and all arrears of preceding years. 'The said assessment so 'to be laid on in each year shall be payable as for the period 'from Whitsunday in such year to Whitsunday in the year imme-

Act of 1857.

Incidence.

[1] 20 & 21 Vict. c. 72; amended as to the 8th sect. by 21 & 22 Vict. c. 65.

[2] The Act only applies to Orkney and Shetland by Order in Council, which has never been issued (sect. 76).

'diately following, and may be levied either on the proprietor or 'tenant of all such lands and heritages; but such tenant, in case 'of his paying such assessment, shall be entitled to deduct the 'amount from the rent payable by him: provided always, that 'the said commissioners shall not levy assessment in respect of 'any dwelling-house, shop, or other such premises, or any offices 'or outhouses connected therewith, which shall be unoccupied and 'unfurnished during the whole period to which such assessment 'applies' (sect. 29); and deduction in respect of every unoccupied or unfurnished half-yearly term is allowed in the case of premises within a burgal part of the county (as hereafter explained) let at less than £4 a-year or for a less period than a year (sect. 30). Remission in whole or part may be granted by the commissioners on the ground of poverty or inability to pay where the premises are rated at less than £4 a-year, but upon no other account whatsoever (sect. 31). The assessment is recoverable by summary warrant, like the land and assessed taxes,[3] and is a preferable claim on a bankrupt estate (sect. 32). Disputes as to the rate which it may not be competent or convenient to try in the Small-Debt Court may be summarily and finally determined by the sheriff in such way as he may think proper (sect. 33). Detached parts of counties are to be taken as part of the counties in which they are locally situated; if marching with two other counties, as part of that with which they have the longest common boundary (sects. 35-39).

Recovery.

Detached parts of counties.

Borrowing powers.

The commissioners may provide station-houses, strong-rooms, and lock-ups, or any or either of them, for temporary confinement, and for that purpose purchase or hire premises, or appropriate premises already belonging to the county and unused; and apply the police assessment to defray the expense thereof, and of repairing and furnishing (sect. 55). And money may be borrowed for purchasing such premises and erecting such buildings, chargeable on the assessment, and repayable by twenty annual instalments (sect. 57).[4]

Districts.

If the Commissioners of Supply, or her Majesty in Council, upon petition by ratepayers, shall be of opinion that a distinction ought to be made in the number of constables appointed to keep the peace in different parts of a county, the commissioners are to divide the county into districts, alterable from time to time, and to declare the number of constables proper to each, always subject to the approval of a Secretary of State, who also has power to

[3] See *infra*, chap. 41 *ad fin.*

[4] Cf. 40 & 41 Vict. c. 53, sect. 30, as to the use of police cells.

apportion the districts on the failure of the commissioners to do so in compliance with an Order in Council (sects. 58, 60).[5] Where districts exist, the expenditure is divided into general and local—the former being laid on all the districts, the latter (consisting of the expense of the salaries and clothing of the local constables, and such other expenses as the commissioners, subject to approval, shall include therein) being defrayed by each district separately (sect. 59).

Inclusion of burghs.

The consolidation of county and burgh police in certain circumstances is provided for by the 61st and following sections. The Commissioners of Supply of any county, and the magistrates and town council of any included or adjoining burgh (royal, or parliamentary, or police), may agree to consolidate; so that the constables of each may have the same privileges and duties as those of the other.[6] The burgh is then to be represented on the police committee,[7] but the agreement may be departed from on certain conditions (sect. 61); and failing agreement, the terms of consolidation may be fixed and from time to time altered by the Queen in Council (sect. 63).

Contribution by Treasury.

Some relief to the police-rate is furnished by the 66th section, whereby the Treasury, on the certificate of the Home Secretary that the police of any county or burgh (as above defined) has been maintained in a state of efficiency for the preceding financial year, may pay a sum not exceeding one-fourth of the charge for pay and clothing. It has been the habit of the Legislature to suspend the operation of this restriction by temporary Acts in recent years,[8] and of the Treasury to increase the relief to one half.

B. In burghs. Act of 1862.

B. *In Burghs.*—The combined effect of the interpretation clause and certain other sections of the above Act[9] was to leave the management of the police system within burghs as it stood in 1857—the date of the Act—with the exception of the relief mentioned in last paragraph, and of liability to inspection. The burgh police system then stood on an Act of 1850, which had repealed and come in place of an earlier statute which was one of the first fruits of the first Reform Act.[10] This statute of 1850, except so far as already adopted, and an amendment of date 1860,[11] have themselves been repealed by the existing General Police (commonly called the Lindsay) Act, 1862.[12]

[5] The power has been exercised in five old and five new burghs, and in Lanarkshire and Aberdeenshire. See H.M. Inspector's Report, 1883.

[6] Twenty-seven burghs have taken advantage of this section.

[7] See also sect. 73-4.

[8] 38 & 39 Vict. c. 48, continued annually.

[9] Sects. 72, 75, 78.

[10] 13 & 14 Vict. c. 33; repealing 3 & 4 Will. IV. c. 46, and 10 & 11 Vict. c. 39.

[11] 23 & 24 Vict. c. 96.

[12] 25 & 26 Vict. c. 101.

General rate.

In any burgh wherein this Act is in force, the commissioners may levy one general and several special rates. The general rate is called the 'police assessment,' and is intended to provide for the police purposes of the Act in so far as adopted.[13] The ratepayers are the occupiers of lands or premises within the burgh according to the valuation roll in force for the time, though at the date of laying on the assessment, the roll for the year lacks adjudication on appeals for its final adjustment.[14] The rate and date of payment are published by handbills posted up within burgh, and by newspaper advertisement. The year runs from Whitsunday.[15] The rate is not to exceed two shillings and sixpence in the pound of gross yearly value where the enactments of the statute with respect to water have been adopted, or one shilling and sixpence where not. And an existing classification, according to rent, may be retained (sect. 84). In the case of premises let at a rent under £4, the owners are assessed, under deduction of one-fourth (sect. 87); and poverty or inability to pay, but no other excuse,[16] is admitted, in the discretion of the commissioners (sect. 88). Deduction must be allowed for any period during which premises have not been let or occupied for three months consecutively in any one year; and owners as well as occupiers are liable to be assessed where the subjects have been let for less than a year (sect. 89), though let continuously without break during the whole year.[17] There is a classification according to the nature of the premises, similar to that which has been already set forth as contained in the Public Health Act.[18] These rules and others are given effect to in the police assessment roll, made up and corrected by the commissioners, and open to the inspection of the ratepayers (sect. 91). The common good of the burgh, so far as available, is taken in aid of the police assessment (sect. 95).

Recovery.

The rate is recoverable on application by the collector to the sheriff or a magistrate of the burgh, along with a penalty of one penny in the pound of rental, by summary warrant of seizure and

[13] Sect. 84. Now that sects. 441-447 are repealed by the Public Health Act, these purposes now practically extend to the whole Act—see sect. 3, third clause from end. These purposes are very multifarious, and must be sought in the Act itself.

[14] Paisley *v.* Marshall, 16th Feb. 1881, 8 Ret. 480.

[15] Along with a broken period before adoption (sect. 86).

[16] See cases of exemption of Crown property from local rates, *supra*, pp. 200, 649. As to exemption by statute, see British Fisheries Soc. *v.* Henderson, 27th Feb. 1866, 4 Macph. 492.

[17] Paisley *v.* Marshall, *supra*, [14].

[18] *Supra*, p. 654. But here (sect. 90), mines, minerals, quarries, and manufactories are only classified in regard to water-works. See the result in Edmonstone *v.* Kilsyth Comrs., 9th June 1882, 9 Ret. 917.

sale, subject to the control of these officials, if the ratepayer fails to pay within three months after the rate is due, notwithstanding a printed notice delivered to him or left for him in the premises (sect. 92). Recovery is not to be prejudiced or stopped by misnomer, mistake, or informality, or by the death, resignation, or removal of the collector (sect. 93), or by removal of the ratepayer beyond burgh (sect. 94). No *condictio indebiti* lies for erroneous payment of rates in bygone years.[19]

Special rates.

The special rates are leviable (*a*) on occupiers for the purpose of defraying claims for damages sustained in consequence of riot or tumult within burgh (sect. 85);[20] on owners (*b*) a special sewer-rate and (*c*) a general sewer-rate[21] (sects. 96-100); on owners (*d*) a foot-pavement rate (sect. 101); (*e*) on owners and occupiers in equal proportions a general improvement rate; and (*f*) on owners or occupiers, according as one or other or both are in fault, a private improvement assessment (sect. 103).[22] Those marked (*b*) (*c*) (*f*), with interest and expenses, continue burdens on the premises (but that only for three years from the date of payment), as against *bonâ fide* singular successors and heritable creditors, without prejudice to superiors (sect. 104);[23] and the collector may be called on to furnish a list of these burdens still due (sect. 105). These rates, and apparently also those marked[24] (*d*) and (*e*), may be imposed and levied yearly, half-yearly, or at other periods, after certain notices and an opportunity being given for appeal to the commissioners (sect. 107). Separate assessment rolls are made up and the rates are recoverable in like manner as the police assessment, and any surplus is earmarked and kept distinct (sects. 107, 108).[25]

Borrowing powers.

It is lawful for the commissioners, after certain public notices, to borrow and take up, for any of the purposes of the Act (other than the construction, alteration, or maintenance of sewers, or for repayment of moneys borrowed for such purposes), such sums and

[19] Bell *v.* Thomson, 30th Nov. 1867, 6 Macph. 64.

[20] This may also be included in the police-rate (ibid.) See authorities as to riots collected *infra*, p. 669.

[21] See *supra*, p. 655.

[22] Including the paving of a 'private 'street'—Campbell *v.* Leith Police Comrs., 21st June 1866, 4 Macph. 853, revd. 8 Macph. H.L. 31. The obligation to reimburse the commissioners for necessary outlay on a private street exists only on those who own premises fronting or abutting on it, and consequently not on one whose property was separated from it by the site of an old wall not belonging to him; sect. 151, Leith Mags. *v.* Gibb, 3d Feb. 1882, 9 Ret. 627.

[23] See Macknight *v.* Oman's Tr., 29th Nov. 1872, 11 Macph. 154.

[24] There is no other provision with respect to them.

[25] For the powers of commissioners, and even of occupiers to execute works in default of the owner, see sects. 399, 400.

at such times as they deem necessary; and if the maximum has not been reached, to assess all owners or occupiers respectively liable in the several assessments in such additional assessments as will produce a sum equal to 5 per cent on the loans besides the interest thereon—the former sum to act as a sinking fund for repayment (sect. 384 *et seq.*)

Dogs Act.

The expenses connected with the enforcement of the Dogs Act, 1871,[26] so far as not otherwise recovered, are thrown on the 'local 'rate,' which in police burghs is any rate leviable by the police commissioners or trustees, or any fund belonging to them; in burghs royal or parliamentary, not subject to the separate jurisdiction of police commissioners or trustees, the revenue of the burgh, or a sewer rate; in other places, the police-rate.

II.—The County General Assessment.

II. County general assessment. Act of 1868.

The county assessment, commonly called 'rogue money,' was introduced by the Act 2 Geo. I. c. 26, sect. 12, which required the freeholders of each county at one of their head-courts annually to assess the county for the purpose of defraying the charges of apprehending of criminals, and of subsisting them in prison until prosecution, and of prosecuting such criminals for their several offences by due course of law, and to and for no other use whatsoever. The raising of this rate was put into the hands of the Commissioners of Supply in 1832,[27] thrown in 1839 optionally,[28] in 1854 compulsorily, on the real rent,[29] and put an end to by the County General Assessment Act, 1868,[30] after the purposes originally enacted had been cut down in the main to the prosecution of criminals by the fiscal in justice of peace courts.

For what purposes.

The last-mentioned statute enacts that the following salaries, fees, outlays, and expenses, in so far as not by law or usage payable or provided from other funds than those raised by the Commissioners of Supply, may be defrayed by them out of the 'county general 'assessment,' to be made and levied in terms of the Acts:—

Salaries of county officials.

'1. The salaries or fees of clerks, treasurers, collectors, auditors, 'and other officials necessarily employed in conducting the affairs 'of each county, together with the necessary outlays[31] of such 'officials, in so far as not covered by their salaries or fees;

[26] 34 & 35 Vict. c. 56.

[27] 2 & 3 Will. IV. c. 65, sect. 44.

[28] 2 & 3 Vict. c. 65, sect. 2; referring to 2 & 3 Vict. c. 42, sects. 41, 42.

[29] 17 & 18 Vict. c. 91, sect. 32.

[30] 31 and 32 Vict. c. 82.

[31] In conducting the ordinary affairs of the county—Wakefield *v.* Renfrew Comrs., 29th Nov. 1878, 6 Ret. 259, *infra.*

'2. The salaries or fees and necessary outlays of procurators-fiscal in the sheriff and justice of peace courts, and clerks of justice of peace courts, in so far as such salaries, fees, and outlays are at present in use to be paid by each county;

'3. The expenses incurred in searching for, apprehending, sub- Cost of prosecutions, &c.
sisting, prosecuting, or punishing criminals;

'4. The expenses connected with the upholding, repairing, en- Court-houses.
larging, renting, furnishing, insuring, lighting, cleaning, or warming any court-house, or any buildings belonging to or occupied for the purposes of such county, and all taxes, rates, and assessments legally chargeable thereon;[32]

'5. The expenses connected with the holding of the court for Fiars courts.
striking the fiars prices for such county, in so far as the said expenses have hitherto been defrayed by such county, together with a fee of three guineas to each of such professional accountants not exceeding two, and a fee of one guinea to each of such other persons not exceeding six, as shall be summoned by the sheriff as witnesses at such court, as such fees shall be certified under the hand of the sheriff;[33]

'6. All expenses occasioned by damage done to property within Riot damage.
the county by tumultuous or riotous assemblies, and all expenses properly incurred in the prevention of riots;[34]

'7. All expenses or payments presently directed by any Act &c., &c.
of Parliament to be defrayed out of the "rogue money"' (sect. 3).

The foregoing purposes, and such others as are expressly thrown on this assessment by Act of Parliament, are the only purposes to which it can be legally applied. Accordingly, any Commissioner of Supply is entitled to object to any other application of the fund—such as, in payment of the cost of opposing a bill in Parliament.[35]

The 'county general assessment' is treated in the Act, either Treated like police assessment.
by practically identical wording or by express reference, in regard to the subjects and mode of rating (on owners, or on tenants with

[32] See as to providing sheriff court-houses, *infra*, p. 676.

[33] See the authorities on fiars prices in Howden *v.* E. Haddington, 25th Jan. 1851, 13 D. 522; Bankt. 4.14.20; Ersk. 1.4.6; Hutchison, 2.98; Connel on Tithes, 2.431; Hunter, 2.294; and a Law Tract by Mr George Paterson, giving an historical account of the institution.

[34] See the Riot Act, 1 Geo. I. c. 5, sect. 9; 52 Geo. III. c. 130. Amended as to punishment by 7 Will. IV. and 1 Vict. c. 91; 20 & 21 Vict. c. 3; 1 Hume, 123, 416 *et seq.* See also the similar provision in the General Police Act, *supra*, p. 667; and Bryson *v.* Mags. of Glasgow, 20th Nov. 1821, 1 S. 156 (N.E. 121); Johnstone *v.* Kerr, 24th Nov. 1837, 16 S. 104.

[35] Wakefield *v.* Renfrew Comrs, [31].

relief out of other rents), (sect. 4), remission on the ground of poverty (sect. 5), the treatment of detached parts of counties (sect. 6), and the mode of recovery and management of the funds (sect. 7), in exactly the same way as the police assessment under the Act of 1857, sects. 29, 31, 35, 70, 71, 32, 33, and 40-47.[36]

Distinctions.

The only real distinctions are, that the provisions of the present Act apply only to the county, exclusive of burghs—to what is called in the Police Act the landward part of the county;[37] and that there is no power of borrowing money. The machinery of the two statutes is further assimilated by the incorporation of the Commissioners of Supply, and by permitting their accounts to be made up, published, and audited, if so resolved, in one uniform manner and at one time, notwithstanding any Act to the contrary (sects. 8, 9).

Incorporation of Commissioners of Supply.

Payments to the fund

Exemptions.

'Where by any existing law or usage penalties, fees, or other 'moneys fall to be paid or credited to the "rogue money," the 'same shall, from and after the passing of this Act, be paid or 'credited to the "county general assessment"' (sect. 7). Exemptions of any lands and heritages from being assessed for 'rogue 'money,' and the right of other bodies than the commissioners to levy that burden, are expressly saved (sect. 10).

Similar purposes in burghs.

Many of the purposes for which the county general assessment is levied—such as the payment of officials, the maintenance of necessary premises, and indemnification for damage through riots—find in burghs their analogues in the provisions of the General Police Act, and their corresponding fund in the police assessment.[38] In regard to these, it will be sufficient to refer to the Act itself. But there are certain other expenses, introduced by statutes of great importance to the community, which are charged to these two funds respectively, and which deserve a separate notice.

III.—Burdens thrown by later Acts on the County General Assessment and Burgh Police Assessment.

III. Statutory burdens thrown on these funds. Pedlars Act.

1. The enforcement of the Pedlars Act, 1871,[39] is thrown on police districts—that is, any areas maintaining a separate police force (Sched. I.) The fees are accounted for and paid to the collector of the police assessment (sect. 21), and all penalties to the

[36] See *supra*, p. 664.
[37] Act 1857, sects. 30, 78.
[38] *Supra*, p. 666.
[39] 34 & 35 Vict. c. 96; amended as to their beats by 44 & 45 Vict. c. 45.

collector of county rates in aid of the county general assessment when the court which imposes them is the justice of peace court, and to the treasurer of the burgh or commissioners in aid of the funds of the burgh when the court is a burgh or police court (sect. 20).

Petroleum Act.

2. The Petroleum Act, 1871,[40] passed for the purpose of insuring the safe keeping of petroleum and other substances of a like nature, is enforced by a local authority, which in burghs proper is the town council, in police burghs the commissioners or trustees, in harbours under a harbour authority[41] that authority, in other places two justices of the peace sitting in the justice of peace court (sect. 8). Any expenses incurred in testing the petroleum, and not recovered from the dealer, come out of any funds for the time being in the hands of the local authority, and in case the local authority are the justices, out of the county general assessment (sects. 11 and 12); and penalties are accounted for and payable as in the foregoing statute (sect. 15 (8)).

Explosives Act.

3. The kindred Explosives Act of 1875[42] is enforced partly by central, partly by local supervision. The latter is conducted by an officer who has extensive powers of inspecting stores (other than mine-stores), registered premises, and small firework factories, and of seizure (sects. 69, 73-75). The local authority in a burgh, royal or parliamentary, are the magistrates and town council; in a harbour having a harbour authority, that body, to the exclusion of every other;[43] in any other place, the justices of the peace for the county (sects. 109, 110). The expenses incurred by the local authority in carrying out the Act, including the salary and expenses of officers, are paid out of the local rate (sect. 70), which in a burgh is the police assessment; in a harbour, the fund or rate leviable or applicable by the authority; and elsewhere, the county general assessment (sect. 111). The commissioners of police burghs and their police-rate may, by order of the Home Secretary, on the application of the Commissioners, be charged with the enforcement of the Act (sect. 112). Penalties and forfeitures go to the Treasury (sect. 114). The local authority—other than justices—may, with the approval of the Home Secretary, erect magazines within or beyond their jurisdiction, in the interests of the public safety, and for that purpose borrow money and take lands (sects. 72, 113).

[40] 34 & 35 Vict. c. 105; amended as to tests and hawking by 42 & 43 Vict. c. 47, and 44 & 45 Vict. c. 67.

[41] See 24 & 25 Vict. c. 47, as amended in 1862, 1863, and 1866.

[42] 38 & 39 Vict. c. 17. The recent Explosive Substances Act, 46 Vict. c. 3, throws no burden on the rates.

[43] See note [41], *supra*.

Sale of Food and Drugs Act.

4. The protection of the lieges against adulteration of food and drink (other than water), and of drugs either for internal or external use, is the aim of the Sale of Food and Drugs Acts, 1875 and 1879.[44] By the Act of 1875, sect. 10, the power is conferred and the duty imposed upon the Commissioners of Supply, and the commissioners or boards of police, and the town councils of boroughs, within their respective jurisdictions, subject to the approval of the Home Secretary, to appoint an analyst or analysts, with such remuneration as may be agreed on. A burgh may appoint the analyst of a neighbouring burgh, or of the county in which it is locally situated (sect. 11). The term 'borough' means any royal burgh and any burgh returning or contributing to return a member to Parliament. The expenses of executing the Act are borne in counties by the county general assessment, and in burghs by the police assessment, to which funds respectively are paid the penalties imposed and recovered under the Act (sect. 33).

Prisons Act.

5. The Prisons (Scotland) Act, 1877,[45] which transfers the ownership and administration of prisons from local prison boards to one of her Majesty's Principal Secretaries of State, and throws the burden of maintaining them and their inmates on parliamentary grants, does so on the footing that each prison authority has or ought to have, on 1st October 1877, provided sufficient cell-accommodation for the wants of the district. A sum of £120 for every prisoner for whom such accommodation has not been provided is payable into the Exchequer out of the county general assessment and the burgh police assessment or common good, in proportions to be determined by the Secretary of State; and authority is granted to borrow money for this purpose on the security of these funds, repayable in thirty-five years (sects. 18, 55). Special provisions are made for compensation to a prison authority which has received the prisoners of another board, or which has superabundant accommodation (sects. 18, 19), for taking over uncompleted prisons, for building new prisons instead of paying compensation (sects. 20, 21),[46] and for payment out of these funds of superannuation allowances to prison officers (sect. 43). On the other hand, assets in the hands of the prison authorities are to be paid to the above-mentioned county and burgh funds in proportion to valuation (sect. 26). Commissioners of Supply and magistrates may resolve,

[44] 38 & 39 Vict. c. 63; 42 & 43 Vict. c. 30. Sect. 9 of the latter Act, relating to repetition of rates by the county, does not seem to apply to any burgh in Scotland.

[45] 40 & 41 Vict. c. 53; amended as to superannuation by 41 & 42 Vict. c. 63.

[46] See as to building assessment under the old system, 28 & 29 Vict. c. 84, sect. 1, repealing 23 & 24 Vict. c. 105, sect. 33.

so long as the Secretary of State approves, to contribute to any reformatory or industrial school, certified under Acts of 1854 and 1866,[47] out of the county general assessment, or any municipal, police, or other burgh assessment, as the case may be (sect. 67). It has also been enacted and declared[48] that the Prison Authorities Act, 1874,[49] applied to the Scotch prison boards as they existed prior to 1877, which were therefore entitled to borrow money towards enlarging, building, &c., any industrial or reformatory school under the various Acts thereanent,[50] and, subject to the approval of the Secretary of State, to throw the debt on the county general assessment, with relief against any burgh in proportion to valuation.

Weights and Measures Act.

6. The administration of the Weights and Measures Act, 1878,[51] is partly local. The local authority—that is, in counties, the justices in general or quarter sessions assembled; in burghs royal and parliamentary, the magistrates—has to provide such local standards of measure and weight as it deems requisite for the purpose of comparison by way of verification or inspection; to furnish proper means, from time to time, for verification and stamping (sects. 40, 47, and Sched. IV.); to appoint, from time to time, a sufficient number of inspectors of weights and measures, holding office at its pleasure, with reasonable remuneration (sect. 43). The expense of providing and reverifying local standards, the salaries of inspectors, and all other expenses incurred by the local authority, are thrown on the 'local rate,' which in counties is the county general assessment, in burghs the police assessment (sect. 51 and Sched. IV.) Any two local authorities may combine, as to the whole or any part of the areas within their jurisdiction, for all or any of the purposes of the Act (sect. 52). Fines and forfeitures recovered in the justice of peace court pass into the county general assessment, into the burgh funds if recovered in the burgh court, into the police funds if in a police court (sect. 72).

IV.—Miscellaneous County and Burgh Burdens.

IV. Miscellaneous county and burgh burdens.

1. *Under Militia Acts.*—The local burdens connected with the militia are constituted by the Acts of 1802 and 1854, which in

[47] 17 & 18 Vict. c. 86; 29 & 30 Vict. c. 118; the latter amended by 43 & 44 Vict. c. 18.

[48] 41 & 42 Vict. c. 40.

[49] 37 & 38 Vict. c. 47.

[50] 29 & 30 Vict. c. 118; 35 & 36 Vict. c. 21; 29 & 30 Vict. c. 117; 37 & 38 Vict. c. 47.

[51] 41 & 42 Vict. c. 49.

Militia Acts of 1802,

this respect are left standing by the Consolidation Act of 1875.[52] By the first statute it is enacted that in every county, stewartry, city, or place in which the quota shall not be raised within six months after it is first ordered out, or three months after notice by the commanding officer of any deficiency, the sum of £10 shall be annually payable for every private militiaman deficient (sect. 150)—the assessment in counties being apportioned among the parishes and places proportionally to the number of men each is required to raise (sect. 151), unless the deficiency is ascribable to some particular parishes or places, in which case these alone are assessed, according to the number by which each falls short (sect. 152). Similar rules are laid down with regard to burghs and to parishes partly landward and partly within burgh (sects. 155-157). The assessment is laid on according to valued rent, or the customary payment of land-tax and cess, or, if so resolved, on the real rent[53] (sects. 154, 155), and is collected by the collector of land-tax (sect. 158).[54]

and 1854.

The Act of 1854, *inter alia*, provides for the keeping of arms, accoutrements, clothing, and other militia stores (sect. 35); and, if necessary, for the furnishing, by the Commissioners of Supply, of a secure and suitable place for that purpose, by purchasing or hiring, or enlarging, altering, repairing, building or rebuilding, premises, containing an orderly and guard room, a magazine, and a muster-yard. They may also provide quarters for the permanent staff, as may appear to them desirable (sect. 36). These premises are expressly exempted from payment of local rates (ibid.) The cost incurred in this way and in the use of the premises is laid on and recovered in like manner with prison assessments, as then levied by prison boards (sect. 37). This is now[55] interpreted to mean 'with the like powers as any other assessment which may 'be leviable by the Commissioners of Supply within any county, 'or the magistrates withiny an burgh, upon the lands and heritages 'within the same, as appearing on the valuation roll thereof,'—provided in counties they be laid on owners; in burghs, one-half on owners and one-half on tenants or occupiers (or the whole, in the last case, on the latter, with right to deduct from rent): provided also that the commissioners may exempt on the ground of poverty subjects valued at £2 yearly or under, and that the magistrates

[52] 42 Geo. III. c. 91; 17 & 18 Vict. c. 106; 38 & 39 Vict. c. 69. See Sched. II.

[53] 17 & 18 Vict. c. 91, sect. 40.

[54] See the other particulars in the succeeding sections.

[55] 40 & 41 Vict. c. 53, sect. 63; see 2 & 3 Vict. c. 42; and 23 & 24 Vict. c. 105, sects. 1, 32, 33 *et seq.*

may exempt the occupiers of subjects worth £5 a-year or under; and all such assessments are, in case of bankruptcy or insolvency, to be paid out of the first proceeds of the estate, and to be preferable to private debts.[56] The rates are relieved by the sale of premises used formerly for the same purposes (Act 1854, sect. 37). Power to borrow money, repayable in thirty years, on security of the assessments, is conferred on the commissioners (sect. 38). The burden on county and burgh is apportioned according to valuation (sect. 39). And the Secretary of War may, through the Lord Advocate, set the local authorities in motion (sect. 40).

Valuation Act.

2. *Valuation.* — By the 18th section of the Valuation Act, 1854,[57] it is enacted that the Commissioners of Supply of each county and the magistrates of each burgh (royal or parliamentary) are to make up an account of the expenses attending the completion of each annual valuation, and to apportion the amount upon the parishes according to their real rent, and cause the same to be levied along with the poor-rate; or they are to cause the amount, along with the expenses of collection, to be assessed upon the lands and heritages in county and burgh respectively, rateably on proprietors and occupiers equally between them; or again, along with any other assessment levied on the real rent; or lastly, from available funds other than rates. Surpluses from one year are carried on to the next. But three years later,[58] a power which has been extensively taken advantage of was conferred on the commissioners and magistrates respectively, if they should think fit, to appoint the surveyor of income-tax and assessed taxes within their county or burgh to be their valuation assessor, and thereby to throw the expense on the Treasury. If this power be not made use of, the valuation is not binding on the collectors of imperial taxes.[59] Further, the commissioners or magistrates, after proper notice, may resolve at any meeting, general or special, to print the valuation roll for the current year—the expense being deemed part of the expense of making up the roll,[60] but not included in that which the Treasury may be called on to bear.

Voters Registration Acts. In burghs,

3. *Registration of Voters.*—The earliest subsisting statute on this subject is the Burgh Voters Registration Act of 1856.[61] By the 42d section it is provided that the town clerk and the assessor shall keep accounts; and by the 43d section that the magistrates shall,

[56] 40 & 41 Vict. c. 53, sect. 63.
[57] 17 & 18 Vict. c. 91, sect. 18.
[58] 20 & 21 Vict. c. 58, sect. 1.
[59] Ibid., sect. 3; and Menzies *v.* Inland Revenue, 18th Jan. 1878, 5 Ret. 531.
[60] 30 & 31 Vict. c. 80, sect. 10.
[61] 19 & 20 Vict. c. 58; see *supra*, p. 184.

as soon as may be after the completion of the annual registration, make up an account and fix the amount of the expense therein incurred, including remuneration to officers, and also the amount of income. If there be a deficit, this is to be raised in some one of the modes pointed out in the 18th section of the Valuation Act (sect. 43).[62] In the newly enfranchised burghs of 1868 where there are no magistrates, the police commissioners appoint the assessor and an official to act as town clerk; and the expense of making up the valuation roll and of the annual registration of voters is levied by the said commissioners 'from the same description of persons and property as the police-rate within such 'burgh: provided that no person shall be liable to such assessment who is not a proprietor or occupier of a dwelling-house or 'other lands and heritages within the burgh.'[63]

and counties.

The corresponding County Voters Registration Act was passed in 1861.[64] The sheriff-clerk and assessor are to keep an account of their receipts (sect. 40), and the Commissioners of Supply are to make up an account of the expenses incurred and income received, and lay the deficit on the lands and heritages of the county (exclusive of burghs represented in Parliament), according to the real rent, and collect it along with any county rate for the current year. Any surplus is to be carried on to the same fund for the following year (sect. 41). Where a county is divided for the purposes of representation, though two registers must be kept and two assessors may be appointed, the *cumulo* expenses of registration are still laid on the lands and heritages of the whole county as formerly.[65]

Sheriff Court-Houses Act.

4. *Sheriff Court-Houses Act*, 1860.[66]—The object of this statute is to provide additional accommodation for the sheriff courts, and the offices connected therewith, by the erection of new premises, or by addition, alteration, rebuilding, or purchase. On intimation by a Secretary of State to the Commissioners of Supply, a meeting is called, in which the burghs are duly represented. If the resolution then come to be unfavourable to proceeding further, it may be overruled by the Secretary of State. After the plans and specifications have been approved by the latter, the Commissioners must proceed with the works, purchasing the site, if necessary, under the agreement sections of the Lands Clauses Act. The premises vest in the Commissioners, who control their use, subject to a reference to the Lord Advocate (sects. 1-14). The account

[62] See last paragraph.
[63] 31 & 32 Vict. c. 48, sects. 46-48.
[64] 24 & 25 Vict. c. 83.
[65] 31 & 32 Vict. c. 48, sect. 42.
[66] 23 & 24 Vict. c. 79.

of expenses is certified by the convener and two Commissioners: one half is payable by the Treasury;[67] the other half by assessment on the county and burghs (sect. 15). The powers of assessment conferred on the Commissioners and magistrates are precisely the same as those competent to the Commissioners under the Police Act of 1857, sects. 29-34.[68] Powers are bestowed of borrowing the whole certified expense on security of the premises and assessment, repayable out of the Treasury contribution or by a sinking fund; and of borrowing on cash credit, with similar security (sects. 26, 27). A disused court-house, or any part thereof, may be sold, any party having right to other parts of the building being entitled to a first offer at a valuation. The price goes towards the total cost of any new court-house; and after deduction of the price, the respective liabilities of the Treasury and the locality are calculated.[69]

Lunacy Acts.

5. *Lunatic Asylums.*—The elaborate system built up by the subsisting Lunacy Acts[70] is under the immediate control of a Board of Commissioners of Lunacy, located in Edinburgh, at first (by the 22d section of the principal Act) intended to be temporary, but now continued until Parliament shall otherwise determine.[71] The board is assisted by two deputy commissioners, whose office, originally also temporary, was at first continued, and is now equally permanent.[72]

Asylums.

The establishments which at present exist in Scotland for the reception of the insane are 6 private asylums, as many parochial asylums, 2 charitable institutions for the training of imbecile children, the lunatic department of the general prison at Perth, 14 poorhouses containing wards licensed for the reception of lunatics 'who are not dangerous and do not require 'curative treatment,'[73] and 20 public and district asylums.[74] It is with the last class of institutions alone that we have here directly to do, and with the others only in so far as they provide the accommodation which would otherwise have to be afforded by the leading establishments.

Act of 1857.

By the principal Act of 1857,[75] it was provided, with a view

[67] More, in case of a circuit town, sect. 17.

[68] *Supra*, p. 664. The present Act corresponds in sects. 19-21, 23, 24. Section 28 also incorporates sects. 40-47, incl. of the Act of 1857.

[69] Sect. 18, as amended 29 & 30 Vict. c. 53.

[70] 20 & 21 Vict. c. 71 (the principal Act); 21 & 22 Vict. c. 89; (23 & 24 Vict. c. 75); 25 & 26 Vict. c. 54; 27 & 28 Vict. c. 59; 29 & 30 Vict. c. 51; 30 & 31 Vict. c. 55; 40 & 41 Vict. c. 53, sects 61-63.

[71] 25 & 26 Vict. c. 54, sect. 25.

[72] 29 & 30 Vict. c. 51, sect. 3.

[73] 21 & 22 Vict. c. 89; 25 & 26 Vict. c. 54, sects. 3, 4.

[74] Further, about one-sixth of the insane are detained in private buildings under inspection.

[75] 20 & 21 Vict. c. 71.

to the erection of asylums for the reception and care of pauper lunatics, and for the purposes of the Act, that Scotland should be

Districts.

divided into specified districts, alterable by the board of commissioners—hereinafter to be called the 'board'—on application by the no longer existing prison boards of each county (sects. 49, 110, and Sched. H). The number of districts is now 22. The

District boards.

district boards of lunacy—which form the local authority—were formerly elected by the prison boards (sect. 50); but are now chosen annually by the Commissioners of Supply and magistrates of burghs respectively in each county within the district, in numbers fixed by the 'board,' and proportioned to the valuation of property situated in each such county and burgh.[76]

Providing asylums.

The 'board' has the duty of making investigation into the necessities of each district, and into the accommodation provided; and, if it is of opinion that alteration, enlargement, or adaptation of existing premises, or the erection of a new district asylum is required, may (in the last case) express an opinion as to the site, and (in any case) require the district board to order plans and specifications. On approving of these and the site, the 'board' may further require the works to be proceeded with, and to be finished within two years (Act 1857, sects. 51 and 52). Additional ground may also be taken, with consent of the 'board;' and in both cases the compulsory powers of the Lands Clauses Act are incorporated.[77] If the district board fail to furnish new or additional accommodation, and have not, alternatively, contracted with an existing asylum to such an extent or in such a way as the 'board' may consider necessary, the 'board' may represent this failure to the Home Secretary, who may, after hearing parties, authorise it to apply to the Court for the appointment of a person at whose sight the work shall be performed at the expense of the district board.[78]

Allotment of expense.

The expense of providing, building, altering, enlarging, and repairing and fitting up and furnishing district asylums, and the whole expense of maintaining the establishment for the first year, and also the after-expense of altering, repairing, and keeping in repair, and of the surveys, plans, and investigations in relation thereto, are first ascertained by the 'board,' and then apportioned by it upon the landward parts of counties and upon the burghs (royal and parliamentary) respectively, according to their real rent, and the result notified to the convener of each county and

[76] 40 & 41 Vict. c. 53, sect. 61 (the Prisons Act).

[77] Act 1857, sect. 52; 25 & 26 Vict. c. 54, sect. 11; 23 & 24 Vict. c. 105, sects. 2, 77; 40 & 41 Vict. c. 53, sect. 64.

[78] 25 & 26 Vict. c. 54, sect. 9.

the chief magistrate of each burgh. The portion of expense apportioned to a county, along with the cost of collection and remittance, and arrears, is leviable by the Commissioners of Supply: the portion allotted to a burgh, with these additions, is leviable by the magistrates. The mode is that which has been already pointed out in relation to militia storehouses, as coming in lieu of the old prison assessment.[79] The whole sum must be remitted to the district board within eight months after the notice sent to the convener and chief magistrate (Act 1857, sect. 55). The assessing clauses of the Act do not apply to Shetland (sect. 114). Assessment.

What are called 'special arrangements' are thus provided for. Mortifications for the establishment of asylums, county or parochial, may be applied by the trustees in payment of the assessments leviable on the county or parish, or in the erection of an asylum, to be made over or otherwise made available to the district board in relief *pro tanto* of the assessment leviable from the said county or parish (sect. 56). The same is the case with any sort of county or parish asylum, the use of which can be validly transferred to the district board (sect. 57). If, in a public asylum within any district, right of accommodation has been acquired by any parish beyond it, or by any other district, the right may be bought up by the former district (sect. 58). If any asylum established in any district have sufficient accommodation for the pauper lunatics of the district, or can be easily rendered adequate to the reception of such pauper lunatics or any portion of them, the district board shall, before assessing for or erecting a new asylum, contract for the use of the whole or any part of the same, and for the reception and maintenance of the pauper lunatics or any portion of them—the 'board' acting as arbiter in case of dispute (sect. 59).[80] Special arrangements.

Power to borrow on security of the assessments all or any of the moneys required in the district or in any county or burgh within it, at five per cent, is bestowed on the district board (sect. 61); and the loan may be repaid by annual instalments of a fixed and uniform amount,[81] being not less than one-thirtieth part of the whole, and therefore in not more than thirty years (sects. 63-65), or by raising money, but always under the same con- Borrowing powers.

[79] *Supra*, p. 674. The references here are to Act 1857, sect. 54; 40 & 41 Vict. c. 53, sect. 63, referring back to 2 & 3 Vict. c. 42, sect. 40; 23 & 24 Vict. c. 105, sect. 1.

[80] Sect. 60 relates to the Crichton Institution, Dumfries; and 25 & 26 Vict. c. 54, sect. 10, to accommodation provided before 1857.

[81] 25 & 26 Vict. c. 54, sect. 13.

ditions (sect. 66). The Public Works Loan Commissioners are authorised to advance the money (sect. 62).[82]

Districts without asylum.

In those districts where there is no district asylum, the district board may dissolve itself, with the sanction of the 'board,' and on its requisition or order may be again revived.[83] In such districts, the clerk of the district board apportions the amount of expenses incurred between the landward part of the county and the burghs, according to their respective real value, and notifies the result to the convener and chief magistrates. Thereupon the portion allotted on the landward part is taken out of the county general assessment, and the portion laid on the burghs out of any assessment levied in the burgh, and payable one-half by the owner and one-half by the tenant—failing which, out of any other assessment levied in the burgh.[84] And if ground has been acquired needlessly it may be sold, and the free proceeds paid to the Commissioners of Supply or magistrates, as the case may be.[85]

Sale of useless land.

Officials.

While public asylums with which district boards have contracted for accommodation remain under the management of the proprietors *in toto* (sect. 59), district asylums are consigned to the charge of the district boards, who must appoint the requisite officers—a clerk, if necessary (sect. 68), and district inspectors whose duty it is to visit the public, private, and district asylums within their districts (sect. 70). The current expenses of the establishment (the maintenance and expenses of the patients, the salaries and allowances of the superintendent, clerk, officers, and servants, &c.) are defrayed out of sums calculated per week for each pauper lunatic, and payable by the parochial boards which are liable, at periods fixed by the district board, with the approbation of the 'board;' and deficiencies are made up by raising the charge (sect. 73). This burden on parochial boards is now alleviated by public grant, administered by the Board of Supervision, and is further moderated to a slight degree by the contributions of relatives and the proceeds of the estates of the patients themselves[86] (sect. 77). Penalties or forfeitures awarded in respect of any district asylum are paid to the district board (sect. 107).

Contribution by parochial boards,

and the Treasury.

Contagious Diseases (Animals) Act.

6. *The Contagious Diseases* (*Animals*) *Act*, 1878.[87]—Part III. of this Act applies to Scotland in substitution for or in addition

[82] Similar powers are conferred on parochial boards—29 & 30 Vict. c. 51, sect. 27.

[83] 25 & 26 Vict. c. 54, sect. 12.

[84] 40 & 41 Vict. c. 53, sect. 62.

[85] 25 & 26 Vict. c. 54, sect. 12.

[86] In 1881-2, Parliament contributed about 2-5ths, and relatives about 1-20th of the whole sum spent on pauper lunatics.

[87] 41 & 42 Vict. c. 74, repealing 32 & 33 Vict. c. 70, and its amendment, 38 & 39 Vict. c. 75, which again had repealed the earlier statutes.

to Part II. which relates more especially to England (sect. 67). The Act provides generally for the declaration of places infected with cattle plague, pleuro-pneumonia, or foot-and-mouth disease; the declaration of their freedom therefrom; the slaughter of the animals infected with the two first diseases, and the compensation payable therefor out of the public money in the case of the first, and out of local rates in the case of the second malady; the transit of animals; the inspection of dairies, cow-sheds, and milk-shops; the importation of foreign animals; the regulation of ports; and the extermination of destructive insects. The central authority is the Privy Council, and, as to orders of no general application, the Lord President thereof or a Secretary of State (sect. 8). The local authority in Scotland is, in burghs which return or contribute to return a member to Parliament, the magistrates and council. In counties[88] exclusive of such burghs, it is a body appointed in the following way. Members are nominated, to the number of four and not more than fifteen, by the Commissioners of Supply, and others are elected in numbers equal to those nominated by the Commissioners by a meeting of occupiers of agricultural subjects valued at £100 a-year, and of owners and occupiers of such subjects valued at £50 and under £100. Failing such election, this latter half of the local authority may be nominated by the lord lieutenant from among such occupiers or owners and occupiers. A certain number—not exceeding a third of the whole body—may be ordained by by-laws to retire periodically, at intervals of not less than three years; and the vacancies thus or otherwise caused must be filled up in the same way as the members vacating were appointed. To the members so obtained are added *ex officio* the lord lieutenant, the convener, and the sheriff, or, in his absence, one of his substitutes by his direction (sects. 68, 69, Sched. VII.)

Purposes.

Local authority.

The local authority in a county shall, from time to time, give notice to the Commissioners of Supply of the sums necessary to be provided under the provisions of the Act by means of the local rate. The amount is by them assessed according to the real rent. In like manner the local rate is raised by the local authority itself within burgh. All such assessments are payable one-half by the proprietor and one-half by the tenant, but may be collected wholly from the tenant or wholly from the proprietor, with a corresponding right of deduction from rent or of relief. And the mode of recovery is that of the Police Act, 1857 (sect. 70 hereof).[89]

Assessments.

[88] Not including the county of a city. Maxwelltown is in the Stewartry (Sched. VII).

[89] 20 & 21 Vict. c. 72; *supra*, p. 664.

Borrowing powers.

Where the amount of the local rate levied or required would exceed in any financial year sixpence in the pound, the local authority may borrow at interest on the credit of the rate, and repay by mortgaging the rate for a term not exceeding seven years; if it would exceed ninepence, the term may be extended by the Home Secretary to a period not exceeding fourteen years. The Commissioners Clauses Act, 1847, with respect to mortgages, is incorporated; and payment to a creditor may be secured by the appointment of a judicial factor. The Public Works Loan Commissioners may advance the money. And in addition to, or apart from, the rate, wharfage dues, estates, revenues, or funds belonging to the local authority may, so far as relates to the provisions in regard to foreign animals, be given in security, without the above limitations as to amount and duration (sects. 49, 72). Penalties incurred in the justice of peace court go in aid of the county general assessment; in the burgh court, in aid of the funds of the burgh; and in a police court, in aid of the police funds (sect. 74).

Roads and Bridges Act.

Abolition of turnpikes.

7. *The Roads and Bridges Act*, 1878.[90]—The most important recent alteration on county and burgh rating has been brought about by this Act, which provides for the gradual abolition of turnpikes and tolls, and for throwing all highways, whatever their origin, except mere rights of way, on the local rates, so far as that had not been done prior to the date of the Act. It does not repeal local Acts in force in counties where tolls and statute labour had been already abolished, but provides that, if temporary, these Acts shall be continued till the general statute is adopted, and that in all such counties it may be adopted by resolution of the Road Trustees (sects. 5, 6 (1)). In other counties it might be adopted prior to 1st June 1883,[91] and became then compulsory, through the repeal of the general and all local, turnpike, and statute labour Acts (sects. 4, 6, 7, 8, 122), as at that date, if not already superseded by such adoption. The date of the compulsory commencement of the statute (so far as the latter class of counties is concerned) having now passed, it will be justifiable to confine attention to the new measure, without referring to the old system of turnpike, statute labour, conversion money, and Highland roads.[92]

Local authority.

The local authority under the Act is different in counties and in burghs. A burgh means and includes a royal burgh, parliamentary burgh, or any populous place under the General Police Acts of

[90] 41 & 42 Vict. c. 51.

[91] See Midlothian Comrs. of Supply *v.* Midlothian Turnpike Trs., 18th July 1882, 9 Ret. 1134.

[92] See the more accessible authorities cited, *supra*, p. 292.

1850 and 1862, or under a local Act, provided the population of such populous place, three months after the Act takes effect within it, exceeds 5000.[93] A county means a county exclusive of burghs wholly or partly situated therein, and does not include a county of a city (sect 3). The burgh local authority is the town council, commissioners of police, or other local authority having the management of the streets, and power to assess in respect thereof (sects. 3 and 11). The county local authority are the 'county road trustees,' a body composed as follows: of all Commissioners of Supply (except such as are only qualified by property in burgh), but factors only in absence of their constituents; one nominee of a corporation rated at £800 in the county; persons elected once in every three years by the ratepayers in each parish wholly or partially situated in the county—viz., where the number of ratepayers does not exceed 500, two persons; if 1000, three persons; if above that number, four persons;[94] and lastly, two persons chosen from among themselves by the commissioners of police of any police burgh (not a separate authority as above) partly or wholly within the county (sect 12). Burghs of 10,000 inhabitants or less, though entitled to be independent, may devolve their duties under the Act on the county by a rescissible agreement, and then the provost or chief magistrate and another councillor or commissioner are added to the number of trustees (sects. 12, 47). A 'county road board' of not more than thirty members (one-third to one-half being elected trustees), and the chairman of trustees *ex officio*, are to have all the powers of the trustees, except that of making an assessment, or in so far as the trustees otherwise expressly provide, and subject to their instructions (sect. 15). The trustees, subject to correction by a Secretary of State, must in most cases divide the county into districts, alterable from time to time, and appoint district committees for each, with the same proportion of elected trustees (sects. 16, 17).

In burghs.

In counties.

'County road board.'

'District committees.'

In lieu of causeway-maill in burghs, there may be levied from occupiers of lands and heritages an assessment equivalent to the net yearly amount thereof, but not exceeding threepence in the pound, separately, or as part of and in addition to, and under the same conditions as, any police or burgh rate leviable within the burgh. These assessments come *ipso facto* in the place of the maill as security for debt. The rate need not descend to fractions of a farthing (sect. 34). The amount required for carrying out the provisions of the Act within a burgh or by the local

Assessment in burghs.

[93] Determined as in the General Police Act, 1862, sect. 7. As to boundaries, see the present Act, sect. 46.

[94] Mode of election in sect. 13.

authority thereof, where there was no rate or assessment leviable at the date of the Act for the maintenance and repair of its streets or roads, has to be levied by the burgh local authority by an assessment on all lands and heritages, payable, unless otherwise provided, one-half by the proprietor and the other half by the tenant or occupier, unless the latter's name does not appear on the valuation roll, in which case the owner pays the whole, reserving relief (sect. 54). And old modes of assessment may be continued till duly altered, disregarding any maximum limit if the execution of the Act so requires (sect. 55).

Assessment in counties.

The amount required for the management, maintenance, and repair of highways within each district in counties, or, in the discretion of the trustees, within the several parishes constituting the same, along with a proportion of the general expense of executing the Act, as allocated by the trustees, has to be levied by them by an assessment on lands and heritages within the district or parish, as the case may be, payable half by proprietor, half by occupier, except where the subjects are entered on the roll at £4 or less, in which case the whole may be imposed on the proprietor, reserving his relief: provided that outgoing have relief against incoming tenants or occupiers for the proportion of the assessment applicable to the period of the year unexpired at their removal. If there be no districts, the same rules apply to the whole county (sect. 52). Bridges on the march between two districts are maintained equally by them, and managed as the trustees shall determine (sect. 53); if situated between two separate local authorities, these share the expense, and act by a joint bridge committee (sects. 37-39).[95] Accumulations of pontage money, made prior to the adoption of the Act, vest in the trustees unconditionally as part of their general funds, and do not require to be set apart as formerly for repair and reconstruction of the bridge.[96] If in any case extraordinary expenses have been caused to the authority in repairing a highway by reason of the damage caused by excessive weight passing along the same, or by extraordinary traffic thereon, the person by whose order this is done is liable to pay the amount, as ascertained in a summary manner by the sheriff, unless he agree with the authority for payment of a composition. This rule applies to every county,

In districts or parishes.

Or in the whole county.

March-bridges.

Injury through excessive weight.

[95] As to purchasing pontages; regulating old turnpikes situated within two or more local authorities; detached parts of counties,—see sects. 36-40; Aberdeen Comrs. of Supply *v.* Morice, 17th May 1881, 8 Ret. H.L. 93.

[96] Perthshire Road Trs. *v.* Perth District Committee, 10th March 1880, 7 Ret. 686. (At the same time it was intimated from the Bench that it would be more equitable to charge the district than the parish with repair and reconstruction).

though the other provisions of the Act have not been adopted (sect. 57). In construing similar provisions in England, it has been held that the expressions 'excessive weight' and 'extraordinary traffic' relate, not to an extraordinary amount of traffic of the usual sort, caused, for instance, by carriage of materials for building an ordinary dwelling-house, but to weight and traffic which are abnormal and beyond the ordinary traffic on the road—that is, not the amount of use to which the road is subjected, but the weight and character of the traffic; that the fact of the weight of a locomotive being within the legal standard is no answer; and that a comparison of the cost of repairs with the average expense of repairing highways is an important element, though not conclusive in determining the amount of extraordinary expenses.[97] Regard must in every case be had to the sort of industry prosecuted in the place, and to the recognised mode in which it is carried on; so that if quarrying be a recognised business in the district, and the loads complained of are of the usual weight in such traffic, it will not do to contrast the tear and wear caused in this way with that which results from ordinary agricultural traffic, as founding an obligation to repay extraordinary expenses.[98] If the traffic does not materially differ in character from that which is usually carried over roads of the same nature in the neighbourhood, or from that which the road in its ordinary and fair use may be reasonably subjected to, there will be no claim, though the aggregate weight and quantity was extraordinary as compared with the usual use of the road.[99]

Burdens on owners only.

Besides these assessments for the ordinary administration of highways, there are two other burdens imposed, with a single exception, on owners only. The first of these is imposed for the construction of any new road or bridge, and the rebuilding of any bridge, which the board, subject to the approval of the trustees and after certain notices, may resolve upon. The board may also agree with any person or corporation (including the trustees of any adjoining county or the local authority of any burgh) for such construction, and as to the expense of the same. The cost, so far as payable by the board, is raised by assessment leviable, as the trustees may determine, either on the county, or on the district or districts within which such new road or bridge is situated, in the same way and with the same powers of borrowing for a period not

For new roads and bridges.

[97] L. Aveland *v.* Lucas, 5 C.P.D. 211, 351.

[98] Wallington *v.* Hoskins, 6 Q.B.D. 206.

[99] Pickering Board *v.* Barry, 8 Q.B.D. 59, and cases there; Raglan Board *v.* Monmouth Steam Co., 46 J.P. 498.

Borrowing powers.

exceeding fifty years, as in the case of assessments for payment of debt.[100] The cost of a march-bridge is presumed, in the absence of agreement, to be equally divisible between the several counties or burghs interested. In an insular district,[101] the district committee has a veto, and the district is alone liable for its own new roads and bridges, and for none others. In burghs, the local authority has the same powers herein as the county road trustees, but the assessments are levied in the same manner as the assessments for maintaining and repairing the streets (sect. 58).

(Insular districts.)

(Burghs.)

For payment of debt. Valuation.

The other assessment referred to is laid on for the payment of debt. Elaborate provisions are enacted for the valuation of road debts, and their allocation between two or more counties and between counties and burghs (sects. 59-70). The debtor and the amount of debt being thus determined, the trustees or burgh local authority, as the case may be, shall, until the debt be wiped off, impose and cause to be levied or levy an assessment sufficient to pay the interest; and further, they may resolve, immediately after the allocation, to pay the debt off (sects. 71-73), and for that purpose to lay on an annual assessment sufficient to provide a sum equal to not less than one-fiftieth part of the total valued and allocated debt, with interest thereon or on the balance at five per cent. All assessments for payment of debt and for payment of interest on any debt shall be paid by proprietors only.

Borrowing powers.

The trustees and burgh local authority respectively have, moreover, power to borrow on the security of the assessments for payment of debt, at five per cent or under, by assignations, transferable by indorsation and ranking *pari passu*, and extinguishable by instalments during the currency of the assessments (sects. 75, 76). The loans may be paid off, and others on the same conditions contracted. Sums of principal or interest, unclaimed, or due to persons under disability, may be consigned in bank (sects. 79, 80).

Payment of assessments.

With regard to all the assessments authorised by the Act, it is enacted that they are to be deemed and taken to be for the year from 15th May preceding the date of imposition, and to be imposed according to the valuation roll in force for that year; and to be made payable at a date between 1st November and 1st February inclusive (sect. 82). In counties they may be collected by the county road collector, or if the trustees so require it, by the Com-

[100] See next paragraphs.

[101] *I.e.*, any island or group of islands forming at the date of the Act a separate highway district, sect. 18.

missioners of Supply, at the expense of the trustees (sect. 83). Appeals against improper assessment are determined by the board, or in insular districts, by the district committee, on complaint given in at a date fixed at least 14 days prior to the date of payment. Poverty of occupiers of premises valued under £4 is the only legal ground of exemption (sect. 84). The mode and power of recovery in counties is the same as that in force with regard to the land and assessed taxes, or either of them, and other public taxes; or by action in the Sheriff Small-Debt Court or in any other court. In any suit for recovery, more than six defenders may be called. The assessments are preferable to private debts (sect. 85). In burghs the rules applicable to the recovery of the police assessment or any other local rate are followed, and the present assessment may be collected either separately or along with the same. The tenant or occupier may be called on to pay the whole, with relief thereof or of half thereof out of his rent, according as the rate is or is not for payment of debt and interest thereon. Here also the debt is preferable, and poverty may be held an exemption in the case of occupiers under £4 (sect. 86). Existing funds available to the burgh local authority may be applied in aid or in place of this assessment (sect. 87).[102]

Appeals. Exemption. Recovery. Incidence.

8. *Gas Contingent Guarantee Rate.*—In the administration of burghs under the General Police Act, 1862,[103] there are many purposes for which, *inter alia*, the police-rate is imposed which have no analogy either in parochial or county management. Others, again, are provided for under local Acts, or by adoption of such statutes as the Gas and Water Works Acts.[104] In the case of gas and water, the rates levied by the civic authorities or other bodies are less in the nature of an assessment than of a price for a commodity supplied. The only assessment, properly so called, which need here be noticed, is the gas contingent guarantee rate, which the town council or police commissioners of any burgh which has adopted the Burghs Gas Supply (Scotland) Act, 1876,[105] may impose and levy, in order to pay any annuities and interest thereon, and the interest of money borrowed under the Act (sect. 38); and that similarly in all respects to the police-rate (sect. 39). The annuities here referred to are the price or

Gas contingent guarantee rate.

[102] Special arrangements as to the allocation, &c., of burdens, are provided in sects. 88-98. By sect. 103 the maximum rate in local Acts is abolished.

[103] 25 & 26 Vict. c. 101.

[104] 10 & 11 Vict. cc. 15 and 17; 26 & 27 Vict. c. 93; 33 & 34 Vict. c. 70; 34 & 35 Vict. c. 41; 36 & 37 Vict. c. 89.

[105] 39 & 40 Vict. c. 49.

part of the price of private gas undertakings taken over by the authorities (sect. 22), and money may be borrowed for the purchase or erection of gasworks for the burgh (sects. 27-37). On the other hand, the price of the gas supplied covers the cost of manufacture and distribution, the interest of money borrowed in respect of the works, and the provision of a sinking fund and a depreciation and renewal fund (sect. 41).

CHAPTER XLI.

IMPERIAL TAXES.

THERE are three subsisting forms of imperial taxation which are incident to the ownership or possession of land and other heritages in Scotland—cess or land-tax, inhabited-house duty, and income-tax.[1] Of these in their order.

I.—LAND-TAX OR CESS.

Land-tax. History of taxation.

This is the oldest mode of raising revenue by taxation. At the earliest historical period in Scotland, as in all feudal sovereignties, 'the ordinary source of the royal revenue may be described generally as consisting of the rents of Crown lands, with the payments due from the thanages, the casualties of ward, marriage, relief and non-entry exigible from time to time from the Crown vassals, the fines imposed by the justiciary and sheriffs, the estates of attainted persons, the fermes or maills of royal burghs, and the customs on merchandise, with occasional compositions for letters of gift, remissions, and legitimations, and the castle wards —that is, certain dues payable by lands in the vicinity of some of the royal castles for the expense of upholding them. Taxes were an extraordinary source of income, to which the king was not expected to have recourse except on the occurrence of great national emergencies,'[2] such as king's ransom and costage, dowries,

[1] Succession duty lies beyond the scope of this work, being, like many stamp-duties, a tax upon the transmission of land, and therefore properly a part of conveyancing.

[2] Preface to vol. i. (by Dr Stuart and Mr G. Burnett, Lyon-King) of 'The Exchequer Rolls of Scotland,' 1878, p. xxxiv. Besides the account, contained in this preface, of our earliest taxation, the most accessible authorities are Thomson's Transcript of the same early Rolls (Bannatyne Club); Sir John Sinclair on the Revenue, iii. 72 *et seq.*, 3d ed.; Kames's Hist. Law Tracts, vi. and xiv.; the authorities on Valuation cited *supra*, p. 190

Highland rebellion, Border garrisons, and war with the 'auld 'enemies of England.'[3] The taxes thus casually required were levied on the Church, the freeholders, and the burghs, in varying proportions, which had settled down for a considerable period before the annexation of the Church lands by the Crown in 1587 into one-half on the Church, one-third on the freeholders, and one-sixth on the burghs. In that year the quota of the counties was preserved; the remainder was thrown on the rest of the realm.[4] The further ascertainment of the burden was made, as has been pointed out on an earlier page,[5] according to Bagimont's Roll and the Old and New Extents. The process by which this ancient usage was superseded by the plan of making each county and burgh answerable for a certain sum, leviable in counties by special commissioners according to the valued rent, and in burghs by the magistrates according to certain rules and rates, need not be further described.

Land-tax at the Union.

As the final union of the kingdoms at the beginning of last century approached, that which had already taken place *extra ordinem* under Robert Bruce and Cromwell[6] became more and more the normal state of things;[7] and the Act of Union accordingly recognised the tax, practically though not expressly, as an annual one, by linking it with the similar English impost. The sum payable annually had been about £36,000 in the immediately preceding years; but in order to equalise the burden in the two realms it was enacted, in the ninth article of the Act, that whenever the sum of £1,997,763, 8s. 4½d.[8] was to be raised by land-tax in England, Scotland should be charged with £48,000, and so proportionally for any greater or lesser sum, to be 'raised 'and collected in the same manner as the cess now is in Scot-'land, but subject to such regulations in the manner of collecting 'as shall be made by the Parliament of Great Britain.' The tax was levied, in accordance with these rules, under annual Supply Acts, during nearly the whole of last century, in spite of the fact that the Scottish quota of less than a fortieth, though fair enough at first, had long ceased to be so. In 1798 Mr Pitt launched

Hutchison's J. P. iii. 1 *et seq.*; Bell's Prin., 1123-1131; and the English Treatises of Davies, Miller, and Bourdin. See also the papers and opinions in Renfrew *v.* Mags. of Glasgow, 8th Feb. 1861, 23 D. 505.

[3] The old Acts are—1424, c. 10; 1431, c. 1; 1455, c. 14; 1545, c. 3; 1556, c. 10.

[4] 1587, cc. 29 and 112.

[5] *Supra*, p. 191.

[6] Bruce, on the return of peace, received an annual subsidy during his life; and Cromwell levied £72,000 stg. a-year by monthly instalments.

[7] Between 1689 and 1707 the amount raised was £783,000 stg., including poll-tax and hearth-money.

[8] The English land-tax, at 4s. in the pound.

his famous scheme for easing the national debt by causing the absorption of a large amount of stock through the redemption by landowners of their land-tax. For this purpose the temporary Act of the year[9] was made perpetual, subject to this redemption; and the contingent payable by Scotland was fixed at £47,954, 1s. 2d.[10] The scheme was finally adjusted in 1802.[11]

Made perpetual in 1798.

Certain curious anomalies have, in the course of time, sprung up in both countries. In Scotland, the whole sum is now insignificant. Were it not so, the inequalities which have arisen from fluctuations in the value of heritages in different parts of the country, while the system of valuation and the allocation among counties and burghs remain the same as two centuries ago, would probably have roused more discontent than has appeared across the Border. Even in England it has been repeatedly pointed out as an anomalous state of matters that one part of the metropolis should pay fully four shillings, while another part pays less than one penny, in the pound.[12]

Anomalies.

The principal Acts are those of 1798 and 1802.[13] The last-cited Act supersedes the other two, except in so far as they define and continue for ever the sums of money charged for land-tax in the earlier year, and the powers, rules, &c., for levying them.[14] The state of things thus perpetuated is to be found in the first-cited Act—the last of a long series of annual statutes. It was there enacted (sect. 128) that the said sum of £47,954, 1s. 2d. should be raised and levied by an eight months' cess, in equal proportions for each month, within the respective shires, stewartries, cities, and burghs. Then follow the names of each shire and burgh, with the monthly sum required from each. It was at that time payable in four instalments yearly (sect. 130); later in two instalments, like assessed taxes;[15] and now in one lump, on or before the 1st of January in every year.[16] It is now ingathered by collectors appointed by the Treasury, who may but need not be distributors of stamps, instead of by the Commissioners of Supply and the magistrates of burghs,[17] and recovered, like the

Allocation of Scotch quota.

Payment and recovery.

[9] 38 George III. c. 5.

[10] Ibid. c. 60; in due proportion to the English quota of £1,989,673, 7s. 10½d.

[11] 42 Geo. III. c. 116.

[12] Miller, Bourdin, *supra;* and authorities there quoted. Liverpool pays about a third of one farthing in the pound.

[13] 38 Geo. III. cc. 5 and 60; superseded by 42 Geo. III. c. 116, and intermediate Acts, with the exception mentioned in the text.

[14] 42 Geo. III. c. 116, sect. 1.

[15] 43 Geo. III. c. 161, sect. 24; 5 & 6 Will. IV. c. 64, sect. 13; both repealed by Taxes Management Act, 1880 (43 & 44 Vict. c. 19).

[16] 20 & 21 Vict. c. 28.

[17] 4 & 5 Will. IV. c. 60, sect. 7; 5 & 6 Will. IV. c. 64, sect. 10; cf. 6 & 7 Will. IV. c. 65, sect. 10; all repealed and similar provisions substituted by Taxes Act, 1880, sect. 81.

same taxes, by poinding and sale.[18] It is not a *debitum fundi*,[19] even where it is incident to the ownership of land. But though only a personal debt, whoever has the land is liable to the tax as it arises, as, for example, a creditor, or purchaser from a creditor. But there is no preference for arrears.[20]

1. Land-tax in counties.

1. *Land-tax in Counties.*—In counties, the Commissioners of Supply, formerly named specially in the Name Acts, now constituted as shown in another part of this work,[21] are intrusted with the execution of the Act;[22] but, as has just been said, the collection of the impost has now been taken over by the Treasury, which takes also the risk of defalcation or deficiency in the collection occasioned by the failure of any collector it may appoint.[23] The commissioners cannot be compelled by the Treasury or its collector to furnish annually an assessment roll, corrected to date, containing the names of the different properties liable to be assessed, the amount of cess payable for each, and the names of the parties liable in payment, seeing that there is no such duty imposed on them by statute, and that they have no power to enforce a purgation of the cess-books.[24] And since the quota for the county and the portion thereof laid upon the several subjects therein have long been fixed by Act of Parliament and the cess-books, nothing more is now left to the commissioners in connection with the land-tax but the duty of allotting the valued rent of, and the *cumulo* tax due for, lands which have been subdivided.[25]

Redemption.

The Act of 1802 provides for the redemption of land-tax,[26] and has been so far made use of, that the present produce of the land-tax for Scotland is a little over £34,000 a-year.[27] Commissioners[28] for redemption are appointed or confirmed in their appointment with powers to require inspection of deeds and to examine on oath (sects. 4-8). The consideration to be given for

[18] 52 Geo. III. c. 95, repealed, and similar provisions substituted by Taxes Act, 1880, sect. 97. See Renfrew *v.* Mags. of Glasgow, 8th Feb. 1861, 23 D. 505.

[19] Graham *v.* Hers. of Clackmannan, 1664, M. 10164. It is the same in England — Astle *v.* Grant, 2 Dougl. 722.

[20] 1 B.C. 739 (7th ed.)

[21] *Supra*, p. 178. They are now incorporated, *supra*, p. 670.

[22] 38 Geo. III. c. 5, sect. 131.

[23] 6 & 7 Will. IV. c. 65, sect. 12, repealed and a similar provision substituted by the Taxes Act, 1880, sect. 81. This statute, while not affecting the substantive part of the old enactments, is the modern code of procedure, except as to redemption.

[24] L. Adv. *v.* Edinburgh Comrs. of Supply, 5th June 1851, 23 D. 933, affd. 4 Macq. 387.

[25] *Supra*, p. 192.

[26] The powers of purchase by the Crown, and parties other than those interested in the estate, exist no longer.

[27] The annual sum redeemed in both countries since 1798 now amounts to £850,000.

[28] Now the Commissioners of the Treasury—1 & 2 Vict. c. 58, sect. 1.

the redemption may be in money, or so much capital stock of public annuities transferable at the Bank of England (3 per cent Consols, and 3 per cent reduced Annuities)[29] as will yield an annuity or dividend exceeding the amount of the land-tax to be redeemed by one-tenth,[30] to be transferred to the National Debt Commissioners (sect. 22), except as to small sums, under £25 per annum, in which case the price must be paid in cash to the collector (sect. 23). In both cases the price may be paid by instalments within one or sixteen years after the date of the contract, according as each year's payment is under or over £100 stock or £60 sterling (sects. 24-29).[31] The cases of certain special redeemers are carefully provided for (sects. 39-60, 68 *et seq.*) As has been already pointed out, powers are given to heirs of entail to sell for the purpose of redeeming (sect. 61 *et seq.*)[32] The money in these cases is either paid into the Bank of England to the account of the National Debt Commissioners, and by them invested as above, or in the form of Three per cents directly (sects. 98, 99).[33] The contracts in every case must, before the payment of the second instalment, or within three months of the transfer, be registered with the proper officer, who makes out three duplicates of the amounts redeemed, and delivers one to the Receiver-general, another to the Commissioners of Supply, and the third to the Queen's Remembrancer (sect. 165). Contracts unfulfilled at death are enforceable against the personal representatives, and default to fulfil infers a penalty, besides revival of the cess (sects. 166, 167).[34] Appeals are heard by Commissioners of Supply who are also justices in all suits under the Act (sects. 196, 197).[35]

2. *Land-tax in Burghs.*—The impost here differs mainly in these points: There is no valued rent, and the burden is therefore distributed, so far as leviable on the rents of heritages, in accordance with the annual value set forth in the valuation roll.[36] 2. In burghs.

[29] Now of any Parliamentary stocks or annuities chargeable upon Consols—16 & 17 Vict. c. 90, sect. 8.

[30] The terms were relaxed—16 & 17 Vict. c. 74.

[31] As amended 53 Geo. III. c. 123, sects. 3, 4.

[32] *Supra*, p. 579. This is also a competent use of compensation money—Lands Clauses Act, sect. 67; Rutherfurd Act, sect. 26, *infra*, Appx. Nos. 13 and 21.

[33] As to surplus in case of entail—see sects. 101, 102.

[34] If the contracts cannot for some reason be completed, the Inland Revenue may rescind—57 Geo. III. c. 100, sect. 23.

[35] As to penalties and forfeitures, see sects. 189 *et seq.* The later Redemption Acts, so far as not cited, are mainly adapted to English practice—43 Geo. III. c. 51; 45 Geo. III. c. 77; 50 Geo. III. c. 58, sect. 2; 53 Geo. III. c. 123; 54 Geo. III. c. 173; 57 Geo. III. c. 100; 4 & 5 Will. IV. c. 11, sect. 5.

[36] 17 & 18 Vict. c. 91, sect. 33.

In the next place the tax, where it exists and is not defrayed out of the common good,[37] is not confined to the rents of heritable property, but may, in proportions determined by usage, be also laid on trade profits and personal estate, such as shipping. It was determined, after an elaborate argument, that this latter portion of the cess—called trade-stent—is not only a proper part of the so-called land-tax, and therefore an imperial burden, but also that it is leviable by the Crown from the inhabitants of the burgh directly, and not from the magistrates, as was argued on the terms of certain old statutes.[38] The usage of burdening other subjects besides heritage goes back to the sixteenth century, when the burgesses, inhabitants, and 'neighbours' of each burgh were stented and taxed, each 'according to the avail and quantity of his rent, 'living, goods, and gear that he has within burgh.'[39] The amount chargeable on each burgh is fixed by the same section of the earlier Act of 1798, already quoted,[40] as dealt with the quota in counties. The time-honoured usages in respect to the incidence of the tax are preserved, until altered by the burghs themselves.[41] The magistrates have even larger powers than the Commissioners of Supply in counties in relation thereto, and will not be interfered with by the Court—as in fixing the proportions leviable on heritable and moveable property—except in case of gross abuse of power.[42] But they could not enter into a binding agreement with an inhabitant to compound for payment of his cess, though there was a stipulation for proportional increase in case of a rise in the burgh's quota.[43] The third and last main point of distinction is that the Redemption Acts do not seem to apply, and have in point of fact never been applied in practice, to land-tax in burghs.[44]

II.—Inhabited-House Duty.

II. Inhabited-house duty.

This imperial tax is leviable from occupiers. Associated with the window-tax early in the century,[45] amended in the years 1808,

[37] See Return to Parliament, among the Parl. papers for 1849.

[38] Renfrew *v.* Mags. of Glasgow, 8th Feb. 1861, 23 D. 505. The Inner House was of opinion that the magistrates had never been primarily liable.

[39] 1597, c. 281. The usage had reference to the exclusive trading privileges of royal burghs. When these were communicated to other towns, the burden of cess followed, but was not laid on foreign trade. See Renfrew [38]; Kell *v.* Saltcoats, 1794, M. 13082.

[40] 38 Geo. III. c. 5, sect. 128.

[41] Ibid. sect. 129.

[42] Wilson *v.* Mags. of Glasgow, 1759, M. 13076.

[43] Agnew *v.* Stranraer, 1758, M. 13074. This referred to the period at which the Convention of Burghs shuffled the allocation.

[44] Renfrew *v.* Mags. of Glasgow, [38].

[45] 43 Geo. III. c. 161.

1817, 1824, and 1832,[46] and reduced in 1833,[47] it was repealed in 1834,[48] only to be revived in 1851 by the Act which abolished its justly unpopular comrade.[49] Upon the last-mentioned Act, with the statutes it incorporates and those by which it is itself amended, rests the inhabited-house duty as at present exigible. The name is somewhat misleading. 'An inhabited house does 'not mean a place of residence—habitation in the sense of the 'statute may consist of any kind of occupation of a house or 'building. If it be not unoccupied—that is to say, without any 'use being made of it at all—then it is an occupied house within 'the meaning of the Act, and, being occupied, it is also within 'the meaning of the statute an inhabited house.'[50]

The first section of the Act of 1851 grants certain duties upon inhabited dwelling-houses, as set forth in a schedule annexed, 'according to the annual value of such dwelling-houses.' The schedule charges a duty of sixpence in the pound 'for every in- 'habited dwelling-house which, with the household and other 'offices, yards, and gardens therewith occupied and charged, is or 'shall be worth the rent of £20 or upwards by the year,— Act of 1851.

'Where any such dwelling-house shall be occupied by any 'person in trade who shall expose to sale and sell any goods, 'wares, or merchandise in any shop or warehouse, being part of 'the same dwelling-house, and in the front and on the ground or 'basement storey thereof; Dwelling with shop, warehouse,

'And also where any such dwelling-house shall be occupied by 'any person who shall be duly licensed by the laws in force to 'sell therein by retail beer, ale, wine, or other liquors, although 'the room or rooms thereof in which any such liquor shall be 'exposed to sale, sold, drunk, or consumed shall not be such shop 'or warehouse as aforesaid;[51] and licensed, &c., premises.

'And also where any such dwelling-house shall be a farm- 'house occupied by a tenant or farm-servant, and *bonâ fide* used 'for the purposes of husbandry only.' Farmhouse.

And a duty of ninepence 'where any such dwelling-house shall 'not be occupied and used for any such purpose and in manner 'aforesaid.' Other dwelling-houses.

[46] 48 Geo. III. c. 55; 57 Geo. III. c. 25; 5 Geo. IV. c. 44; 6 Geo. IV. c. 7; 2 & 3 Will. IV. c. 113.

[47] 3 & 4 Will. IV. c. 39.

[48] 4 & 5 Will. IV. c. 19.

[49] 14 & 15 Vict. c. 36.

[50] *Per* L.-P. Inglis in Glasgow Corpn. *v.* Inland Revenue, 19th Oct. 1880, 8 Ret. 17, 19.

[51] To this are now added premises occupied in the business of a hotel, inn, or coffee-house keeper, unlicensed—34 & 35 Vict. c. 103, sect. 31—including a hydropathic establishment, Strathearn Hydrop. Co., *v.* Inland Revenue, 14th June 1881, Exch. Ca. 53, 8 Ret. 798.

Cases.

In the interpretation of these enactments it has been determined in Scotland that a farmhouse unsuitably large for the farm, built by a tenant who had other occupation besides that of farming, was not entitled to be assessed at the lower rate;[52] nor a farmhouse used also as the business-office of a distillery, which formed the greater part of the tenant's business.[53] On a construction of similar words in one of the window-tax statutes,[54] it has been decided that the combination, with the character of farmer, of the character of half-pay officer (Ca. 273), auctioneer (288), surgeon and blacksmith (449, 452), clergyman (611), or grocer (610), does not take the premises out of the relaxation; nor their use for lodging a farming-pupil (643): but that the contrary is true if a farmhouse is also used as permanent (450) or summer lodgings, or as a shooting-box (211, 368); or as a factor's, miller's (286, 287), or maltster's (330) office; or as an inn (763). A building occupied by a working man's club, which used the ground floor for the ordinary purposes of such a club, and let the upper floor to an auctioneer for an office, no person sleeping in the premises, has been held not to be an inhabited dwelling-house in the sense of the Act of 1851 and its predecessors.[55] The cases relating to other parts of this schedule are noticed further on.

Incorporation of Assessed Taxes Acts.

The second section of the Act of 1851 incorporates all the powers, provisions, rules, regulations, directions, and exemptions, fines, forfeitures, pains, and penalties contained in any Assessed Taxes Act, with reference to the duties on inhabited dwelling-houses according to the value thereof, as set forth in the schedule marked B annexed to 48 Geo. III. c. 55, and which were in force at the date of the repeal of these duties in 1834, with certain exceptions, which will be given effect to in the following paragraphs.

Schedule B of Act 1808.

The said Schedule B, coming in the place of a similar schedule to the Act of 1803,[56] in its first clause incorporates the mode of levying the now repealed window-tax, but the only part of the schedule devoted to the latter tax, which still subsists in respect to the present impost, is the 5th section, relating to change of occupancy; which, again, must be taken along with the 15th section of the Act of 1803, and the 2d and 3d sections of 6 Geo. IV. c. 7. The purport of these enactments is this: Houses unoccupied at the date of assessment are entered as such at the annual rent at which they might be let. On occupancy com-

Change of occupancy.

[52] Ca. 1042 of 'The Assessed Tax Cases' in Scotland, printed for the Inland Revenue; cf. Ca. 612.

[53] Ass. Tax Ca. 1089; cf. Ca. 609.

[54] 4 & 5 Will. IV. c. 73, sect. 2.

[55] Riley *v.* Read, Exch. Ca. 34 (1879), 4 Exch. D. 100, *sed quæ re.*

[56] 43 Geo. III. c. 161.

mencing, the occupier must give notice, under a penalty of £5 and chargeability for the whole year, to the Revenue officers within twenty days. If notice is given, chargeability begins as from the end of the preceding quarter. Again, if, after assessment has been made, an occupier, whether at the ish of his lease or not, quits possession, and gives notice thereof to the assessor, the duty will be discharged for the remaining entire quarter or quarters of the year during which time the house remains unoccupied. If no notice is given, duty for the whole year is exacted. Again, a house at the date of assessment not completed for occupation, and becoming occupied thereafter, is, on notice as above, charged only for the period of occupancy commencing from the end of the quarter preceding the beginning thereof; in default of notice, and also when occupation begins within the first quarter, duty for the whole year is leviable.[57] Further, a house is deemed unoccupied from which the owner or occupier has *bonâ fide* removed, and which is wholly unfurnished, although it may have been left in charge of a care-taker, who inhabits it solely for the purpose of airing it and preventing depredation or injury.[58]

Non-occupancy.

In regard to these provisions it has been decided, that in order to be deemed unoccupied, there does not require to be a total absence of furniture, or even such a want thereof as would not be put up with by an ordinary tenant, but that actual non-occupation is enough, though the house is furnished for letting.[59] If part of a self-contained house be unlet and unoccupied, it will only escape if it falls under 41 Vict. c. 15, sect. 13;[60] and partial or occasional occupation suffices to fix the liability (Ca. 363, 750), unless it be casual and transient, as the visit of a factor to a dismantled house (434). The furniture introduced by a care-taker is not sufficient to involve chargeability (417). If, while part of a house is unfinished, another part is occupied; or if the unfinished part is used for some purposes, such as for storing, liability has set in (16, 456). There has been no decision in Scotland as to who are occupiers; but in England it has been recently settled that a policeman inhabiting, as part of his duty, a house communicating with a police-station, and who was liable to be removed at any time to another station, is not an occupier in the sense of the Acts.[61]

Cases thereof.

Who are occupiers?

Schedule B goes on (sect. 2) to include in the subjects charge-

[57] See Ass. Tax Ca. 373.

[58] See also 48 Geo. III. c. 55, exemption 5.

[59] Ass. Tax Ca. 845, 794, 691, overruling Ca. 5, 6, 13, 435, 714.

[60] *Infra*, p. 702. See Ass. Tax Ca. 91, 415, 506.

[61] Bent *v.* Roberts, Exch. Ca. 30 (1877), 3 Exch. D. 66.

Offices, &c., included.

able 'every coach-house, stable, brew-house, wash-house, laundry, 'wood-house, bake-house, dairy, and all other offices, and all yards, 'courts, and curtilages,[62] and gardens and pleasure-grounds belong-'ing to and occupied with any dwelling-house; provided no more 'than one acre of such gardens and pleasure-grounds' shall be included. And the Act of 1851 in its 3d section also excludes market-gardens and nursery-grounds occupied by a market-gardener or nurseryman *bonâ fide* for the sale of the produce thereof. With regard to these appurtenances, it has been determined that an interval of 300-400 yards between house and offices is no objection to rating them together (608, 664); nor the fact that they are on different feus (1063); nor the fact that they are held by different agreements, or that the use of the offices is shared by others (1099). But farm-buildings, properly so called, are excluded (1062, 1086). This part of the Schedule is not affected by the recent legislation which deals with composite premises.[63]

Shops and warehouses.

Subject to the classifying enactment contained in the schedule to the Act of 1851,[64] shops and warehouses attached to a dwelling-house or having any communication therewith are valued along with the dwelling-house, except (1) warehouses and buildings upon or near adjoining wharfs which are occupied by wharfingers having dwelling-houses on the wharfs for themselves or their servants; and (2) warehouses which are 'distinct and separate buildings, 'and not parts or parcels of such dwelling-houses or the shops 'attached thereto, but employed solely as' stores or factories '(not-'withstanding the same may adjoin to or have communication with 'the dwelling-house or shop)' (Act 1808, Sched. B, 3). The rule and not the latter exception was applied to premises consisting of a shop on the ground-floor and three flats above extending over that shop and another which was separately owned and occupied, the state of intercommunication being that the shop and first and third flats were in direct communication by an internal stair, and the second flat, occupied by a salesman in the shop, was in communication with all three by means of what had formerly been a common stair, and was now exclusively owned along with the flats to which it gave access.[65] If a building formerly used for the purpose of residence wholly comes to be employed for the

[62] As to this expression, see under the Gun-tax, *infra*, Appx. No. 6.

[63] Douglas *v.* Young, Exch. Ca. 37, 14th Nov. 1879, 7 Ret. 229.

[64] *Supra*, p. 695.

[65] Cowan & Strachan *v.* Inland Revenue, Exch. Ca. 39, 22d Jan. 1880, 7 Ret. 491, and Union Bank, 2d Feb. 1878, 5 Ret. 598.

purposes of trade only, or as a warehouse for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting-house, or as an office or counting-house for the purposes of exercising or carrying on any profession, vocation, business, or calling by which any person shall seek a livelihood or profit, no one inhabiting it except in the daytime only for the purpose of such trade, it will be exempted, on notice being given to the assessor or surveyor, and examination being made by the assessor;[66] and that either for the whole year or for any entire quarter thereof, provided in the latter case occupation for the same sort of use (as dwelling-house and as trade-premises) do not recur at a different part of any year of assessment.[67] These amending Acts apply only to whole buildings, or to such parts of buildings as, belonging to separate owners, are separately assessed, not to different parts of the same building all belonging to the same owner, and some occupied for trading or professional purposes, others for residential purposes. They were therefore inapplicable to a building, four storeys of which were used as railway offices, and the two uppermost storeys as part of a hotel belonging to the railway company;[68] and to a stamp-distributor's office, which was a room situated in a wing adjoining his dwelling-house, and was accessible from it by an internal communication.[69] The occupier of any mill or place of manufacture or warehouse, not being part or parcel of any dwelling-house, nor attached or adjoining to any dwelling-house, nor having any internal communication therewith, may, on obtaining a licence and giving notice, appoint any one of his servants named in the licence to watch the premises by night, without thereby rendering himself liable for the duties;[70] and this relaxation is by a later Act extended to all the cases mentioned in the Acts of 1817 and 1824.[71] And its scope has been recently extended still further by an enactment that 'every house or tenement which is occupied solely for the 'purposes of any trade or business, or of any profession or calling 'by which the occupier seeks a livelihood or profit, shall be 'exempted from the duties by the commissioners upon proof of 'the facts to their satisfaction, and this exemption shall take 'effect although a servant or other person may dwell in such

[66] 57 Geo. III. c. 25, sects. 1, 2 (1817); amended 30 & 31 Vict. c. 90, sect. 25; and 5 Geo. IV. c. 44, sect. 4 (1824).

[67] 2 & 3 Will. IV. c. 113, sect. 3.

[68] G.S.W. Ry. *v.* Banks (St Enoch's), Exch. Ca. 47, 16th July 1880, 7 Ret. 1161 (see L.P. Inglis's elaborate opinion and correction of a verbal discrepancy between the Acts of 1817 and 1824).

[69] Russell *v.* Coutts, 14th Dec. 1881, 9 Ret. 261.

[70] 57 Geo. III. c. 25, sect. 4.

[71] 6 Geo. IV. c. 7, sect. 7. The Acts are cited *supra*, [66].

'house or tenement, for the protection thereof.'[72] In this provision of the Act of 1878, the term 'servant' means 'only a 'menial or domestic servant employed by the occupier, and the 'expression "other person" shall be deemed to mean any person 'of a similar grade or description not otherwise employed by the 'occupier, who shall be engaged by him to dwell in the house or 'tenement solely for the protection thereof.'[73]

Cases.

The decisions on these enactments are very numerous, but they are in most part superseded by the Act of 1878 as thus authentically interpreted, and are concerned, moreover, more with the premises in question as tools of trade than as ordinary heritable subjects. It will be sufficient to add a note of the most important earlier cases, collected by the Revenue authorities,[74] and to trace the course of decisions since the law took its present shape. A building, containing a hall, side-rooms, and a hall-keeper's house, employed primarily as a coal exchange, but also hired out for balls, bazaars, and other entertainments, comes within the exemption;[75] but the contrary is true of a hotel, which is essentially a dwelling-house, though the landlord has a separate house, and with his family spends the night there, only residing in the hotel to such an extent as is required for carrying on the business.[76] The exemption does not extend to a farmhouse inhabited by the farm-steward or by a farm-servant of the landlord who has the farm in his own hands,[77] nor to a building consisting of insurance-office premises in two flats, a caretaker's dwelling in the sunk flat, and the cashier's house in the top flat, having no internal communication with the rest.[78] The house or tenement to which the sub-section applies must belong to one proprietor.[79] And public trustees, holding a museum to which the public are admitted free, do not occupy it 'solely for the purposes of any trade or busi-'ness by which the occupier seeks a livelihood or profit.'[80]

[72] 41 & 42 Vict. c. 15, sect. 13, repealing 32 & 33 Vict. c. 14, sect. 8.

[73] 44 Vict. c. 12, sect. 24. See the cases decided on these expressions, as read without the help of this Act, in 7 Ret. 229, 491, 8 Ret. 17; 6 Q.B.D. 530, 673, 8 Q.B.D. 421, 47 L.J. 254.

[74] Besides a mass of cases relating to internal and other communication under the Window-tax Acts, there are Ass. Tax Ca. 839-41, 846, 897, 1000, 1019, 1052, 1072-3, 1077, 1102, 1106, 1108; Exchequer Cases, 2-3 (2 Ret. 394), 4-7, 21, 22-23 (4 Ret. 1143), 27-29 (5 Ret. 598). As to care-takers—Ass. Tax Cases, 228-30, 269, 713, 757, 840-2, 890, 1020, 1033, 1109-10, 1112, 1115; and the Exchequer Cases already cited.

[75] Glasgow Coal Exchange Co., Exch. Ca. 33, 18th March 1879, 6 Ret. 850. (See L.P. Inglis's history of the impost.)

[76] Douglas *v.* Young, Exch. Ca. 37, 14th Nov. 1879, 7 Ret. 229.

[77] Ainslie, Exch. Ca. 49.

[78] Scottish Widows' Fund *v.* Inland Revenue, Exch. Ca. 40, 22d Jan. 1880, 7 Ret. 491.

[79] Ibid., *per* L.P. Inglis.

[80] Glasgow Corp. *v.* Inland Revenue, 19th Oct. 1880, 8 Ret. 17.

Schedule B goes on to charge the duties on halls and offices belonging to any persons or bodies politic or corporate, or to any company that are or may be lawfully charged with the payment of any other taxes or parish rates, making the owner liable (sect. 4).[81] But among the special exemptions annexed to the Act of 1808 are—'I. Any house belonging to his Majesty or any of 'the Royal Family, and every public office for which the duties 'heretofore payable have been paid by his Majesty or out of the 'public revenue;' and 'IV. Any hospital, charity school, or house 'provided for the reception and relief of poor persons.' Under this latter and a similar exemption from window-tax, it has been decided that it extends to an infirmary supported wholly by subscription, but not to a dispensary where fees are exacted (Ass. Tax Ca. 93, 754); to an infirmary, a district asylum, and even to the superintendent's house in either, whether there was a statutory obligation to reside in the premises or not,[82] but not to a burgh school (570), nor to a public school (748), nor to public baths (603), none of which were subjects meant for profit. Exemptions.

Every chamber or apartment in any college in any of the universities of Great Britain, being severally in the tenure or occupation of any person or persons, is charged as an entire house; as also is every tenement, being a distinct property, into which any dwelling-house is divided; and in both cases the duty is payable by the occupiers (Sched. B, 4, 14). But where any house is let in different storeys, tenements, lodgings, or landings, and is inhabited by two or more persons or families, the duty is charged on the landlord, as if it were inhabited by one person or family only; or in case of absence of the landlord beyond the collector's district, and his default for twenty days, it may be levied from the occupiers respectively, they having a right to deduction from next payment of rent (Sched. B, 6).[83] The effect of these two sections taken together is, 'that where a dwelling-house, meaning 'an entire block of building, is the property of one individual, but 'is divided into different occupations or tenements let to different 'tenants, the landlord or owner of the entire block of building is 'to be taken as the occupier of the entire block of building, and 'assessed as if he occupied the whole himself; but where the 'entire block of building is divided into tenements in the same 'manner as is contemplated by the 6th section, but these tene- Composite houses.

[81] See Scottish Widows' Fund, [78].

[82] Ass. Tax Ca. 753; Jepson v. Gribble, Exch. Ca. 16 (1876), 1 Exch. D. 151; Wilson v. Fasson, 19th May 1883, 10 Ret. 870 (the question was mooted whether a chaplain's house is so far a necessary part of such establishments as to be also exempt).

[83] Varying in part 43 Geo. III. c. 161, sect. 55.

'ments are distinct properties belonging to different owners, then 'the incidence of duty is to be upon the occupant of each separate 'tenement.' In the case which led to these remarks, the 6th section was applied to the case of a building, the ground-floor of which was let to a club and the rest as part of a hotel.[84] And to such houses divided into different tenements is now afforded, by the above-mentioned Act of 1878, the same exemption, with regard to trades and professions and non-occupancy, as was by the same Act afforded to separate buildings so employed. The words of the exemption are: 'Where any house, being one property, 'shall be divided into and let in different tenements, and any of 'such tenements are occupied solely for the purposes of any trade 'or business, or of any profession or calling by which the occupier 'seeks a livelihood or profit, or are unoccupied, the person charge-'able as occupier of the house shall be at liberty to give notice 'in writing at any time during the year of assessment to the 'surveyor of taxes,' so that the assessment may be confined 'to 'the duty on the value according to which the house should 'have been assessed, if it had been a house comprising only 'the tenements other than such as are occupied as aforesaid 'or are unoccupied.'[85] The enactments prior to 1878 were held not to apply to a self-contained house in which the landlord retained possession of a room for storage,[86] but to apply to a flatted house, whether a portion of it were occupied by the landlord or not.

Cases. It will be sufficient to refer in a note[87] to the many cases decided before 1878, since they have been in most part superseded by the enactment just quoted. The cases which have elucidated that enactment are numerous, and scarcely repay an examination of the minute detail of structural peculiarities on which reliance was placed by one party or the other. Two sorts of cases are referred to in the passage quoted from the case of *Campbell*. To the first of these, in certain circumstances, the exemption introduced by the late Act applies; to the other it does not apply. None of the relaxations contained in this and the other Acts are applicable to a third possible case—viz., that of a building, the property of one person, occupied wholly by him, but used for different purposes in different parts.[88] With respect to a fourth possible case—where

[84] Campbell *v.* Inland Revenue, Exch. Ca. 41, 21st Feb. 1880, 7 Ret. 579.

[85] 41 & 42 Vict. c. 15, sect. 13, 1; following on Att.-Gen. *v.* Mutual Tontine, 1 Exch. D. 469.

[86] Ass. Tax Ca. 1, 8, 60, 62.

[87] Ass. Tax Ca. 216-9, 271, 304-8, 336-7, 421-3, 431, 442-7, 487, 500, 502-3, 521-6, 542-4, 567, 657-9, 686-7, 693-4, 715-9, 721-3, 759-61, 790-1, 1077; Exchequer Ca. 8 and 9.

[88] G.S.W. Ry. *v.* Banks, [68].

a house, being one property, is partly let and partly retained in the owner's hands—the express words of the quoted sub-section and the balance of judicial opinion seem to exclude this case also from the benefit of the exemption, however small may be the portion retained.[89] In order to satisfy the requirements of the sub-section, there must be, besides separate letting, a structural division of the tenements, not merely that division which exists in all houses which have different floors and separate rooms.[90] This rule was applied in favour of the Crown, where rooms were separately let, some for trading purposes, others for residence, in a building which did not substantially differ from an ordinary storeyed house;[91] but in favour of exemption, where part of the ground-floor and basement of a building was severed from the rest of the house by a party-wall, and had its own separate entrance, there being no communication between it and the rest of the building, and the part so separated being used as a bank.[92] Lord President Inglis in a recent case, after explaining that the word 'tenement' suggested to a Scotch lawyer—whatever might be the difficulty of construing it in English law—the mode of occupation by flatted houses, with entrances to each part of the house from a common stair, thus paraphrased the leading words of the sub-section: 'There must be a house belonging to one owner so structurally 'divided into different tenements as to be capable of being sepa-'rately owned or separately let; and these different tenements 'must be either all separately let or all for the time unoccupied, 'or some of them separately let and some of them for the time 'unoccupied.' Accordingly exemption was refused to writing-chambers let by the owner to a firm of which he was a member, the rest of the house in which they were situated being occupied by the owner, partly as a residence, partly as a separate office, since, though all three parts of the house had separate entrances, there was also internal communication between them all, and there was not, properly speaking, any structural separation between them.[93] There the owner had the means, without coming out of his door, of ranging over the entire buildings. In a case where that was impossible owing to structural separation, exemp-

[89] Yorkshire Fire Office *v.* Clayton, [90], *per* Lindley J., Chapman *v.* Royal Bank, [92], *per* Huddleston B., Hawkins J. *contra*. Cf. Russell *v.* Coutts, *loc. cit.*, [93].

[90] Yorkshire Fire Office *v.* Clayton, Exch. Ca. 48 (1881), 6 Q.B.D. 557, aff. 8 Q.B.D. 421. Lord-Justice Cotton's remarks are approved by L.P. Inglis in Corke *v.* Brims, *infra*, [94].

[91] Yorkshire Fire Office, [90].

[92] Chapman *v.* Royal Bank, Exch. Ca. 52 (1881), 7 Q.B.D. 136, esp. *per* Hawkins J. at p. 144.

[93] Russell *v.* Coutts, 14th Dec. 1881, 9 Ret. 261, 265.

tion was admitted. Of two contiguous houses in one ownership, part was let as bank-offices, part as a dwelling-house, and part as writing-chambers, occupied by the landlord and the tenant of the dwelling as a firm. The street door gave into a vestibule, and on that opened three doors, one leading to the bank, another to the dwelling-house, and the third to the bank consulting-room and thence to the writing-chambers. The only route between these different premises passed through the vestibule; there being thus a well-marked distinction between this case and the cases of *Russell* and the *Yorkshire Fire Office*.[94] A banking-house and a dwelling-house under the same roof do not compose a house 'let 'in different tenements,' though the latter is let to a third party by the bank-agent, an official removeable at the will of his employers, who were really the occupiers of the whole building.[95] In the same way a museum is occupied by the public trustees who are its owners, though part be the dwelling-house of the curator.[96] Portions of a house which are occupied by learned bodies as halls for discussions on subjects of interest to them, are not occupied 'solely for the purposes of any profession or calling 'by which the occupier seeks a livelihood or profit.'[97]

Valuation.

The mode of ascertaining the full and just yearly rent at which the premises are really and *bonâ fide* worth to be let,[98] or the 'annual value,'[99] is carefully set out in the remaining sections of Schedule B, and is founded in the first place on the poor-assessment roll,[100] if therefrom can be ascertained 'the full annual 'value.' If not, the assessors are thrown on their inquiry, starting with the actual rent of premises let within the preceding three years. The valuation roll is now the rule in such inquiries, when made up by officers of the Inland Revenue;[101] not, however, if still retained by the localities in their own hands.[102] In the latter case, and also where the valuation roll lumps together subjects chargeable and subjects not chargeable to the duty, the assessors must rate on 'the best information they can obtain of the annual 'value, which in all cases shall be the actual amount of the rent,' or 'the rent at which the premises respectively are worth to be 'let by the year' (Sched. B, sects. 7-12). Power to enter with the assistance of a constable and to examine any premises for

[94] Corke *v.* Brims, 7th July 1883, 20 Sc. L. R. 778.

[95] Commercial Bank, Exch. Ca. 35, *per* L. Curriehill (II.)

[96] Glasgow Corp. *v.* Inland Revenue, 19th Oct. 1880, 8 Ret. 17.

[97] Ibid.

[98] 43 Geo. III. c. 161, sect. 10.

[99] 14 & 15 Vict. c. 36, sect. 1.

[100] This is not held to relieve manses—Ass. Tax Ca. 847, 874-6, 886.

[101] 20 & 21 Vict. c. 58, sect. 3.

[102] Menzies *v.* Inland Revenue, 18th Jan. 1878, 5 Ret. 531.

the purpose of ascertaining their taxable value is conferred on the surveyors.[103] They will be entitled to get behind a grossly evasive[104] or an improving rent.[105]

Collection.

The machinery for assessment, collection, appeal, and recovery, by means of commissioners, surveyors, and assessors under the Inland Revenue, is now the same as that employed in levying the income-tax.[106] The date of payment is the 1st of January for the year beginning with the preceding 24th of May.[107] On removal out of the collector's district without obtaining a discharge, the defaulter is charged to pay by the commissioners of the district to which he has gone, on certificate of removal being transmitted to them.[108] Parents, guardians, and executors are liable to pay out of the estate they administer.[109] There is an appeal to the Commissioners of Income Tax against any surcharge or over-rating or double assessments.[110]

III.—Property and Income Tax.

Annual grant.

This impost, the most important of the direct taxes and the most convenient of all on account of the ease with which it can be raised and lowered without serious dislocation to commercial enterprise, has now come to be recognised as a part of every year's budget. The grant to her Majesty, as contained in the annual Customs and Inland Revenue Act, is, so far as pertinent to the present subject, couched in the following terms: 'There shall 'be charged, collected, and paid for the year commencing on the '6th of April, . . . in respect of all property mentioned or de-'scribed as chargeable in the Act of the sixteenth and seventeenth 'years of her Majesty's reign, chapter 34, the following duties of 'income-tax (that is to say):

'For every twenty shillings of the annual value or amount of 'property chargeable under Schedule (A) of the said Act, the duty 'of pence.

[103] 43 Geo. III. c. 161, sect. 60. This section, repealed by the Taxes Act of 1880, is restored by 45 & 46 Vict. c. 72, sect. 7. Constables and other police-officers are required to aid generally in the execution of the Acts, and to obey warrants directed to them by the Commissioners—Taxes Act, 1880, sect. 22.

[104] Cases of £19, 19s. in Ass. Tax Ca. 895, 1001-3, 1015-18. Other cases, 1069-71, 1080, 1088, 1091.

[105] Ibid. 870.

[106] *Infra*, p. 707; 14 & 15 Vict. c. 36, sect. 1, incorporating the Assessed Taxes Acts; Taxes Act, 1880, sects. 48 *et seq.* 81, 57-59, 97.

[107] Taxes Act, 1880, sects. 48, 82.

[108] Ibid. sect. 90. This Act, while not affecting the substance of the impost, forms the modern code of procedure.

[109] Ibid. sect. 92.

[110] Ibid. sects. 57, 60.

'And for every twenty shillings of the annual value of the 'occupation of lands, tenements, hereditaments, and heritages, 'chargeable under Schedule (B) of the said Act, . . . in Scotland 'the duty of .'[111]

Schedules (A) and (B).

The Schedules (A) and (B) here referred to are contained in the 2d section of the Income Tax Act of 1853,[112] and came in place of corresponding schedules contained in the principal Act of 1842,[113] at the date when Ireland was brought within the sphere of the income-tax. The enactment is, that for the purpose of classification and assessment the tax now in question 'shall be deemed 'to be granted and made payable yearly' (Sched. A), 'for and in 'respect of the property in all lands, tenements, hereditaments, 'and heritages in the United Kingdom, and to be charged for 'every twenty shillings of the annual value thereof;' and (Sched. B) 'for and in respect of the occupation of all such lands, tenements, 'hereditaments, and heritages as aforesaid, and to be charged for 'every twenty shillings of the annual value thereof. Upon every 'fractional part of twenty shillings of the annual value or amount 'of the property . . . aforesaid, the like proportion of duty 'at the respective rates aforesaid shall be charged, provided that 'no duty shall be charged of a lower denomination than one 'penny.'[114]

Rules applicable thereto.

The rules under which the duties mentioned and granted in Schedule A are assessed and charged, are those which are appended to sections 60-61 of the principal Act of 1842;[115] and those applicable to Schedule B are similarly appended to section 63 of the same Act. Rules common to both are annexed to section 64, and others are contained in various other sections of the statute. These regulations are of great importance in the present relation, but are too long for insertion in the present place. They are accordingly printed and annotated in the Appendix.[116] The absence of an appeal to the ordinary tribunals down to the year 1874[117] accounts for the almost total lack of judicial elucidation.

Scope of the tax.

The general scope of the tax and the mode in which it is worked out in the cases now in question are thus described by

[111] The English duty under Schedule (B) is usually fixed at half the amount in the pound of what is charged under Schedule (A); while the Scotch and Irish rate under Schedule (B) is somewhat lower.

[112] 16 & 17 Vict. c. 34.

[113] 5 & 6 Vict. c. 35, sect. 1—the successor of 43 Geo. III. c. 122, and 46 Geo. III. c. 65.

[114] 16 & 17 Vict. c. 34, sect. 3.

[115] 5 & 6 Vict. c. 35.

[116] *Infra*, Appx. No. 27.

[117] 37 Vict. c. 16, sects. 8-10; 41 & 42 Vict. c. 15, sect. 15; both repealed and re-enacted, Taxes Act, 1880, sect. 59. This Act, while not affecting the principal statutes of 1842 and 1853 and some minor Acts, repeals, re-enacts, and consolidates the rules of management of the three taxes discussed in this volume.

Lord President Inglis. The Act is intended as a tax on profits, whether they arise from lands or from trades and professions; 'but 'there is a material distinction between the provisions of the Act 'as regards profits arising from the one source and as regards 'profits arising from the other. In the case of profits arising 'from trades and professions, the Act says that there shall be an 'estimate made of what the profits are; and we know that it is 'a very rough and round kind of estimate that can be made in 'that case. But in the case of lands, the statute requires no such 'estimate of profits. It fixes the mode in which the profits are 'to be estimated—a statutory mode of proving what the profits 'are—and that is, by taking the actual annual value of the land, 'which it defines to be the rent payable, if it be the full rent, or 'the rack rent, as the statute calls it, or what the rent would be, 'if it be not let.'[118]

Local authority.

Commissioners for General Purposes.

The central authority are the Commissioners of Inland Revenue, called for shortness, the Board (principal Act, 1842, sect. 3);[119] the local authority are the Commissioners for General Purposes, appointed by the Commissioners of Supply or magistrates, at meetings convened by the Inland Revenue. The normal number is fixed at from three to seven (sect. 4); but the Inland Revenue may authorise an increase to fourteen.[120] The qualification in counties is infeftment in property or superiority or the possession as proprietor or liferenter of lands to the extent of £150 Scots valued rent, or possession of a capital in personal estate of £5000, or of an income therein of £200 sterling, or of a similar income lumping land and personalty together, and taking money at four per cent. The eldest son of a person infeft or possessed of a like estate of twice the above value is also qualified (sect. 12). In burghs, the qualification is infeftment or possession of an estate of the like nature, and of three-fifths of the above value; and the eldest son of one who is infeft or possessed of an estate worth thrice the qualification required of his father is also entitled to act (sect. 13). The estate may be situated beyond the limits of the particular county or burgh (sect. 14). The provost, bailies, dean of guild, treasurer, master of the Merchants' Company, and deacon convener of the trades in a royal burgh, and the bailies of a burgh of regality or barony, may act without further qualification than their office (sect. 15); and the sheriff or sheriff-substitute of any county or division is *ex officio* a commissioner for that county or division.[121]

[118] Middleton *v.* L. Adv., 16th March 1876, 3 Ret. 599, 602.

[119] As altered, 12 Vict. c. 1, sect. 3; re-enacted, Taxes Act, 1880, sect. 12 *et seq.*

[120] 28 Vict. c. 30, sect. 5, repealed and re-enacted, Taxes Act, 1880, sect. 28.

[121] Taxes Act, 1880, sect. 27.

Additional Commissioners.

Additional commissioners may be appointed by the principal body, either out of those qualified as above or out of persons seised or infeft or possessed of one-half of the above qualifications (sects. 16, 19, and 20).[122]

Special Commissioners.

Special commissioners, including the Board of Inland Revenue, are also appointed; but their sphere is confined, in cases under Schedules A and B, in Scotland, to the allowances enumerated in Schedule A, No. VI.[123] There are also provisions for filling up vacancies, for default of appointment, and for cases of a lack of commissioners (sects. 4-8).[124]

Machinery.

The machinery of the Act is thus described by an English judge:[125] 'The commissioners are to make the assessments; they 'are to give notice of the assessment to the parties assessed; they 'are to appoint the time for hearing appeals against the assess-'ments; they are to appoint collectors; and after the time for 'hearing appeals is over, they are to deliver to them the dupli-'cate assessments and warrants to collect, so that the collectors 'may know what amounts they are to demand from the parties 'assessed.'

Rules of assessment.

Following this order—1. The rules of assessment are set forth in detail in the sections of the principal Act and its amendments,

Parties liable.

printed in the Appendix.[126] 2. The parties who are liable to be assessed—including temporary residents, temporary absentees, corporations and their officers, trustees, guardians, factors, agents, receivers, and married women—are described in sects. 39-45.

Notices.

On these persons, the assessors—who for several years have, as regards Schedules A and B, been the inspectors or surveyors of taxes[127]—serve general notices edictally by fixing them on or near the door of the church, chapel, market-house, or cross of the town or parish, or on the church or chapel nearest thereto, requiring those liable in the tax to make out and deliver to them, the commissioners, or their clerk, the necessary lists, declarations, and statements, within twenty-one days; and also serve a particular notice to the same effect, by delivering it at the taxpayer's dwelling-house, or at the premises to be charged (sects. 47-49). The

[122] Their special duty is under Schedule D (see sects. 111 *et seq.*)

[123] Sched. A, No. III., being now transferred to Sched. D, cases under it may, and railway cases must, go before the special commissioners—29 Vict. c. 36, sect. 8. See Miller *v.* Farie, 29th Nov. 1878, 6 Ret. 270.

[124] A certificate of being an acting commissioner, issued by the Inland Revenue, exempts from service on juries 'in the 'county wherein such person shall dwell' (sect. 35; altered 31 & 32 Vict. c. 100, sect. 43, but restored 34 & 35 Vict. c. 103, sect. 30, which is repealed and re-enacted by the Taxes Act of 1880, sect. 40.

[125] Maule J. in Kepp *v.* Wiggett, 10 C.B. 52.

[126] *Infra*, No. 27.

[127] 25 Vict. c. 22, sect. 44, and later Acts, the last being 46 Vict. c. 10, sect. 11 (1).

statement so required must be true and correct, in writing, and signed, containing the annual value of all lands and tenements in the party's occupation, whether 'the same be situate in one or more 'parish or parishes;' and there must be a declaration of the completeness of the disclosure. The statement does not embrace 'any 'annual payment arising out of the property of any other person' (sects. 52-54). The penalty on wilful neglect or delay to deliver in lists is £20 and treble duty, or if sued for in Court, £50 (sect. 55). The clerks to the commissioners make an abstract of the returns of statements (sect. 58). The assessors then make up their assessments, with the assistance, if necessary, of the commissioners, inspectors of poor, and schoolmasters, and get them signed by the commissioners (sects. 74-79). Statements. Penalties. Abstract.

3. A notice of the assessment being made and of the day for hearing appeals is given by the commissioners edictally or personally, leaving an interval of at least fourteen days for appeal (sect. 80). In order to the determination of any appeal, the valuation may be checked by reference to a man of skill, if either the commissioners or the taxpayer so desire (sect. 81).[128] It has been the custom to allow the same valuation, in regard to Schedules A and B, to stand for a series of years without alteration (sect. 87),[129] unless cases of original under-rating or undue exemption or new chargeability be discovered, or the taxpayer proves, on appeal, that he is over-rated in any year of the series, in the same way as he might have done in the first (ibid).[130] Certain abatements are granted in case of loss from floods or tempest, whether the lands be in the occupation of the owners or not (sects. 83-86), and in case of other losses in husbandry.[131] Appeals. Valuation. Abatements.

Both before and after the assessments are made up and signed, the inspectors and surveyors may inspect and examine the returns, the estimates, or the assessments themselves, and certify any errors of omission, under-rating, or neglect, on the part either of the assessors[132] or of the taxpayer, to the commissioners, in the way of a surcharge (sect. 161). If, on appeal to the commissioners, the surcharge be sustained and the fault have been wilful, the assessment is made in treble the rate of duty prescribed in the various schedules on the amount of duty surcharged; if not wilful, Inspection. Surcharge. Penalties.

[128] As amended by 16 & 17 Vict. c. 34, sect. 47.

[129] See the ordinary provision in such cases in the last Customs and Inland Revenue Act, 46 Vict. c. 10, sect. 11.

[130] And see 16 & 17 Vict. c. 34, sect. 45.

[131] 14 Vict. c. 12, sect. 3; 16 & 17 Vict. c. 34, sect. 46.

[132] As to Schedules A and B, the assessors and the inspectors or surveyors are the same persons, according to recent Acts—*c.g.*, 25 Vict. c. 22, sect. 44; 46 Vict. c. 10, sect. 11.

the whole or any part of the said treble rate may be remitted; and the overplus not so remitted shall be paid to the officer for receipt to the use of her Majesty (sect. 162).

Exemptions and reliefs.

After various vicissitudes, which may be traced in the statutes noted below,[133] the present state of the law with regard to exemptions in respect of small incomes was settled in 1876. The total exemption granted in the principal Act of 1842 to persons whose incomes were less than £150 a-year was restored; and in lieu of the abatement or relief allowed in the last-cited Act of 1872, it was enacted that any person charged to or paying income-tax who shall prove his income, though £150 a-year or upwards, to be less than £400, shall be entitled to be relieved from so much duty as an assessment on £120 would amount to; and the relief shall be given by abatement or repayment, or both combined.[134] The claim for exemption or abatement has to be given in within the time limited for delivering returns, along with a declaration containing particulars of income. If the inspector or surveyor makes no objection, the commissioners may discharge the assessment made on the claimant either in his own name or in that of his tenant, and certify the exemption to the Inland Revenue, so as also to free him from payment on income arising beyond the district of the said commissioners. If the inspector or surveyor objects, appeal to the commissioners proceeds in the usual way, and subject to the usual penalties (principal Act, sect. 164). If exemption be allowed, and payment of tax by way of deduction from any annual payment be proved, this is certified by the commissioners to the Inland Revenue Office in England, and an order for repayment issued, as under Schedule A, No. V. sect. 61[135] (sect. 165). Fraud is punished by forfeiture of £20 and treble duty; aiders and abettors therein forfeit £50 (sect. 167). For the purposes of exemption, the annual value of lands and heritages belonging to or in the occupation of the claimant is estimated according to the rules contained in Schedules A and B; and the income arising from the occupation thereof is taken in Scotland at one-third thereof. When the claimant is both owner and occupier, the two are added together in order to obtain his income from lands and heritages. And the income arising from a lease of or composition for tithes is estimated at one-fourth of their full annual value (sect. 167). Coparceners, joint tenants or tenants in common of the profits of any property whatever, and

Appeal.

Penalties.

Basis of value.

Joint interests.

[133] Principal Act, sect. 163; 16 & 17 Vict. c. 34, sect. 28; 23 Vict. c. 14, sect. 9; 26 Vict. c. 22, sect. 3; 35 & 36 Vict. c. 20, sect. 12.

[134] 39 Vict. c. 16, sect. 8.

[135] *Infra*, Appx. No. 27.

joint tenants or tenants of lands or tenements in partnership, being in the actual and joint occupation thereof in partnership, and entitled to the profits thereof in shares, and personally labouring therein and managing the same, may severally claim according to their respective shares; provided always, that the profits so arising shall not in any case be charged separately to the duty in respect of the occupation of lands, where lands shall be let or underlet without relinquishing the possession by the lessor, or where the lessee or tenant shall not be exclusively in the possession and occupation of the lands so let (sect. 168). The claim must be made in the district of the claimant's residence, and may be made by guardians, trustees, or agents, as in the case of making returns (sects. 169, 170). Double assessments may, on proof led, be vacated by the commissioners of the district or by the Board, and the overcharge, if paid, returned by the Treasury on the direction of the Board (sect. 171).[136] The appeal may, subject to the approval of the Inland Revenue, be taken to the commissioners of the district to which the person charged may have removed before appealing.[137]

Double assessments.

Immediately on the determination of any appeal by the commissioners for general or special purposes, the appellant or the inspector or surveyor may declare to them his dissatisfaction in point of law, and within twenty-one days require them, by notice in writing addressed to their clerk, to state and sign a case for the opinion of the Court of Exchequer in Scotland. The case shall set forth the facts and the determination, and the party requiring the same shall transmit the case to the said Court within seven days after receipt, along with or following on a notice to the other party of the case having been stated on his application, and a copy thereof.[138] The party requiring the case has to pay twenty shillings to the clerk before being entitled to have it stated. The Court may reverse, affirm, or amend the determination, or remit with its opinion, or may make such other order, and such order as to expenses, as it sees fit; or may remit for amendment. Its jurisdiction may be exercised by a judge in chambers, as well in vacation as during session. Acts of Sederunt are authorised.[139] The duties are to be paid notwithstanding appeal by case stated,

Case for Exchequer.

[136] Supplemented by Taxes Act, 1880, sect. 60.

[137] 16 & 17 Vict. c. 34, sect. 55.

[138] Taxes Act, 1880, sects. 10, 59, the latter section being amended by 45 & 46 Vict. c. 72, sect. 7. The same enactments apply to appeals anent inhabited-house duty.

[139] Ibid.; see A.S., 8th Jan. 1875, prescribing procedure under the original Act 37 Vict. c. 16, of which the Taxes Act, sect. 59, is a transcript.

leaving the matter for adjustment according to the result.[140] And there is now an appeal to the House of Lords.[141]

Duplicates.

4. Within one calendar month after the first day of hearing appeals to themselves—these having been first determined[142]—the commissioners must issue to the collectors[143] duplicates of the assessments charged at the various rates, together with warrants, as directed in the Assessed Tax Acts, for the speedy and effectual

Payment.

levying and collecting of the duties, which are now payable in one sum on the 1st of January for the financial year then current (sect. 172).[144] If not paid as directed,[145] the duties are recoverable as a Crown debt with expenses (ibid.) Guardians and executors are made liable for the duties chargeable on infants and

Notice of removal.

deceased persons (sect. 175). Persons removing into a new parish or place receive a notice requiring them to declare in writing within fourteen days the name of the parish and place and county wherein he has been assessed, or else to deliver a return,

Fraud, &c.

under a penalty of £20 (sect. 177). Fraud in removing, in converting or making away with property, or making false returns, &c.,[146] is penalised with duty treble that which is due for the property thus withdrawn, or treble the difference between the rate actually charged and that which ought to have been charged (sect. 178); besides the pains of perjury in case of false swearing, and of forgery in case of fabricating or altering certificates or receipts (sects. 180, 181). Penalties are sued for, recovered, and applied (sect. 185) as is directed in the Assessed Tax Acts.

Recovery by poinding and sale.

The Assessed Tax Acts here referred to, so far as applicable to Scotland, are those which are noted below.[147] They are, with the exception of the third and fourth of the late king, repealed by the Taxes Management Act of 1880, but their provisions for the recovery of the tax are substantially re-enacted by sect. 97 of the same statute.[148] It provides that in case of non-payment of the duties

[140] 42 & 43 Vict. c. 21, sect. 19.

[141] 41 Vict. c. 15, sect. 15, repealed and re-enacted, Taxes Act, 1880, sects. 10, 59.

[142] See Kepp *v.* Wiggett, 10 C.B. 51, *per* Jervis C.J.

[143] As to the appointment of assessors, inspectors, surveyors, and collectors, see sects. 36-38, and Taxes Act, 1880, sects. 5, 42, 81.

[144] Amended as to Scotland, 20 & 21 Vict. c. 28, sect. 2, repealed and re-enacted by Taxes Act, 1880. sect. 82; see the annual enactment, 46 Vict. c. 10, sect. 11 (3).

[145] In cash, or by post-office order less commission; or, if the Treasury see fit, and under its regulations, by postage-stamps—27 & 28 Vict. c. 56, sects. 15, 19, repealed and re-enacted, Taxes Act, 1880, sects. 98 and 99.

[146] Aiding in or making fraudulent returns infers a penalty of £50—16 & 17 Vict. c. 34, sect. 56.

[147] 43 Geo. III. c. 150; 45 Geo. III. c. 95; 52 Geo. III. c. 95; 55 Geo. III. c. 161; 3 & 4 Will. IV. c. 13; 4 & 5 Will. IV. c. 60; 5 & 6 Will. IV. cc. 20 and 64; 6 & 7 Will. IV. c. 65.

[148] 43 & 44 Vict. c. 19.

it shall be lawful for any two[149] commissioners, or for the sheriff or his substitute, and they are required, under a penalty of £10, on certificate made to them or either of them by the collector for the division, district, or county that such duties are resting and not duly paid, to grant warrant for the said collector recovering the said duties by poinding and distraining the goods of the person or persons mentioned in the certificate, which warrant shall be executed by constables or sheriff-officers; and the goods so poinded or distrained shall be detained and kept on the ground or at the house where they were poinded, or at a place near it, notified to the owner, for five days, there to be in the custody of the officer, and liable to payment of the duty and costs, unless the owner shall redeem them within the said period by payment of the duty and costs. The goods so poinded must, after the expiration of the said five days, be valued and appraised by two persons appointed by the officer (under a penalty of forty shillings in case of their neglect or refusal), and shall be sold at a sum not less than the value by the officer. The price is applied in the first place in payment of the duties, in the second place in payment of a fee of two shillings per pound of the duties to the officer for his trouble, unless the owner redeems by payment of the appraised value within five days after the valuation. If there be a surplus, it is returned to the owner. If no purchaser appears, the goods are lodged with the sheriff or his substitute, and, if not redeemed within five days after the consignation, are sold by him, he being liable for the duties and fees, but being entitled thereafter to one shilling per pound for his own trouble.[150] An allowance is also made to the poinding officer for the expense of preserving the goods, and maintaining any cattle, if such there be among the goods, during the period allowed for redemption, and also for the expense of the sale; and to the sheriff in a similar way. Where no sufficient goods are found, any one of the commissioners or the sheriff or his substitute is required to commit the defaulter to the common jail, without bail.[151] To prevent evasion of these provisions, auctioneers are bound, under a penalty of £50, to notify to the collector all sales at least three days before they are to begin.[152] The duties in arrear for one whole year are preferable to the claims of ordinary creditors, who cannot do ultimate diligence without satis-

[149] Ibid.; interpretation clause, sect. 5.

[150] This allowance is renewed in the Taxes Act of 1880, in spite of the intermediate Act by which sheriffs' fees were abolished—40 & 41 Vict. c. 50, sect. 12.

[151] Taxes Act, 1880, sect. 97. See Oakeley *v.* Campbell, 6th Nov. 1867, 6 Macph. 12, on the old enactment, 52 Geo. III. c. 95, sect. 14.

[152] Taxes Act, 1880, sect. 97.

fying the collector's claims to that extent, but this enactment does not apply to a landlord taking proceedings for rent.[153] Penalties are recoverable by the Lord Advocate in Exchequer, and, if they do not exceed £20, summarily and without appeal before the General Commissioners or any two or more of them, or before the sheriff or his substitute, with power to mitigate the same, and are levied in the same manner as the duties themselves.[154]

[153] Taxes Act, 1880, sect. 88.

[154] Taxes Act, 1880, sect. 21.

CHAPTER XLII.

RELIEF OF PUBLIC BURDENS.

Introductory.

It is not intended in this chapter to discuss the difficult questions which have arisen[1] with respect to the constitution of clauses of relief from public burdens, and the parties to whom and against whom they are available. It will here be postulated that an owner of heritable property has an undoubted claim of relief vested in him, by the titles under which he holds his estate, against his superior or some other party effectually bound.

Ordinary clause of relief.

The ordinary clause of relief used to contain *in extenso*, and the short statutory forms[2] now used are declared to import, an obligation to relieve of all feu-duties, or other duties or services or casualties, payable or prestable to the superior, and of all public, parochial, and local burdens due from or on account of the lands conveyed prior to the date of entry; and in burgage subjects an obligation to relieve of all ground-annuals, cess, annuity, and other public, parochial, and local burdens due for the same period.[3] The object is to apportion the payments according to the possession.

And warrandice.

Warrandice, if general, is construed, in onerous deeds for a full consideration, to be absolute; in deeds the result of a transaction, to be from fact and deed; and in gratuitous deeds, to

[1] See Johnstone *v.* Ramsay, 20th May 1824, 3 S. 33 (N.E. 22); Wilson *v.* Agnew, 1st Feb. 1831, 9 S. 357; Hamilton *v.* Montgomery, 28th Feb. 1834, 12 S. 349, 3 D. 942; Lennox *v.* Hamilton, 14th July 1843, 5 D. 1357; Horne *v.* E. Breadalbane, 23d Jan. 1835, 13 S. 296, 16 S. 820, rem. 7th May 1840, n.r.; in C.S. 23d Jan. 1841, 3 D. 435, revd. 21st Feb. 1842, 1 B. App. 1 (see also 16 S. 815); Nisbet's Trs. *v.* Halket, 20th Feb. 1835, 13 S. 497, affd. M'L. and Rob. 53; Sinclair *v.* Ms. Breadalbane, 16th Jan. 1844, 6 D. 378, revd. 14th Aug. 1846, 5 B. App. 353; Trinity Hosp. *v.* Nisbett's Trs., 18th June 1851, 13 D. 1161; Spottiswoode *v.* Seymer, 2d March 1853, 15 D. 458; Stewart *v.* D. Montrose, 15th Feb. 1860, 22 D. 755, affd. 27th March 1863, 1 Macph. H.L. 25; M'Callum *v.* Stewart, 14th Feb. 1868, 6 Macph. 382, affd. 17th Feb. 1870, 8 Macph. H.L. 1.

[2] 31 & 32 Vict. c. 101, sects. 5, 7, and Sched. (B), Nos. 1 and 2.

[3] Ibid. sect. 8.

be simple. But the short form introduced in 1847, 'and I grant 'warrandice,' is authentically interpreted as importing absolute warrandice as regards the lands and writs and evidents, and warrandice from fact and deed as regards the rents—no matter what the consideration may have been. The obligation thereby entered into by the granter of the deed is to indemnify the grantee in case of its being reduced, or in case of the subject being evicted from him in whole or part, on any ground not attributable to the grantee; and with respect to the rents, *debitum subesse*, but not that the debtors are solvent. The effect of these clauses on the incidence of public burdens is, that the granter of the conveyance is not liable in payment of any public burdens imposed on the land or to be imposed and due for the possession after the date of entry.

Special clauses of relief.

This, which is the normal state of things, may be altered through the agreement of parties by the introduction of special clauses of relief. No part of a conveyance has been subjected to so much criticism as these clauses. Most of the cases relate, however, to relief from augmentations of stipend, which, being a burden not on land but on teinds, does not fall within the scope of this work. The principles on which these cases have been decided are similar to those which have been applied to burdens on land. The rules evolved are thus stated by Mr Duff: 'Warran-'dice against payment of teinds and stipends does not protect 'against future augmentations, unless that term be used, or words 'admitting of no other construction. In construing a clause of 'this nature, it is of importance to observe if the teinds do or do 'not belong to the disponee. If the former, then it will require 'very clear expressions to relieve him from future augmentations 'of stipend; but if the latter, warrandice simply against teinds 'and stipends seems necessarily to imply relief from present and 'future stipends.'[4]

From augmentations of stipend.

And other burdens.

One of the clauses of relief which came up for construction in a recent case[5] may be taken as an example of the language in

[4] Feud. Convey. p. 89; St. 2.3.46; Bankt. 2.3.121; Ersk. 2.3.29. The cases down to 1829 are collected in Connell on Tithes, 2, 103 *et seq.* Add Hepburn *v.* Callander, 1814, 6 Pat. 6; Elliot *v.* Ms. Lothian, 1808, Hume, 465; 1824, 3 S. 348. The later cases of most importance are Baird's Trs. *v.* L. Lynedoch, 2d March 1830, 8 S. 622; Wilson *v.* Agnew, 1st Feb. 1831, 9 S. 357, and other cases in note [1]; M'Ritchie's Trs. *v.* Hope, 26th Feb. 1836, 14 S. 578; D. Roxburghe *v.* Ms. Lothian, 23d Jan. 1838, 16 S. 341; Pedie *v.* Heriot's Hosp., 4th June 1839, 1 D. 871; Paterson *v.* D. Hamilton, 4th July 1843, 5 D. 1313; Stevenson *v.* Spiers' Trs., 20th Feb. 1858, 20 D. 651; Pagan *v.* M'Rae, 15th Feb. 1860, 22 D. 806; Campbell's Trs. *v.* Dingwall, 17th Nov. 1865, 4 Macph. 50; L. Rosslyn *v.* N.B. Ry., 7th Dec. 1865, 4 Macph. 140; Preston *v.* Mags. of Edinburgh, 4th Feb. 1870, 8 Macph. 502; Reid's Trs. *v.* Ds. Sutherland, 25th Feb. 1881, 8 Ret. 509.

[5] Dunbar's Trs. *v.* British Fisheries Soc., 19th Dec. 1877, 5 Ret. 350, affd.

which superiors in feuing out land take on themselves special obligations towards their feuars. It runs—'To free and relieve 'the said society of the whole cess or land-tax, feu-duties, and 'other duties payable to his the said B. D.'s superiors of the said 'lands, ministers' stipends, schoolmasters' salaries, and other 'public burdens due and exigible out of the whole lands and sub-'jects hereby feued, or that may become due and payable for and 'from the same in all time coming.'

Supervenient law.

The obligation, though in terms very general, has been restricted in construction, in accordance with a distinction early drawn in cases of warrandice. As stated by Lord Ormidale,[6] with the approval of Lord Chancellor Cairns:[7] 'While such an obligation as 'that in question will give relief from all public burdens exigible 'or payable at its date, or that might thereafter become exigible 'or payable by virtue of any law or practice existing at its date, 'it will not afford relief from public burdens created and imposed 'for the first time by supervenient laws—that is to say, by laws 'enacted after the date of the obligation.'[8] The main difficulty is to determine whether a new statutory enactment is to be regarded as introducing a novel burden, or as merely rearranging an old one. Novelty sufficient to take a public burden out of the purview of such a clause of relief as has been quoted above, may arise in either of two ways. 'There may be a burden existing at the 'date of the contract; and subsequently the incidence of that 'burden may be so altered that, although the burden in specie re-'mains the same, the same in name and the same in application, 'still a change subsequently made by law in the incidence of the 'burden may be such that it becomes, with reference to a contract 'of this kind, a new burden, and is no longer covered by the con-'tract. Or, on the other hand, the incidence of the burden may 'remain the same, and yet the application of the burden may be 'so entirely different that the burden will become, although the 'same in name, yet a different burden in specie, and no longer be 'covered by the contract.'[9]

An example of the first sort of innovation here described ap-

12th July 1878, 5 Ret. H.L. 221, 3 App. Cas. 1297.

[6] Ibid. 5 Ret. 363.

[7] 3 App. Cas. 1305.

[8] St. 2.3.46; Bankt. 2.3.121; Ersk. 2.3.29 (cf. Cr. 2.4.10); Elphinstone *v.* L. Blantyre, 1663, M. 16585; Watson *v.* Law, 1667, M. 16588; Auchintuill *v.* Innes, 1676, M. 16603; Lumsden *v.* Gordon, 1682, M. 16606; Bonar *v.* Lyon, 1683, M. 16606; Scott *v.* Edmond (whole Court), 25th June 1850, 12 D. 1077; Wilson *v.* Mags. of Musselburgh, 22d Feb. 1868, 6 Macph. 483. Unless the rental be explicitly warranted—Ly. *v.* L. Cardross, 1635, M. 16580; Ly. *v.* L. Balbegno, 1637, M. 16582.

[9] Dunbar's Trs., [5], *per* L. Chan. Cairns, 3 App. Cas. 1305.

Novelty of incidence. Road-money.

peared in the case from which the remarks cited are taken. At the date of the feu the roads of the county were maintained under a local Statute Labour Conversion Act, which provided for an assessment according to valued rent leviable from owners who were in the personal occupation of their land, as well as for contribution by tenants, householders, labourers, carters, &c. At the date when the question of relief arose, the roads were maintained under an Act which abolished tolls, and assessed the whole sum required for the roads in the county on owners and occupiers, according to real rent. It was held by a majority of the Second Division, and by the House of Lords, that the new burden was so different in its incidence as not to fall under the clause of relief.[10] It had been decided early in the century, on similar grounds, that an ordinary clause of relief from burdens imposed or to be imposed did not extend to ministers' annuity and impost-money leviable in a burgh, within which the lands in question had been included with consent of the feuars during the interval between the date of the feu and that of the question arising; nor to poor-rates, leviable at the earlier date as a personal tax exigible in respect of inhabitancy (being laid on means and substance), and at the latter date as a burden on land. These exactions could not have been in the contemplation of parties when the charters were granted.[11] Again, it was sought to bring under the operation of a similar clause, dated in 1789, three different payments,—a church assessment, voluntarily imposed on themselves by the heritors of a parish in 1812, for the purpose of repairing the parish church; the prison assessment, imposed by an Act of 1839; and the constabulary assessment, imposed by another Act of the same year.[12] These burdens were all held to lie beyond the scope of the relief clause, —and that though the two latter came in place of earlier burdens imposed on the land according to valued rent.[13] A disposition, dated in 1861, contained a clause relieving the disponee of, *inter alia*, 'all schoolmaster's salary and road-money payable 'for the lands and others hereby disponed from henceforth and in 'all time coming.' The road-money payable at that date was the ordinary statute labour conversion-money; but in 1866 tolls were abolished by a local Act, and a general assessment imposed for

Poor-rates.

Prison, &c., assessment.

[10] Ibid. There was a specialty which pointed the same way. Part of the roads in question had in the interval been embraced within a burgh. See the effect of a similar inclusion of lands within burgh in a case of burgh-stent—Preston *v.* Mags. of Edinburgh, 4th Feb. 1870, 8 Macph. 502; and in a case of poor-rates, Hunter *v.* Chalmers, 16th July 1858, 20 D. 1311.

[11] Sprot *v.* Heriot's Hosp., 29th May 1829, 7 S. 682.

[12] *Supra*, p. 668, note [26].

[13] Scott *v.* Edmond, 25th June 1850, 12 D. 1077.

the maintenance of all the roads in the district. Lord Young held that 'road-money' applied to this general assessment, and no attempt was made to overturn his judgment. The parties burdened were the same, and the object generally the same; there was simply an addition to the scope of the burden. The burdens were 'in substance' the same; so that the judgment is not inconsistent with the road-money part of the case of *Dunbar's Trustees*.[14] On the other hand, with regard to schoolmaster's salary, there were these differences between the burden of elementary education as existing before and after 1872—the subject burdened was formerly estimated at the valued rent, now at the real rent; the parties burdened were then £100 valued-rent proprietors, now all owners and occupiers according to the valuation roll; and the school-fund under the Education Act is made up from other sources besides the rate, and is provided for other purposes besides remunerating the schoolmaster; while the schoolmaster's salary, with a fixed maximum, had, under the old law, to be provided irrespective of other payments. The incidence and the objects of the rate were therefore different, and in both ways the granter of the relief went free.[15] It had been decided in an earlier case that an obligation to relieve from augmentations of schoolmaster's salary, dated in 1648, when the maximum allowed by law was 200 merks, could not be stretched beyond that limit, when relaxed by the supervenient Education Act of 1803.[16]

School-rate.

The amount of novelty of the other sort—novelty in object—which will or will not entitle the superior to regard the burden as a new one, imposed by a supervenient law, and therefore necessarily beyond the contemplation of the parties in entering into the contract, is well illustrated by a series of cases relating to the principal local burden—that of poor-rates. It was first decided that poor-rates, both before and after the Act of 1845, when payable, as they now always are, *ratione soli*, are included in the term 'public burden,' as employed in a clause of relief.[17] After the passing of the Amendment Act of 1845 it was contended that even where the incidence of the burden remained the same, its object was totally altered; and that while under the old law the only legal use of the rate was in furnishing weekly doles

Novelty of application.

Poor-rates.

[14] Steuart *v.* E. Seafield, 1st March 1876, 3 Ret. 518.

[15] Ibid.

[16] Elliot *v.* Ms. Lothian, 2d Dec. 1824, 3 S. 348 (N.E. 248).

[17] Reid *v.* Williamson, 16th Feb. 1843, 5 D. 644, and cases there cited; Johnston *v.* Home, 1800, M. Appx. Public Burden, No. 1; Sprot *v.* Heriot's Hosp., [11]; Ainslie *v.* Mags. of Edinburgh, 19th Nov. 1839, 2 D. 64, for the law before 1845; and for the later law—Lees *v.* Mackinlay, 11th Nov. 1857, 20 D. 6, and other cases *infra*, pp. 720, 722.

to the poor and the maintenance of vagabonds in prison, the new system provided for the payment of certain officers, for the defraying of expenses of litigation, for the erection of poorhouses, for subscription to hospitals and asylums, and for medical and educational aid. Yet it was held that the burden remained the same, the alterations here enumerated being merely 'improvements in the mode of the application of that burden, and in the 'mode of the administration of poor-law relief.'[18] It is of no consequence whether, at the date of the deed, the assessment or its predecessor was actually in use to be imposed or not, if it might have been imposed under a law then existing.

Interpretation of such clauses.

Applying these rules, and the 'general paramount and governing canon that the meaning and intention of the contracting 'parties, as expressed in the contract, must form the rule and 'the limit of the liability,' the Court has construed a number of clauses of relief, which it will be useful to notice in this place. A number of feus in three adjoining parishes had been given out from the same estate, with clauses of relief which, though differing in enumeration, agreed in relieving the vassals from 'public 'burdens' in all time coming, or, more frequently, 'imposed or to 'be imposed,' and in omitting any express reference to parochial ecclesiastical burdens. The Court of Session found that such a clause did not extend to the building or repairing of manses or churches, proceeding partly on the practice of the parishes referred to. The House of Lords affirmed—on what ground it does not appear. There is plainly, however, an important distinction between an annual burden and one which is merely occasional; and it may well have been that the decision—which has been regarded in practice as ruling the general point apart from custom—may have proceeded on this ratio.[19] The distinction is certainly not between public and parochial,[20] or between personal and real burdens, since the phrase 'public burden' will include poor-rates, which are a purely parochial burden and no more a real burden than is the land-tax. Again, where a disposition, dated in 1747, relieved the purchaser from 'ministers' 'stipend, schoolmasters' salaries, augmentations of the same, or 'new erections, and all burdens which do or can affect the lands 'and teinds thereby disponed for ever, excepting £5 Scots, payable

Ecclesiastical burdens.

Road-money.

[18] *Per* L. Chan. Cairns in Dunbar's Trs. *v.* British Fisheries Soc., 3 App. Cas. 1308; Lees *v.* Mackinlay, [17]; Hunter *v.* Chalmers, 16th July 1858, 20 D. 1311; Paterson's Trs. *v.* Hunter, 10th Dec. 1863, 2 Macph. 234; Wilson *v.* Mags. of Musselburgh, 22d Feb. 1868, 6 Macph. 483.

[19] Carstairs *v.* Greig, 1773, M. 2333, 5 B.S. 561, affd. 3 Pat. 675.

[20] As stated in Duncan, Par. Eccl. Law, p. 423.

'yearly to the schoolmaster of C, and the proportion of cess that 'should from time to time be laid upon and levied furth of the 'same,' the Lord Ordinary held that the relief extended to poor-rates, bridge-money, repairs of toll-bars, manses, and schoolhouses, and to other public and parochial burdens. The disponee maintained that among the public burdens was included the statute-labour conversion-money introduced by a supervenient local Act; but the Court held that while the assessment imposed on heritors in 1669 for the repair of highways, and in practice only employed for the repair of bridges and ferries, justified that part of the interlocutor which related to bridge-money, the disponee had at the date of his grant no right of relief from statute labour (a burden on occupants), and was, therefore, not relieved from payment of the conversion-money which came in its place.[21] A clause of relief from 'all the town's burdens, burrow and county cess, stents, 'taxations, and all other public burdens of whatever kind now 'imposed or hereafter to be imposed,' was held to free the feuar from payment of city-cess, impost-duty, annuity-tax, poor-rates, police-tax, cholera-tax, bridewell-assessment, and road-money, but not of an improvement-tax which was described as imposed by special statutes and administered by statutory commissioners for particular and temporary purposes, apart from the maintenance of the general establishment of the city. It made no difference whether the burdens were payable in the strict sense 'furth' of the subjects, or only 'for' or on account of them.[22] In a case already cited,[23] relief from all 'taxations . . . and other public bur- 'dens' was admitted to strike at bridewell, court-house, and rogue money, and the only question raised was as to poor-rates. Lastly, a feu-contract, dated in 1765, provided that the feu-duty should be 'in full of all cess, ministers' stipends, and all other public 'burdens whatever, payable or that may be claimed or demanded 'furth of the said lands hereby feued,' of which the superiors bound themselves in relief 'now and in all time coming.' It was held that the case of *Scott* v. *Edmond* was conclusive of the doctrine that such a clause imports relief only of such burdens as were payable by virtue of laws in existence at its date. This excluded from the claim of relief county, police, and prison assessment, statute-labour money, general prison assessment, and constabulary

Burdens in town.

And county.

Supervenient burdens.

[21] Johnston *v.* Home, 1800, M. Appx. Public Burden, No. 1.

[22] Ainslie *v.* Mags. of Edinburgh, 19th Nov. 1839, 2 D. 64. The disposition was the result of a transaction, and the usage of payment had been conform, and extended to the occupant's part of the assessments, and the whole relief was continued on account of this specialty. See Wilson *v.* Mags. of Musselburgh, *infra*, [25], 6 Macph. 488.

[23] Reid *v.* Williamson, [17].

Poor-rates on occupancy.

assessment. As regarded the other burdens on the subjects, the case of poor-rates, so far as leviable on ownership, was ruled in favour of relief by decisions already cited;[24] while, so far as effeiring to occupancy, they were as much a personal burden as the old rate according to 'means and substance,' and therefore no relief was due. Rogue-money had been swallowed up by the prison and constabulary assessments. As to sums said to have been expended on church repairs, it was enough that the destination of the funds and the fact that they were contributed under the statutory obligation were not proved, without going back to the old case of *Carstairs* for authority. And a small cholera assessment was really parcel of the poor-rate.[25]

Rogue-money.

Ecclesiastical.

Cholera assessment.

Burden not limited,

The enormous increase of burdens (more especially of poor-rates) laid upon the land in some localities, partly through an actual rise in the rates, partly through enhancement of the value of feus by the erection of buildings, the spread of towns, the proximity of railways, and other causes, while the feu-duty remains fixed, has led to many attempts on the part of superiors to obtain some rule of restriction on their liability under such clauses as have been discussed above. Except in so far as has been already pointed out, these attempts have been uniformly unsuccessful. 'It is settled that under such obligations relief is to 'be given from the assessments actually imposed upon the subjects, 'including all buildings erected thereon, in their actual condition 'at the date of assessment; and the liability will not be restricted 'to assessments calculated on the footing of the feu-duty being the 'true annual value of the subjects.'[26] Again, 'it is settled that 'the obligation to relieve the vassal of such burdens is not affected 'or diminished by the vassal having sub-feued the lands to sub-'vassals, whether with or without communication of the obligation 'of relief, all such arrangements being held to be *res inter alios* '*actæ*, in so far as regards the original superior and his suc-'cessors.'[27] Again, after the point had been frequently raised in argument, and as often reserved by the Court as not in the cir-

though buildings are erected;

or as effeiring to the feu-duty;

or by sub-feuing;

[24] *Supra*, p. 719.

[25] Wilson *v.* Mags. of Musselburgh, 22d Feb. 1868, 6 Macph. 483.

[26] *Per* L. Curriehill (the 2d), L.O. in Dunbar's Trs. *v.* British Fishery Soc., [5], 5 Ret. 354; Lees *v.* Mackinlay, 11th Nov. 1857, 20 D. 6; Hunter *v.* Chalmers, 16th July 1858, 20 D. 1311, explained in Paterson's Trs. *v.* Hunter, 10th Dec. 1863, 2 Macph. 234; Nisbet *v.* Lees, 15th June 1869, 7 Macph. 881; Preston *v.* Mags. of Edinburgh, 4th Feb. 1870, 8 Macph. 502. But see a peculiar case of a lease being converted into a feu, with corresponding obligations — Smith *v.* Maitland, 7th Jan. 1876, 3 Ret. 281.

[27] *Per* L. Curriehill (the 2d), L.O. in Dunbar's Trs. *v.* British Fishery Soc., [5], 5 Ret. 355; Montgomerie *v.* Hamilton (augmentation), 27th May 1841, 3 D. 942; Hunter *v.* Chalmers, [26].

cumstances of the cases before it necessary to be decided,[28] it has been determined, both in the Court of Session and in the House of Lords, that the extent of the obligation is not limited to the amount of the feu-duty—at least in cases where building or other extensive improvements were in the contemplation of the parties at the date of the grant.[29] In the case referred to, the bargain turned out a very improvident one for the superior, since it involved not only the loss of the whole feu-duty, but also the payment of nearly £300 a-year besides; while arrears for about thirty years, amounting to about £9000, were repayable by him, though, in the circumstances, without interest.[30] It is difficult to see on what principle the fact that at the date of the grant it was not in the view of the superior that the ground feued was to be covered with buildings should make any difference on the amount of his liability. It is part of the ordinary use of land to build upon it, and he must be held to have had this fact before him in making the bargain. It would be easy for him to restrict his obligation to the actual value at the date of the feu by inserting express words to that effect; nor does there seem to be any arguable distinction between ordinary and extraordinary buildings.[31]

or to the amount of feu-duty.

[28] Cases of Lees, Hunter, Paterson, Nisbet, Preston, *supra*, [26]; L. Ch. Westbury in D. Montrose *v.* Stewart, 27th March 1863, 1 Macph. H.L. 28, 4 Macq. 499.

[29] Dunbar's Trs. *v.* British Fisheries Soc., [5].

[30] Following Hope *v.* Lumsdaine, 22d June 1871, 9 Macph. 865. As to the negative prescription of augmentations, see Elliot *v.* Ms. Lothian, 1808, Hume, 465; Walker *v.* Dundas, 1815, Hume, 466; Lennox *v.* Hamilton, 14th July 1843, 5. D. 1357.

[31] See Lees *v.* Mackinlay, [26].

APPENDIX

CONTAINING

STATUTES, WITH NOTES.

APPENDIX.

No. I.

9 GEORGE IV. c. 69.

An Act for the more effectual Prevention of Persons going armed by Night for the Destruction of Game.—[19*th July* 1828.][1]

WHEREAS an Act was passed in the fifty-seventh year of the reign of his late Majesty King George the Third, intituled *An Act for Prevention of Persons going armed by Night for the Destruction of Game; and for repealing an Act made in the last Session of Parliament, relating to Rogues and Vagabonds:* And whereas the practice of going out by night for the purpose of destroying game has nevertheless very much increased of late years, and has in very many instances led to the commission of murder, and of other grievous offences;[2] and it is expedient to repeal the said recited Act, and to make more effectual provisions than now by law exist for repressing such practice: May it please your Majesty that it may be enacted; and be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the said recited Act shall be and the same is hereby repealed, except so far as the same repeals any other Acts; and if any person shall, after the passing of this Act, by night, unlawfully take or destroy any game or rabbits in any land, whether open or enclosed, or shall by night unlawfully[3] enter or be in any land, whether open[4] or enclosed,[5] with any gun, net, engine, or other instrument,[6] for the purpose of taking or destroying game,[7] such offender shall, upon conviction thereof[8] before two Justices of the Peace,[9] be committed for the first offence to the common gaol or house of correction for any period not exceeding three calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognisance, or in Scotland by bond of caution, himself in ten pounds, and two sureties in five pounds each, or one surety in ten pounds, for his not so[10] offending again[10] for the space of one year next following; and in case of not finding such sureties,

57 Geo. 3. c. 90.

Recited Act repealed.

Persons taking or destroying game by night to be committed, for the first offence, for three months, and kept to hard labour, and to find sureties:

shall be further imprisoned and kept to hard labour for the space of six calendar months, unless such sureties are sooner found; and in case such person shall so offend a second time, and shall be thereof convicted before two Justices of the Peace,[9] he shall be committed to the common gaol or house of correction, for any period not exceeding six calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognisance, or bond as aforesaid, himself in twenty pounds, and two sureties in ten pounds each, or one surety in twenty pounds, for his not so offending again for the space of two years next following; and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for the space of one year, unless such sureties are sooner found; and in case such person shall so offend a third time, he shall be guilty of a misdemeanour, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported[11] beyond seas for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding two years; and in Scotland, if any person shall so offend a first, second, or third time, he shall be liable to be punished in like manner as is hereby provided in each case.[12]

Second offence, six months, and kept to hard labour, and to find sureties;

Third offence, to be liable to transportation.

[1] See chap. 9, *supra*.

[2] The object of the statute is discussed in a case noted by Bell, Notes to Hume, p. 118; and by the judges in L. Adv. *v.* Swanston, 1 Swinton, 54; and L. Adv. *v.* Reid, ibid. p. 202.

[3] May apply to a tenant—Smith *v.* Young, 8th March 1856, 2 Irv. 402. See 11 & 12 Vict. c. 30, sect. 4, *infra*, p. of note [2] sect. 6 of Appx. IV. The onus of proving permission lies on the accused—Reg. *v.* Wood, D. and B. C. C. 1.

[4] The word 'open' does not apply to waste ground on each side of a highway, separated from the adjoining land by hedges. See 7 & 8 Vict. c. 29, *infra*, p. 740; Reg. *v.* Harris, 12 L.T. 303 (Veysey *v.* Hoskins).

[5] See *infra*, Appx. No. 12, sect. 80, for meaning of 'enclosed' in Turnpike Act. The names of the fields are mere surplusage—Henderson *v.* Callendar, 6th Nov. 1878, 4 Coup. 120, 6 Ret. (Just.) 1.

[6] This alternative is contravened by being in company with one who had a net, &c., for the purpose stated—L. Adv. *v.* Granger, 17th Sept. 1863, 4 Irv. 432.

[7] 'Or rabbits,' omitted in this alternative. A charge brought under it, and containing these words, is bad, and cannot be cured by striking them out—Mitchell *v.* Campbell, 5th Jan. 1863, 4 Irv. 257.

[8] The section describes, not two different offences, but one offence, which may be committed in either of two alternative ways—L. Adv. *v.* Duncan, 29th Feb. 1864, 4 Irv. 474, overruling Jones *v.* Mitchell, 23d Dec. 1853, 1 Irv. 334, 337.

[9] Now the sheriff—40 & 41 Vict. c. 28, sect. 10.

[10] The omission of the word 'so' in a conviction is fatal, the word 'again' not being sufficient—*In re* Reynolds, 1 N. Sess. Ca. 51.

[11] Now penal servitude for not less than five years—20 & 21 Vict. c. 3, sect. 2, amended by 27 & 28 Vict. c. 47, sect. 2.

[12] The Justiciary Court has no jurisdiction as to the first two offences—L. Adv. *v.* Duncan, *supra*, [8]. An objection that the first two convictions were stated as both of a first offence was repelled—L. Adv. *v.* Bird, 6th April 1865, 5 Irv. 75. Previous convictions may be looked to by the jury in judging of the intent—L. Adv. *v.* Granger, *supra*, [6].

Owners or occupiers of land, lords of manors, or their servants, may apprehend offenders.

2. And be it enacted, that where any person shall be found upon any land committing any such offence as is hereinbefore-mentioned,[1] it shall be lawful for the owner or occupier of such land, or for any person having a right or reputed right of free warren or free chase thereon, or for the lord of the manor or reputed manor wherein such land may be situate, and also for any gamekeeper or servant of any of the persons herein mentioned, or any person assisting such gamekeeper or servant,[2]

to seize and apprehend such offender upon such land, or in case of pursuit being made, in any other place to which he may have escaped therefrom,[3] and to deliver him, as soon as may be, into the custody of a Peace officer, in order to his being conveyed before two Justices of the Peace; and in case such offender[1] shall assault or offer any violence[4] with any gun, crossbow, firearms, bludgeon, stick, club, or any other offensive weapon[5] whatsoever, towards any person hereby authorised to seize and apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a misdemeanour, and being convicted thereof, shall be liable, at the discretion of the court, to be transported[6] beyond seas for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding two years; and in Scotland, whenever any person shall so offend, he shall be liable to be punished in like manner.

Offenders assaulting or offering violence deemed guilty of misdemeanour, and liable to be transported for seven years, or imprisoned for two years.

[1] An indictment under sect. 2 must recite, in explication, sect. 1—L. Adv. *v.* Lauder, 1st May 1844, 2 Broun, 177.

[2] In England there may be 'lawful apprehension or detainer,' in the sense of 9 Geo. IV. c. 31, sect. 12, by a game-watcher, though he be not furnished with a written authority—Rex *v.* Price, 7 C. and P. 178. But not by the servant of one who possessed none of the characters mentioned—Rex *v.* Addis, 6 C. and P. 388; *e.g.*, a game tenant—Reg. *v.* Price, 5 Cox, 277; or one having permission to shoot—Reg. *v.* Wood, 1 F. and F. 470; Reg. *v.* Wesley, 1 F. and F. 528. This was altered as to England by 14 & 15 Vict. c. 19, sect. 11, as to indictable offences. Cf. Day Trespass Act, sect. 2, *infra*, p. 734.

[3] Little, in 1 Alison, 554. The pursuit must be made for the purpose of apprehension—Reg. *v.* Doddridge, 8 Cox, 335.

[4] It is competent in the same indictment to charge under sect. 2, and also assault at common law, but questioned whether there can be a conviction for both on the same *species facti*—L. Adv. *v.* Puller, 1st March 1870, 1 Coup. 398, where sects. 2 and 9 are compared. See also Reg. *v.* May, 5 Cox, 176; and Rex *v.* Finucane, 5 C. and P. 551.

[5] Includes large stones capable of inflicting serious injury—Rex *v.* Grice, 7 C. and P. 803 (under sect. 9); though not taken to the ground—L. Adv. *v.* M'Nab, 14th March 1845, 2 Broun, 416. Question as to a crutch is for the jury—Rex *v.* Palmer, 1 M. and Rob. 70. As to a walking-stick, the use it is put to decides—Rex *v.* Fry, 2 M. and Rob. 42; Reg. *v.* Turner, 3 Cox, 304. See Reg. *v.* Merry, 2 Cox, 240.

[6] See note [11], last page.

3. And be it further enacted, that where any person shall be charged on the oath of a credible witness, or in Scotland on the application of the Procurator Fiscal of Court[1] before any Justice of the Peace, with any offence punishable upon summary conviction by virtue of this Act, the Justice may issue his warrant for apprehending such person, and bringing him before two Justices of the Peace, to be dealt with according to law.[2]

Power to issue a warrant for apprehension of offenders.

[1] It is still a question whether private persons may prosecute; at all events, they must have the concurrence of the Procurator Fiscal of the Court—Graham *v.* D. Buccleuch, 29th Jan. 1844, 2 Broun, 85; and set forth an interest—Herbert *v.* D. Roxburghe, 26th Dec. 1855, 2 Irv. 346.

[2] See Summary Procedure Acts, 1864 and 1881; and Kinnear *v.* Whyte, 25th May 1868, 1 Couper, 56. The jurisdiction is now removed from the justices to the sheriff. See last page, note [9].

4. And be it enacted, that the prosecution for every offence punishable upon summary conviction[1] by virtue of this Act shall be commenced within six calendar months after the commission of the offence; and the prosecution for every offence punishable upon indictment,[2] or otherwise

Limitation of time for proceedings under this Act.

than upon summary conviction, by virtue of this Act, shall be commenced within twelve calendar months after the commission of such offence.[3]

[1] The first and second convictions under sect. 1.
[2] The other offences in the Act.
[3] In both countries the charge mentioned in sect. 3 is the 'commencement' of the prosecution—L. Adv. *v.* M'Nab, last page, note [5]; Reg. *v.* Brooks, 1 Den. C.C. 217; Reg. *v.* Austin, 1 C. and K. 621. Reg. *v.* Parker, 33 L.J.M.C. 135, which decides that not only the warrant of commitment, but also the 'application' on which it proceeded, must be put in evidence, has been doubted—1 Russell on Crimes, 5th ed., 626.

Form of conviction.

5. And be it enacted, that the Justices of the Peace[1] before whom any person shall be summarily convicted[2] of any offence against this Act may cause the conviction to be drawn up in the following form of words, or in any other form of words to the same effect, as the case may require; that is to say,

'BE it remembered, that on the day of in the year of our Lord at in the county of [*or* riding, division, liberty, city, *&c., as the case may be,*] *A. O.* is convicted before us, [*naming the Justices,*] two of his Majesty's Justices of the Peace for the said county, [*or* riding, *&c.*] for that he the said *A. O.* did [*specify the offence,*[3] *and the time and place when and where the same was committed, as the case may be, and on a second conviction state the first conviction;*] and we the said Justices adjudge the said *A. O.* for his said offence to be imprisoned in the and there kept to hard labour for the period of and at the expiration of such period to find sureties, by recognisance, or bond of caution in Scotland, himself in the sum of ten pounds, and two sureties in the sum of five pounds each, or one surety in the sum of ten pounds, conditioned that he the said *A. O.* shall not so[4] offend again for the space of one year next following; and we further adjudge the said *A. O.*, in case he shall not find such sureties as aforesaid, to be further imprisoned and kept to hard labour for the space of six calendar months, unless such sureties shall be sooner found. Given under our hands, the day and year first above mentioned.'

[1] Sect. 5 did not apply to the sheriff—Clapperton *v.* Rodger, 3d Dec. 1855, 2 Irv. 292. See forms of the Summary Procedure Act, 1864.
[2] Neither the justices nor the sheriff required to take down the evidence in writing—Shields *v.* Dykes, 2d Feb. 1854, 1 Irv. 359; Moncreiff on Review, p. 324.
[3] Conviction under second mode, sect. 1, void, as omitting to state that the *entry* was 'by night'—Reg. *v.* Merry, 2 Cox, 240.
[4] See sect. 1, note [10].

Appeal.

6. And be it further enacted, that any person who shall think himself aggrieved by any such summary conviction may appeal to the next Court of General or Quarter Sessions which shall be holden, not less than twelve days after the day of such conviction, for the county, riding, or division wherein the cause of complaint shall have arisen; provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least before such sessions, and shall also either remain in custody until the sessions, or within such three days enter into a recognisance, or bond of caution in Scotland, with a sufficient surety, before a Justice of the Peace, conditioned personally to

appear at the said sessions, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be awarded by the court; and upon such notice being given, and such recognisance or bond being entered into, the Justice before whom the same shall be entered into shall liberate such person if in custody; and the court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the court shall seem meet; and in case of the dismissal of the appeal, or the affirmance of the conviction, shall order and adjudge the offender to be dealt with and punished according to the conviction, and to pay such costs as shall be awarded; and shall, if necessary, issue process for enforcing such judgment.

No certiorari, &c.

7. And be it further enacted, that no such conviction, or adjudication made on appeal therefrom, shall be quashed for want of form, or be removed by certiorari, or otherwise, into any of his Majesty's Superior Courts of Record, or in Scotland by advocation or suspension into any Superior Court;[1] and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same.

[1] See cases on similar clauses in the Day Trespass and Poaching Prevention Acts, *infra*, Appx. 2 and 5. There is now appeal to the Justiciary Court, on matter of law, by case stated, under the Summary Prosecutions Appeals Act, 1875—38 & 39 Vict. c. 62.

Convictions to be returned to the Quarter Sessions and registered, and may be given in evidence.

8. And be it enacted, that on every conviction under this Act for a first or second offence, the convicting Justices shall return the same to the next Quarter Sessions for the county, riding, division, city, or place wherein such offence shall have been committed; and the record of such conviction, or any copy thereof, shall be evidence in any prosecution to be instituted against the party thereby convicted for a second or third offence; and the Clerk of the Peace shall immediately on such return make or cause to be made a memorandum of such conviction in a register to be kept by him of the names and places of abode of the persons so convicted, and shall state whether such conviction be the first or second conviction of the offending party.

If persons to the number of three, being armed, enter any land for the purpose of taking or destroying game, &c., they shall be deemed guilty of a misdemeanour.

9. And be it enacted,[1] that if any persons, to the number of three or more together, shall by night unlawfully enter[2] or be[3] in any land,[4] whether open or enclosed, for the purpose of taking or destroying game or rabbits,[5] any[6] of such persons being armed with[7] any gun, crossbow, firearms, bludgeon, or any other offensive weapon, each and every[8] of such persons shall be guilty of a misdemeanour, and being convicted thereof before the Justices of Gaol Delivery, or of the Court of Great Sessions of the county or place in which the offence shall be committed, shall be liable, at the discretion of the court, to be transported[9] beyond seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned and kept to hard labour for any term not exceeding three years; and in Scotland any persons so offending shall be liable to be punished in like manner.

[1] This clause makes out of the second alternative mode in sect. 1 a separate offence, by the accused being in concert with others, one or more of them being armed; and it adds the words 'or rabbits.' As to offensive weapons, see notes to sect. 2. These

clauses are compared in Puller there cited, [4]. For a sufficient indictment, see L. Adv. *v.* M'Arthur, 3d May 1866, 5 Irv. 243.

[2] See text, p. 136.

[3] 'Being in' the land is a question of circumstances for the jury—Rex *v.* Worker, 1 M.C.C.R. 165; Rex *v.* Capewell, 5 C. and P. 549; see Reg. *v.* Higgs, 10 Cox, 527.

[4] Not sufficient that the accused have been apprehended on a public road, there having been no pursuit (see sect. 2), though shots were heard proceeding from certain preserves belonging to other proprietors—Reg. *v.* Meadham, 2 C. and K. 633.

[5] 'Therein' would seem to be required to bring out the construction put on the statute—Reg. *v.* Davis, 8 C. and P. 759; Reg. *v.* Turner, 3 Cox, 304.

[6] = any one or more—L. Adv. *v.* Granger, 17th Sept. 1863, 4 Irv. 432. See L. Adv. *v.* Limerick, 3d Jan. 1844, 2 Br. 1; Rex *v.* Smith, R. and R. 368 (on similar clause in 57 Geo. III. c. 90); provided the others knew of the weapon—Rex *v.* Southern, R. and R. 444. Where 'guns and other offensive weapons' were libelled, and some were armed with bludgeons, objection to the omission of this term was repelled, and *constructive* arming admitted—Reg. *v.* Goodfellow, 1 Den. C.C. 81.

[7] Conviction good, though the accused had, when apprehended, crept away 200 yards from their guns—Rex v. Nash, R. and R. 386.

[8] If a common design of poaching be proved, it is enough to convict all concerned if only one actually enter the land—Rex *v.* Passey, 7 C. and P. 282; Rex *v.* Lockett, 7 C. and P. 300 (Opinions of Alderson B.); see Reg. *v.* Whittaker, 1 Den. C.C. 310, where the majority seem to have required that one at least of those who actually entered should be armed. As to description of the land, see Reg. *v* Uezzell, 2 Den. C.C. 274. But concert must be proved to the satisfaction of the jury—Reg. *v.* Nickless, 8 C. and P. 757; Reg. *v.* Jones, 2 Cox, 185.

[9] See note [11] to sect. 1.

Jurisdiction of sheriffs in Scotland.

Proving of convictions.

10. And be it enacted, that in Scotland the sheriff of the county within which the offence shall have been committed shall have a cumulative [1] jurisdiction with the Justices of the Peace in regard to the same; [2] and the conviction in Scotland may be proved in the same manner as a conviction in any other case according to the law of Scotland.[3]

[1] Now exclusive, 40 & 41 Vict. c. 28, sect. 10.

[2] His jurisdiction in the first two offences is exclusive also of the Court of Justiciary (see note [12] to sect. 1; and L. Adv. *v.* Rowet, 1 Broun, 540; L. Adv. *v.* Bell, J. Sh. 348), and does not admit of jury trial even before himself—Caird *v.* Evans, Arkley, 413.

[3] See Summary Procedure Act, 1864, sect. 18, and relative Schedules.

Third offences, &c., to be tried in certain courts.

11. And be it enacted, that in all cases in Scotland of a third offence, or in other cases in Scotland where a sentence of transportation may, by the provisions of this Act, be pronounced, the offender shall be tried before the High Court or Circuit Court of Justiciary.[1]

[1] Sect. 1, note [12]; sects. 2 and 9. This section does not require to be recited in indictments—L. Adv. *v.* Mackenzie, 2 Broun, 147.

What time shall be considered night.

12. Provided always, and be it enacted, that for the purposes of this Act the night shall be considered and is hereby declared to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise.[1]

[1] For mode of computation, see case in Barclay, Dig. *voce* 'Game;' but now statutorily fixed as Greenwich mean time, 43 & 44 Vict. c. 9. The section does not require to be recited—L. Adv. *v.* Duncan, 21st Dec. 1852, 1 Irv. 130. See the same definition in 11 & 12 Vict. c. 30, sect. 5.

What shall be deemed game.

13. And be it enacted, that for the purposes of this Act the word "game" shall be deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards.[1]

[1] The Act does not apply to stealing tame pheasants 'under the charge of a hen,' though roosting at the time on trees near the hen-coops—Reg. *v.* Garnham, 8 Cox, 451.

No. II.

2 & 3 WILLIAM IV. c. 68.

An Act for the more effectual Prevention of Trespasses upon Property by Persons in pursuit of Game in that Part of Great Britain called Scotland.—[17*th July* 1832.][1]

WHEREAS trespasses upon property by persons unlawfully engaged in the pursuit of game have recently become frequent in various parts of Scotland, and have, in many cases, been attended by acts of violence and intimidation, for the repression of which the laws now in force in that part of the United Kingdom provide no sufficient remedy, and that it is therefore expedient that more effectual and summary remedies should be provided; be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that if any person whatsoever shall commit any trespass by entering or being,[2] in the day-time,[3] upon[4] any land, without leave of the proprietor,[5] in search or pursuit of game,[6] or of deer, roe, woodcocks, snipes, quails, landrails, wild ducks, or conies, such person shall, on being summarily convicted thereof before a Justice of the Peace,[7] on proof[8] on oath by one or more credible witness or witnesses, or confession of the offence, or upon other legal evidence, forfeit and pay such sum of money, not exceeding two pounds, as to the Justice shall seem meet, together with the costs of the conviction;[9] and that if any person having his face blackened, coloured, or otherwise disfigured for the purpose of disguise, or if any persons to the number of five or more together shall commit any trespass by entering or being, in the day-time, upon any land in search or pursuit of game, or of deer, roe, woodcocks, snipes, quails, landrails, wild ducks, or conies, each of such persons shall, on being summarily convicted thereof before a Justice of the Peace, on proof on oath by one or more credible witness or witnesses, or confession of the offence, or upon other legal evidence, forfeit and pay such sum of money, not exceeding five pounds, as to the said Justice shall seem meet, together with the expenses of process: provided always, that any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass.[10]

Penalty on persons trespassing in the day-time upon lands in search of game.

Proviso.

[1] The corresponding English statute is 1 & 2 Will. IV. c. 32, sect. 30 *et seq.*

[2] See a discussion of what is sufficient to constitute trespass in search or pursuit of game in the text, p. 136. Under this section it has been held that there can be no constructive trespass, Colquhoun *v.* Liddell, 16th Nov. 1876, 4 Ret. (Just.) 3, 3 Coup. 342; but this decision seems inconsistent with a later and sounder judgment, Stoddart *v.* Stevenson, 8th June 1880, 7 Ret. (Just.) 11, 4 Coup. 334.

[3] See sect. 3.

[4] A conviction of being 'in and near' to a field on the farm of K. is bad—Arthur *v.* Peebles, 30th June 1876, 3 Ret. (Just.) 38, 3 Coup. 300.

[5] A subtle distinction is drawn between the agricultural, or other than game, tenant, and the farm-labourer. This Act does not apply to the former—Smellie *v.* Lockhart, 1st June 1844, 2 Broun, 194; E. Kinnoull *v.* Tod, 15th Dec. 1859, 3 Irv. 501; but applies to the latter—E. Selkirk *v.* Kennedy, 14th Dec. 1850, J. Sh. 463;

Raper *v.* Duff, 6th Feb. 1860, 3 Irv. 529. It is not easy to justify the tenant's exemption, except by his functions under sects. 2 and 5. See Night Act, sect. 1, note [3], *supra*, p. 728, and the principle of Reg. *v.* Pratt, 4 E. and B. 860. As to the tenant's friends—Porter *v.* Stewart, 22d March 1858, 3 Irv. 57; Black *v.* Bradshaw, 16th Dec. 1875, 3 Ret. (Just.) 18, 3 Coup. 209. The Act does not strike at the tenant's servant authorised by him to kill rabbits, though these are excepted from the lease—Calder *v.* Robertson, 6th Nov. 1878, 4 Coup. 131, 6 Ret. (Just.) 3. Doubt may be expressed of the soundness of a decision which supported the acquittal of a farm-servant, lawfully employed by the tenant to attend to rabbit-snaring, who, after taking an apparently dead hare from a snare, and finding it escape from his hands, set his dog at it, and removed it when so caught and killed. L. Young's grounds, especially, appear to be contrary to the whole course of Scotch and English authority—Lawrie *v.* M'Arthur, 29th Oct. 1880, 8 Ret. (Just.) 2. The proprietor's name must appear in the conviction—*per* L. Ardmillan in Mackenzie *v.* Maberly, *infra*, [8].

[6] 'Game' is not defined. The definition in the Night Poaching Act, sect. 13, *supra*, p. 732, was probably in the mind of the Legislature, as the animals added in this section are all different from those enumerated there. See next Act. Trespass for the purpose of taking *dead* game does not fall under the Act, if not occurring *unico contextu* with the killing, so as to infer complicity—L. Macdonald *v.* Maclean, 28th Feb. 1879, 4 Coup. 205, 6 Ret. (Just.) 14 (deer supposed to have been killed the day before).

[7] Now the sheriff—40 & 41 Vict. c. 28, sect. 10.

[8] Written complaint necessary under sect. 1. Question if the same under sect. 2—Mackenzie *v.* Maberly, 21st Nov. 1859, 3 Irv. 459. It is sufficiently signed by a duly qualified law-agent as procurator for the complainer, who may also be represented by an agent at the trial, Stewart *v.* Wilson, 10th July 1881, 4 Coup. 455, 8 Ret. (Just.) 33. An amendment taking hares and rabbits out of a charge under the Act against one whose father (with whom he resided, and whom he assisted in the farm) had a right to shoot these on his farm, was competent but unnecessary, the offence being the shooting of a grouse—James *v.* E. Fife, 28th Jan. 1880, 4 Coup. 321, 7 Ret. (Just.) 9.

[9] 'Costs of conviction' copied from the English Act, and equivalent to 'expenses of process' further down.

[10] See cases in note [5], and M'Adam *v.* Lawrie, 1st March 1876, 3 Coup. 223, 4 Ret. (Just.) 20, where the tenant, who had right to the rabbits, authorised, though only verbally, his son-in-law to kill them. In England the jurisdiction of the Justices ceases on a claim of title being made which appears to them to be *bonâ fide*—Legg *v.* Pardoe, 9 C.B.N.S. 289; and not illusory—Leatt *v.* Vine, 30 L.J.M.C. 207; but the accused cannot deny the prosecutor's ownership without himself claiming the title—Cornwell *v.* Sanders, 32 L.J.M.C. 6.

Such trespassers may be required to quit the land, and to give their names and abodes; and in case of refusal may be arrested.

2. And be it enacted, that where any person shall be trespassing on any land, in the day-time, in search or pursuit of game, or woodcocks, snipes, quails, landrails, wild ducks, or conies, it shall be lawful for any person having the right of killing the game upon such land,[1] or for the occupier of the land, or for any gamekeeper or servant of either of them, or for any person authorised by either of them, to require the person so trespassing forthwith to quit the land whereon he shall be so trespassing, and also to tell his Christian name, surname, and place of abode; and in case such person shall, after being so required, offend by refusing to tell his real name or place of abode, or by giving such a general description of his place of abode as shall be illusory for the purpose of discovery, or by wilfully continuing or returning upon the land,[2] it shall be lawful for the party so requiring as aforesaid, and also for any person acting by his order and in his aid, to apprehend such offender, and to convey him, or cause him to be conveyed, as soon as conveniently may be, before a Justice of the Peace; and such offender (whether so apprehended or not), upon being summarily convicted of any such offence before a Justice of the Peace, at the instance of the owner or occupier of such land,[3] or of the Procurator Fiscal for the county,[4] on proof on oath by one or more credible witness or witnesses, or confession of the offence, or

Penalty.

upon other legal evidence, shall forfeit and pay such sum of money, not exceeding five pounds, as to the convicting Justice shall seem meet, together with expenses of process:[5] provided always, that no person so apprehended shall on any pretence whatsoever be detained for a longer period than twelve hours from the time of his apprehension until he shall be brought before some Justice of the Peace; and that if he cannot, on account of the absence or distance of the residence of any such Justice of the Peace, or owing to any other reasonable cause, be brought before a Justice of the Peace within such twelve hours as aforesaid, then the person so apprehended shall be discharged at the end of that time, but may nevertheless be proceeded against for his offence by summons or warrant, according to the provisions herein-aftermentioned, as if no such apprehension had taken place.

Party arrested must be discharged, unless brought before a justice within twelve hours.

[1] Contrast Night Poaching Act, sect. 2, *supra*, p. 728. If to apprehend, &c., an offender be to 'institute proceedings' in the sense of the Ground Game Act (43 & 44 Vict. c. 47, sect. 7), such party is none the less regarded as having an exclusive right to game by his right to hares and rabbits being reduced to a right concurrent with that of the occupier. It is a question whether one acting under mere permission to kill game is included—2 Burn's Justice, 777.

[2] To justify apprehension of a person under sect. 31 of the English Act, which is identical with this clause, he must have been required to quit the land, *and* to tell his name. For the same purpose, the wilfully continuing or returning must be upon the same land, and for the purpose of searching for or pursuing game there—Rex *v.* Long, 7 C. and P. 314; cf. Birrel *v.* Jones, 6th Feb. 1860, 3 Irv. 546. Conviction does not require to set forth a request to quit the land.

[3] Not the game-tenant—there being a change of phraseology from that employed in the beginning of the clause. The concurrence of the Procurator Fiscal is not required —Russell *v.* Colquhoun, 24th Nov. 1845, 2 Broun, 572.

[4] The resignation of the Procurator Fiscal does not nullify a conviction already obtained—Morton *v.* Johnston, *infra*, sect 7.

[5] An offence under sect. 2 is a separate one; and it is not competent to try for a contravention of sect. 1 one who has been apprehended, for contravening sect. 2, in a manner less formal than is required by sect. 1—Mackenzie *v.* Maberly, *supra*, sect. 1, note [8].

3. And be it enacted, that for the purposes of this Act the day-time shall be deemed to commence at the beginning of the last hour before sunrise, and to conclude at the expiration of the first hour after sunset.[1]

What to be deemed day-time.

[1] See Night Act, sect. 12, *supra*, p. 732. Conviction of trespass, &c., 'during 'some part of the day,' without any reference to the statutory definition, is bad—Robertson *v.* Adamson, 18th June 1860, 3 Irv. 607.

4. Provided always, and be it enacted, that the aforesaid provisions against trespassers shall not extend to any person hunting or coursing upon any lands with hounds or greyhounds, and being in fresh pursuit of any deer, hare, or fox, already started upon any other land on which such person was entitled to hunt or course.

The provisions as to trespassers not to apply to persons hunting, &c.

5. And be it enacted, that where any person shall be found trespassing by day upon any land in search or pursuit of game, and shall then and there have in his possession any game, it shall be lawful for any person having the right of killing the game upon such land, or for the occupier of such land, or for any gamekeeper or servant of either of them, or for any other person authorised by either of them, or for any person acting by the order and in aid of any of the said several persons, to demand from such trespasser such game in his possession, and in case such trespasser shall not immediately deliver up such game, to seize and

Game may be taken from trespassers not delivering up the same when demanded.

take the same from him, for the use of the person entitled to the game upon such land.

Penalty on aggressors for assaulting any one executing this Act.

6. And be it enacted, that if any person being in the commission of a trespass [1] shall assault or obstruct any person acting in the execution or in virtue of the powers and provisions of this Act, such person, on being convicted thereof before two [2] Justices of Peace, on proof on oath by one or more credible witness or witnesses, or confession of the offence, or upon other legal evidence, shall forfeit and pay any sum not exceeding five pounds, over and above any penalty which he may have incurred by contravening this Act, and in default of payment thereof at such time as to the said Justices may seem fit, shall be imprisoned in the common gaol or house of correction (with or without hard labour) for a period not exceeding three months.

[1] A conviction under this clause does not require to add 'without leave of the pro-'prietor,' for that is implied in the word 'trespass'—Birrel *v.* Jones, 6th Feb. 1860, 3 Irv. 546.

[2] Cf. sects. 1, 2, and 10. Now the sheriff—40 & 41 Vict. c. 28.

Application of penalties.

7. And be it enacted, that every penalty and forfeiture for any offence against this Act shall be paid to the moderator or other officer of the kirk-session of the parish where the offence was committed, for the use and benefit of the poor of such parish.[1]

[1] The conviction does not require to set forth the application of the penalty, this clause being intended for the direction of the Court, not for the party—Hume *v.* Meek, 13th July 1846, Arkl. 88, 96. A conviction is good though the minister had died before the fine was paid, for the Crown is the proper creditor as to all penalties—Morton *v.* Johnston, 11th March 1867, 5 Irv. 356.

Justices to fix the time for payment of penalties.

8. And be it enacted, that the Justice or Justices of the Peace [1] by whom any person shall be summarily convicted and adjudged to pay any sum of money for any offence against this Act, together with expenses, may adjudge that such person shall pay the same, either immediately, or within such period as the said Justice or Justices shall think fit; and

Imprisonment for nonpayment.

that in default of payment at the time appointed, such person shall be imprisoned [2] in the common gaol or house of correction (with or without hard labour), as to the Justice or Justices shall seem meet, for any term not exceeding two calendar months, the imprisonment to cease upon payment of the amount and costs.

[1] Now the sheriff—40 & 41 Vict. c. 28.

[2] The warrant of imprisonment granted on failure to pay the fine is indorsable in Scotland, but not in England—Beattie *v.* Maxwell's Trs., 9th March 1846, Arkl. 14; but see Summary Procedure Acts, 1864, sects. 9 and 20 and 1881, (Process) sect. 4.

Form of conviction.

9. And be it enacted, that the Justice or Justices of the Peace before whom any person shall be summarily convicted of any offence against this Act may cause the conviction to be drawn up [1] according to the following form of words, or in any other form of words to the same or the like effect; (that is to say,)

'{ BE it remembered, that on the day of
'to wit, { in the year of our Lord at
'in the county of [*or* division, *et cetera, as the case may*
'*be*], *A. O.* is convicted before me [2] *J.P.*, one [*or* us *J.P.* and *J.J.P.*, two,
'*as the case may require*], of his Majesty's Justices of the Peace for the

'said county [*et cetera*], for that he the said *A. O.* did unlawfully on
' at trespass or was found trespassing in search or
'pursuit of game [*et cetera, as the case may be*], and I [*or* we] do adjudge
'that the said *A. O.* shall for the said offence forfeit the sum of
' [*or* we do adjudge that the said *A. O.* shall for the said offence for-
'feit the sum of], and shall forthwith pay the said sum,
'together with the sum of of expenses of process, and
'that in default of immediate payment of the said sums he the said *A. O.*
'shall be imprisoned [*or* imprisoned and kept to hard labour] in the
' of for the space of
'unless the said sums shall be sooner paid; [*or*, and I [*or* we] order that
'the said sums shall be paid by the said *A. O.* on or before the
'day of and in default of payment on or before that
'day I [*or* we] adjudge the said *A. O.* to be imprisoned [*or* imprisoned and
'kept to hard labour] in the of for the
'space of unless the said sums shall be sooner paid]; and
'I [*or* we] direct that the said sum of (*i.e.*, the penalty)
'shall be paid to being the minister of, *et cetera*, to be by him
'applied according to the directions of the statute in such case made and
'provided; and I [*or* we] order that the said sum of
'of expenses shall be paid to (the complainer). Given
'under my hand [*or* our hands] the day and year first above mentioned.
'*J.P.*
[*or J.P.* and *J.J.P.*]'[3]

[1] Not necessarily in presence of the accused when he has attended the trial—Hume *v.* Meek, *supra*, sect. 7.

[2] A conviction was vitiated by being signed, along with two others, by one J.P. who had not heard the proof; though one J.P. might competently have decided the case—Russell *v.* Lang, 1st June 1844, 2 Broun, 211. Conviction of more than one person under the same charge—Graham *v.* List, 1860, 3 Irv. 567.

[3] See the forms of the Summary Procedure Act, 1864, which apply in terms to the Sheriff Court, now the exclusive tribunal, and also the Amending Act of 1881, 44 and 45 Vict. c. 33.

Power to summon witnesses.

10. And be it enacted, that it shall be lawful for any Justice of the Peace to issue his summons requiring any person to appear before himself, or any one or two Justices of the Peace, as the case may require, for the purpose of giving evidence touching any offence against this Act; and if any person so summoned shall neglect or refuse to appear at the time and place appointed by such summons, and no reasonable excuse for his absence shall be proved before the Justice or Justices then and there present, or if any person appearing in obedience to such summons shall refuse to be examined on oath touching any such offence by the Justice or Justices then and there present, every person so offending shall, on conviction thereof before the said Justice or Justices, or any other Justice or Justices of the Peace, forfeit and pay such sum of money, not exceeding five pounds, as to the convicting Justice or Justices shall seem meet.

Penalty for disobedience of summons, &c.

As to prosecutions for offences.

11. And be it enacted, that the prosecution for every offence punishable by virtue of this Act shall be commenced[1] within three calendar months after the commission of the offence; and that where any person shall be charged,[2] on the oath of a credible witness, with any such offence before a Justice of the Peace, the Justice may summon the party

charged to appear before himself, or any one or two Justices of the Peace as the case may require, at any time and place to be named in such summons; and if such party shall not appear accordingly, then (upon proof of the due service of the summons, by delivering a copy thereof [3] to the party, or by delivering such copy at the party's usual place of abode to some inmate thereat, and explaining the purport thereof to such inmate,) the Justice or Justices may either proceed to hear and determine the case in the absence of the party, or may issue his or their warrant for apprehending and bringing such party before him or them, as the case may be; or the Justice before whom the charge shall be made may, if he shall have reason to suspect, from information upon oath, that the party is likely to abscond, issue such warrant in the first instance, without any previous summons.

[1] See notes to Night Poaching Act, sect. 4, *supra*, p. 730.

[2] There has been much doubt on the Bench whether the procedure detailed in this section is compulsory for all the statutory charges, and whether the oath of a credible witness is required in every case. This is affirmed in Smith *v.* Forbes, 22d July 1848, Arkl. 508; Simpson *v.* Crawford, 22d Dec. 1851, J. Shaw, 523; Blythe *v.* Robson, 10th June 1853, 1 Irv. 235; and M'Gregor *v.* Latour, 13th Nov. 1854, 1 Irv. 579; and denied in Philip *v.* E. Rosslyn, 14th June 1833, 5 Sc. Jur. 433; and Mackenzie *v.* Maberly, *supra*, sect. 1, note [8], where it is said to apply only to special cases.

[3] Of the Sheriff's deliverance appended to the petition and complaint. A formal copy citation is not necessary—Harcourt *v.* Low, 14th Jan. 1861, 4 Irv. 1.

Prosecutor not required to prove a negative.

12. And be it declared and enacted, that it shall not be necessary in any proceeding against any person under this Act to negative by evidence any licence, consent, authority, or other matter of exception or defence; but that the party seeking to avail himself of any such licence, consent, authority, or other matter of exception or defence, shall be bound to prove the same.

Convictions to be returned to sessions, and kept as evidence.[1]

13. And be it enacted, that the Justice or Justices of the Peace before whom any person shall be convicted of any offence punishable under this Act shall transmit every such conviction to the next Court of General or Quarter Sessions of the Peace for the county or division wherein the offence shall have been committed, there to be kept by the proper officer among the records of the court.[2]

[1] Superseded by 40 & 41 Vict. c. 28, sect. 10.

[2] The only proof of a conviction which was regarded by the Court of Justiciary in a suspension was the document here mentioned—Forbes *v.* Duncan, 20th Nov. 1865, 5 Irv. 213. If no conviction is written out, there is nothing to suspend—Jupp *v.* Dunbar, 9th March 1863, 4 Irv. 355.

Appeal.[1]

14. And be it enacted, that any person who shall think himself aggrieved by any conviction in pursuance of this Act may appeal to the Justices at the next General or Quarter Sessions of the Peace to be holden, not less than twelve days after such conviction, for the county or division wherein the cause of complaint shall have arisen, provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least before such sessions, and shall also remain either in custody until the sessions, or within such three days find a security, by bail bond before a Justice, personally to appear at the said sessions, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the

court awarded; and upon such notice being given, and such security being found, the Justice before whom the same shall be produced shall liberate such person if in custody; and the court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the court shall seem meet, and in case of the dismissal of the appeal, or the affirmance of the conviction, shall order and adjudge the offender to be dealt with and punished according to the conviction, and to pay such costs as shall be awarded, and shall, if necessary, grant warrant for enforcing such judgment in common form.[2]

[1] Superseded by 40 & 41 Vict. c. 28.

[2] But not to order imprisonment on failure to pay the costs of the appeal—Snaddon *v.* Spence, 30th June 1862, 4 Irv. 200. See next note.

Convictions, &c., not to be quashed for want of form, or removable by advocation, &c.

15. And be it enacted, that no conviction in pursuance of this Act, or judgment given on appeal therefrom, shall be quashed for want of form, or be removed by advocation, suspension, or reduction into any superior court of law; and that no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that it is founded on a conviction, and there be a good and valid conviction to sustain the same.[1]

[1] The result of the cases which have been decided on sects. 14 and 15 (now obsolete so far as the jurisdiction of the Justices is concerned) seems to be that suspension in the High Court is excluded in any question as to the merits, but is competent where it is alleged that the inferior court has travelled outwith the statute. The cases have been cited in the preceding notes. (See also the Poaching Prevention Act, sect. 5, and note thereto, *infra*, p. 749.) In the cases cited, suspension was found competent; but in Porter *v.* Stewart, 22d March 1858, 3 Irv. 57 and 499, it was excluded, the error alleged being virtually as to the import of the proof. Where suspension was competent, it was not necessary first to appeal to the Quarter Sessions under sect. 14—M'Gregor *v.* Latour, 13th Nov. 1854, 1 Irv. 579. There is now also an appeal on matter of law by case stated under 38 & 39 Vict. c. 62. See M'Adam *v.* Lawrie, *supra*, sect. 1, note [10]; Black *v.* Bradshaw, ibid. note [5]; Colquhoun *v.* Liddell, ibid. note [2]; M'Donald *v.* Maclean, ibid. note [6]; James *v.* E. Fife, ibid. note [8]; Stoddart *v.* Stevenson, ibid. note [2]; Lawrie *v.* M'Arthur, ibid. note [5].

This Act not to preclude actions for trespass; but no double proceedings shall be had for the same trespass.

16. Provided always, and be it enacted, that nothing in this Act contained shall prevent any person from proceeding by way of civil action[1] to recover damages in respect of any trespass upon his land, whether committed in pursuit of game or otherwise, save and except that where any proceedings shall have been instituted under the provisions of this Act against any person for or in respect of any trespass, no action at law shall be maintainable for the same trespass by any person at whose instance or with whose concurrence or assent such proceedings shall have been instituted, but that such proceedings shall in such case be a bar to any such action, and may be given in evidence to this purpose and effect.

[1] This does not imply that proceedings under the statute are of a properly criminal nature. The strict rules of criminal procedure are not binding on the court—Raper *v.* Duff, 6th Feb. 1860, 3 Irv. 529 (signature of complaint); Russell *v.* Colquhoun, 24th Nov. 1845, 2 Broun, 572 (P.F.'s concurrence not necessary); Robertson *v.* Bs. Keith, 5th Jan. 1863, 4 Irv. 268 (notice of *alibi*; proof in replication).

Venue.

17. And for the protection of persons acting in the execution of this Act, be it enacted, that all actions and prosecutions to be commenced[1]

against any person for anything done in pursuance of this Act shall be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing of such action, and of cause thereof, shall be given to the defender one calendar month at least before the commencement of the action; and no prosecutor shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought, by or on behalf of the defender.

Notice of action.

Tender of amends.

[1] Cf. sect. 11.

Limits of Act.

18. And be it enacted, that nothing in this Act contained shall extend to England, Wales, or Ireland.[1]

[1] See Beattie *v.* Maxwell's Trs., note to sect. 8.

No. III.

7 & 8 VICTORIA, c. 29.

An Act to extend an Act of the Ninth Year of King George the Fourth, for the more effectual Prevention of Persons going armed by Night for the Destruction of Game.—[*4th July* 1844.]

9 Geo. 4. c. 69.

WHEREAS an Act was passed in the ninth year of the reign of his Majesty King George the Fourth, entituled *An Act for the more effectual Prevention of Persons going armed by Night for the Destruction of Game*, whereby it is enacted, that if any person shall, after the passing of the said Act, by night, unlawfully take or destroy any game or rabbits in any land, whether open or enclosed, such offender should, upon conviction thereof before two Justices of the Peace, be liable to be punished, and to find security for good behaviour, as in the said Act specified; and it was further thereby enacted, that if any person should be found upon any land committing any such offence as is herein-before mentioned, such person might be seized and apprehended, and committed to custody, and in case of any assault or violence should be punished as in the said Act is set forth: And whereas the provisions of the said Act have of late years been evaded and defeated, by the destruction, by armed persons at night, of game or rabbits, not upon open or enclosed lands,[1] as described in the said Act, but upon public roads and highways, and other roads and paths leading through such lands, and also at the gates, outlets, and openings between such lands, and roads, highways, and paths, so that not only has the destruction of game or rabbits not been prevented, but the risk of murder and other grievous offences contemplated by the said Act has been increased, and great danger and alarm occasioned to persons using such roads, highways, and paths; and it is expedient that the remedies provided by the said Act against such offences as herein-before mentioned should be extended and applied to the like offences committed upon such roads, highways, and paths;[2] Be it therefore enacted by the Queen's most Excellent Majesty, by and

with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, and from and after the passing of this Act all the pains, punishments, and forfeitures imposed by the said Act upon persons by night unlawfully taking or destroying any game or rabbits in any land, open or enclosed, as therein set forth, shall be applicable to and imposed upon any person by night unlawfully[3] taking or destroying any game or rabbits on any public road, highway, or path, or the sides thereof, or at the openings, outlets, or gates from any such land into any such public road, highway, or path, in the like manner as upon any such land, open or enclosed; and it shall be lawful for the owner or occupier of any land adjoining either side of that part of such road, highway, or path where the offender shall be, and the gamekeeper or servant of such owner or occupier, and any person assisting such gamekeeper or servant, and for all the persons authorised by the said Act to apprehend any offender against the provisions thereof, to seize and apprehend any person offending against the said Act or this Act; and the said Act, and all the powers, provisions, authorities, and jurisdictions therein or thereby contained or given, shall be as applicable for carrying this Act into execution as if the same had been herein specially set forth.

Punishments and forfeitures imposed by the recited Act on persons by night destroying game or rabbits in any open or enclosed land to apply to persons by night destroying game or rabbits on any public road, &c.

[1] According to the law laid down by the Queen's Bench in 1855, the present statute was scarcely necessary—Reg. *v.* Pratt, 4 E. and B. 860, where it was held that a public road passing through a landowner's estate was land in his occupation, subject to the right of way in the public; and any one present on the road, not in the exercise of the right of way, but for another purpose—namely, in search or pursuit of game—is a trespasser. Approved—Mayhew *v.* Wardley, 14 C.B.N.S. 550. But the Act clears the law, and provides especially for the case of the road being on the boundary between two estates or farms.

[2] The preamble refers only to the first alternative mode of the earlier Act, sect. 1, and that part of sect. 2 which applies thereto. The game or rabbits must be actually destroyed or taken. Accordingly, a libel founding on sect. 9 of the Night Poaching Act and the present section, and charging being on certain lands (sect. 9) or on a road (this section) armed, is objectionable, but can be cured by deleting the latter part—L. Adv. *v.* Burns, 23d April 1863, 4 Irv. 437.

[3] A charge that the accused 'unlawfully entered' a public road, and did then and there kill or destroy a hare, is bad—the word 'unlawfully' being misplaced, and inapplicable to entering a public place. Also, a general verdict of guilty following on this, and on an alternative laid under the second mode of the Night Poaching Act, sect. 1, is bad, as being cumulative—Mains *v.* M'Lullich, 6th Feb. 1860, 3 Irv. 533. It is unnecessary, in a complaint laid on both statutes, to set forth that the panel was unlawfully upon land open or enclosed—Kinnear *v.* Whyte, 25th May 1868, 1 Coup. 56; and a previous conviction of an offence under the earlier Act may be libelled on in a complaint laid on both Acts, as an aggravation (same case).

No. IV.

23 & 24 VICTORIA, c. 90.[1]

An Act to repeal the Duties on Game Certificates and Certificates to deal in Game, and to impose in lieu thereof Duties on Excise Licences and Certificates for the like Purposes.—[13*th August* 1860.]

. . . . . .

[1] This Act is included among the 'Game Acts' scheduled in 40 & 41 Vict. c. 28. The present Act repeats most of the provisions of the older statutes, of which the

principal was 52 Geo. III. c. 93, altering the form of the impost and its amount. The first section and the opening words of the second are repealed by the Statute Law Revision Act, 1875.

In lieu of duties repealed, the duties herein named to be levied.

2. . . . There shall be granted, charged, and paid for and upon the several licences and certificates to take or kill game, and licences to deal in game herein-after mentioned, the respective duties or sums of money herein-after expressed or denoted; (that is to say,)

	£	s.	d.
For a licence in Great Britain or a certificate in Ireland to be taken out by every person who shall use any dog, gun, net, or other engine for the purpose of taking or killing any game[1] whatever, or any woodcock, snipe, quail, or landrail, or any conies, or any deer,[2] or shall take or kill by any means whatever or shall assist in any manner in the taking or killing by any means whatever of any game, or any woodcock, snipe, quail, or landrail, or any coney, or any deer:			
If such licence or certificate shall be taken out after the fifth day of April[3] and before the first day of November,			
To expire on the fifth day of April[3] in the following year	3	0	0
To expire on the thirty-first day of October in the same year in which the licence or certificate shall be taken out	2	0	0
If such licence or certificate shall be taken out on or after the first day of November,			
To expire on the fifth day of April[3] following .	2	0	0
[4] Provided always, that any person having the right to kill game on any lands in England or Scotland shall be entitled to take out a licence to authorise any servant for whom he shall be chargeable to the duty of assessed taxes as a gamekeeper, to kill game upon the same lands, upon payment of the duty of	2	0	0
And for every licence to deal in game in England, Scotland, or Ireland, to be granted under this Act .	2	0	0

[1] 'Game' here almost certainly refers to the use of the word in the English Game Act, 1 & 2 Will. IV. c. 32, sect. 2, and the Night Poaching Act, sect. 13, *supra*, p. 732, which are identical.

[2] The Scotch Day Trespass Act, sect. 1, *supra*, p. 733, applies to all of these, and wild ducks besides. See exceptions in the present Act, sects. 5 and 6.

[3] Now, 31st July—46 Vict. c. 10, sect. 4—and licences taken out to expire on 5th April [1884] are continued to 31st July, ibid.

[4] A short licence is now added by 46 Vict. c. 10, sect. 5, in these words: 'A licence 'or certificate to kill game may be taken out under the provisions of [the present Act] 'for a continuous period of fourteen days to be specified in such licence or certificate; 'and there shall be granted and paid thereon the duty of one pound.'

Duties granted to be excise duties under the Commissioners of Inland Revenue.

3. The duties by this Act granted shall be under the management of the Commissioners of Inland Revenue, and shall be deemed to be excise duties, and all the powers, provisions, clauses, regulations, and directions contained in any Act relating to excise duties or to penalties under Excise Acts, and now or hereafter in force,[1] shall respectively be of full force and effect with respect to the duties by this Act granted, and to

the penalties hereby imposed, so far as the same are or may be applicable, and shall be observed, applied, and enforced for and in the collecting, securing, and recovering of the said duties and penalties hereby granted and imposed respectively, and otherwise in relation thereto, so far as the same shall be consistent with and not superseded by the express provisions of this Act, as fully and effectually as if the same had been herein repeated and specially enacted in this Act with reference to the said last-mentioned duties and penalties respectively.

[1] These are the chief statutes—7 & 8 Geo. IV. c. 53; 4 & 5 Will. IV. c. 51; 4 Vict. c. 20; and 12 Vict. c. 1.

Licence to be taken out for taking or killing game in Great Britain.

4. Every[1] person before he shall in Great Britain take, kill, or pursue, or aid or assist in any manner in the taking, killing, or pursuing by any means whatever, or use any dog, gun,[2] net or other engine[3] for the purpose of taking, killing, or pursuing any game, or any woodcock, snipe, quail, or landrail, or any coney, or any deer, shall take out a proper licence to kill game under this Act,[4] and pay the duty hereby made payable thereon; and if any person shall do any such act as herein-before mentioned in Great Britain without having duly taken out and having in force such licence as aforesaid, he shall forfeit the sum of twenty pounds.[5]

Penalty for neglect.

[1] *I.e.*, all who join in: a separate penalty for each—Bell on Excise, p. 625; but see exemption 3 in sect. 5.

[2] Use of a dog *and* gun on the same day entails only one penalty—R. *v.* Lovet, 7 T.R. 152.

[3] Setting a trap for the purpose is sufficient, though nothing be killed—Saunders *v.* Baldy, 13 L.T.N.S. 322. So also carrying a gun with an evident intention of shooting game. The intention distinguishes the offence from one against the Gun Act—Hebden *v.* Hentley, 1 Chitt. 608. For the nature and amount of evidence of the said purpose admitted in Scotland, see Assessed Tax Cases, 267, 268, 745, 746, 788, 789; cf. 328, 329, 597, 598. One witness is enough—268, 483, 650.

[4] Not sufficient to take one out after being challenged, though the party *bonâ fide* believed it had been taken out before—Stewart, 1847, Scotch Ass. Tax. Ca. No. 637.

[5] The double assessment imposed by the older statutes, alternatively to the penalty, was a civil debt giving right to the Act of Grace—Adv.-Gen. *v.* Mags. of Inverness, 29th Jan. 1856, 18 D. 366.

Exceptions and exemptions.

5. The following exceptions and exemptions from the duties and provisions of this Act are hereby made and granted; (that is to say,)

Exceptions.

1. The taking of woodcocks and snipes with nets or springes in Great Britain.
2. The taking or destroying of conies in Great Britain by the proprietor of any warren[1] or of any enclosed ground whatever, or by the tenant of lands, either by himself or by his direction or permission.
3. The pursuing and killing of hares[2] respectively by coursing with greyhounds, or by hunting with beagles or other hounds.
4. The pursuing and killing of deer by hunting with hounds.
5. The taking and killing of deer in any enclosed lands by the owner or occupier of such lands, or by his direction or permission.

Exemptions.

1. Any of the Royal Family.

2. Any person appointed a gamekeeper on behalf of her Majesty by the Commissioners of her Majesty's Woods, Forests, and Land Revenues, under the authority of any Act of Parliament relating to the land revenues of the Crown.
3. Any person aiding or assisting in the taking or killing of any game, or any woodcock, snipe, quail, landrail, or coney, or any deer, in the company or presence and for the use of another person who shall have duly obtained, according to the directions of this Act, and in his own right, a licence to kill game, and who shall by virtue of such licence then and there use his own dog, gun,[3] net or other engine for the taking or killing of such game, woodcock, snipe, quail, landrail, coney or deer, and who shall not act therein by virtue of any deputation or appointment.[4]
4. And, as regards the killing of hares only, all persons who, under the provisions of the two several Acts, 11th and 12th Victoria, chapter 29 and chapter 30 respectively,[2] are authorised to kill hares in England and Scotland respectively, without obtaining an annual game certificate.

[1] See text, p. 128.
[2] See also sect. 6.
[3] There is no exemption for a servant using a gun, though in the presence or by the order of his master, a qualified person—Ex. *p.* Sylvester, 9 B. and C. 61 (on 5 Ann. c. 14).
[4] Lewis *v.* Taylor, 16 East. 49.

Nothing herein to alter 11 & 12 Vict. cc. 29 and 30, except that 'game certificate' in said Acts, and also in 1 & 2 W. 4. c. 32, shall be read as 'licence to kill game.'

6. Provided always that nothing herein contained shall extend to repeal, alter, or affect any of the provisions of the said two several Acts of the eleventh and twelfth years of her Majesty, chapter twenty-nine[1] and chapter thirty,[2] further than that the term 'game certificate' in the said Acts respectively used shall be construed to mean a licence to kill game under the provisions of this Act, and shall be so read accordingly; and that the term 'game certificate' used in the Act of the first and second years of King William the Fourth, chapter thirty-two,[3] shall be construed and read in like manner; and that wherever in the said last-mentioned Act the duty of three pounds thirteen shillings and sixpence on a game certificate is mentioned the duty of three pounds on a licence to kill game shall be read in lieu.

[1] English Act.
[2] The Scotch Act, 11 & 12 Vict. c. 30, sect. 1, recites various Assessed Tax Acts and the damage done by hares, and enacts—'that from and after the passing of this 'Act it shall be lawful for any person having at present a right to kill hares in Scot-'land to do so himself, or by any person permitted, directed, or commanded by him 'by any writing under his hand, without the payment of any such duties of assessed 'taxes as aforesaid, and without obtaining an annual game certificate: Provided al-'ways, that such hares shall be found and killed in or upon his own land; provided 'also, that no person permitted, directed, or commanded as aforesaid shall have power 'to authorise any other person whatever to take or destroy any hare.'
Sect. 2. 'No person so permitted, directed, or commanded to kill hares as aforesaid 'shall, unless otherwise chargeable, be liable to any duties of assessed taxes as game-'keeper.'
Sect. 3 is equivalent to sect. 5, exception 3, of this Act, *supra*.
Sect. 4. Nothing herein contained shall extend or be taken or construed to extend 'to the making it lawful for any person, with intent to destroy or injure any hares or 'other game, to put, or cause to be put, any poison or poisonous ingredient on any 'ground, whether open or enclosed, where game usually resort, or in any highway,

'or for any person to use any fire-arms or gun of any description, by night, for the 'purpose of killing any game or hares.'

Sect. 5 defines night as in the Night Poaching Act, sect. 12, *supra*, p. 732.

By the Ground Game Act, 1880 (43 & 44 Vict. c. 47, sect. 4), 'the occupier [of 'land] and the persons duly authorised by him as aforesaid' [*i.e.*, one other person authorised by him to kill ground game with fire-arms, and authorised members of his household resident on the land in his occupation, and persons in his ordinary service on such land, and any one other person *bonâ fide* employed by him for reward in the taking and destruction of ground game, the authority in every case being in writing (sect. 1)] 'shall not be required to obtain a licence to kill game for the purpose of 'killing and taking ground game' [*i.e.*, hares and rabbits] 'on land in the occupation 'of such occupier, and the occupier shall have the same power of selling any ground 'game so killed by him, or the persons authorised by him, as if he had a licence to kill 'game, provided that nothing in this Act contained shall exempt any person from 'the provisions of the Gun Licence Act, 1870.' A person is not occupier in the sense of the Act who has merely a right of common, or occupation for the purpose of grazing or pasturage of sheep, cattle, or horses, for not more than nine months (sect. 1 (3).)

[3] English Act extended to Scotland so far as relating to dealers' licences by the present Act, sect. 13.

Licences may be taken out on behalf of assessed servants acting as gamekeepers for persons having right to kill game, or under deputations from lords of manors.

7. Any person having the right to kill game on any lands in England or Scotland, and being charged or liable to be charged to the assessed tax on servants in respect of any gamekeeper, by whomsoever deputed or appointed, and whether deputed or appointed or not, and any person granting a deputation or appointment in Great Britain to the servant of any other person who shall be duly charged to the assessed tax on servants in respect of such servant, whether as gamekeeper or in any other capacity, with power and authority to take or kill any game, shall respectively be at liberty to take out a licence to kill game on behalf of any such servant, on payment of the duty of two pounds for the year ending on the fifth day of April,[1] and such licence shall exempt the servant named therein during his continuance in the same capacity and service, and on his quitting such service shall also exempt any servant who shall succeed him in the same service and capacity, or who shall succeed to the deputation of the same manor or royalty or lands within the year for which the licence is granted, during the remainder of such year; and no such servant on whose behalf a licence shall have been duly obtained as aforesaid shall be required to obtain a licence for himself, or be liable to any penalty by reason of not obtaining a licence in his own name.

[1] Now, 31st July—46 Vict. c. 10, sect. 4—and licences taken out to expire on 5th April [1884] are continued to 31st July, ibid.

On change of gamekeeper, or revocation of deputation, licence may be continued to successor.

8. Every such licence to kill game taken out on behalf of any such servant as aforesaid shall, upon the revocation of any such deputation or appointment, or on his quitting the service of the master by whom such licence shall have been taken out, be from thenceforth of no further effect as to the person named therein as such servant, or so deputed or appointed as aforesaid; but if within the year for which such licence was granted the said master, on the quitting of such servant, shall employ another servant as gamekeeper in his stead, or the person by whom such deputation or appointment was made shall on the revocation thereof make a new deputation or appointment to any person in his service, or in the service of the same master by whom such licence shall have been taken out, and who shall have been charged or be chargeable to the said

assessed tax on servants as aforesaid, the officer by whom such licence was granted, or the proper officer appointed by the commissioners in that behalf, shall renew such licence for the remainder of that year, on behalf of the fresh servant or the person so newly appointed, as the case may be, without payment of any further duty, by indorsing on such licence the name and place of abode of the said last-mentioned servant, or the person to whom such last-mentioned deputation or appointment shall have been granted, and declaring the same to be a renewed licence free of duty.

Such licences not available for acts done out of limits of the manor or lands for which the parties are appointed gamekeepers.

9. Provided always, that no such licence taken out for or on behalf of any person, being such servant or acting under a deputation or appointment as aforesaid, shall be available for such person in any suit or prosecution where proof shall be given of his doing or having done any act for which a licence is required under this Act on land on which his master had not a right to kill game.[1]

[1] Cases in Irvine, Game Laws, p. 227.

Persons doing any act requiring a licence to kill game, to produce the same, on demand, or declare their names, places of residence, &c.

10. If any person shall be discovered doing any act whatever in Great Britain in respect whereof a licence to kill game is required under this Act, by any officer of Inland Revenue, or by any lord or gamekeeper[1] of the manor, royalty, or lands wherein such person shall then be, or by any person having duly taken out a proper licence to kill game under this Act, or by the owner, landlord, lessee, or occupier of the land on which such person shall then be, it shall be lawful for such officer or other person aforesaid to demand and require from the person so acting the production of a licence to kill game issued to him; and the person so acting is hereby required to produce such licence to the person so demanding the production thereof, and to permit him to read the same, and (if he shall think fit) to take a copy thereof or of any part thereof; or in case no such licence shall be produced to the person demanding the same as aforesaid, then it shall be lawful for the person having made such demand to require the person so acting forthwith to declare to him his Christian and surname and place of residence, and the place at which he shall have taken out such licence; and if such person shall, after such demand made, wilfully refuse to produce and show a licence to kill game issued to him, or in default thereof as aforesaid to give to the person so demanding the same his Christian and surname and place of residence, and the place at which he shall have taken out such licence, or if he shall produce any false or fictitious licence, or give any false or fictitious name or place, or if he shall refuse to permit any licence which he may produce to be read, or a copy thereof or of any part thereof to be taken, he shall forfeit the sum of twenty pounds.[2]

Penalty for refusal.

[1] His authority need not be written—Rex. *v.* Price, 7 C. and P. 178—this being *à fortiori* of the Night Poaching Act, sect. 2, *supra*, p. 729; nor be shown—Scarth *v.* Gardener, 5 C. and P. 38. See also Day Trespass Act, sect. 2, and notes, *supra*, p. 734.

[2] The offence under this sect. is not complete unless there be refusal to produce the licence *and* to tell the name, &c.—Molton *v.* Rogers, 4 Esp. 214.

Licence to be void if party be convicted of any offence

11. If any person, having obtained a licence to kill game under this Act, shall be convicted of any offence under section thirty of the said Act of the first and second years of King William the Fourth, chapter

thirty-two,[1] or under the Act of the second and third years of King William the Fourth, chapter sixty-eight,[2] the said licence shall thenceforth be null and void. under 1 & 2 Will. 4. c. 32, or 2 & 3 Will. 4. c. 68.

[1] The English Game Act.
[2] The Scotch Day Trespass Act, *supra*, p. 733.

12. *Commissioners to publish lists of persons licensed to kill game.* Sections **13 - 15** *inclusive relate to game dealers.*[1]

[1] See Thomson *v.* Romanes, 3d Jan. 1865, 5 Irv. 1; M'Dougall *v.* Douglas, 14th April 1875, 3 Coup. 110; Lazenby *v.* Arthur, 9th Nov. 1874, 3 Coup. 23; and Irvine, Game Laws, p. 228 *et seq.*

16. All licences and certificates to kill game and to deal in game respectively, under the provisions of this Act, shall be in such form as the Commissioners of Inland Revenue shall from time to time provide in that behalf, and shall denote the amount of duty charged thereon respectively, and shall be granted, signed, and issued at the chief office of Inland Revenue in London, Edinburgh, and Dublin respectively, and by the several supervisors of excise in their respective districts, or by such other officers of Inland Revenue and at such places as the said Commissioners shall think fit to employ and appoint respectively in that behalf; and every such licence shall contain the proper Christian and surname and place of residence of the person to whom the same shall be granted, with any other particulars which the Commissioners of Inland Revenue may direct to be inserted therein, and shall be dated on the day when the same was actually issued, and shall have effect and be in force upon the day of the issuing thereof, and shall expire on the day therein mentioned for the termination thereof.[1] By whom licences shall be granted, and form thereof. Duration and expiration of licences.

[1] See sect. 2.

Section **17** *relates to Ireland.*

18. Every licence and certificate to kill game taken out respectively in Great Britain and Ireland under this Act, by or on behalf of any person in his own right, and not as a gamekeeper or servant, shall be available for the killing of game in any part of the United Kingdom. Licences and certificates to be available throughout the United Kingdom.

No. V.

25 & 26 VICTORIA, c. 114.

An Act for the Prevention of Poaching.—[*7th August* 1862.]

WHEREAS it is expedient that the laws now in force for the better detection and prevention of poaching should be amended: Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Interpretation of terms.

1. The word 'game' in this Act shall for all the purposes of this Act be deemed to include any one or more hares, pheasants, partridges, eggs of pheasants and partridges, woodcocks, snipes, rabbits, grouse, black or moor game, and eggs of grouse, black or moor game; and the words 'Justice' and 'Justices' in this Act shall, unless otherwise provided for, mean respectively a Justice and Justices of the Peace respectively of or for the county, riding, division, liberty, city, borough, or place in which any game, gun, part of gun, net, snare, or engine after mentioned shall be found.

Power to constables to search persons without warrant, in certain cases.

2. It shall be lawful[1] for any constable or peace officer in any county, borough, or place in Great Britain and Ireland, in any highway, street, or public place, to search[2] any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of gun, or nets or engines used for the killing or taking game,[3] and also to stop and search any cart or other conveyance in or upon which such constable or peace officer shall have good cause to suspect that any such game or any such article or thing is being carried by any such person, and should there be found any game or any such article or thing as aforesaid upon such person, cart or other conveyance,[4] to seize and detain such game, article, or thing; and such constable or peace officer shall in such case apply to some Justice of the Peace[5] for a summons citing such person to appear before two Justices of the Peace[5] assembled in petty sessions, as provided in the eighteenth and nineteenth of her present Majesty, chapter one hundred and twenty-six, section nine, as far as regards England and Ireland, and before a sheriff or any two Justices of the Peace[5] in Scotland; and if such person shall have obtained such game by unlawfully going on any land in search or pursuit of game,[6] or shall have used any such article or thing as aforesaid for unlawfully killing or taking game, or shall have been accessory thereto, such person shall, on being convicted thereof,[7] forfeit and pay any sum not exceeding five pounds, and shall forfeit such game, guns, parts of guns, nets, and engines, and the Justices shall direct the same to be sold or destroyed, and the proceeds of such sale, with the amount of the penalty, to be paid to the treasurer of the county or borough where the conviction takes place; and no person who, by direction of a Justice in writing, shall sell any game so seized shall be liable to any penalty for such sale; and if no conviction takes place, the game or any such article or thing as aforesaid, or the value thereof, shall be restored to the person from whom it had been seized.

[1] No distinction is drawn between day and night, as in former statutes. Cf. 7 & 8 Vict. c. 29, *supra*, p. 740.

[2] Not to apprehend—Reg. *v.* Spencer, 3 F. and F. 857. It has been held in England that actual search is not necessary (the game being seen on the person) to found right to apply for a summons—Hall *v.* Knox, 33 L.J.M.C. 1—but it is necessary that game, or instruments for taking game, shall have been *found* (seen, heard, or felt) on the accused on a highway, street, or public place. It is not enough that the accused have been seen and suspected on a highway, followed, and game, &c., found on him elsewhere. There was also a strong opinion on the bench that seizure of the game, &c., on the highway is necessary to give the Court jurisdiction—Clarke *v.* Crowder, L.R., 4 C.P. 638; Turner *v.* Morgan, L.R. 10 C.P. 587.

[3] It is enough to show that a net in the possession of one of the accused had been used with the object of killing game—it was wet, and a lurcher was seen hard by—Jenkin *v.* King, L.R. 7 Q.B. 478. The possession of a ferret, mesh needle, and twine for making nets is not enough to convict—Gillan *v.* Milroy, 14th Dec. 1877, 3 Coup. 551.

[4] The complaint need not set forth that the game, &c., were found on the person of the accused, or upon a cart or conveyance belonging to him or in his charge—Anderson *v.* Cooper, 7th March 1868, 1 Coup. 18; but see Clark *v.* Crowder, *supra* [2].

[5] Now the sheriff alone—40 & 41 Vict. c. 28.

[6] Proof of having been seen on the land is not required, such circumstantial evidence as should satisfy a jury being sufficient—Browne *v.* Turner, 32 L.J.M.C. 106; Evans *v.* Botterill, 33 L.J.M.C. 50.

[7] 'Of the contravention charged' in a conviction is sufficient, where the complaint averred possession on a road of two hares, and that the complainer had good cause, &c.—Scott *v.* Anderson, 2d Nov. 1868, 1 Coup. 98. It is not necessary to take a note of the evidence—Anderson *v.* Cooper, *supra* [4].

3. Any penalty under this Act shall be recovered and enforced in England in the same manner as penalties under the Act first and second William the Fourth, chapter thirty-two, and in Scotland under the Act second and third William the Fourth, chapter sixty-eight,[1] and in Ireland under the Petty Sessions, Ireland, Act, 1851, when not otherwise directed in this Act. Recovery of penalties.

[1] The Day Trespass Act, sect. 11, *supra*, p. 733. Accordingly, there must be an oath of credulity, charging the offence and the good cause of suspicion at the date thereof—Trainer *v.* Johnston, 5th Jan. 1863, 4 Irv. 264; Logan *v.* Coupland, *infra*. Objections to complaints are now regulated by the Summary Procedure Act, 1864, where its forms have been adopted. Thus it was held to be 'changing the character of the offence charged' to convert averments only relevant for a conviction under the Day Trespass Act into averments relevant also under this Act, without a fresh oath of credulity—Morris *v.* E. Glasgow, 24th Dec. 1867, 5 Irv. 529. The procurator-fiscal is a competent prosecutor—Anderson *v.* Cooper, *supra*, sect. 2, note [4].

4. *Provisions of* 11 *&* 12 *Vict. c.* 43 *extended to this Act.*[1]

[1] English Act; ruled out of the Act as applicable to Scotland, Logan *v.* Coupland, 14th Dec. 1863, 4 Irv. 453.

5. No conviction or order made under this Act, or adjudication made on appeal therefrom, shall be quashed for want of form, or be removed by certiorari or otherwise into any of her Majesty's Superior Courts of Record;[1] and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same. No conviction shall be quashed for want of form or removed by certiorari.

[1] Appeal on the merits to the Circuit Court is excluded—Anderson *v.* Nicholson, 22d April 1872, 2 Coup. 225. But there is now an appeal on matter of law, by case stated, to the Court of Justiciary, by 38 & 39 Vict. c. 62.

6. Any person who shall think himself aggrieved by any such summary conviction may appeal to the next Court of General or Quarter Sessions which shall be holden not less than twelve days after the day of such conviction for the county, riding, division, or borough wherein the cause of complaint shall have arisen, provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least before such sessions, and shall, within three days, enter into a recognisance, or bond of caution in Scotland, with a sufficient surety, before a Justice of the Peace, conditioned personally to appear at the said sessions, and to try such appeal, and to abide the judgment Power of Appeal.[1]

of the court thereupon, and to pay such costs as shall be awarded by the court; and the court at such sessions shall hear and determine the matter of appeal, and shall make such order therein, with or without costs, to either party, as to the court shall seem fit, and shall, if necessary, issue process for enforcing such judgment.

[1] Superseded by procedure before the sheriff.

No. VI.

33 & 34 VICTORIA, c. 57.

An Act to grant a Duty of Excise on Licences to use Guns.—[*9th August* 1870.]

Short title.

1. This Act may be cited as 'The Gun Licence Act, 1870.'

Definition of terms.

2. In this Act the term 'gun' includes a firearm of any description and an air gun or any other kind of gun from which any shot, bullet, or other missile can be discharged.

The term 'commissioners' means the Commissioners of Inland Revenue.

Duty on licence to use a gun.

3. After the first day of April one thousand eight hundred and seventy there shall be granted and paid unto and for the use of her Majesty, her heirs and successors, for and in respect of every licence to be taken out yearly by every person who shall use or carry a gun in the United Kingdom the sum of ten shillings.

4. *Duty and licence to be under the management of the Commissioners of Inland Revenue.*[1]

[1] See note to sect. 3 of the Game Certificates Act, *supra*, p. 743.

Form and date of licence.

5. Every licence to be granted under this Act shall be in such form and shall be granted by such officer of Inland Revenue and at such place as the commissioners shall direct, and shall contain the Christian and surname and place of residence of the person to whom the same shall be granted, and shall be dated on the day on which the same shall be granted, and shall expire on the thirty-first day of March[1] next following; but no licence under this Act shall be granted upon payment of a less sum than the duty for a whole year, nor shall any such licence be transferable.

[1] Now, 31st July, 'provided that in the case of any such licence in force at the 'passing of this Act' [31st May 1883] 'or to be granted before the first day of August 'next after the passing thereof, the same shall not expire until the thirty-first day of 'July one thousand eight hundred and eighty-four,' 46 Vict. c. 10, sect. 6.

6. *Register of licences to be kept.*

Penalty for using or carrying a gun without licence.

7. Every person who shall use or carry a gun elsewhere than in a dwelling-house or the curtilage[1] thereof without having in force a licence duly granted to him under this Act shall forfeit the sum of ten pounds.

Provided always, that the said penalty shall not be incurred by the following persons; namely,

(1.) By any person in the naval, military, or volunteer service of her Majesty, or in the constabulary or other police force, using or carrying any gun in the performance of his duty, or when engaged in target practice.

(2.) By any person having in force a licence or certificate to kill game granted to him under the laws of excise in that behalf.[2]

(3.) By any person carrying a gun belonging to a person having in force a licence or certificate to kill game or a licence under this Act, and by order of such licensed or certificated person and for the use of such licensed or certificated person only, if the person carrying the gun shall, upon the request of any officer of Inland Revenue or constabulary, or any constable, owner or occupier of the land on which such gun shall be used or carried, give his true name and address, and also the true name and address of his employer.

(4.) By the occupier of any lands using or carrying a gun for the purpose only of scaring birds or of killing vermin[3] on such lands, or by any person using or carrying a gun for the purpose only of scaring birds or of killing vermin on any lands by order of the occupier thereof, who shall have in force a licence or certificate to kill game or a licence under this Act.

(5.) By any gunsmith or his servant carrying a gun in the ordinary course of the trade of a gunsmith, or using a gun by way of testing or regulating its strength or quality in a place specially set apart for the purpose.

(6.) By any person carrying a gun in the ordinary course of his trade or business as a common carrier.

In any information for the recovery of the penalty imposed by this section, it shall be sufficient to allege that the defendant used or carried a gun without having a licence in force under this Act, and it shall lie upon the defendant to prove that he is a person not incurring the penalty by virtue of the proviso contained in this section.

[1] See this term also used in the Inhabited-House Duty Acts, *supra*, p. 698. Curtilage is an English law term — etymologically connected with 'court'— and is defined 'a courtyard, backside, or piece of ground lying near and belonging to a 'dwelling-house'— Tomlins's Law Dict. *s. voce.* It includes an orchard and garden adjacent to a house—*per* Cockburn C.J. in Josh *v.* Josh, 5 C.B.N.S. 454; and a strip of ground lying between a house and a street—L. Grosvenor, 1 De G. and J. 446.

[2] See the Act, *supra*, p. 741.

[3] Are wood-pigeons vermin? In the case of Bryson, 1875, the right of a tenant-farmer to kill wood-pigeons as vermin, or at least to scare them by firing into a flock and thereby killing some of them, was affirmed by the Ayrshire Quarter Sessions. An appeal was withdrawn by the Crown, thus leaving the point still open. *Ex relat. Ulti.* Rabbits are vermin in the sense of this subsection—Gosling *v.* Brown, 9th March 1878, 5 Ret. 755; but nothing in the Ground Game Act, 1880 (43 & 44 Vict. c. 47, sect. 4) shall exempt any person from the provisions of the present Act.

Provision where a gun is carried in parts by two or more persons.

8. Where a gun is carried in parts by two or more persons in company, each and every one of such persons shall be deemed to carry the gun.

9. It shall be lawful[1] for any officer of Inland Revenue or for any officer of constabulary or any constable to demand from any person

Licence to be produced on demand, or name and address declared, under penalty of £10.

using or carrying a gun (not being a person in the naval, military, or volunteer service of her Majesty, or in the constabulary or other police force, using or carrying a gun in the performance of his duty) the production of a licence granted to such person under this Act.

If the person upon whom the demand is made shall not produce a licence duly granted to him under this Act, or a licence or certificate to kill game granted to him under the laws of excise, and permit the officer or constable demanding the production thereof to read such licence or certificate, it shall be lawful for such officer or constable to require such person to declare to him immediately his Christian and surname and place of residence, and if such person shall refuse to declare his Christian and surname and place of residence as aforesaid, he shall for such refusal forfeit the penalty of ten pounds over and above any other penalty to which he may be liable under this or any other Act of Parliament; and it shall be lawful for such officer or constable to arrest such person so refusing, and to convey him before any Justice of the Peace having jurisdiction at the place where the offence shall be committed, and such Justice shall, upon due proof on oath of the offence, or upon the confession of the accused person, convict such person in the penalty aforesaid, or in some mitigated portion thereof, not being less than one fourth; and if such penalty be not immediately paid into the hands of the officer or constable (who is hereby required to receive and pay over the same to the commissioners), such Justice shall commit the offender to hard labour in the proper house of correction for any period not exceeding one month, nor less than seven days, or until the penalty shall be sooner paid.

[1] Cf. sect. 10 of the Game Certificates Act, *supra*, p. 746, and notes thereto.

Authorised officers may enter upon lands.

10. It shall be lawful[1] for any officer of Inland Revenue, officer of constabulary, or constable, who may see any person using or carrying a gun to enter and remain so long as may be necessary upon any lands or upon any premises (other than a dwelling-house or the curtilage thereof) for the purpose of making the demand specified in the preceding section.

[1] See text, p. 123.

Licence to be void if person be convicted of any offence under sect. 30 of 1 & 2 Will. 4. c. 32, or under 2 & 3 Will. 4. c. 68.

11. If any person[1] having obtained a licence under this Act shall be convicted of any offence under section thirty of the Act of the first and second years of King William the Fourth, chapter thirty-two, or under the Act of the second and third years of King William the Fourth, chapter sixty-eight, the said licence shall thenceforth be null and void.

[1] Cf. sect. 11 of the Game Certificates Act, *supra*, p. 746, and notes thereto.

Not to interfere with any other Act requiring authority to keep firearms.

12. No licence granted under this Act shall entitle the person to whom the same is granted to use, carry, or have in his custody or possession any firearm in any part of the United Kingdom where such person is by any other Act now or hereafter in force forbidden to use, carry, or have in his custody or possession any firearm, nor to entitle such person to use, carry, or have in his custody or possession any firearm unless he shall have obtained a licence or permission so to do

from any authority empowered by any such other Act to grant such licence or permission.

No. VII.

2 & 3 WILLIAM IV. c. 65.

An Act to amend the Representation of the People in Scotland.—[17*th July* 1832.][1]

None hereafter to acquire votes, except as herein-after provided; but freeholders now enrolled in shires to be entitled to vote for their lives.

6. And be it enacted, that from and after the passing of this Act no person shall acquire, by succession, purchase, gift, or otherwise, the right of voting for a member of Parliament, either in shires, or in cities, burghs, or towns, except by one or other of the qualifications herein-after prescribed and directed: Provided always, that all persons who at the passing of this Act shall be lawfully on the roll of freeholders of any shire in Scotland, or who shall then be entitled to be put on such roll, or who shall previous to the first day of March one thousand eight hundred and thirty-one have become the owners or superiors of lands affording the qualification for being so enrolled, shall, so long as they retain the necessary qualification on which they are now enrolled or are entitled to be enrolled as aforesaid, be entitled to be registered and to vote as herein-after directed in the election of a member for such shire.[2]

[1] The franchises conferred by this Act are saved by its successor of 1868, sect. 56, *infra*, Appx. No. 8, but so that no person shall be entitled to vote for the same place in respect of more than one qualification. The main distinction is in respect of voting in virtue of possessing feu-duties, *infra*, sect. 7.

[2] See sect. 35, *infra*. The old qualification is thus practically obsolete, the proviso applying only to the persons mentioned, not to their successors—see Cay, p. 31; Nicolson, pp. 2, 3, 26.

Qualification of county voters.

7. And be it enacted, that from and after the passing of this Act every person, not subject to any legal incapacity,[1] shall be entitled to be registered as herein-after directed, and thereafter to vote at any election for a shire in Scotland, who, when the sheriff proceeds to consider his claim for registration[2] in the present or in any future year, shall have been, for a period of not less than six calendar months next previous to the last day of August in the present or the last day of July in any future year,[3] the owner[4] (whether he has made up his titles,[5] or is infeft, or not,[6]) of any lands, houses, feu-duties,[7] or other heritable subjects[8] (except debts heritably secured[9]) within the said shire, provided the subject or subjects on which he so claims shall be of the yearly value[10] of ten pounds, and shall actually yield or be capable of yielding that value to the claimant, after deducting[11] any feu-duty,[12] ground-annual, or other consideration which he may be bound to pay or to give or account for as a condition of his right, provided he be, by himself, his tenants, vassals, or others, in possession of the said subjects, and be either himself in the actual occupation or in receipt of the profits and issues thereof to the extent above mentioned:[13] Provided always, that where the whole profits and issues of any such subject do not arise

annually, but at longer intervals, the worth and amount of such occasional profits shall be taken into computation in estimating the annual value:[14] Provided also, that where any property which would entitle the owner to be registered and to vote as above shall come to any person, within the said period of six months, by inheritance, marriage, marriage settlement, or *mortis causa* disposition, or by appointment to any place or office, such person shall be entitled to be registered on the first occasion of making up the list of voters, as herein-after provided, next following such succession or acquisition.[15]

[1] This is regarded as excluding minors, at the date of registration (see *infra*, Act 1868, sect. 5 note); women; fatuous and insane persons; aliens, unless they have before the statutory period of possession obtained naturalisation, and taken the oath prescribed by 33 Vict. c. 14; the persons mentioned in sect. 36, *infra;* an assessor under the County and Burgh Voters Acts, or under the Valuation Act, for the county or burgh to which he is appointed, but not elsewhere—19 & 20 Vict. c. 58, sect. 8; 24 & 25 Vict. c. 83, sect. 13; Paton *v.* Haldane, 1863, 2 Macph. 177; do. 1865, 3 Macph. 418 (as to resignation of office timeously); police constables, in their county or any adjoining county, or in any burgh within either—20 and 21 Vict. c. 72, sect. 17; all peers, but not their eldest sons, *infra*, sect 37; persons convicted of bribery, for seven years after conviction. The penalties incurred, through treating undue influence, corrupt and illegal practices, &c., are detailed in the Corrupt & Illegal Practices Protection Act, 46 & 47 Vict. c. 51 (1883), sect. 4-6, 10, 21, 36-39. The disabilities imposed on Roman Catholics were abolished by 10 Geo. IV. c. 7; on revenue officers, by 31 & 32 Vict. c. 73. Probably post-office officials would now be held entitled to vote. As to the above, see Cay, 12, 406; Nicolson, pp. 19-25. A doubt there mooted is set at rest by the Judges in Johnstone *v.* M'Muldrow, 1868, 7 Macph. 281, who held that whenever there was a disqualification to vote, there could be no registering. This applies to officials (20 & 21 Vict. c. 70, sect. 8, only referring to municipal registers), to minors, the insane, &c.

[2] See the text, as to the Registration Acts, p. 183.

[3] As the valuation roll is made up for the year beginning at Whitsunday, two rolls may have to be consulted—Millar *v.* Rutherford, 1865, 3 Macph. 412; see Stevenson *v.* Miller, 1880, 8 Ret. 8. A disponee's title does not require to have been delivered beyond this period, if really held for his behoof—Matthewson *v.* Rutherford, 1865, 3 Macph. 413; Paterson *v.* Rutherford, 1865, 3 Macph. 421.

[4] The ownership must be reasonably permanent—*i.e.*, indefeasible, except on some remote contingency. Therefore a Free Church minister's tenure of house and garden under the 'model trust-disposition' in favour of trustees was held sufficient ownership in liferent—Rutherford *v.* Young, 1863, 2 Macph. 180, and next case there. See Gow *v.* Watson, 1865, 4 Macph. 115, a building society case under this Act, and similar cases under Act 1868, *infra*, p. 759. A decree of maills and duties does not oust the owner from the franchise, though followed by possession—M'Culloch *v.* Sharpe, 1865, 4 Macph. 137; nor an *ex facie* absolute disposition, if the back-letter be validly proved, but not otherwise—Jardine *v.* M'Culloch, 1865, 4 Macph. 138; Macfarlane *v.* Cooper, 1866, 5 Macph. 79; Skeete *v.* Stewart, 1879, 7 Ret. 12. The test of the right of beneficiaries under a trust to the franchise is whether or not their right is heritable—Cay, 56-61. The right is lost by sale, divestiture on bankruptcy (see Bankruptcy Act of 1856, sect. 102, and Yuille *v.* Donaldson, 1865, 4 Macph. 136, Lennox *v.* Donaldson, 1878, 6 Ret. 8), declarator of expiry of the legal disposition, *omnium bonorum*, within the period; not by mere adjudication, nor trust-disposition for creditors—Nicolson, 27, 30, and authorities there. See also cases under Act 1868, sects. 3 and 5; and this Act, sect. 8, and notes. Sufficient ownership had formerly to be retained down to the date of voting—24 & 25 Vict. c. 83, sect. 42; but this is now altered by Act 1868, sect. 54.

[5] A written title is necessary; see Ferguson, 1865, 4 Macph. 120; and Act 1868, sect. 3, *infra*. It must be of the beneficial right.

[6] Minute of enactment on articles of roup, with possession, was enough, though the right was defeasible in the event (which happened) that the price was neither paid nor secured—Kinniburgh *v.* Donaldson, 1865, 4 Macph. 119.

[7] Feu-duties are omitted in Act 1868. The qualification here is as 'owner of feu-'duties,' not as owner of lands under burden of the feu-rights—Lee *v.* Matheson, 1871, 10 Macph. 5. Effect of a division of the feu—Raeburn *v* Geddes, 1870, 9 Macph. 20.

[8] Including 'ground-annuals'—Guy *v.* Reston, 1866, 5 Macph. 62; though no

buildings have been erected to earn them—Ferguson *v.* Lang, 1878, 6 Ret. 13. See note to Act 1868, sect. 5, *infra*, as to shootings; and Valuation Act, sect. 42, *supra*, p. 197.

[9] *E.g.*, a real burden, constituted by way of a liferent annuity, on which infeftment has been taken, does not confer the franchise—M'Culloch *v.* Smith, 1865, 4 Macph. 132.

[10] See Valuation Act, text, p. 197.

[11] Deducting terce, though the widow has not been served—Henderson *v.* Maxton, 1866, 5 Macph. 65.

[12] Where, in dividing a feu, there has been an allocation of the *cumulo* feu-duty, each sub-feu is liable only to deduction of its share for the purposes of this Act, though contingently liable for the whole—Babtie *v.* Lindsay, 1866, 5 Macph. 72; even though the superior has not consented—Stewart *v.* Hector, 1866, 5 Macph. 69. See Act, 1868, sect 5, *infra*. The feu-duty must be deducted from the whole property of joint owners, and then the division made; not from the share of each—Macfarlane *v.* Lamont, 1866, 5 Macph. 78; but not arrears—Cay, 228-9.

[13] A piece of ground yielding, and capable of yielding, no return as an agricultural subject, but worth more, if built on, than £10 a-year as a building-stance, gave no qualification—Gun *v.* Paterson, 1866, 5 Macph. 64. See Cay, 162, 207.

[14] Not casualties, unless perhaps they by arrangement—*e.g.*, under the Conveyancing Act, 1874—recur at regular intervals—Lee *v.* Matheson, 1871, 10 Macph. 5.

[15] See Millar *v.* Russell, 1868, 7 Macph. 283.

Rule as to liferenters and fiars and joint owners.

8. And be it enacted, that in elections for shires, where two or more persons are interested in any subject to which a right of voting is for the first time attached by this Act, as liferenter and as fiar, the right of voting shall be in the liferenter,[1] and not in the fiar; and all co-proprietors or joint owners[2] shall be entitled each to vote in respect of their joint property within the shire, provided the share or interest of each joint owner so claiming on such property is of the yearly value of ten pounds, as above specified, but not otherwise: Provided also, that husbands shall be entitled to vote in respect of property belonging to their wives,[3] or owned or possessed by such husbands after the death of their wives by the courtesy of Scotland.

[1] His assigning the profits of the subject will not convey the franchise—Cay, 88; Nicolson, 32. As to official liferenters, as bank agents, schoolmasters, and ministers, see last section, note [4], and *infra*, Act 1868, sect. 3, notes. Liferent of feu-duties sustained—Halley *v.* Stirling, 1878, 6 Ret. 12; cf. case in note [9] to last section.

[2] Either in fee or mere liferent—Miller *v.* Fisher, 1863, 2 Macph. 192 (a multiplication of votes checked by Act 1868, sect. 14). The term 'joint owners' includes partners in a trading concern, but not members of a corporation—Cay, 72 *et seq.*, and Act 1868, sect. 14; and not trustees—see declaration in 24 & 25 Vict. c. 83, Sched. D, superseding Sched. I at the end of this Act.

[3] Though the wife be only liferentrix under a trust—Boylan *v.* Rutherford, 1865, 3 Macph. 414; but not in respect of a long lease—Blair *v.* Baptie, 1865, 4 Macph. 124. The husband's qualification is valid, though his *jus mariti* to the rents is excluded, but he is disabled by his own bankruptcy—Buchanan *v.* M'Culloch, 1865, 4 Macph. 135.

Right of voting for burghs and towns no longer to be in town councils and delegates, but in qualified inhabitants.

10. And be it enacted, that from and after the end of this present Parliament the members who are to be returned to serve in any future Parliament for any single city, town, or burgh on which the right of returning a member or members is by this Act conferred, shall no longer be elected by the town councils of such cities, burghs, or towns, but directly by the several individuals on whom the right of electing such members to serve in Parliament is by this Act conferred; and where the election is by districts or sets of cities, burghs, or towns conjoined, the right of electing shall no longer be in the town councils or corporations of the said cities, burghs, or towns, or in delegates appointed by them, but in the individual voters on whom the right of election is by this

Act conferred; and the member to serve in Parliament for any such district shall be returned according to the majority of individual votes given in the whole district.

Occupants of houses worth £10 a-year entitled to vote in cities, burghs, and towns.

11.[1] And be it enacted, that every person, not subject to any legal incapacity,[2] shall be entitled to be registered as herein-after directed, and to vote at elections for any of the cities, burghs, or towns, or districts of cities, burghs, or towns, herein-before mentioned, who, when the sheriff proceeds to consider his claim for registration, shall have been, for a period of not less than twelve calendar months next previous to the last day of August in the present or the last day of July in any future year, in the occupancy, either as proprietor, tenant, or liferenter, of any house, warehouse, counting-house, shop, or other building[3] within the limits of such city, burgh, or town, which, either separately or jointly with any other house, warehouse, counting-house, shop, or other building within the same limits, or with any land owned and occupied by him, or occupied under the same landlord, and also situate within the same limits, shall be of the yearly value of ten pounds: Provided always, that the claimant shall have paid, on or before the twentieth day of August in the present or the twentieth day of July in any future year, all assessed taxes[4] which shall have become payable by him in respect of such premises previously to the sixth day of April then next preceding: Provided also, that no such person shall be entitled to be registered or to vote in the present or any future year unless he shall have resided[5] for six calendar months next previous to the last day of August in the present or the last day of July in any future year within such city, burgh, or town, or within seven statute miles of some part thereof: Provided also, that persons so resident shall be entitled to be registered and to vote if they are the true owners[6] of such premises as are herein-before mentioned, within such city, burgh, or town, of the yearly value of ten pounds or upwards, although they should not occupy any premises within its limits, or although the premises actually occupied by them should be of less yearly value than ten pounds; and that the husbands of such owners shall be entitled to vote, either in the lifetime of their wives, or after their death, if then holding such property by the courtesy of Scotland: Provided also, that no person shall be entitled to be registered or to vote for any city, burgh, or town, who shall have been in the receipt of parochial relief within twelve calendar months next previous to the last day of August in the year one thousand eight hundred and thirty-two, or next previous to the last day of July in any succeeding year.

[1] See generally the notes to sect. 7.

[2] The disqualifications here are the same as those in sect. 7, note [1], with the addition of the non-payment of assessed taxes and receipt of poor relief contained in this section.

[3] Of a substantial permanent description. Further, this occupancy does not include mere lodging.

[4] Now inhabited-house duty, 13 & 14 Vict. c. 36, see text, p. 694.

[5] Kennard *v.* Allen, 1879, 7 Ret. 1—residence which was held insufficient.

[6] 'Occupancy is the true basis of the burgh franchise, as created by the Act of '1832. Now this clause [concerning 'true owners'], which is exceptional, must be 'read fairly, and construed in such a way as not to nullify the previous enactments. 'I am of opinion that to give *joint* owners, who do not occupy, a right to the franchise, 'would be to unduly strain the clause.'—*Per* L. Ardmillan in Fairies *v.* M'Guffie, 1873, 1 Ret. 13. But a joint owner occupying is not excluded from voting by his

co-owners not being occupants—Stewart *v.* Tait, 1868, 7 Macph. 300. See Cay, 541; Nicolson, 83.

Provision as to premises occupied in succession, and as to joint occupants.

12. And be it enacted, that the premises in respect of which any person shall be deemed entitled to be registered, and to vote in the election for any city, burgh, or town, or district, shall not be required to have been the same premises for the whole twelve months of his occupancy, but may be different premises (but always of the requisite value) occupied in succession by such person;[1] provided always, that such person shall have paid all the assessed taxes[2] legally exigible from him in respect of all such premises; and that where such premises shall be of the yearly value of twenty pounds or upwards, and shall be jointly occupied by more than one person, each of such joint occupiers shall be entitled to be registered and to vote, provided his share and interest in the same shall be of the yearly value of ten pounds or upwards.

[1] Continuously within the burgh. See Act 1868, sect. 13.
[2] See sect. 11, note [4].

Persons not entitled to vote or to be elected.

36. And be it enacted, that no sheriff shall be entitled, from and after the passing of this Act, to vote at any election for any member of Parliament to be holden within the county or combined counties of which he shall be sheriff; and that no sheriff-substitute, and no sheriff clerk or deputy sheriff clerk, shall be entitled, from and after the passing of this Act, to vote or to be elected at any election for a member to serve in Parliament for the shire of which he is the sheriff-substitute or sheriff clerk; and no town clerk or depute town clerk shall be entitled to vote or to be elected for the city, burgh, town, or district in which he is such clerk; and no sheriff-substitute, sheriff clerk, or town clerk shall, after the passing of this Act, directly or indirectly, act as an agent for any candidate in any matter connected with or preparatory to any election for the county or burgh respectively in which such persons shall be respectively sheriff-substitute, sheriff clerk, or town clerk.

Eldest sons of Scotch peers may vote and be elected.

37. And be it enacted, that from and after the end of this present Parliament the eldest sons of Scotch peers shall be entitled to be registered and to vote at all elections for members of Parliament for Scotland, and shall also be entitled, though not so registered, to be elected to serve as such members for any county, city, burgh, or town, or district of burghs, in Scotland; and that after the end of this present Parliament no member for any county in Scotland shall be required to be qualified as an elector or to hold any superiority within such county.

No. VIII.

31 & 32 VICTORIA, c. 48.

An Act for the Amendment of the Representation of the People in Scotland.—[13*th July* 1868.]

WHEREAS it is expedient to amend the laws relating to the representation of the people in Scotland:[1]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

[1] See the saving clause, sect. 56.

Short title.

1. This Act shall be cited for all purposes as 'The Representation of 'the People (Scotland) Act, 1868.'

Application of Act.

2. This Act shall apply to Scotland only, except in so far as it provides that certain boroughs in England shall cease to return members to serve in Parliament.

PART I.

FRANCHISES.

Occupation franchise for voters in burghs.

3. Every man[1] shall, in and after the year one thousand eight hundred and sixty-eight, be entitled to be registered as a voter, and, when registered, to vote at elections for a member or members to serve in Parliament for a burgh, who, when the sheriff proceeds to consider[2] his right to be inserted or retained in the register of voters, is qualified as follows; that is to say,

1. Is of full age, and not subject to any legal incapacity;[3] and
2. Is, and has been for a period of not less than twelve calendar months next preceding the last day of July,[4] an inhabitant occupier as owner[5] or tenant of any dwelling house[6] within the burgh:[7]

Provided that no man shall under this section be entitled to be registered as a voter who, at any time during the said period of twelve calendar months, shall have been exempted from payment of poor rates on the ground of inability to pay; or who shall have failed to pay, on or before the first day of August in the present or the twentieth day of June in any subsequent year, all poor rates (if any) that have become payable by him, in respect of said dwelling house[8] or as an inhabitant of any parish in said burgh, up to the preceding fifteenth day of May,[9] or who shall have been in the receipt of parochial relief[10] within the twelve calendar months next preceding the said last day of July:[11] Provided also, that no man shall under this section be entitled to be registered as a voter by reason of his being a joint occupier[12] of any dwelling house.

[1] Excludes women—Brown *v.* Ingram, 1868, 7 Macph. 281.

[2] In regard to the same expression in sect. 5, it was held that where a claim or objection has been begun to be heard by the sheriff, it is incompetent to alter the qualification in the valuation roll—Dove *v.* Reid, 1868, 7 Macph. 287.

[3] The same disabilities will apply as those enumerated in note [1] to Act 1832, sect. 7, *supra*, p. 754, along with those introduced by sect. 8 of this Act, and by sect. 49, taken in connection with 46 & 47 Vict. c. 51, sects. 4-6, 10, 21, 36-39. One who was a minor at date of assessor's list, coming of age before it came before sheriff, was held qualified—Campbell *v.* Richardson, 1879, 7 Ret. 32.

[4] Of the year in which the claim is made—Davidson *v.* Gray, 1868, 7 Macph. 293.

[5] See note [4] to the same word in Act 1832, sect. 7, *supra*, p. 754. Add here:—The interpretation clause, sect. 59, *infra*. A title must be produced—Weir *v.* Blackwood, 1869, 8 Macph. 3—in writing; but a writ evidencing right to obtain a proper title is sufficient—Stewart *v.* M'Beath, 1868, 7 Macph. 293; Stewart *v.* Flett, 1868, 7 Macph. 294; not receipts for taxes and feu-duties—Cairns *v.* Monteith, 1868, 7 Macph. 295

An *ex facie* absolute disposition may be controlled, and the trust proved by the oath of the disponee, this being the only equivalent possible in the circumstances to his oath on reference—Stewart *v.* Sutherland, 1868, 7 Macph. 298 (diss. L. Benholme; there was also an unstamped back-letter, which could not be regarded). See similar note [4] to Act 1832, sect. 7. A trust-beneficiary (see said note) is not entitled to the franchise if his interest is moveable—*e.g.*, only a right to receive the rents—Martin *v.* M'Lurg, 1868, 7 Macph. 299; or there is a power, equivalent to a direction, to sell—Wilson *v.* Cowan, 1868, 7 Macph. 299—contrast Anderson *v.* Niven, 1880, 8 Ret. 4, with Anderson *v.* Ovens, 1879, 7 Ret. 42. If the power has not had to be exercised, and the trust purposes are worked out, the right is heritable—Stewart *v.* Campbell, 1869, 8 Macph. 13. Even a direction to sell does not deprive the beneficiaries of the franchise, if the date of sale is postponed, for the statute is construed more favourably for them than if the question were one of succession—Skeete *v.* Duncan, 1873, 1 Ret. 18. See 1 M'Laren, Wills, 195. The donee in her marriage-contract of an obligation to have the liferent of certain heritable property qualifies her husband, though the donor has not conveyed to trustees for her—Forbes *v.* Halley, 1882, 10 Ret. 4. The husband of one with whose funds the marriage-contract trustees have purchased qualifying subjects, taking them in their own names, is thereby enfranchised—Blackwood *v.* Veitch, 1878, 6 Ret. 1. The ownership must be indefeasible; but this is understood in a sense favourable to the suffrage. There are many illustrations in the cases. Thus, in cases of allocation to the members of a building society, it has been held that if the society's formal title is only in security for the payment of instalments, the vote is good—Monteith *v.* Scott, 1868, 7 Macph. 300. (See also Stewart *v.* Flannigan, 1869, 8 Macph. 13.) It is not easy to reconcile this with the cases which must now be taken as settling the law—Bishop *v.* Dove, 1868, 7 Macph. 301; and Dalgleish *v.* Wright, 1874, 2 Ret. 5—but the question in every such case is whether the condition of payment of instalments is suspensive (in which case there is no vote), or merely resolutive of the right. Thus, if a formal disposition be not demandable till a proportion of the rent charge has been repaid to the society by instalments, till then, and even thereafter, if the disposition has not in fact been demanded, there is no qualification—Bell *v.* Donaldson; Alexander *v.* Donaldson, 1879, 7 Ret. 34, 36. In cases of official liferents of property, the title to which is elsewhere, the test is the precariousness of the office. Thus both Established Church and Dissenting ministers vote on their manses, as holding them with their charge *ad vitam aut culpam*—see note [4] to Act 1832, sect. 7, and Robbie *v.* Meiklejohn, 1868, 7 Macph. 296; their possession dating from induction, not election or appointment—Mitchell *v.* Halley, 1879, 7 Ret. 11; and that though the premises be held by trustees on long lease—Innes *v.* Robertson, 1878, 6 Ret. 4. A schoolmaster appointed under the law before 1872 is entitled to vote, though his duties are performed by an assistant—Home *v.* Paterson, 1872, 11 Macph. 1. If he retires, an arrangement that he should keep the house and garden is illegal, and cannot confer the suffrage—Paton *v.* Morison, 1871, 10 Macph. 1. The same rules apply to the master of a parochial side school of the old tenure—Wardrop *v.* Cockburn, 1874, 2 Ret. 6. A schoolmaster appointed since 1872 holds office at the will of the school board, and ought, strictly speaking, to be therefore excluded from the register. It has been indeed hinted from the Bench that his position is nearer akin to that of a Dissenting minister—*per* L. Ardmillan in M'Gregor *v.* Caldwell, 1873, 2 Ret. 15 (on Act 1832, sect. 11). It resembles more nearly that of a bank agent in respect of the bank premises, whose right is held defeasible—Murray *v.* M'Gowan, 1869, 8 Macph. 4; or a military chaplain—Cole *v.* Raeburn, 1870, 9 Macph. 13; or land-factor—Hilson *v.* Otto, ibid. p. 18. But the case of board schoolmasters is now provided for by the enfranchising enactment, 41 & 42 Vict. c. 78, sect. 24, as construed, Murray *v.* Morton, 1878, 6 Ret. 26, which makes them liferent proprietors *ex officio* of the premises held by them.

[6] See interpretation clause, sect. 59.

[7] Ibid.

[8] See sect. 18. As to exemption for inability, see sect. 17. Owners occupying part must, to obtain the franchise, be separately rated in respect of the part occupied—Forbes *v.* Gordon, 1868. 7 Macph. 320. The tenant of one half of a house must be rated separately from the tenant of the other half—Archie *v.* Mackenzie, 1868, 7 Macph. 322.

[9] *I.e.*, rates payable during the year ending 15th May, not arrears—Hewat *v.* Henderson, 1874, 2 Ret. 12. (This case came under a similar provision in sect. 6.) See sect. 18.

[10] Receipt of relief for an idiot child does not exclude the father—Gilmour *v.* Cannon, 1873, 1 Ret. 12.

[11] This (from Act 1832, sect. 11) is applied to counties, sect. 50.
[12] See sect. 14 as to counties.

4. *Lodger franchise for voters in burghs.*

Ownership franchise for voters in counties.

5.[1] Every man [1] shall, in and after the year one thousand eight hundred and sixty-eight, be entitled to be registered as a voter, and when registered, to vote at the election of a member or members to serve in Parliament for a county, who, when the sheriff proceeds to consider [1] his right to be inserted or retained on the register of voters, is qualified as follows; that is to say,

1. Is of full age, and not subject to any legal incapacity;[1] and
2. Is, and has been for a period of not less than six calendar months next preceding the last day of July,[2] the proprietor[3] (whether he has made up his titles, or is infeft,[1] or not) of lands and heritages,[4] the yearly value of which, as appearing from the valuation roll of the county, shall be five pounds or upwards, after deduction of any feu duty,[5] ground annual, or other annual consideration which he may be bound to pay or give or account for as a condition of his right, and after deduction of any annuity, liferent provision, or such other annual burden.[6]

[1] See notes to sect. 3, and to Act 1832, sect. 7.

[2] Insufficient, where title was dated within the six months, though it bore entry to have been taken before that period, though this was proved *aliunde*, and feu-duties had been paid for two half years—Blackwood *v.* Thomson, 1881, 9 Ret. 6; but unstamped missives of sale dated prior, may be used to prove the real date of transfer in supplement of a stamped disposition dated subsequent, to the beginning of this period—Blackwood *v.* Ruickbie, 1881, 9 Ret. 8. A depression of the value below the requisite sum during a small part of the period, through an accidental fire, does not disqualify—Hunter *v.* Ballantine, 1879, 7 Ret. 2.

[3] See 'owner' (or 'proprietor') in the interpretation clause, sect. 59, and in notes to sect. 3, and to Act 1832, sect. 7. As to partnership and liferent, see sect. 14. Not nominally and fictitiously proprietors (*faggots*)—Hill *v.* Hill, 1871, 10 Macph. 3. The term includes a donatary from the Crown, after intimation of the gift—Kilpatrick *v.* Reid, 1870, 9 Macph. 2.

[4] Not including customs—Johnston *v.* Alexander, 1868, 7 Macph. 308 (tenant); but including value of shootings (Valuation Act, sect. 42): it used to be held that these alone, without a house, would not enfranchise a tenant—Dawson *v.* Watson, 1869, 8 Macph. 10, see Richardson *v.* Stewart, 1878, 6 Ret. 17; Girvan *v.* Campbell, 1875, 3 Ret. 1; but this is altered—Paterson *v.* Johnston, 1879, 7 Ret. 17: and including salmon-fishings—Dunn *v.* Cotesworth, 1874, 2 Ret. 5 (tenant). See Act 1832, sect. 7, note, *supra*, p. 754. Feu-duties, as conferring the franchise, are here omitted—Baird *v.* Ballantine, 1869, 8 Macph. 18—but Act 1832, sect. 7, *supra*, p. 753, is saved, *infra*, sect. 56.

[5] See the last cited note. If the feu-duty is elusory, it is correctly returned as 'none'—Blackwood *v.* Alexander, 1870, 9 Macph. 1. No deduction is required of interest on a reserved real burden—Blackwood *v.* Ferguson, 1882, 10 Ret. 6.

[6] As to parochial relief, see sect. 50.

6. *Occupation franchise for voters in counties.*[1]

[1] Amended, 43 & 44 Vict. c. 6.

Electors employed for reward within six months of an election not to vote.

8.[1] No elector who, within six months before or during any election for any county or burgh, shall have been retained, hired, or employed for all or any of the purposes of the election for reward by or on behalf of any candidate at such election as agent, canvasser, clerk, messenger, or in other like employment, shall be entitled to vote at such election; and if he shall so vote he shall be guilty of a crime and offence.

[1] See sect. 3, note [3].

PART III.

SUPPLEMENTAL PROVISIONS.

Incidents of Franchise.

Successive occupancy.

13. Different premises occupied[1] in immediate succession by any person as owner or tenant[2] during the twelve calendar months next previous to the last day of July in any year shall have the same effect in qualifying such person to vote for a burgh or county[3] respectively as a continued occupancy of the same premises in the manner herein provided: And this provision shall apply to the successive occupancy of premises in counties of the annual value of fifty pounds and upwards[4] as well as to premises which for the first time under this Act afford the qualification for the franchise.

[1] Successive ownership of different premises, with only civil possession, does not qualify—Learmont *v.* Young, 1875, 3 Ret. 5. All the subjects occupied in succession within the year must be entered in the claim—Hill *v.* Collins, 1868, 7 Macph. 283; Wilson *v.* Kerr, 1878, 6 Ret. 21. See Stevenson *v.* Miller, 1880, 8 Ret. 8; Murray *v.* Donnan, 1882, 10 Ret. 13.

[2] It is competent to combine successive occupancy in the characters of owner and tenant in burghs, for there occupancy is the basis of the franchise—Hannah *v.* Dodds, 1875, 3 Ret. 7; not in counties, where a distinction is drawn, even in the term of possession required—Moncrieff *v.* Dalgleish, 1868, 7 Macph. 315; Greig *v.* MacCreath, 1882, 10 Ret. 11.

[3] See Act 1832, sect. 12, *supra*, p. 757, which applies only to burghs.

[4] The tenancy qualification of Act 1832, sect. 9.

Liferenters.

14. In a county where two or more persons are interested as liferenter and as fiar in any lands and heritages to which a right of voting is for the first time attached by this Act, the right to be registered and to vote shall be in the liferenter,[1] and not in the fiar: And where any such lands and heritages shall be owned, held, or occupied by more persons than one as joint owners,[2] whether in fee or in liferent, or as joint tenants and joint occupants of the same, as the case may be, each of such joint owners shall be entitled to be registered and to vote, provided his share or interest in the said lands and heritages is of the annual value of five pounds as before specified, but not otherwise; and each of such joint tenants and joint occupants shall in like manner be entitled to be registered and to vote, provided the annual value of the said lands and heritages, as appearing on the valuation roll, held and occupied by them shall be sufficient, when divided by the number of such joint tenants and joint occupants, to give to each of them a sum of not less than fourteen pounds, but not otherwise: Provided always, that no greater number of persons than two shall be entitled to be registered as joint owners or joint tenants of the same lands and heritages unless their shares or interests in the same shall have come to them by inheritance, marriage, marriage settlement, or *mortis causâ* conveyance,[3] or unless such joint owners or joint tenants shall be *bonâ fide* engaged as partners carrying on trade or business in or on such lands and heritages:[4] Provided also, that husbands shall be entitled to be registered and to vote in respect of lands and heritages as aforesaid belonging, whether in fee or in liferent,[5] to their wives, or owned

Joint owners and joint occupants.

Husbands in right of their wives.

or possessed by such husbands after the death of their wives by the courtesy of Scotland.

[1] As to official liferenters, see sect. 3, note [5]. A liferenter may be competently termed 'proprietor' in his claim, County Voters Registration Act, 1861, sects. 2 and 44—Hilson *v.* Home, 1870, 9 Macph. 5. See Act 1832, sect. 7, note [9], sect. 8, note [1], *supra*, p. 755.

[2] A claim as 'proprietor or joint proprietor' is competent—Wilson *v.* Maltman, 1873, 1 Ret. 12.

[3] While the same property cannot qualify more than two purchasers, it may qualify along with these a third joint owner (or tenant) who has acquired his right in one of the excepted modes—Craig *v.* M'Kie, 1870, 9 Macph. 6.

[4] Shares in a joint-stock company are moveable, and do not confer the franchise, though the company holds heritage—Dove *v.* Young, 1868, 7 Macph. 304 (English cases there); Arthur *v.* Baird, 1868, 7 Macph. 308.

[5] Not as tenant—M'Queen *v.* Dunn, 1874, 2 Ret. 3. See as to liferenters, husbands, and joint owners, Act 1832, sect. 8, *supra*, p. 755.

15 and 16. *Particulars in Valuation Roll.*[1]

[1] See text, p. 195.

Provision for claims by persons improperly or erroneously exempted from payment of poor rates.

17. Where the name of any person, otherwise entitled to the franchise for any burgh or county, has in any year been omitted from the list of voters prepared by the assessor for such burgh or county on the ground that he has during the twelve calendar months preceding the last day of July in such year been exempted from payment of poor rates on account of inability to pay, it shall be competent for such person to give notice to such assessor of his claim to have his name entered in the register of voters for such burgh or county in the manner provided in the Registration Acts, and such claim shall be published and may be objected to in the manner provided in the said Acts; and the sheriff shall dispose of the said claim, and if it shall be proved to his satisfaction that the person claiming has been improperly or erroneously exempted from payment of the said poor rates, and that he has on or before the first day of August in the present or the twentieth day of June in any subsequent year paid or tendered payment of the amount of poor rates, from payment of which he was improperly or erroneously exempted as aforesaid, the sheriff shall insert the name of such person in the register of voters for the burgh or county, as the case may be; and the judgment of the sheriff sustaining or refusing the claim shall be liable to the appeal provided in the said Registration Acts, and generally the provisions of the said Acts shall apply to the claims mentioned in this section and to all the proceedings following thereon.

Poor rate to be demanded.

18. Where any poor rate due from an occupier of premises to which a right of voting is for the first time attached by this Act remains unpaid on the fifteenth day of May in any year, the collector of poor rates for the parish in which such premises are situated shall, on or before the twenty-fifth day of July in the present or the first day of June in any subsequent year, unless such rate has previously been paid, or has been duly demanded by a demand note [1] served in like manner as the notice in this section referred to, give or cause to be given a notice in the form set forth in Schedule (C.) to this Act to every such occupier. The notice shall be deemed to have been duly given if delivered to the occupier, or left at his last or usual place of abode, or with some person on the

premises in respect of which the rate is payable. Any collector of poor rate who shall wilfully withhold such notice with intent to keep such occupier off the list or register of voters for the burgh or county, as the case may be, shall be deemed guilty of a crime and offence. Collector wilfully neglecting to do so punishable.

[1] The notice given in terms of the Poor Law Statute of 1845, sects. 39 & 40, is equivalent to the 'demand note' of the English law—Mackenzie *v.* King, 1875, 3 Ret. 8.

49. Any person, either directly or indirectly, corruptly paying any rate on behalf of any ratepayer for the purpose of enabling him to be registered as a voter, thereby to influence his vote at any future election, and any candidate or other person, either directly or indirectly, paying any rate on behalf of any voter for the purpose of inducing him to vote or refrain from voting, shall be guilty of bribery, and be punishable accordingly; and any person on whose behalf and with whose privity any such payment as in this section mentioned is made shall also be guilty of bribery, and punishable accordingly.[1] Corrupt payment of rates to be punishable as bribery.

[1] See note [3] to sect. 3.

50. The provision of the eleventh section of the Act of the second and third years of King William the Fourth, chapter sixty-five, disqualifying persons in receipt of parochial relief from being registered as voters, or voting for a burgh, shall apply to a county also; and the said provision of the said section shall be construed as if the word 'county' were inserted therein before the word 'city.'[1] Receipt of parochial relief to disqualify for counties as well as burghs.

[1] See sect. 5 hereof, and the recited section, *supra*, p. 756.

54. The forty-second section of the Act passed in the twenty-fourth and twenty-fifth years of the reign of her present Majesty, chapter eighty-three,[1] is hereby repealed, and in lieu thereof it is enacted as follows: At every future election of a member to serve in Parliament for any county or division of a county, the register of voters, made up in terms of the Registration Acts, shall be deemed and taken to be conclusive evidence that the persons therein named continue to have the qualifications which are annexed to their names respectively in the register in force at such election; and such persons shall not be required to take the oath of possession. Register to be conclusive evidence of qualification.

[1] The County Voters Act, 1861. This section required the qualification or an equivalent one to be retained to the date of the election; and sect. 45 required a declaration of possession to be made if demanded (Sched. D, repealing part of Act 1832, sect. 26).

55. The right of voting at any election of a member or members to serve in Parliament for any county, burgh, or university shall not be affected by any appeal depending at the time of issuing the writ for such election, and it shall be lawful for every person whose name has been entered on the register of voters to exercise the right of voting at such election as effectually, and every vote tendered thereat shall be as good, as if no such appeal were depending; and the subsequent decision in any appeal which shall be depending at the time of issuing the writ for any such election shall not in any way whatever alter or affect the poll taken at such election, or the return made thereat by the returning officers. Right of voting not to be affected by dependance of appeal.

56. The franchises conferred by this Act shall be in addition to and not in substitution for any existing franchises, but so that no person shall General saving clause.

be entitled to vote for the same place in respect of more than one qualification; and, subject to the provisions of this Act, all laws, customs, and enactments now in force conferring any right to vote, or otherwise relating to the representation of the people in Scotland, and the registration of persons entitled to vote, shall remain in full force, and shall apply, as nearly as circumstances admit, to any person hereby authorised to vote, and shall also apply to any constituency hereby authorised to return or contribute to return a member or members to Parliament, as if it had heretofore returned or contributed to return such members to Parliament, and to the franchises hereby conferred, and to the registers of voters hereby required to be formed.

Construction of Act.

58. This Act, so far as is consistent with the tenor thereof, shall be construed as one with the enactments for the time being in force relating to the representation of the people in Scotland, and with the Registration and Valuation Acts.

Interpretation of terms:

59. The following terms shall in this Act have the meanings hereinafter assigned to them, unless there is something in the context repugnant to such construction: (that is to say,)

'Month:' 'Month' shall mean calendar month:

'County:' 'County' shall not include a county of a city, but shall mean any county or division of a county, or any combination of counties, or of counties and portions of counties, returning a member to serve in Parliament:

'Burgh:' 'Burgh' shall mean any city, town, burgh, or district of cities, towns, or burghs, returning a member or members to serve in Parliament:

'Dwelling 'house:' 'Dwelling house' shall include any part of a house occupied as a separate dwelling, and (in any parish in which poor rates are levied) the occupier of which is separately rated to the relief of the poor, either in respect thereof or as an inhabitant of such parish:[1]

'Premises:' 'Premises' shall, in regard to burghs, mean any dwelling house; and in regard to counties shall mean lands and heritages:

'The Registra- 'tion Acts:' 'The Registration Acts' shall mean the Act of the nineteenth and twentieth years of the reign of her present Majesty, chapter fifty-eight, and the Act of the twenty-fourth and twenty-fifth years of the reign of her present Majesty, chapter eighty-three, and any other Acts or parts of Acts relating to the registration of persons entitled to vote at, and proceedings in, the election of members to serve in Parliament for Scotland:

'Proprietor' or 'owner:' 'Proprietor' or 'owner' shall include any person who shall hold under a lease for a period of not less than fifty-seven years, exclusive of breaks:

'Valuation 'Acts:' 'The Valuation Acts' shall mean the Act of the seventeenth and eighteenth years of the reign of her present Majesty, chapter ninety-one, the Act of the twentieth and twenty-first years of the said reign, chapter fifty-eight, the Act of the thirtieth and thirty-first years of the said reign, chapter eighty, and any other Acts or parts of Acts relating to the valuation of lands and heritages in Scotland:[2]

'Assessor:' 'Assessor' shall mean an assessor appointed under the Valuation Acts

or any of them, or under the Registration Acts or any of them, or under this Act, as the case may be:

'Oath of possession' shall mean and include the words 'that I am 'still proprietor (or occupant) of the property for which I am so 'registered, and hold the same for my own benefit, and not in 'trust for or at the pleasure of any other person.' 'Oath of possession.'

[1] Not a small room in the same tenement as contained the dwelling of the occupant's father, though separately let and rated. It was not otherwise used than as an occasional bedroom. Adair *v.* Murray, 1874, 2 Ret. 11.

[2] Add 42 & 43 Vict. c. 32, and text, p. 196.

No. IX.

9 GEORGE IV. c. 39.

An Act for the Preservation of the Salmon Fisheries in Scotland.[1]—[15*th July* 1828.]

1. *Close time* 14*th September to* 1*st February.*[2]

[1] Known as Home Drummond's Act; amended by 7 & 8 Vict. c. 95. See note at end of this Act.

[2] Observed in and superseded by the longer close time of the Act of 1862, and bye-laws, *infra*, p. 770. Its repeal of 1424, c. 35, was itself repealed, though without reviving it, by the Revision Act of 1873, which also repealed sects. 2, 4, 5, 6, 8.

3. And be it further enacted, that if any person shall, after the expiration of two months from and after the passing of this Act, trespass in any ground, enclosed or unenclosed, or in or upon any river, stream, watercourse, or estuary, with intent to kill salmon, grilse, sea-trout, or other fish of the salmon kind, such person shall forfeit and pay any sum not less than ten shillings and not exceeding five pounds. Penalty on trespassers.

7. And whereas by an Act passed in the Parliament of Scotland in the year one thousand four hundred and seventy-seven, intituled *Anent Cruves*, it is *inter alia* ordained, that they that hes cruves in fresh waters, gar keip the lawes anent Satterdaies slop, and suffer them not to stand in forbidden time; and that ilk heck of the said cruves be three inche wide, and quha that beis convict thereof, to pay five pund: And whereas it is expedient that the said penalty of five pounds Scots money should be augmented; be it therefore enacted, that from and after the passing of this Act, if any owner or occupier of cruves shall offend against the said law, such person shall forfeit and pay a sum not less than five pounds nor exceeding twenty pounds sterling for every such offence.[1] Saturday's slop to be kept. 1477, c. 73.

[1] The penalty of Act 1868, sect. 15, *infra*, pp. 782, 789, for contravention of the bye-law concerning cruives is a fine not exceeding £5, £2 for every salmon taken, and forfeiture of the fish; so that the misdemeanours penalised by the Scots statute may or may not infer a higher punishment, if the present section is libelled.

9. Provided always, and be it enacted, that each and every penalty[1] provided by this Act, shall go to the informer, and may and shall be Recovery and application of penalties.

recoverable, with expenses, as well before the sheriff as before the Justices of the Peace of any county as aforesaid wherein the same may be incurred, or where the offender shall reside, at the instance of any person or persons who shall prosecute for the same; and in prosecutions for the different penalties imposed by this Act, or any other Act for the preservation of the salmon fisheries in Scotland, it shall be lawful[2] for the sheriff or Justices before whom any complaint for the recovery thereof may be brought, to proceed in a summary way, and to grant warrant for bringing the parties complained upon immediately before them, and on proof on oath by one or more credible witnesses, or confession of the offence, or other legal evidence, forthwith to determine and give judgment in such complaint, without any written pleadings or record of evidence,[2] and to grant warrant for the recovery of all penalties and expenses decerned for, failing payment within fourteen days after conviction, by poinding and imprisonment, for a period, at the discretion of the sheriff or Justices, not exceeding six months, it being hereby provided, that a record shall be preserved of the charge and of the judgment pronounced; and any person or persons who shall think himself, herself, or themselves aggrieved by any judgment of any sheriff or Justices, pronounced in any case arising under this Act, or by assessment made under this Act, in Scotland, may appeal to the Commissioners of Justiciary at their next Circuit Court, or where there are no Circuit Courts, to the High Court of Justiciary at Edinburgh, in the manner, and by and under the rules, limitations, conditions, and restrictions contained in the Act passed in the twentieth year of the reign of King George the Second, for taking away and abolishing the heritable jurisdictions in Scotland;[3] with this variation, that such person or persons shall, in place of finding caution in the terms prescribed by the said Act, be bound to find caution to pay the penalty or penalties, and expenses, awarded against him, her, or them by the sentence or sentences appealed from, in the event of the appeal or appeals being dismissed, together with any additional expenses that shall be awarded by the Circuit Court on dismissing the said appeal or appeals; and it shall not be competent to appeal from or bring the judgments of any Justices or sheriff acting under this Act under review, by advocation or suspension, or by reduction, or in any other way than as herein provided.[4]

[1] Held a civil debt in the sense of the Act of Grace, but with much hesitation—Robertson *v.* Mags. of Aberdeen, 16th Feb. 1837, 15 S. 572; but not a civil debt in the sense of the Small Debt Act, 5 & 6 Will. 4. c. 70—Lawson *v.* Jopp, 16th Feb. 1853, 15 D. 392; so that imprisonment is lawful though the sum is less than £8, 6s. 8d. The same is true of the expenses, ibid.

[2] *I.e.*, obligatory—Macintosh *v.* Gordon, 6th July 1829, 1 D. and And. 183.

[3] Moncreiff on Review in Criminal Cases, p. 219 *et seq.*

[4] This enactment is copied in the 28th sect. of Act 1862, where see a note of cases. And see the new mode of review on matter of law introduced by the Appeals Act of 1875, as illustrated by cases in note at end of the present Act.

10. *Two proprietors of fisheries on any river in Scotland may call meetings of other proprietors on the same, in order to assess them for the purposes of this Act.*[1]

[1] Superseded by the provisions of Acts 1862 and 1868, *infra*, pp. 772, 778.

Apprehension of offenders.[1]

11. And be it further enacted, that it shall be lawful for any person,

without any warrant or other authority than this Act, *brevi manu*, to seize and detain any person who shall be found committing any offence against this Act, and to carry such person before any Justice of the Peace or other magistrate, or to deliver such person to a constable, who is hereby required to carry such person before a Justice of the Peace or magistrate, who shall forthwith examine and discharge, or commit such person until caution *de judicio sisti* be found, as the case may require.

[1] Cf. Act 1868, sect. 29, *infra*, p. 787; and the Game Acts, *supra*, pp. 728, 733.

Justices though interested in fisheries may act.[1]

12. And be it enacted, that all Justices of the Peace and other magistrates shall and may act in the execution of this Act, notwithstanding such Justice or magistrate shall be interested in any salmon fishery, except in any case where such Justice or magistrate, or his tacksmen, is a party in the prosecution or case to be heard and determined by such Justice or magistrate; and also that every owner or occupier of, or any person otherwise interested in any salmon fishery, shall and is hereby declared not to be an incompetent witness to prove any offence committed against this Act, by reason of being such owner or occupier so interested.

Owners not incompetent witnesses.

[1] Cf. Act 1868, sect. 34, *infra*, p. 787. The jurisdiction of the Justices under the Fisheries Act is not affected by the Game Act of 1877, 40 & 41 Vict. c. 28, sect 10.

Limitation of actions.

13. And be it further enacted, that no prosecution or other proceeding whatever shall be brought or commenced against any person or persons for any offence or offences against this Act, unless the same shall be laid or commenced within six calendar months after any such offence or offences shall have been committed;[1] and provided that where any offender shall be punished by virtue of this Act, he shall not incur the penalty of any other law or statute for the same offence.

[1] This is the only limitation in the salmon statutes.

Act not to extend to England, Ireland, Wales, &c.

14. And be it further enacted, that nothing in this Act contained shall extend or be construed to extend to England, Ireland, Wales, or Berwick-upon-Tweed, or to the fisheries in the river Tweed, or in any of the streams and waters that run into or communicate therewith or to the fisheries in the arm of the sea between the county of Cumberland and the counties of Dumfries and Wigton and the Stewartry of Kirkcudbright, or the fisheries in the several streams and waters which run into or communicate with the said arm of the sea.[1]

[1] The Act 7 & 8 Vict. c. 95, proceeds on doubts being entertained whether the above Act applied to the sea or seashore, and enacts, 'that if any person not having a legal 'right or permission from the proprietor of the salmon fishery shall from and after the 'passing of this Act wilfully take, fish for, or attempt to take, or aid or assist in taking, 'fishing for, or attempting to take, in or from any river, stream, lake, water, estuary, 'firth, sea loch, creek, bay, or shore of the sea, or in or upon any part of the sea, 'within one mile of low-water mark, in Scotland, any salmon, grilse, sea trout, whit-'ling, or other fish of the salmon kind, such person shall forfeit and pay a sum not 'less than ten shillings and not exceeding five pounds for each and every such offence, 'and shall, if the sheriff or Justices shall think proper, over and above, forfeit each and 'every fish so taken, and each and every boat, boat tackle, net, or other engine used 'in taking, fishing for, or attempting to take fish as aforesaid; and it shall be lawful 'for any person employed in the execution of this Act to seize and detain all fish so 'taken, and all boats, tackle, nets, and other engines so used, and to give information 'thereof to the sheriff, or any Justices of the Peace, and such sheriff or Justice may 'give such orders concerning the immediate disposal of the same as may be necessary'

(sect. 1). The provisions of the above Act are extended to this Act (sect. 2); and the rights of proprietors of salmon fisheries to prevent poaching and all Crown rights are saved (sects. 3 and 4). In interpreting these Acts, reference may be made to similar enactments in the Game Laws, and cases thereanent, *supra*, pp. 727, 733. Whether the act is wilful is a question of fact, not of law, and consequently cannot be brought up to the High Court under the Appeals Act of 1875—Grant *v.* Wright, 1876, 3 Ret. (Just.) 28. 'Wilfully' means 'designedly and with a certain intent,'—*per* L. Young, ibid. If a question of 'legal right' to fish is properly raised, and a *primâ facie* title produced, the case should be sisted or dismissed — Barlas *v.* Chalmers, 1876, 3 Ret. (Just.) 26; not otherwise—Easton *v.* List, 1844, 2 Broun, 95. It was thought to be no good objection to a conviction that it had been obtained without proof of ownership of the salmon fishings by the complainer; and that it bore to be a conviction generally 'of the offence charged,' since the offence described above is only one offence which can be committed in various ways—O'Neil *v.* Campbell, 18th July 1883, 20 Sc. L. R. 824. The *locus* was not too vague when described as 'in a river, in the parish of B,' through which the river ran for 3 miles—Bennet *v.* Hinchy, 1860, 3 Irv. 541. The provisions of Act 1868, and of the Acts recited therein, are extended to this Act by sect. 25 of Act 1868, *infra*, p. 785.

No. X.

25 & 26 VICTORIA, c. 97.

An Act to regulate and amend the Law respecting the Salmon Fisheries of Scotland.—[*7th August* 1862.][1]

WHEREAS it is expedient that the Acts relating to the salmon fisheries in Scotland should be amended, and that further provision should be made for the regulation of fisheries, the removal of obstructions, and the prevention of illegal fishing:[2] Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

[1] This Act, and the Acts 26 & 27 Vict. c. 50, 27 & 28 Vict. c. 118, and 31 & 32 Vict. c. 123, are to be read as one Act (last Act, sect. 2). The provisions of the first two are incorporated in their proper places by way of notes to the present statute. The last-mentioned Act is printed *infra*, No. 11.

[2] Poaching is left to the immediately foregoing statutes.

Short title.

1. This Act may be cited for all purposes as 'The Salmon Fisheries (Scotland) Act, 1862.'

Interpretation of terms.

2. The following words and expressions in this Act shall have the meanings hereby assigned to them, unless such meanings be repugnant to or inconsistent with the context:

'Commissioners' shall mean the commissioners appointed and acting under the authority of this Act for the time being:

'Clerk' shall mean the clerk to be appointed by any district board:

'Sheriff' shall mean the sheriff of the county in Scotland of which he is sheriff, and shall include sheriffs substitute:

'Justice' or 'Justices' shall mean any Justice or Justices of the Peace acting for the county, city, or burgh where the matter requiring the cognisance of such Justice or Justices shall arise:

'Secretary of State' shall mean one of her Majesty's principal Secretaries of State:

'Proprietor' or 'proprietors' shall mean and include any person, company, or corporation who is the proprietor of a salmon fishery, or who receives or is entitled to receive the rents of such fishery on his or their own account, or as trustee, guardian, or factor for any person, company, or corporation, and shall also include her Majesty in right of her crown:

'Byelaw' and 'Byelaws' shall include all rules, orders, and regulations made by the commissioners under the authority of this Act:

'Salmon' shall mean and include salmon, grilse, sea-trout, bull trout, smolts, parr, and other migratory fish of the salmon kind:[1]

'Fisheries' and 'fishery' shall mean salmon fisheries and a salmon fishery in any river or estuary or in the sea:

'River' shall include tributaries and any lake from or through which any river flows:

'Valuation roll' shall mean the valuation roll in force for the time for any county, and each of the royal burghs therein, made up under the authority of the Public General Act seventeenth and eighteenth Victoria, chapter ninety-one, or any other Act relating to the valuation of lands and heritages in Scotland which may be in force for the time.[2]

[1] See text, p. 263. As to parr, see Blair *v.* Miller, 1869, 14 Journ. of Jurisp. 625, Perth Sheriff Court. As to 'finnocks' in the Spey, Cooper *v.* Spence, 1875, 19 do. p. 613 (Elgin).

[2] *Supra*, text, p. 194 *et seq.*

Each river and estuary, and the sea-coasts adjoining, to be a district.

4. Each river in Scotland flowing into the sea, and every tributary stream or lake flowing into or connected with such river, and the mouth or estuary of such river, and the sea-coasts adjoining thereto, divided into such portions as may be fixed and defined by the commissioners under the authority of this Act, shall form a district for the purposes of this Act.[1]

[1] This does not mean a territorial area; the district is confined to the sea and river and their shore or banks, Stevenson *v.* M'Levy, 21st Feb. 1879, 6 Ret. (Just.) 33.

Commissioners to be appointed by Secretary of State.

5. It shall be lawful for the Secretary of State to appoint three commissioners for the purposes of this Act, who shall be paid at such rate, not exceeding three pounds *per* day each, as the Commissioners of the Treasury may direct, the whole amount to be received by each commissioner not exceeding three hundred and fifty pounds *per annum*, over and above such travelling expenses as the Commissioners of the Treasury may sanction: Provided that the duration of the office of such commissioners shall in no case extend beyond three years.[1]

[1] The commissioners and their powers were continued at the expiry of this period and thereafter by annual extension till 1882, when by the Fishery Board (Scotland) Act, 45 & 46 Vict. c. 78, they were merged in the new Fishery Board (sect. 5, sub-sect. 2), with the help of an Inspector of Salmon Fisheries for Scotland, whose duty, under the directions of the Board, is to inspect all the salmon fisheries of Scotland except in the Tweed, inquire into the operations of the Acts, and report thereon from time to time to the Board (sect. 6).

Duties of commissioners.

6. The commissioners shall have the powers and perform the duties herein-after specified; that is to say,

(1.) To fix and define, for the purposes of this Act and the other Acts relating to salmon and salmon fisheries in Scotland, the natural limits which divide each river in Scotland (including the estuary thereof) from the sea, in so far as the same may not be already fixed by statute or by judicial decision:[1]

(2.) To fix, for the purposes of this Act, the limits of the Solway Firth, having regard to an Act passed in the forty-fourth year of the reign of his Majesty King George the Third, chapter forty-five:[1]

(3.) To fix, for the purposes of this Act, the limits of every district, and the portions of the sea-coast adjoining to the mouth or estuary of any river to be included in such district:

(4.) To fix, for the purposes of this Act, a point on each river (including the estuary thereof) below which the proprietors of fisheries shall be lower proprietors, and above which the proprietors of fisheries shall be upper proprietors:[2]

(5.) To determine, subject to the provisions of this Act, at what dates the annual close time for every district shall commence and terminate, and at what periods subsequent to the commencement and prior to the termination of the annual close time it shall be lawful to fish for and take salmon with the rod and line: Provided that the number of days during which such annual close time shall continue shall be the same as regards every district:[3]

(6.) To make general regulations with respect to the following matters; *viz.*,

The due observance of the weekly close time:[4]

The construction and use of cruives:[5]

The construction and alteration of mill-dams, or lades, or water-wheels, so as to afford a reasonable means for the passage of salmon:[6]

The meshes of nets (so that they shall not intercept smolts or salmon fry):[7]

Obstructions in rivers or estuaries to the passage of salmon:[8]

Provided that such regulations shall not interfere with any rights held at the time of the passing of this Act under royal grant or charter, or possessed for time immemorial.

[1] This was done by Byelaw, 25th August 1864, for all the principal rivers in Scotland, numbering more than 100. This Byelaw, like the others, is printed as Appendix to the Act of 1868, but is omitted here. The Solway was included.—(Sched. B of Act 1868.) See sect. 10 of that Act, *infra*, p. 780, and text, p. 267. As to the Tweed, see 26 & 27 Vict. c. 50, sect. 4.

[2] The particulars required in (3) and (4) were fixed by Byelaw dated 10th January 1863 (Sched. A).

[3] Fixed by Byelaw dated 19th April 1864 (Sched. C). In the great majority of cases the annual close time is fixed as from 27th August to 10th February; in a few cases, 1st September to 15th February; in a few others, 10th September to 24th February. In 1869 the close time in the Thurso was altered to—15th September to 10th January. The rod-fishing extension is almost uniformly to 31st October, no matter

when the close time begins; in two Bute streams and eight northern rivers it ends on the 15th of October.

[4] Byelaw, Sched. D, *infra*, p. 789.
[5] Byelaw, Sched. F, *infra*, p. 789.
[6] Byelaw, Sched. G, *infra*, p. 790.
[7] Byelaw, Sched. E, *infra*, p. 789.
[8] This has been left to the old law. See text, p. 266.

Annual and weekly close time.

7. The annual close time for every district shall continue for one hundred and sixty-eight days;[1] and the weekly close time, except for rod and line, shall continue from the hour of six of the clock on Saturday night to the hour of six of the clock on Monday morning; but the commissioners shall have power, on the application of the district board, or of any two proprietors of fisheries in any district, to vary the period at which the weekly close time shall commence in any district, or any part thereof, in so far as they may think reasonable or expedient:[2] Provided that such weekly close time shall in no case be less than thirty-six hours.

[1] This is 29 days longer than the close time of Act 1828, *supra*, p. 765.
[2] This latitude was admitted for the purpose of varying with the tides. The weekly close time for rod-fishing is Sunday. Act 1868, sect. 15 (2), *infra*, p. 782.

Application of annual close time.

8. The annual close time shall be applicable to every mode of fishing for or taking salmon in any river, lake, or estuary, or in the sea, except by means of the rod and line for the periods in each district to be fixed by the commissioners subsequent to the commencement and prior to the termination of the annual close time during which it shall be lawful to fish for and take salmon by means of the rod and line.[1]

[1] Sect. 6 (5), note [3].

Present annual close times to subsist until altered under this Act.

9. In regard to any river and estuary which are regulated by any local Act relating thereto the annual close time fixed by such Act, and in regard to all other rivers, estuaries, and sea-coasts in Scotland the annual close time fixed by the Public General Act ninth George the Fourth, chapter thirty-nine,[1] shall respectively be applicable until the annual close time with respect to any such river, estuary, or sea-coast shall be otherwise determined by any byelaw made by the commissioners under the authority of this Act.

[1] *Supra*, p. 765.

Fishing illegal where prohibited by existing Acts.

10. It shall not be lawful to fish for or take salmon at any place or by any mode prohibited by any statute relating to salmon or salmon fisheries in Scotland subsisting and in force at the date of the passing of this Act; and nothing contained in this Act or in any byelaw made by the commissioners shall render legal any mode of fishing which was or would have been illegal at the date of the passing of this Act.

11. *Penalties for offences.*[1]

[1] Repealed by Act 1868, sect. 15, *infra*, p. 781.

12. *Penalty for using or possessing salmon roe.*[1]

[1] Repealed by Act 1868, sect. 15, *infra*, p. 781.

Penalty for causing or allowing poisonous sub-

13. Every person who causes or knowingly permits to flow, or puts or knowingly permits to be put, into any river containing salmon, any liquid or solid matter poisonous or deleterious to salmon, [or who shall

stances to flow into rivers.

discharge into any river sawdust][1] to an extent injurious to any salmon fishery, shall be liable to the following penalties; (that is to say,)

For the first offence a penalty not exceeding five pounds:

For the second offence a penalty not exceeding ten pounds, and a further penalty not exceeding two pounds for every day during which such offence is continued:

For the third or any subsequent offence a penalty not exceeding twenty pounds, and a further penalty not exceeding five pounds for every day during which such offence is continued:

But no person shall be subject to the foregoing penalties for any act done in the exercise of any right to which he is by law entitled, if he prove to the satisfaction of the court before whom he is tried that he has used the best practicable means, within a reasonable cost, to dispose of or render harmless the liquid or solid matter so permitted to flow or to be put into waters; but nothing herein contained shall prevent any person from acquiring a legal right in cases where he would have acquired it if this Act had not passed, or exempt any person from any punishment to which he would otherwise be subject, or legalise any act or default that would but for this Act be contrary to law.[2]

[1] The part within brackets was struck out by Act 1868, sect. 16.

[2] See text as to whole subject of pollution of rivers, p. 465 *et seq.*

14-17 *treat of the issuing of byelaws.*[1]

[1] The time for issuing byelaws was, by 26 & 27 Vict. c. 50, and 27 & 28 Vict. c. 118, extended to 1st January 1866; and the latter statute provided for the reissue of a byelaw when a district board was late of being constituted (sect. 3), and for byelaws being binding in localities where there was no board. The commissioners did not exhaust their powers in issuing an invalid order, but might make another—Pitcaithley *v.* Tay District Board, 1866, 5 Irv. 224. Relation to the Summary Procedure Act—Blair *v.* Lumsden, 20th July 1869, 7 Macph. 1126, 1 Coup. 309.

As to the election of district boards.[1]

18. Within three months after any byelaw constituting the district shall have been published the sheriff shall direct the sheriff clerk to make up a roll of the upper proprietors and also a roll of the lower proprietors in each district;[2] and the qualification of an upper proprietor shall be the property of a fishery entered in the valuation roll as of the yearly rent or yearly value of twenty pounds or upwards, or, if such fishery be not valued on the valuation roll, of half a mile of frontage to the river, with a right of salmon fishing, and the qualification of a lower proprietor shall be the property of a fishery entered in the valuation roll as of the yearly rent or yearly value of twenty pounds or upwards; and the sheriff shall have power to decide summarily any question arising on any claim to such qualification; and the sheriff shall thereafter direct the sheriff clerk to call a meeting of the upper proprietors, and also a meeting of the lower proprietors, at such times and places as he shall direct; and notice of such meeting shall be given as herein-before provided with respect to the publication of byelaws made by the commissioners;[3] and the upper proprietors and lower proprietors present at such separate meetings respectively shall elect not more than three of their number to be members of the district board, every proprietor of a fishery valued at more than five hundred pounds on the valuation roll having two votes at such election, and an additional vote for every five hundred pounds

of rental, but not more than four votes in all; and the members so elected with the proprietor having the largest amount entered in the valuation roll as the yearly rent or yearly value of fisheries in such district shall constitute the district board; and the last-mentioned proprietor shall be the chairman of the board, and have a deliberative as well as a casting vote; and the election of such board shall be notified by the chairman of such respective meetings to the sheriff clerk within seven days from the date of the same, [and the sheriff shall thereafter summon the first meeting of such board for such day and such place as he may fix]:[4] Provided always, that if any river be situate in two or more counties, the notices above provided shall be given and such meetings shall be called in such manner as the sheriffs of such counties jointly shall direct.

[1] See Act 1868, sect. 3 *et seq.*, *infra*, p. 778.

[2] This roll may be brought under reduction in the Court of Session—for the finality clause, sect. 28, does not apply, and it may be that the sheriff was not called on to apply his mind to the matter—Colquhoun *v.* Buchanan, 29th March 1866, 4 Macph. 682.

[3] *I.e.*, by advertisement, once for each of two successive weeks, in a newspaper published in the county—failing which, in an adjoining county, sects. 15, 16.

[4] Part in brackets repealed. The sheriff only gives notice of the meeting. See sect. 22, and 26 & 27 Vict. c. 50, sect. 2.

Constitution of the board where proprietors are less in number than three.

19. If in any district the upper proprietors or the lower proprietors shall be fewer in number than three, the board shall consist of an equal number, elected as aforesaid, along with the proprietor having the largest valuation, who shall also be chairman of the board, as above provided; and if such last-mentioned proprietor be the sole upper or the sole lower proprietor, he shall have two votes on the board; and if there shall be only one proprietor in any district such proprietor shall have and may exercise all the powers by this Act conferred on the district board.

Their votes.

Mandataries may be appointed.

20. It shall be lawful for the Commissioners of her Majesty's Woods, Forests, and Land Revenues, or either of them, in cases where her Majesty in right of her crown is proprietor of any fishery, and for any corporation or company, being the proprietors of any fishery, or for any proprietor of a fishery, respectively, from time to time to nominate and appoint, by any writing under his or their hand or seal, any person as the mandatary of such commissioners, corporation, company, or proprietor to attend, act, and vote at any meeting of proprietors under this Act; and every such nomination and appointment shall subsist until recalled by the said commissioners or either of them, or by the corporation or company or proprietor making the same.

Payment to sheriff clerk in connection with elections.

21. All expenses incurred by the sheriff clerk in making up the roll of proprietors, and in calling and attending the meetings for the election of the district board, with such reasonable remuneration for his time and trouble as shall be fixed by the sheriff, shall be paid to the sheriff clerk by the district board out of the assessments to be levied under the authority of this Act.

Powers and duties of district boards.

22. The district board may sue or be sued in the name of their clerk, and if there be more than six members three members shall form a quorum, and if there be fewer than six members two shall form a quorum, and they shall keep regular books and accounts, and shall hold their first meeting within ten days[1] after the first election under this Act

at a time and place to be fixed at the meetings of proprietors at which such election took place, or in cases where such election is not necessary the first meeting shall take place at a time to be fixed by a majority of the proprietors, and notice of such meeting shall be given as hereinbefore provided with respect to the publication of byelaws to be made by the commissioners; and the district board shall have power, subject to the provisions of this Act and the byelaws made by the commissioners, [to make and alter from time to time regulations for the preservation of the fisheries in the district, and][2] from time to time to appoint a clerk, and such number of constables, water bailiffs, watchers, and other officers as they think fit, to fix and prescribe the duties of all persons appointed by them, and to remove such persons, and appoint other persons in their stead; and they may combine with any other district board for the purpose of this Act, and to maintain a common staff of officers for the protection and preservation of the fisheries of more than one district, and may agree with the police committee of any county for the purpose of paying additional constables for the better protection of the fisheries in their district: Provided that all such regulations shall, before taking effect, be reported to and approved by the Secretary of State, and shall not interfere with any vested right of property, and shall not authorise any encroachment or trespass on private property.

[1] Twenty-one days, 26 & 27 Vict. c. 50, sect 2.
[2] Part in brackets repealed, Act 1868, sect. 42. The regulations of sect. 9 of the same Act are substituted.

Assessments may be imposed by district boards.[1]

23. The district board shall have power to impose an assessment for the purposes of this Act, to be called the fishery assessment, on the several fisheries in each district, according to the yearly rent or yearly value of such fisheries as entered in the valuation roll; and every proprietor of a fishery which is not valued on the valuation roll, and who shall claim right to vote in the election of members of the district board, shall be held to be a proprietor of a fishery of the value of twenty pounds, and shall be assessed accordingly; and such fishery assessment may be imposed, collected, and recovered by the district board in the same manner as police assessments may be imposed, collected, and recovered by the Commissioners of Supply under the authority of the Public General Act, twentieth and twenty-first Victoria, chapter seventy-two;[2] and for the purpose of imposing, collecting, and recovering such fishery assessments the district boards shall have and may exercise all the powers conferred by the said Act on Commissioners of Supply for imposing, collecting, and recovering the assessments leviable under the same.

[1] Borrowing powers in Act 1868, sect. 14, *infra*, p. 781.
[2] *Supra*, p. 664.

As to future elections of district boards.

24. Each district board shall continue in office for three years, and members thereof shall be eligible for re-election, and vacancies occurring during such period shall be filled up by the board until the next meeting of proprietors, who shall then fill up the same; and meetings of the upper and lower proprietors respectively for the purpose of each triennial election of not more than three upper proprietors and three lower proprietors respectively shall be called by the clerk, who shall give notice of such

meetings by advertisement as herein-before provided with respect to the publication of byelaws made by the commissioners; and such meetings shall at the same time take such steps as they shall think proper for auditing and attesting the accounts of the district board for the preceding three years.[1]

[1] No provision is made in the Acts for renewing a district board, where one has been in existence, but has been allowed to drop at the close of its term. The Court of Session will then, on petition, in exercise of its *nobile officium*, remit to the sheriff of the county to proceed as in sect. 18, and authorise him, the sheriff-clerk and the chairman to do the acts set forth in the said section, in sect. 22, and in the amending 26 & 27 Vict. c. 50, sect. 2, relative to calling and holding the first meeting; but it will not declare the board so constituted to be the district board. It either is so or not, and the declarator of the Court on a petition could make no difference—Campbells, 17th March 1883, 10 Ret. 819.

25. *Penalties for breach of byelaws and regulations.*[1]

[1] Repealed, Act 1868, sect. 42.

Forfeited articles may be seized.

26. Any net, rod, line, or other article directed to be forfeited under this Act may be seized by any constable, water bailiff, watcher, or other officer appointed by the district board, and the sheriff or Justice may either order the same to be destroyed or to be sold, and the proceeds of such sale to be paid to the clerk on behalf of the district board.

Three or more persons illegally fishing at night to be guilty of a criminal offence.[1]

27. If three or more persons acting in concert, or being together or in company, shall at any time between the expiration of the first hour after sunset on any day and the beginning of the last hour before sunrise on the following morning enter or be found upon any ground adjacent or near to any river or estuary or the sea, or in or upon any river or estuary or the sea, with intent illegally to take or kill salmon, or having in his or their possession any net, rod, spear, light, or other instrument used for taking salmon with such intent as aforesaid, or shall illegally take or kill, or attempt to take or kill, or aid or assist in killing or taking salmon, every such person shall be guilty in Scotland of a criminal offence, and in England within the limits of the 'Tweed Fisheries Amendment Act' of a misdemeanour, and shall for every such offence be liable to a fine not exceeding five pounds, or to imprisonment for any period not exceeding three months, as the sheriff or Justices before whom such persons or any of them are tried and convicted may determine; and if such fine be not paid immediately on conviction, the offender so failing to pay shall be sentenced to imprisonment for such period, not exceeding three months, as the sheriff or Justices may adjudge, unless such fine shall be sooner paid.

[1] Cf. Night Poaching Act, sect. 9, *supra*, p. 731. A conviction under this section is pleadable in bar of trial on a charge under Act 1868, sect. 15, sub-sect. 1, not on a charge under sub-sect. 4, *infra*, p. 782—Glen *v.* Colquhoun, 1865, 5 Irv. 203.

Prosecution for offences under this Act, and recovery of penalties.

28. All offences under this Act may be prosecuted and all penalties incurred under this Act may be recovered before any sheriff or any two Justices acting together and having jurisdiction in the place where the offence was committed,[1] at the instance of the clerk of any district board or of any other person; and it shall be lawful for the sheriff or Justices to whom any petition or complaint is presented to proceed in a summary form, and to grant warrant for bringing the persons complained against

before him or them,[2] and on proof on oath by one or more credible witness or witnesses or confession of the person accused, or other legal evidence, forthwith to determine and give judgment in such complaint, without any written pleadings or record of evidence,[3] other than a record of the charge and of the judgment pronounced thereon, and to grant warrant for the recovery of all penalties and expenses decerned for, by poinding, and imprisonment for any period not exceeding six months; and any person who shall think himself aggrieved by any judgment of the sheriff or Justices pronounced in any complaint or prosecution under this Act may appeal to the Court of Justiciary at their next Circuit Court, or where there is no Circuit Court, to the High Court of Justiciary at Edinburgh, in the manner and under the rules, limitations, conditions, and restrictions contained in the Act passed in the twentieth year of the reign of his Majesty King George the Second, chapter forty-three, for taking away and abolishing heritable jurisdictions in Scotland, with this variation, that such person shall, in place of finding caution in the terms prescribed by the said Act, be bound to find caution to pay the penalty and expenses awarded against him by the judgment appealed from, in the event of such appeal being dismissed, together with any additional expenses that shall be awarded by the Circuit Court or Court of Justiciary on dismissing such appeal; and it shall not be competent to appeal from or bring the judgments of any sheriff or Justices acting under this Act under review by advocation or in any other way than as herein provided.[4]

[1] As to boundary rivers, sea-coast, and sea, Act 1868, sect. 35. Disqualification of Justices, do. sect. 34, *infra*, p. 787.

[2] *Brevi manu* seizure of offender in certain cases, Act 1868, sect. 29, *infra*, p. 787; thereby introducing a provision contained in the Home Drummond Act, sect 11, *supra*, p. 766.

[3] This is obligatory—see case in note to Act 1828, sect. 9, *supra*, p. 766. It would be to stray into criminal procedure to enlarge on the general rules applicable to complaints and summary trials, but the following points have been decided on this statute. The convicting need not be the same as the committing Justices; the Procurator-Fiscal is not a necessary prosecutor; and there may be a general conviction on a charge of 'fishing for *or* taking' salmon—Tough *v.* Jopp, 1863, 4 Irv. 366. This is a criminal statute—Blair *v.* Mitchell, 1864, 4 Irv. 545. Many of the game decisions are in point—see *supra*, pp. 727 *et seq.*, 733 *et seq.*, notes.

[4] But see the Appeals Act of 1875, and cases in note at the end of the foregoing Act of 1828, *supra*, p. 768.

Enforcement of regulations and byelaws.

29. In the event of any person refusing or neglecting to obey any byelaw made by the commissioners, or any regulation made by the district board, the clerk may apply to the sheriff by summary petition in ordinary form, praying to have such person ordained to obey the same, and the sheriff shall take such proceedings and make such orders thereupon as he shall think just.[1]

[1] Blair *v.* Lumsden, 1869, 1 Coup. 309, 7 Macph. 1126.

Expenses may be decerned for.

30. In giving judgment on any application or complaint under this Act the sheriff or Justices may find the person[1] complained against liable in expenses, and may decern for payment of the same.

[1] Act 1868, sect. 38, adds 'complaining or,' *infra*, p. 788.

Recovery of penalties and expenses.

31. All penalties and expenses incurred under this Act, or under any byelaw or regulation made under the authority thereof, may be recovered by ordinary action or in the Small Debt Court of the Sheriff.

Payment and application of penalties.

32. The penalties incurred under this Act shall in all prosecutions at the instance of the clerk of any district board [1] be payable to and recoverable by such clerk, and shall in all other cases be paid and applied in such manner as the sheriff or Justices may direct; and all penalties and expenses received by the clerk, and the proceeds of the sale of any articles seized and directed to be sold as before provided, shall be applied by the district board towards defraying the expenses incurred by them in carrying into execution the provisions of this Act.

[1] Act 1868, sect. 40, adds, 'or by any person authorised by any district board.'

Certain provisions of Act 24 & 25 Vict. c. 109, applied to Solway Firth.

33. From and after the first day of January one thousand eight hundred and sixty-five the provisions of the [said Act,] [1] intituled *An Act to amend the Laws relating to Fisheries of Salmon in England*, shall extend and apply to salmon fisheries in the waters and on the shores of the Solway Firth situate in Scotland, as the same may be fixed by authority of this Act, and to the rivers flowing into the same, in so far as such provisions relate to the use of fixed engines for the taking of salmon: Provided that all offences against such provisions shall be prosecuted and punished as directed by this Act.

[1] For these words read 'Public General Act, 24 & 25 Vict. c. 109.' See 26 & 27 Vict. c. 50, sect. 3.

This Act not to apply to the river Tweed.

34. No part of this Act, with the exception of the tenth, twelfth, and twenty-seventh clauses, shall apply to the river Tweed, or to any fisheries in the said river or the mouth or entrance thereof, as defined by 'The Tweed Fisheries Amendment Act, 1859;' and any penalties incurred under the said tenth, twelfth, and twenty-seventh clauses of this Act shall, so far as concerns the river Tweed, be recoverable in manner prescribed by the Tweed Fisheries Amendment Act, 1857, which Act, and the Tweed Fisheries Amendment Act, 1859, shall remain in full force and effect, anything herein contained to the contrary notwithstanding.

No. XI.

31 & 32 VICTORIA, c. 123.

An Act to amend the Law relating to Salmon Fisheries in Scotland.—[31*st July* 1868.]

WHEREAS an Act was passed in the twenty-fifth and twenty-sixth years of her present Majesty, chapter ninety-seven, intituled *An Act to regulate and amend the Law respecting the Salmon Fisheries of Scotland;* and another Act was passed in the twenty-sixth and twenty-seventh years of her present Majesty, chapter fifty, intituled *An Act to continue the Powers of the Commissioners under the Salmon Fisheries (Scotland) Act until the First Day of January One thousand eight hundred and sixty-five, and to amend the said Act;* and another

25 & 26 Vict. c. 97.

26 & 27 Vict. c. 50.[1]

27 & 28 Vict. c. 118.[1]

Act was passed in the twenty-seventh and twenty-eighth years of her present Majesty, chapter one hundred and eighteen, intituled *An Act to amend the Acts relating to Salmon Fisheries in Scotland;* and it is expedient that the recited Acts should be amended, and further provision made with respect to salmon fisheries in Scotland:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

[1] The provisions of these Acts have been introduced into the notes to Act 1862.

Short title.

1. This Act may be cited for all purposes as 'The Salmon Fisheries (Scotland) Act, 1868.'

Recited Acts and this Act to be as one.

2. The recited Acts and this Act shall be read and construed together as one Act.

Appointment of district board where none exists at the passing of this Act.[1]

3. Where in any district a district board has not been constituted before the passing of this Act, it shall be lawful for any two proprietors of salmon fishings in the district, whether there be at the present time salmon in the waters of the district or not, to present a petition to the sheriff praying that a district board may be constituted, and the sheriff shall thereupon direct the sheriff clerk to make up a roll of the upper proprietors and a roll of the lower proprietors in the district, and the sheriff shall thereafter direct the sheriff clerk to call a meeting of the upper proprietors, and also a meeting of the lower proprietors, at such time and place as he shall direct, and notice of such meeting shall be given by advertisement inserted once at least in two successive weeks in a newspaper printed or circulating in the county or counties in which the district is situated, and at the same time with the said notice the sheriff shall direct the sheriff's clerk also to intimate the time and place at which the first meeting of the board shall be held after its election; and the upper proprietors and lower proprietors present at such separate meetings respectively shall elect members of the district board in the manner provided in the first-recited Act; and the first meeting of the said district board shall be held at the time appointed by the sheriff as aforesaid, unless the upper proprietors and the lower proprietors agree together to appoint another time and place for the first meeting.

[1] Read along with sect. 18 of Act 1862. In cases where district boards have not been constituted, the commissioners, on requisition, may reissue a byelaw constituting the district; or issue byelaws under sects. 6 and 16 of the foregoing Act, valid without communication to any board—sects. 3 and 4 of 27 & 28 Vict. c. 118.

Roll of proprietors to be made up.

4. The clerk of each district board, constituted under the recited Acts or this Act, shall make up and keep rolls of the upper and lower proprietors in the district, and correct the same from time to time whenever a new valuation roll comes into force; and at any meeting of the district board it shall be lawful for any person whose name has been erroneously struck out or omitted from the said roll to apply to the district board to have his name entered therein, or for any person whose name is on the roll for the district to object to the name of any other person being entered or remaining on the said roll on the ground that he does not

appear on the valuation roll to be qualified, or that he does not possess the requisite frontage to the river; and if it shall be proved to the satisfaction of the board that such claim or such objection is well founded, the board shall direct their clerk to enter or strike out the name accordingly, as shall appear to them just; and if any person shall be dissatisfied with the decision of the board, he may appeal by summary petition to the sheriff of the county within which the subjects affording his qualification, or the greater part thereof, are situated; and the sheriff's decision shall be final, but in such appeal the jurisdiction of the sheriff shall not extend to questions of heritable right.

Provisions for valuation of fisheries.

5. Where any fishery is not entered in the valuation roll, or where any fishery is entered in the valuation roll along with and as a part of other subjects, the county assessor shall, on being required by the clerk to the district board, value and enter such fishery in the valuation roll separately from other subjects; and where any fishery or rod fishing when let in the sea happens to be situate in two separate districts, the county assessor shall, on being required by the clerk of either district, value and enter separately in the valuation roll the annual value of such fishery situate in the respective districts.[1]

[1] See *supra*, pp. 197, 207.

Vacancies or defect in qualification not to vitiate proceedings of board.

6. No act or proceeding of a district board shall be questioned on account of any vacancy or vacancies in their body, and no defect in the qualification or appointment of any persons or person acting as a member or members of such board shall be deemed to vitiate any proceedings of such board in which he or they have taken part.

Evidence of proceedings at meetings.

7. The minutes of the proceedings of every meeting of a district board shall be signed by the chairman; and any minute of proceedings of any meeting of such board, signed by the chairman of that meeting, shall be receivable in evidence in all legal proceedings without further proof; and, until the contrary is proved, every meeting of the board in respect of which minutes have been so made and signed shall be deemed to have been duly convened and held, and all the members thereof to have been duly qualified. On requisition in writing by any two members of a district board, the chairman shall be bound to convene a meeting of the board within a fortnight of the date of the requisition, and the clerk of the board shall give notice to each member, by circular, of the date of said meeting, and of the business to be brought before it.

Mandataries may be appointed members of district board.

8. The factor or mandatary of any proprietor of a fishery (including the factor or mandatary of the Commissioners or Commissioner of Woods in charge of the land revenues of the Crown in Scotland where her Majesty is the proprietor of a fishery) shall be qualified to be and may be elected as a member of any district board, and shall have all the powers and privileges which the proprietors by whom he is appointed could have had under the recited Acts or this Act; and any member of any district board appointed under the powers of the recited Acts, or any of them, or this Act, may from time to time nominate and appoint, by writing under his hand, any person as the mandatary of such member to attend, act, and vote at any meeting of such district board; and every

such nomination and appointment shall subsist until recalled by the member making the same.

Power of Secretary of State to alter regulations.[1]

9. Any district board at any meeting, of which due notice has been given by advertisement at least ten days previously in a newspaper printed or circulated in the county or counties in which the district is situated, may resolve to petition the Secretary of State to do any of the following things:

(1.) To vary the annual close time in such district, provided that such annual close time shall always be one hundred and sixty-eight days:

(2.) To vary the weekly close time in such district or in different parts of such district, provided that the weekly close time or such weekly close times shall always be thirty-six hours.

(3.) To alter the regulations with respect to the observance of annual or weekly close time in so far as they relate to such district:

(4.) To alter the regulations with respect to the construction and use of cruives and cruive dykes or weirs within such district, provided such alterations do not injure the supply of water to any person entitled to use any existing cruive dyke as a dam dyke.

And such petition, authenticated by the signature of the chairman of the board, shall be transmitted to the Secretary of State by the clerk of the board, after notice thereof has been given by advertisement once at least in each of two successive weeks in a newspaper printed or circulating in the county or counties in which the district is situated, and the Secretary of State may direct such inquiry to be made, and such notice thereof to be given, as he shall think fit.

And any alteration petitioned for in such manner by any district board may be made by the Secretary of State, if he shall see fit, by order under his hand, and such order shall be published in the *Edinburgh Gazette*, and a copy of the *Edinburgh Gazette* containing such order shall be evidence of the same having been made; but the Secretary of State shall not entertain any such petition until it shall be proved to him, by such evidence as he shall think satisfactory, that notice of such petition has been duly given in manner aforesaid: Provided that such alteration shall not interfere with any rights held at the time of the passing of this Act under royal grant or charter, or possessed for time immemorial.

[1] This section comes in place of a repealed portion of Act 1862, sect. 22, *supra*, p. 774, and qualifies the next section. See also sects. 6 and 7 of that Act.

Byelaws to be valid until altered by Secretary of State.

10. The byelaws contained in the Schedules (A.), (B.), (C.), (D.), (E.), (F.), and (G.),[1] to this Act annexed shall in all respects be held to have been duly made and published, but only in so far as consistent with and authorised by the recited Acts, and to such extent shall be as valid and binding as if the same had been expressly enacted in this Act: Provided always, that notwithstanding the terms of the said recited Acts, any such byelaw shall be valid and binding as aforesaid although it includes in one district more than one river, or makes provisions with respect to a district including more than one river, or to two or more districts having assigned to them a common estuary.[2]

[1] The rules of these byelaws, except A, B, and C, are printed *infra*, p. 789 *et seq.*
[2] A proviso rendered necessary by the words of Act 1862, section 4, taken in connection with the convenient grouping of rivers in Sched. A.

Acts not to apply to streams not frequented by salmon.

11. Notwithstanding anything contained in or authorised by this Act or the recited Acts, no regulations with respect to the construction and alteration of mill dams or lades or water-wheels, so as to afford a reasonable means for the passage of salmon, shall apply to streams or branches or tributaries of rivers which are of such small size as not to be frequented by salmon, nor to dam dykes which in their existing state at the time and in the average state of the river do not obstruct the passage of salmon; and where in any existing intake lade there is at present a sufficient sluice, it shall not be necessary to remove said sluice to a higher point of the lade, nor to construct an additional sluice at the intake thereof; and it shall be lawful to lift any heck from out the water as a means of protection during a flood, or when the river is encumbered with ice, or with weeds and floating leaves to an extent to choke the heck.[1]

[1] See byelaw, Sched. G, *infra*, p. 790.

12. *Byelaws not to apply to water-course or mill-lade of Kinnaber.*

Power to the board to purchase and remove dams by agreement.

13. The district board shall by agreement (which agreement any heir of entail or other person under disability is hereby empowered to make with such board, and to implement,) have power to purchase, for the purpose only of removal, any dam, weir, cruives, or other fixed engines they may deem it expedient to remove for the benefit of the fisheries in their district, and to remove any natural obstructions to the passage of fish in the bed of a river, or to attach a fish pass to any waterfall, and generally to execute such works, do such acts, and incur such expenses as may appear to them expedient for the protection or improvement of the fisheries within their district, the increase of salmon, or the stocking of the waters therewith; but it shall not be lawful for the board to pay to any member of the board any salary or fees for his acting in any way as a member of or under the board; provided that such powers of purchase shall not be exercised unless the resolution of the district board shall have been consented to by the proprietors representing four-fifths in value of the fishings on the roll in the district.

Power to the board to borrow money.

14. Any expenses incurred by the district board in carrying out the provisions of this Act may be defrayed out of the assessment which they are empowered to lay on by the first recited Act;[1] and any district board may, for the purpose of defraying any charge or expenses incurred by them under the powers of the last section, with the consent of the Secretary of State, borrow and take up at interest, on the credit of any assessment they are authorised by the first-recited Act to impose, such sum of money as may be necessary for defraying such charge or expenses, not exceeding the amount of two years assessments authorised by the said first-recited Act.

[1] Act 1862, sect. 23, *supra*, p. 774.

Penalties for offences.

15. Sections eleven and twelve of the first-recited Act are hereby repealed, and in place thereof it is enacted as follows:

Every person who commits any of the following offences,—

(1.) Who fishes for, takes, or attempts to take, or aids or assists in fishing for, taking, or attempting to take, salmon during the annual close time by any means other than rod and line;[1]

(2.) Who fishes for, takes, or attempts to take, or aids or assists in fishing for, taking, or attempting to take, salmon (except during Saturday or Monday by rod and line)[2] during the weekly close time, or contravenes in any way any byelaw in force regarding the observance thereof;[3]

(3.) Who fishes for or takes, or aids in fishing for or taking, salmon during the annual close time by means of rod and line at a period not sanctioned by the byelaws in force in the district;[4]

(4.) Who fishes for or aids in fishing for salmon with a net having a mesh contrary to any byelaw;[5]

(5.) Who sets or uses, or aids in setting or using, a net or any other engine for the capture of salmon when leaping at or trying to ascend any fall or other impediment, or when falling back after leaping;[6]

(6.) Who does any act for the purpose of preventing salmon from passing through any fish pass, or taking any salmon in its passage through the same;

(7.) Who wilfully puts or causes to be put, or neglects to take reasonable precautions to prevent the discharge of, any sawdust, or any chaff, or any shelling of corn into any river;

(8.) Who in any way contravenes any byelaw,[7]

shall for every offence be liable to a penalty not exceeding five pounds, and to a further penalty not exceeding two pounds for every salmon taken or killed in an illegal manner, and shall forfeit the salmon so taken; and all penalties imposed under this Act and the recited Acts, or any of them, shall be in addition to the costs and expenses of prosecution and conviction.[8]

[1] Byelaw, Sched. C, and 1862 Act, sect. 6 (5), and note thereto, *supra*, p. 770.
[2] This closes Sunday only to rod-fishing.
[3] Byelaw, Sched. D, *infra*, p. 789, and Act 1862, sect. 6 (6).
[4] Byelaw, Sched. C, and Act 1862, sect. 6 (5).
[5] Byelaw, Sched. E, *infra*, p. 789, and Act 1862, sect. 6 (6).
[6] See text, p. 270, as to fishing at weirs.
[7] Relation to the Summary Procedure Act—Blair *v.* Lumsden, 1869, 1 Coup. 309, 7 Macph. 1126.
[8] As to penalties and expenses, see Act 1828, sect. 9, note, *supra*, p. 766; Act 1862, sects. 28, 30, 31, 32, *supra*, p. 776; and this Act, sects. 30, 33, 38, 39, 40.

16. *Amendment of sect.* 13 *of* 25 *&* 26 *Vict. c.* 97.[1]

[1] See this section, *supra*, p. 771.

Penalties for using lights, &c.[1]

17. Every person that shall use any light or fire of any kind, or any spear, leister, gaff, or other like instrument, or otter, for catching salmon, or any instrument for dragging for salmon, or have in his possession a light or any of the foresaid instruments under such circumstances as to satisfy the court before whom he is tried that he intended at the time to catch salmon by means thereof, shall be liable to a penalty not exceeding five pounds, and shall forfeit any of the foresaid instruments and any

salmon found in his possession; but this section shall not apply to any person using a gaff as auxiliary to angling with a rod and line.

[1] This section is not confined, like Act 1862, sect. 27, to night, nor to three or more persons in concert. It is like sects. 19, 20, 21, an amplified substitute for part of Act 1862, sect. 11. See a case in which foul hooking by dragging a busked fly-hook across a pool, was held not to be fishing 'by means of rod and line with the artificial fly,' in the sense of the Tweed Act, Rodger *v.* Hislop, 19th May 1879, 6 Ret. (Just.), 16.

Penalty for using roe.[1]

18. Every person that shall use any fish roe for the purpose of fishing, and every person that shall buy, sell, or expose for sale, or have in his possession, any salmon roe, shall for every such offence be liable to a penalty not exceeding two pounds, and shall forfeit all salmon roe found in his possession; but this section shall not apply to any person who uses or has in his possession salmon roe for artificial propagation or scientific purposes, or gives any reason satisfactory to the court by whom he is tried for having the same in his possession.

[1] Substituted for Act 1862, sect. 12.

Penalties for destroying the young of salmon, or disturbing spawning beds.

19. Every person who shall wilfully take or destroy any smolt or salmon fry,[1] or shall buy, sell or expose for sale, or have in his possession,[2] the same, or shall place any device or engine for the purpose of obstructing the passage of the same, or shall wilfully injure the same, or shall wilfully injure or disturb any salmon spawn, or disturb any spawning bed, or any bank or shallow in which the spawn of salmon may be, or during the annual close time shall obstruct or impede salmon in their passage to any such bed, bank, or shallow, shall be liable to a penalty not exceeding five pounds for every such offence, and shall forfeit every rod, line, net, device, or engine used in committing any such offence, and shall forfeit any smolt or salmon fry that may be found in his possession; but nothing herein contained shall apply to acts done for the purpose of artificial propagation of salmon or other scientific purpose, or in the course of cleaning or repairing any dam or mill-lade, or in the course of the exercise of rights of property in the bed of any river or stream: Provided also, that the district board may, with the consent of all the proprietors of salmon fisheries in any river or estuary, adopt such means as they think fit for preventing the ingress of salmon into narrow streams in which they or the spawning beds are from the nature of the channel liable to be destroyed, but always so that no water rights used or enjoyed for the purposes of manufactures, or agricultural purposes or drainage, shall be interfered with thereby.

[1] As to parr, see Blair *v.* Miller, 1869, 14 Journ. of Jurisp. p. 625, Perthshire Sheriff Court.

[2] See Hopton *v.* Thirlwall, 9 L.T.N.S. 327.

Penalties for taking unclean salmon.

20. Every person who shall wilfully take, fish for, or attempt to take, or aid or assist in taking, fishing for, or attempting to take, any unclean or unseasonable salmon, or who shall buy, sell, or expose for sale, or have in his possession,[1] any unclean or unseasonable salmon, shall be liable to a penalty not exceeding five pounds in respect of each such fish taken, sold, or exposed for sale, or in his possession, and shall forfeit every such fish; but this section shall not apply to any person who takes such fish accidentally, and forthwith returns the same to the water with the least

possible injury, or to any person who takes or is in possession of such fish for artificial propagation or scientific purposes.

[1] This, not sect. 15, is contravened by taking a fish already dead out of the water—Bathgate *v.* M'Arthur, 1873, 2 Coup. 420 (Tweed Act).

Penalty for buying or selling salmon in close time.

21. Any person who shall buy, sell, or expose for sale, or have in his possession, any [1] salmon taken within the limits of this Act between the commencement of the latest and the termination of the earliest annual close time which is in force at the time for any district,[2] shall be liable to a penalty not exceeding five pounds, and to a further penalty not exceeding two pounds for every salmon so bought, sold, or exposed for sale, or in his possession; and any salmon so bought, sold, or exposed for sale, or in his possession, shall be forfeited; and the burden of proving that any such salmon was caught beyond the limits of this Act shall lie on the person selling or exposing the same for sale, or having the same in his possession.

[1] Act 1862, sect. 11, now repealed, here interpolated 'fresh'—*i.e.*, unsalted—and did not prohibit 'buying.'

[2] But the fishmonger may prove that the fish were caught with rod and line, within the rod-fishing season—Blair *v.* Shepherd, 1871, 2 Coup. 28. It is sufficient for the prosecutor to prove possession during the close time; the *onus* is then thrown on the accused of proving innocent capture—Stevenson *v.* M'Levy, 21st Feb. 1879, 6 Ret. (Just.) 33.

Provision as to exportation of salmon.[1]

22. All salmon intended for exportation shall be entered for that purpose with the proper officer of customs at the port or place of intended exportation before shipment thereof; and any salmon shipped or exported or brought to any wharf, quay, or other place for exportation between the commencement of the latest and the termination of the earliest annual close time for any district in Scotland contrary to this section shall be forfeited, unless proof be given to the satisfaction of the Commissioners of Customs of the salmon having been legally captured, and the person so illegally shipping or exporting or bringing the same for exportation shall be liable to a penalty not exceeding two pounds for every salmon so shipped or exported or brought for exportation; and no salmon caught by rod and line during the annual close time for net-fishing shall be shipped, exported, or brought for exportation under the like penalties; and any officer of customs may during the aforesaid period open any parcel entered or intended for exportation or brought to any quay, wharf, or place for that purpose, and suspected by him to contain salmon, and may detain any salmon found in such parcel until proof is given to the satisfaction of the Commissioners of Customs of the salmon being such as may be legally exported; and if the salmon before such proof is given become unfit for human food the officer of customs may destroy the same.

[1] Taken from the English Act 28 & 29 Vict. c. 121, sect. 65. This section is in supplement of 26 & 27 Vict. c. 10, which prohibits the exportation beyond seas of unclean or unseasonable salmon, and of salmon caught during the time (see foregoing section) at which sale is prohibited in the district where it is caught, under pain of forfeiture of the fish and a fine not exceeding £5 for each fish. The burden of proving that salmon entered for exportation between 3d September and 30th April (sect. 3 as amended by 33 & 34 Vict. c. 33) were not so entered in contravention of the Act, lies on the exporter.

23. The proprietor or occupier of any fishery shall within thirty-six hours after the commencement of the annual close time remove and carry from such fishery, and from the landing places and grounds adjacent thereto, all boats, oars, nets, engines, and other tackle used or employed by such occupier in taking salmon, and effectually secure the same so as to prevent their being used in fishing until the end of the close time, with the exception of such boats and oars as may be used for angling; and the proprietor or occupier of any cruive shall within thirty-six hours after the commencement of the annual close time remove and carry away all the hecks, rails, and inscales, and effectually secure the same so as to prevent their being used in fishing, and shall also remove all planks and temporary fixtures and other obstructions to the free passage of fish through the cruive; and any proprietor or occupier who neglects to remove and carry away and effectually secure in manner aforesaid any boat, oar, net, engine, or other tackle, or any heck, rail, or inscale, or any obstruction to the passage of salmon through a cruive, shall forfeit every engine and thing not removed and carried away in compliance with the terms of this section, and for every day during which he suffers any such engine or thing to remain unremoved beyond the period prescribed in this Act he shall be liable to a penalty not exceeding ten pounds: Provided always, that nothing herein contained shall apply to any ferry boat, or prevent any proprietor of lands from continuing any boat for the use of himself or of his family if such boat shall have the name of the proprietor painted thereon, and be secured, when not in use for lawful purposes, by lock and key.

All boats and other engines to be removed during annual close time.

24. The proprietor, or when let the occupier, of every fishery at which stake, weir, or stake nets, fly nets, or bag nets are used, shall in regard to such nets do all acts required by any byelaw in force within the district in which such fishery is situated for the due observance of the weekly close time; and if any such proprietor or occupier shall omit to do any act so required [1] he shall incur the following penalties; that is to say,

1. He shall forfeit the net or nets with regard to which such omission has occurred:
2. He shall for each weekly close time during any part of which such omission has occurred pay, in respect of each net to which the proof of such omission applies, a sum not exceeding ten pounds, and a further sum not exceeding two pounds for every salmon taken or killed by means of such nets during the said weekly close time.

Penalties on proprietor or occupier for breach of weekly close time.

[1] See byelaw, Sched. D, *infra*, p. 789. Knowledge that the nets were set, &c., during close time, had to be proved against him under Act 1862—Greig *v.* Jopp, 1863, 4 Irv. 369. This section seems not to require such proof, but to throw the duty of seeing there is no omission on the proprietor or occupier. Replacing removed nets before expiry of the weekly close time is a relevant charge under this section—Cooper *v.* Tough, 1874, 2 Coup. 547. The Summary Procedure Acts, 1864 and 1881, are applied to sects. 23 & 24 of this statute by the latter Act, 44 & 45 Vict. c. 33, sect 3.

25. In order the better to carry out the provisions of the Act of the seventh and eighth years of her present Majesty, chapter ninety-five, it shall be lawful for any water bailiff, constable, watcher, or officer of any district board, or any police officer, to search all boats, boat tackle, nets, or other engines, and all receptacles, whether at sea or on shore, which

Amendment of 7 & 8 Vict. c. 95.[1]

he or they may have reason to suspect may contain salmon captured in contravention of the said last-mentioned Act, and to seize all salmon found in the possession of persons not having a right to fish salmon, and the possession of such salmon shall be held *primâ facie* evidence of the purpose of the possessor to contravene the provisions of the said last-mentioned Act: Provided also, that the words 'the said recited Act' contained in the second section of the last-mentioned Act shall be read and construed as if they meant and included this Act and the Acts recited therein.

[1] See *supra*, p. 767, and the Game Acts, *supra*, Appx. Nos. 1, 2, 5.

Sheriff or Justice may grant warrant to search premises.

26. It shall be lawful for the sheriff or any Justice of the Peace, upon an information on oath that there is probable cause to suspect any breach of the provisions of this Act to have been committed on any premises, or any salmon illegally taken, or any illegal nets, or other engines or instruments, to be concealed on any premises, by warrant under his hand to authorise and empower any water bailiff, constable, watcher, or other officer of the board, or police officer, to enter such premises for the purpose of detecting such offence, or such concealed fish or instruments, at such time or times in the day or night as in such warrant may be mentioned, and to seize all illegal nets, engines, or other instruments, or any salmon illegally taken, that may be found on such premises; provided that no such warrant shall continue in force for more than one week from the date thereof.

Constables or water bailiffs entering on lands not to be deemed trespassers.

27. Any water bailiff, constable, watcher, or officer of the board, or any police officer, may enter and remain upon any lands in the vicinity of any river or of the sea-coast during any hour of the day and night for the purpose of preventing a breach of the provisions of this or the recited Acts, or of detecting the persons guilty of any breach thereof, and no such person entering and remaining upon such lands as aforesaid shall be deemed to be a trespasser: Provided always, that the owner or occupier of such land may require such person to quit, and such person may on refusal be proceeded against as a trespasser, and shall be liable to the penalties,[1] unless he shall prove to the satisfaction of the sheriff or Justices before whom he is tried that he had reason to apprehend a breach of the law had been or was about to be committed.

[1] This is unmeaning in Scotland, unless it refers to Act 1828, sect. 3, *supra*, p. 765, which, however, relates only to trespass with intent to kill salmon, &c. See text, *supra*, p. 123.

Board and its officers to have access to examine dams, weirs, &c.

28. Any member of the district board, or water bailiff, constable, watcher, or officer of the board, or any police officer, may examine any dam, weir, cruive, or fixed engine within the limits of the district, or any artificial watercourse in that district; and any owner or occupier of any such dam, weir, cruive, or fixed engine, or artificial watercourse, refusing access thereto to any such member of the board, water bailiff, constable, or officer of the board, or any police officer, shall be liable to a penalty not exceeding five pounds for each offence; and any member of the board, or water bailiff, constable, watcher, or officer of the board, or any police officer, may search all boats, nets, baskets, or bags and other instruments used in fishing for salmon, or which he may have reason to

suspect may contain salmon illegally taken, and he may seize all illegal nets, or nets being used illegally, and other instruments of fishing, and all fish and other articles liable to be forfeited under the provisions of this Act, and generally may act as a constable for the enforcement of the provisions of this Act, and when so acting shall be deemed to be a constable.

Apprehension of offenders.

29. It shall be lawful for any person, without any warrant or other authority than this Act, *brevi manu* to seize and detain any person who shall be found committing any offence contained in the first six subdivisions of the fifteenth section, or in the seventeenth, eighteenth, nineteenth, twentieth, twenty-first, and twenty-second sections of this Act, and to carry such person before any sheriff or Justice of the Peace or other magistrate, or to deliver such person to a constable, who is hereby required to carry such person before a Justice of the Peace or other magistrate, who shall forthwith examine and discharge or commit such person until caution *de judicio sisti* be found, as the case may require.[1]

[1] Cf. 1828, sect. 11, *supra*, p. 767.

30. *The same as Act* 1862, *s.* 28, *supra*, p. 775.

Forfeitures of articles found in possession of any offender.

31. Every person found guilty of any offence against any of the provisions of the recited Acts or any of them, or of this Act, shall, in addition to any other penalties to which he may be liable, at the discretion of the sheriff or Justices before whom he has been tried, forfeit every boat, net, rod, line, gaff, spear, leister, or other article or instrument of whatever kind which has been or may be used in fishing for or in taking salmon, and which is found in the possession of such person at the time of committing such offence, and which was capable of being used in the commission of such offence, and also any salmon that may be found in his possession.[1]

[1] Cf. Act 7 & 8 Vict. c. 95, sect. 1, *supra*, p. 767. Under a similar English Act, breach of the weekly close time involved forfeiture of the net though no fish had been caught—Ruther *v.* Harris, 1 Ex. D. 97.

Forfeited articles may be seized.

32. Where any salmon, net, rod, line, or other article directed to be forfeited under this Act has been seized by any constable, water bailiff, watcher, or other officer appointed by the board or by any police officer, the sheriff or Justices may order the same to be destroyed or handed over to the district board, or to the person prosecuting, to be disposed of as such board or person prosecuting may think fit.

Minimum penalties.

33. The penalty in respect of any offence under this Act, or the recited Acts, shall, on a conviction for a second offence, be not less than one half of the greatest penalty capable of being imposed in respect of such offence, and on a conviction for a third or subsequent offence the greatest amount of penalty mentioned in this Act shall be imposed; and any boat, net, rod, line, or other article or thing used in the commission of any offence under this Act, or found in the possession of the offender, shall be forfeited.

As to disqualification of Justices.

34. No Justice of the Peace shall be disqualified from hearing any case arising under this Act by reason of his being a member of a district

board; provided that no Justice shall be entitled to hear any case in respect of an offence committed on his own fishery.[1]

[1] Cf. Act 1828, sect. 12, *supra*, p. 767; and see Reg. *v.* Allen, 33 L.J.M.C. 98.

Offences on boundary rivers or on sea-coast where to be tried.

35. Where any offence under this Act is committed in or upon any waters forming the boundary between any two counties, such offence may be prosecuted before a sheriff or two Justices of the Peace in either of such counties, and any offence committed under this Act on the sea-coast, or at sea beyond the ordinary jurisdiction of any sheriff or Justices of the Peace, shall be held to have been committed within the body of any county abutting on such sea-coast, or adjoining such sea, and may be tried and punished accordingly.

Fishing illegal where prohibited by existing law.

36. It shall not be lawful to fish for or take salmon at any place or by any mode prohibited by any statute relating to salmon or salmon fisheries in Scotland subsisting and in force at the date of this Act; and nothing contained in this Act or in any byelaw shall render legal any mode of fishing which was or would have been illegal at the date of the passing of this Act.[1]

[1] See text, p. 265.

Title to sue.

37. Any proprietor of a fishery shall be held to have a good title and interest at law to sue by action any other proprietor or occupier of a fishery within the district, or any other person who shall use any illegal engine or illegal mode of fishing for catching salmon within the district.[1]

[1] See text, p. 271.

Expenses may be decerned for.

38. In giving judgment on any application or complaint under this Act the sheriff or Justices may find the person complaining or complained against liable in expenses, and may decern for payment of the same.

Recovery of penalties and expenses.

39. All penalties and expenses incurred under this Act, or under any byelaw or regulation made under the authority thereof, may be recovered by ordinary action or in the Small Debt Court of the sheriff.

Payment and application of penalties.

40. The penalties incurred under this Act shall in all prosecutions at the instance of the clerk of any district board, or by any person authorised by any district board, be payable to and recoverable by such clerk, and shall in all other cases be paid and applied in such manner as the sheriff or Justices may direct; and all penalties and expenses received by the clerk, and the proceeds of the sale of any articles seized and directed to be sold as before provided, shall be applied by the district board towards defraying the expenses incurred by them in carrying into execution the Provisions of this Act.

Extent of Act.

41. This Act shall not extend to England or Ireland; and no part of this Act, except the thirteenth, eighteenth, twentieth, and thirty-third sections thereof, shall apply to the river Tweed as defined by the Tweed Fisheries Act, 1859; and the penalties imposed by this Act, so far as applicable to the river Tweed and its fisheries, shall be recoverable and applicable in the same manner as penalties imposed by the Tweed Fisheries Act, 1857; and the sections of this Act hereby applied to the river Tweed shall be read and taken as if they formed part of such last-men-

tioned Act and of Tweed Fisheries Amendment Act, 1859; and the words 'district board' in the said sections shall signify the Board of Commissioners of the River Tweed.

THE GENERAL ENACTMENTS OF THE BYELAWS.[1]

SCHEDULE (D.) [WEEKLY CLOSE TIME.]

Byelaw.

1. That in each and every stake weir or stake net a clear opening of at least four feet in width from top to bottom shall be made and kept free from obstruction in each and every pouch, trap, or chamber of same.
2. That the pouches, traps, or chambers of each and every fly net shall be either raised and tied up to the upper ropes of same, or lowered and tied to the lower ropes, so as effectually to prevent the capture or obstruction of salmon.
3. That the netting of the leader of each and every bag net shall be entirely removed, and taken out of the water.

[1] See Act 1862, sect. 6, and Act 1868, sects. 10, 24, *supra*, pp. 770, 780, 785.

SCHEDULE (E.)[1] [MESHES OF NETS.]

Byelaw.

That no net shall be used for the capture of salmon the meshes whereof shall be under one inch and three quarters in extension from knot to knot, measured on each side of the square, or seven inches measured round each mesh when wet; and the placing two or more nets behind or near to each other in such manner as to practically diminish the mesh of the nets used, or the covering the nets used with canvas, or the using any other artifice so as to evade the provisions of the regulations with respect to the meshes of nets, shall be deemed to be an act in contravention of this byelaw.

[1] See last note.

SCHEDULE (F.)[1] [CRUIVES.]

Byelaw.

1. The upper surface of the sill of each cruive shall be not higher than twelve inches above the natural bed of the river where the cruive is placed, and in the event of the sill being placed any higher than the natural bed of the river there must be a paved floor or apron to it down stream at least as wide as the cruive, having its lower end not higher than the natural level of the river, and having a slope not steeper than one in six; and otherwise the cruives shall be so constructed as to afford a ready and easy passage for the fish during the annual and weekly close times.

2. No cruive shall be less at any part of it than four feet broad in the clear; provided that where an upright post is used to support the

cruive, thereby dividing the width into two parts, the aggregate width exclusive of such post shall not be less than four feet.

3. The hecks or rails and inscales shall be capable of being removed from the cruive, and shall be removed during the annual close time. During the weekly close time the hecks or rails shall be removed, and the inscales shall either be removed or kept open for the space of four feet.

4. The bars of the upper hecks or rails shall be placed perpendicularly, not less than three inches apart, and they shall not be more than two inches thick, and not more than four inches broad in the up and down way of the stream, and they shall have their edges rounded off, so that only 1½ inches in breadth of the whole thickness of two inches shall remain in the side of the hecks or rails in the up and down way of the stream.

5. The bars of the inscales shall not be of larger dimensions than those of the hecks or rails, and they shall not be less than two inches apart.

6. Each side or half of the inscales shall not be less than three feet long for a cruive four feet wide in the clear, and shall be longer in the same proportion to any additional width of cruive. They shall be constructed so that the up stream ends cannot and shall not at any time approach nearer to each other than five inches.

7. No net or other contrivance whatever shall be placed or used on or at any cruive, or structure connected with a cruive, for the purpose of catching fish, or for preventing their entry into or passing through the same; nor shall any device be employed to scare, deter, or obstruct fish from entering into or passing through any such cruive. But, notwithstanding anything herein contained, it shall be lawful to place a canvas cloth or a wooden blind or blinds over the heck or hecks of a cruive whilst the fish are being taken out of it, provided such cloth, blind or blinds, be not applied longer than fifteen minutes at a time, or oftener than six times in the course of twenty-four hours, and that when there are more cruives than one at the same dam only one cruive shall be covered by the cloth or blinds at the same time.

8. No cruive shall be so constructed, enclosed, roofed, or built over, or in any other manner hidden or fenced in, as to prevent persons duly authorised from inspecting the same at all times, and ascertaining whether the law is being duly complied with.

9. No cruive shall be so altered as to create a greater obstruction to the free passage of fish than at present exists.

[1] See last note, and text, p. 270.

SCHEDULE (G.) [DAMS, LADES, AND WATER-WHEELS.]

Byelaw.[1]

1. Every new dam, and every portion of any dam that may require to be renewed or repaired after this time, shall be made and maintained water-tight or as nearly so as possible, so that no water that can reasonably be prevented shall run through the dam; but all water not taken into the lade for the use of the mills or other lawful purpose shall be made to flow over the dam as fully as may be practicable.

2. There shall be a sluice or sluices at the intake of every mill lade. No water shall, with the exception herein-after stated, be allowed to enter any mill lade beyond the quantity required for the use of the water wheel or wheels of any one fall on that lade, or for other lawful purpose in the lade; that is to say, no water shall be allowed to escape from any lade into the river by means of any bye-wash or over-flow, but all water not required for the uses aforesaid shall be made to flow over the dam into the river as far as may be practicable.

At the option of the millers or manufacturers, this provision may be carried out either by shutting the sluice or sluices at the intake of the lade, or by raising the banks of the lade to a height that will prevent an overflow of water from the lade when the sluice at the wheel and the bye-wash sluice herein-after mentioned are both kept shut. Provided always, that the said byelaw shall not apply to millers or manufacturers when taking measures necessary for the protection of their premises during heavy floods, or when rivers are cumbered with ice, or while necessary repairs are being executed on any emergency; provided that nothing be omitted or done unnecessarily to defeat the objects of this byelaw. Furthermore, in all cases when the intake sluice is more than 300 yards from the water wheel, it shall not be imperative to shut the intake sluice, or to keep the bye-wash sluice shut, during ordinary meal hours, or during any stoppage of the wheel not exceeding an hour at a time.

3. At the intake of every lade there shall be placed and constantly kept a heck or grating for each opening, or one embracing the whole openings, the bars to be not more than three inches apart, if horizontal, and not more than two inches if vertical.

4. A similar heck or grating shall be placed and constantly kept across the lade or troughs immediately above the entrance to each mill wheel.

5. A similar heck or grating shall be placed and constantly kept across the lower end of each tail lade at its entrance into the main river.

NOTE.—To prevent any obstruction to the flow of the water by the hecks or gratings in the lades, it is recommended that the lade should be increased in width where the hecks are placed, and that the heck, instead of being in a straight line across, should be curved or pointed up or down stream, and thereby increased in length, so that the aggregate of the openings between the bars shall exceed the sectional area (or waterway) of the lade, and thus compensate for the space occupied by the bars.

6. There shall be a bye-wash sluice placed as near as practicable above each water-wheel in the embankment of the lade of not less than three feet in width, with its sill as low as the bottom of the lade, and the said sluice shall be raised to a height sufficient to allow the smolts to descend for at least five but not exceeding eight hours each week from the 15th March to the first July, not more than six days intervening between each time of opening.

There shall be a salmon pass or ladder on the down stream face of every dam, weir, or cauld, capable of affording a free passage for the ascending fish at all times when there is water enough in the river to supply the ladder. The width shall not be less than four feet in the clear in rivers of less than 100 feet in breadth at the site of the dam, nor less than five

cruive, thereby dividing the width into two parts, the aggregate width exclusive of such post shall not be less than four feet.

3. The hecks or rails and inscales shall be capable of being removed from the cruive, and shall be removed during the annual close time. During the weekly close time the hecks or rails shall be removed, and the inscales shall either be removed or kept open for the space of four feet.

4. The bars of the upper hecks or rails shall be placed perpendicularly, not less than three inches apart, and they shall not be more than two inches thick, and not more than four inches broad in the up and down way of the stream, and they shall have their edges rounded off, so that only 1½ inches in breadth of the whole thickness of two inches shall remain in the side of the hecks or rails in the up and down way of the stream.

5. The bars of the inscales shall not be of larger dimensions than those of the hecks or rails, and they shall not be less than two inches apart.

6. Each side or half of the inscales shall not be less than three feet long for a cruive four feet wide in the clear, and shall be longer in the same proportion to any additional width of cruive. They shall be constructed so that the up stream ends cannot and shall not at any time approach nearer to each other than five inches.

7. No net or other contrivance whatever shall be placed or used on or at any cruive, or structure connected with a cruive, for the purpose of catching fish, or for preventing their entry into or passing through the same; nor shall any device be employed to scare, deter, or obstruct fish from entering into or passing through any such cruive. But, notwithstanding anything herein contained, it shall be lawful to place a canvas cloth or a wooden blind or blinds over the heck or hecks of a cruive whilst the fish are being taken out of it, provided such cloth, blind or blinds, be not applied longer than fifteen minutes at a time, or oftener than six times in the course of twenty-four hours, and that when there are more cruives than one at the same dam only one cruive shall be covered by the cloth or blinds at the same time.

8. No cruive shall be so constructed, enclosed, roofed, or built over, or in any other manner hidden or fenced in, as to prevent persons duly authorised from inspecting the same at all times, and ascertaining whether the law is being duly complied with.

9. No cruive shall be so altered as to create a greater obstruction to the free passage of fish than at present exists.

[1] See last note, and text, p. 270.

SCHEDULE (G.) [DAMS, LADES, AND WATER-WHEELS.]

Byelaw.[1]

1. Every new dam, and every portion of any dam that may require to be renewed or repaired after this time, shall be made and maintained water-tight or as nearly so as possible, so that no water that can reasonably be prevented shall run through the dam; but all water not taken into the lade for the use of the mills or other lawful purpose shall be made to flow over the dam as fully as may be practicable.

2. There shall be a sluice or sluices at the intake of every mill lade. No water shall, with the exception herein-after stated, be allowed to enter any mill lade beyond the quantity required for the use of the water wheel or wheels of any one fall on that lade, or for other lawful purpose in the lade; that is to say, no water shall be allowed to escape from any lade into the river by means of any bye-wash or over-flow, but all water not required for the uses aforesaid shall be made to flow over the dam into the river as far as may be practicable.

At the option of the millers or manufacturers, this provision may be carried out either by shutting the sluice or sluices at the intake of the lade, or by raising the banks of the lade to a height that will prevent an overflow of water from the lade when the sluice at the wheel and the bye-wash sluice herein-after mentioned are both kept shut. Provided always, that the said byelaw shall not apply to millers or manufacturers when taking measures necessary for the protection of their premises during heavy floods, or when rivers are cumbered with ice, or while necessary repairs are being executed on any emergency; provided that nothing be omitted or done unnecessarily to defeat the objects of this byelaw. Furthermore, in all cases when the intake sluice is more than 300 yards from the water wheel, it shall not be imperative to shut the intake sluice, or to keep the bye-wash sluice shut, during ordinary meal hours, or during any stoppage of the wheel not exceeding an hour at a time.

3. At the intake of every lade there shall be placed and constantly kept a heck or grating for each opening, or one embracing the whole openings, the bars to be not more than three inches apart, if horizontal, and not more than two inches if vertical.

4. A similar heck or grating shall be placed and constantly kept across the lade or troughs immediately above the entrance to each mill wheel.

5. A similar heck or grating shall be placed and constantly kept across the lower end of each tail lade at its entrance into the main river.

NOTE.—To prevent any obstruction to the flow of the water by the hecks or gratings in the lades, it is recommended that the lade should be increased in width where the hecks are placed, and that the heck, instead of being in a straight line across, should be curved or pointed up or down stream, and thereby increased in length, so that the aggregate of the openings between the bars shall exceed the sectional area (or waterway) of the lade, and thus compensate for the space occupied by the bars.

6. There shall be a bye-wash sluice placed as near as practicable above each water-wheel in the embankment of the lade of not less than three feet in width, with its sill as low as the bottom of the lade, and the said sluice shall be raised to a height sufficient to allow the smolts to descend for at least five but not exceeding eight hours each week from the 15th March to the first July, not more than six days intervening between each time of opening.

There shall be a salmon pass or ladder on the down stream face of every dam, weir, or cauld, capable of affording a free passage for the ascending fish at all times when there is water enough in the river to supply the ladder. The width shall not be less than four feet in the clear in rivers of less than 100 feet in breadth at the site of the dam, nor less than five

feet in breadth in rivers of less than 200 feet and more than 100 feet in breadth as aforesaid, nor less than six feet in breadth in rivers of more than 200 feet in breadth as aforesaid; the upper sill shall be not less than six inches below the lowest part of the crest of the dam for the whole width of the ladder; the inclination shall in no case be steeper than five horizontal to one perpendicular, but, wherever practicable, shall be seven or eight horizontal to one perpendicular, and in all cases shall be provided with breaks or stops placed at suitable intervals, so as to lessen the velocity of the current sufficiently to allow the fish to ascend without difficulty.

The foot of the ladder shall be placed where there is most running water, and with the best lead for the fish to approach it; and if the ladder should project beyond the toe of the dam, there shall be an apron of stone formed to the dam, extending as far down the river as the entrance to the pass or ladder, and extending throughout the whole length of the dam at either side of the ladder, and on a high enough level to prevent there being any pool in the river, or sufficient depth of water farther up than the entrance to the said pass or ladder, by which the fish might be induced to remain there obstructed in their ascent, and not be led to the ladder.

NOTE.—The commissioners would recommend the following details to be adopted in the construction of salmon ladders, in addition to those given in the foregoing byelaw, but do not insist on them, provided some other perfectly efficient arrangement be substituted, —viz., the side walls to be not less than twenty-two inches in height; the breaks to be not less than eighteen inches in height, with openings of ten inches in breadth at the alternate ends of each break, and five feet apart in cases where the gradient of the ladder is one in five and of a greater distance, but the same proportions being maintained where the gradient is easier than one in five.

7. No dam shall be so altered as to create a greater obstruction to the free passage of fish than at present exists.

[1] See text, p. 269, Act 1862, sect. 6, and Act 1868, sects. 11 & 12, *supra*, pp. 770, 781. This byelaw was recognised as valid; as applicable, in so far as regarded clauses 3, 4, and 5, to lades, &c., already made and requiring no repair; as not interfering with immemorial rights; and (by 4 to 3) as imposing an obligation on owners or occupiers of mills to execute the necessary works at their own cost, there being no difference in this respect between new and old dams—Kennedy *v.* Murray, 8th July 1869, 7 Macph. 1001 (see opinions).

No. XII.

41 & 42 VICTORIA, c. 51.

An Act to alter and amend the Law in regard to the Maintenance and Management of Roads and Bridges in Scotland.—[*8th August* 1878.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Com-

mons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title, and commencement of Act.

1. This Act may be cited for all purposes as the Roads and Bridges (Scotland) Act, 1878, and, except in so far as otherwise expressly provided, it shall commence and take effect in each county (including the burghs wholly or partly within the same) from the date of its adoption therein, as herein-after provided for.[1]

[1] In the notes, the 'Turnpike Act' is the statute of 1831, 1 & 2 Will. IV. c. 43; and the 'Statute Service Act' is the statute of 1845, 8 & 9 Vict. c. 41.

Extent of Act.

2. This Act shall apply to Scotland only, except in so far as otherwise expressly provided.

Interpretation.

3. In this Act the following words and expressions shall have the meanings hereby assigned to them respectively, unless there be something in the subject or context repugnant to such construction:

'The Secretary of State' shall mean one of her Majesty's principal Secretaries of State:

'Sheriff' shall include sheriff-substitute:

'The trustees' shall mean the county road trustees appointed and acting under this Act:

'The board' shall mean the county road board appointed and acting under this Act:

'The district committee' shall mean the district road committee appointed and acting in any district under this Act:

'Clerk,' 'treasurer,' 'collector,' and 'surveyor,' shall respectively mean the county road clerk, the county road treasurer, the county road collector, and the county road surveyor, appointed and acting for the time being under this Act:

'County' shall mean (except where otherwise expressly provided) the county exclusive of any burgh wholly or partly situate therein, and shall not include a county of a city.

'Burgh' shall mean and include royal burgh, parliamentary burgh, or any populous place the boundaries whereof have been fixed and ascertained under the provisions of the General Police and Improvement (Scotland) Act, 1862, or of the Act first therein recited, or have been determined by or under any local Act, provided that the population of such populous place, as the same may be ascertained as nearly as possible in the manner described in the seventh clause of the General Police and Improvement (Scotland) Act, 1862, within three months after this Act commencing to have effect therein, exceeds five thousand: 25 & 26 Vict. c. 101. 25 & 26 Vict. c. 101.

'Police burgh' shall mean every such populous place, the population of which shall not have been ascertained in manner aforesaid to exceed five thousand:

'Burgh local authority' or 'local authority of any burgh' shall mean the town council, commissioners of police, or other local authority having the management and control of the streets, and the power to levy assessments in respect thereof, in any burgh, under or in virtue of any general or local Act or of this Act:

feet in breadth in rivers of less than 200 feet and more than 100 feet in breadth as aforesaid, nor less than six feet in breadth in rivers of more than 200 feet in breadth as aforesaid; the upper sill shall be not less than six inches below the lowest part of the crest of the dam for the whole width of the ladder; the inclination shall in no case be steeper than five horizontal to one perpendicular, but, wherever practicable, shall be seven or eight horizontal to one perpendicular, and in all cases shall be provided with breaks or stops placed at suitable intervals, so as to lessen the velocity of the current sufficiently to allow the fish to ascend without difficulty.

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'Sheriff' shall include sheriff-substitute:

'The trustees' shall mean the county road trustees appointed and acting under this Act:

'The board' shall mean the county road board appointed and acting under this Act:

'The district committee' shall mean the district road committee appointed and acting in any district under this Act:

'Clerk,' 'treasurer,' 'collector,' and 'surveyor,' shall respectively mean the county road clerk, the county road treasurer, the county road collector, and the county road surveyor, appointed and acting for the time being under this Act:

'County' shall mean (except where otherwise expressly provided) the county exclusive of any burgh wholly or partly situate therein, and shall not include a county of a city.

'Burgh' shall mean and include royal burgh, parliamentary burgh, or any populous place the boundaries whereof have been fixed and ascertained under the provisions of the General Police and Improvement (Scotland) Act, 1862, or of the Act first therein recited, or have been determined by or under any local Act, provided that the population of such populous place, as the same may be ascertained as nearly as possible in the manner described in the seventh clause of the General Police and Improvement (Scotland) Act, 1862, within three months after this Act commencing to have effect therein, exceeds five thousand: 25 & 26 Vict. c. 101. 25 & 26 Vict. c. 101.

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'Burgh local authority' or 'local authority of any burgh' shall mean the town council, commissioners of police, or other local authority having the management and control of the streets, and the power to levy assessments in respect thereof, in any burgh, under or in virtue of any general or local Act or of this Act:

'Parish' shall include united parish, but it shall be exclusive of any burgh or police burgh wholly or partly situated within a parish:

'Turnpike road' shall include all roads and bridges forming part of any turnpike road trust, and all bridges under the management of any separate bridge trust:

'Statute labour' shall include moneys raised as the conversion of statute labour, or in lieu thereof, and bridge money:

'Statute labour road' shall include all roads and bridges maintained by statute labour:

'Highway' shall mean and include all existing turnpike roads, all existing statute labour roads, all roads maintained under the provisions of the Highland Roads and Bridges Act, 1862, and all bridges forming part of any highway, and all other roads when declared to be highways under the provisions of this Act, all public streets and roads within any burgh or police burgh not at the commencement of this Act vested in the local authority thereof, but shall not include any street or road so vested, or any street or road or bridge which any person is at the commencement of this Act bound to maintain at his own expense:

25 & 26 Vict. c. 105.

'Bridge' shall include the accesses thereof, but shall not include any bridge which any person is, at the commencement of this Act, bound to maintain at his own expense:

'Tolls' shall include pontages; and also any sum payable in respect of any exemption from or relinquishment of tolls:[1]

'Causeway-mail' shall include through customs and all exactions of whatever kind, and also any sum or duty payable or leviable in lieu or satisfaction thereof or in respect of any exemption therefrom, other than tolls or assessments, made or which may be made in respect of the use of or passage over the streets or roads within any burgh, but shall not include petty customs or any sum or duty as aforesaid except in so far as they are exacted payable or leviable in respect of goods, articles, things, or animals passing or carried through such burgh:

'Proprietor' and 'lands and heritages' shall have the same meanings as are attached thereto respectively in the Act passed in the seventeenth and eighteenth years of the reign of her present Majesty, chapter ninety-one, intituled 'An Act for the valuation of lands 'and heritages in Scotland;' and the expression 'the valuation 'roll' shall mean the valuation roll in force for the time in any county or burgh, as the case may be, made up under the authority of the said Act, or any other Act relating to the valuation of lands and heritages in Scotland:[2]

17 & 18 Vict. c. 91.

'Person' shall include corporation, incorporated company, commissioners or trustees (not being county road trustees):

'Ratepayer' shall mean any person (not being a Commissioner of Supply) being of full age and not subject to any legal incapacity, whose name appears as proprietor, tenant, or occupier of lands and heritages entered on the valuation roll for the county as of the annual value of four pounds and upwards, or as joint proprietor, tenant, or occupier of lands and heritages entered on such roll of an annual value which, when divided by the number of such

joint proprietors, tenants, or occupiers, yields a quotient of four pounds and upwards:

'Debt commissioner' shall mean a debt commissioner appointed for the purposes of this Act:

'Local newspaper' shall mean any newspaper circulating in the county or burgh, as the case may be:

Where in this Act notice is required to be given by 'special advertisement,' such notice shall be published once in at least two local newspapers.

[1] See Fife Road Trs. *v.* Cowdenbeath Coal Co., 19th Oct. 1883, 21 Sc. L.R. 15.
[2] See text, *supra*, p. 194.

Highways may cease to be such, and other roads may become highways.[1]

42. The trustees may, on a written report from the board recommending the same, declare, at any annual general meeting, that any highway shall cease to be a highway within the meaning and for the purposes of this Act,[2] and that whether another highway shall have been substituted therefor or not;[3] or that any road or bridge which at the commencement of this Act was not maintained out of public funds derived as aforesaid, shall, with the consent of the proprietor, which consent he may effectually give although not an absolute owner, be a highway within the meaning and for the purposes of this Act, and as such be added to the list mentioned in the preceding section; but such declaration shall not be competent unless the county road clerk shall have given notice of the same by special advertisement, and by printed notices affixed to the principal door of each church in every parish in which any part of such road, highway, or bridge is situated, and also affixed in some conspicuous place at both ends of such road, highway, or bridge, for at least one month before the date of the meeting at which such declaration is made.

[1] The Turnpike Act, sect. 70, regarding shutting up roads, was less general, and gave powers to the Justices, on the application of the road trustees, after advertisement and notice similar to those demanded by this and the next section, with appeal to quarter sessions or to the sheriff.

[2] If there had been also an existing servitude road on the same line, the act of the trustees would not affect the private right—M'Gavin *v.* M'Intyre, 12th June 1874, 1 Ret. 1016, overruling or explaining Smiths *v.* Knowles, 11th March 1825, 3 S. 651 (N.E. 456). By referring to the definition of highway in the interpretation clause, it will be seen that the doubt raised under a local Act, whether the trustees could interfere with a mere right of way, cannot arise here—Murray *v.* Arbuthnot, 29th Nov. 1870, 9 Macph. 198; and see Pollock *v.* Thomson, 18th Dec. 1858, 21 D. 173.

[3] See the case of Davidson *v.* E. Fife, 5th June 1863, 1 Macph. 874, already noticed, *supra*, p. 283.

A highway ceasing to be a highway may be shut up.

43. After a road has, as herein-before provided, ceased to be a highway, the trustees may resolve that it shall be shut up,[1] but such resolution shall not take effect until the expiration of six months from the date thereof: Provided always, that thirty days notice of the intention to propose a resolution to that effect shall be given by advertisement in any newspaper usually circulating in the county in which such road proposed to be shut up is situated, and that, upon such resolution being carried, the county road clerk shall give notice of the same by special advertisement, and by printed notices affixed to the principal door of each church in every parish in which any part of such road is situated, and also by printed notices affixed during the said six months in some conspicuous place at both ends of such road.[2]

The determination of the trustees under the preceding section shall be final, and not subject to review in any court or in any process or proceeding whatsoever, unless any three ratepayers who shall be dissatisfied with such determination shall, within fourteen days after the date thereof, appeal to the sheriff, and the resolution of the trustees under this section shall in like manner be final and not subject to review, unless any three inhabitants who shall be dissatisfied therewith shall, within six months after the date thereof, appeal to the sheriff, who shall hear and determine the appeal in a summary way, and the decision of the sheriff shall be final and not subject to review, and the expenses of such appeal shall be in the discretion of the sheriff.

The ground occupied by any road which has been shut up in terms of this section shall fall and belong to the person or persons whose lands immediately adjoin thereto, and from whom or his or their predecessor or predecessors the ground so occupied was acquired without payment; and if any question shall arise as to the person or persons to whom such ground should fall and belong, the same shall be disposed of by the sheriff, whose decision shall be final: Provided, that if a price was originally paid for such ground the trustees shall dispose of the same as nearly as may be in the manner herein provided in regard to toll-houses.[3]

[1] It cannot be shut up without such a resolution—*e.g.*, by the substitution of a diverted road for a part of an old highway obstructed by a railway company under compulsory powers—Campbell *v.* Walker, 29th May 1863, 1 Macph. 825.

[2] The powers of the trustees must be exercised 'in precise terms of the Act,' *per* L. Ch. Eldon in Walker *v.* Weir, 1817, 6 Pat. 281—or the transaction be protected by sufficient acquiescence or by prescription. The formality of the notices, &c., will not be presumed, but must be proved—Forbes *v.* Morison, 3d Dec. 1851, 14 D. 134. See a case in which no special procedure was laid down—Carlisle Road Trs. *v.* Tennent, 9th Feb. 1854, 16 D. 521. Neglect of formality takes the case out of the statute, and may be brought before the Court of Session notwithstanding a limitation of appeal—Shearer *v.* Hamilton, 24th Jan. 1871, 9 Macph. 456.

[3] See Shearer *v.* Hamilton, *supra*, [2], and see next section.

Toll-houses to be first offered to adjoining proprietors.

44. The trustees before selling any toll-house or other building belonging to them shall first offer the same, together with the site thereof, to the person or persons whose lands immediately adjoin thereto, at a price to be fixed by a valuator, to be named by the sheriff, and the price obtained for such toll-house or other buildings shall be applied in the first place to the payment of road debts, if any, and the balance, if any, to the general purposes of this Act: Provided always, that in fixing such price the valuator shall take into consideration the terms and conditions upon which such site was originally acquired.[1]

[1] The Turnpike Act, sect. 71, offered useless toll-houses first to the person from whose land the stance was taken, and then to the adjoining owner, and sent disputes as to the price to a jury.

Provision for footpaths.

45. It shall be lawful for a district committee, or for the board where the county is not divided into districts, subject to the approval of the trustees, to make and, if made, to maintain footpaths on the side or sides of any highway.[1]

[1] Sect. 82 of the Turnpike Act made footpaths compulsory within two miles of a town of 2000 souls.

Construction of Roads and Bridges.

New roads and bridges may be constructed by the board, and assessed for upon proprietors.[1]

58. The board, subject to the approval of the trustees, to be given at their annual general meeting, may from time to time, at a meeting to be called for the purpose by special advertisement, or by special circular sent through the post to every member of the board, stating the object of the meeting, resolve to construct any new road or bridge that they may think requisite, or may enter into an agreement with any person or corporation (including the trustees of any adjoining county or the local authority of any burgh) for the construction of any new road or bridge, and may require such person or corporation to provide the whole or any part of the expense of such new road or bridge as a condition of the construction of the same, and all new roads and bridges so constructed shall be highways; and the expense of such construction, so far as payable by the board, shall be raised by an assessment to be imposed and levied as the trustees may determine either on the county (except as herein-after otherwise provided), or on the district or districts within which such new road or bridge is situated, or partly situated, in the same manner and with the same powers, including the power of borrowing money, as is herein-after provided in the case of assessments for payment of debt in so far as the same are applicable thereto;[2] and such assessment shall not extend over a longer period than fifty years, and shall be levied from and paid by the proprietors of lands and heritages within such county or district or districts; provided, that where any such new bridge is not situate wholly within one county or burgh, the agreement for the construction thereof shall provide for the proportions in which the expense of the future maintenance of such bridge shall be divided between the county or counties and burgh or burghs in which the same is partly situated respectively; and failing such agreement such expense shall be deemed to rest equally upon the counties or county and burgh or burghs within which such bridge is partly situated, as the case may be: Provided always, that no such resolution for the construction of any new road or bridge in any insular district shall be carried into effect without the consent of the district committee of such district, and that no assessment shall be levied on any other part of the county for the expense of such construction, nor shall any assessment be levied on such district for the expense of construction of any new road or bridge in any other part of the county.

The burgh local authority shall have the same powers in regard to the construction of new streets or roads or bridges to be wholly or partly situate within the burgh, which the county road trustees have in regard to the construction of new roads or bridges wholly or partly situated within the county; but the assessments for paying or providing for the expense of such construction shall be levied in the same manner as the assessments for maintaining and repairing the streets within the burgh.[3]

The provisions of this section shall apply to the rebuilding of bridges.

[1] Where roads had been authorised by statute, the Turnpike Act (sect. 60 *et seq.*) furnished compulsory clauses similar to those later enacted by the Lands Clauses Act.

[2] Sect. 71 *et seq.*, and text, p. 686.

[3] Sects. 34, 54, and text, p. 684.

Byelaws.

Byelaws.

104. The trustees may from time to time make, with respect to all or any highways within their jurisdiction, and, when made, may alter or repeal byelaws for all or any of the purposes following; (that is to say,)

(1.) For the general regulation of traffic on highways; and

(2.) For prohibiting the use of any waggon, cart, or carriage, drawn by animal power, and having wheels of which the fellies or tires are not of such width in proportion to the weight carried by, or to the size of, or to the number of wheels of such waggon, cart, or carriage, as may be specified in such byelaws; and

(3.) For prohibiting the use of any waggon, cart, or other carriage, drawn by animal power, not having the nails on its wheels countersunk in such manner as may be specified in such byelaws, or having on its wheels bars or other projections forbidden by such byelaws; and

(4.) For prohibiting the locking of the wheel of any waggon, cart, or carriage, drawn by animal power, when descending a hill, unless it is locked in such manner as to prevent the road from being destroyed or injured by the locking of such wheel; and

(5.) For prohibiting the erection of gates across highways except under regulations specified in such byelaws.

Penalties to be recovered summarily may be imposed by any such byelaws on persons breaking any byelaw made under this section: Provided, that no such penalty exceeds for any one offence the sum of two pounds, and that the byelaws are so framed as to allow of the recovery of any sum less than the full amount of the penalty.

No byelaw shall be binding until it has been approved of by the sheriff, after it has been published in some newspaper circulating in the county at least ten days before the sitting of the sheriff for its consideration.

Repeal of Acts.

8 & 9 Vict. c. 41.

1 & 2 Will. 4. c. 43.

122. From and after the commencement of this Act in any county, the Act passed in the eighth and ninth years of the reign of her present Majesty, chapter forty-one, and the Act passed in the first and second years of the reign of his Majesty King William the Fourth, chapter forty-three, except the sections thereof incorporated herewith as after mentioned, shall cease to have effect therein; provided that nothing herein contained shall affect anything duly done or suffered, or any right or liability acquired, accrued, or incurred, or any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment contained in either of the last-mentioned Acts, or in any other Act which, from and after the commencement of this Act in any county, shall cease to have effect therein: Provided also, that until the fifteenth day of May or twenty-sixth day of May, as the case may be, following the commencement of this Act in any county where such commencement shall happen before the year one thousand eight hundred and eighty-three, and otherwise until the first day of June one thousand eight hundred and eighty-three, all provisions for levying, collecting, and recovering toll duties, statute labour conversion money, bridge money, and

other moneys of whatever kind, for managing, maintaining, and repairing roads, bridges, and highways situated or partly situated in such county or in any burgh therein, and also all provisions against persons evading or attempting to evade payment of such toll duties and other moneys, shall continue in full force and effect, and may be put in operation by the trustees or burgh local authority under this Act, as the case may be, in the same manner as they might have been put in operation by the trustees under the other Acts mentioned in this section.

Incorporation of parts of General Turnpike Act. 1 & 2 Will. 4. c. 43.

123. The following sections of the Act passed in the first and second years of the reign of his Majesty King William the Fourth, chapter forty-three, viz., sections eighty, eighty-one, eighty-three, eighty-four, eighty-five, sections eighty-seven to ninety-two, both inclusive, section ninety-four, and sections ninety-six to one hundred and eight, both inclusive (the enactments whereof are contained in Schedule C. to this Act annexed), in so far as the same are not inconsistent herewith, shall be and are hereby incorporated with this Act, and, from and after the commencement of this Act in any county, shall extend and apply to all the highways made or to be made within such county, and, except in so far as inconsistent with the provisions of any general or local Police Act in force therein, within the burgh or burghs situated or partly situated within the same; and in the construction of the aforesaid sections of the said Act, with reference to this Act, the expression 'trustees under any 'Turnpike Act,' or words having the like import, and the expression 'turn-'pike roads' shall mean and apply to the trustees of counties and local authorities of burghs under this Act, and the roads, highways, and bridges placed under their management by this Act, as the case may require, in so far as such application shall not be excluded by the context or any of the provisions of this Act; and where notice is required to be given 'on 'the two nearest toll bars,' it shall be sufficient if it is given once in two newspapers circulating in the county or burgh, as the case may be: Provided that it shall not be lawful for the trustees, or local authority, as the case may be, or any one authorised by them, under the powers conferred by the eightieth section of the recited Act, to carry away any materials to be used by them for any purpose whatsoever from any place beyond the county or burgh, as the case may be, or to a greater distance than three miles from the place where such materials have been obtained, unless satisfaction shall be made for the same in the manner provided in said section in the case of stones to be used for building.

Recovery and application of penalties.[1]

124. All penalties under this Act or the enactments incorporated herewith or continued in force hereby may be recovered, together with the expenses of process, at the instance of the procurator fiscal, or of the clerk of the trustees, or of the clerk of the burgh local authority, as the case may be, upon the testimony of one or more credible witnesses, before the sheriff or any Justice of the Peace of the county or magistrate of the burgh, as the case may be, in which the same shall have been incurred, under the provisions of the Summary Procedure Act, 1864; and all the jurisdictions, powers, and authorities necessary for this purpose are hereby conferred on sheriffs and Justices of the Peace, and magistrates of burghs, and their decision shall be final, save only that the provisions of the Summary Prosecution Appeals (Scotland) Act, 1875, shall apply to the same.

27 & 28 Vict. c. 53.

38 & 39 Vict. c. 62.

Every prosecution shall be begun within six calendar months after the penalty shall have been incurred and not afterwards: Provided, that this shall not apply to any proceedings for the recovery of assessments levied under this Act.

It shall be lawful for any person acting in the execution of this Act, and such other person as any such person shall call to his assistance, or for any person seeing any offence committed against this Act, without any warrant or authority other than this Act, *brevi manu*, to seize and detain any person whose name and place of abode are unknown, and who shall commit any such offence, and take such person without delay before the sheriff or any neighbouring Justice of the Peace for the county or magistrate of the burgh, as the case may be, where the offence shall have been committed or where such offender shall be seized and apprehended, who shall forthwith examine and discharge or commit such person till caution *de judicio sisti* be found, as the case may seem to require.

Every penalty imposed and recovered under this Act shall be paid to the clerk of court and by him shall be accounted for and paid to the treasurer of the trustees or of the burgh local authority, as the sheriff or Justice of the Peace or magistrate shall direct.

Every penalty imposed by this Act may be reduced or mitigated according to the judgment of the sheriff or Justice of the Peace or magistrate.

Every person found liable in any penalty recoverable summarily under this Act shall, failing payment thereof, and expenses, immediately or within a specified time, as the case may be, be liable to be imprisoned for a term not exceeding sixty days; and the conviction and warrant may be in the form No. 3 of Schedule K. of the Summary Procedure Act, 1864.

27 & 28 Vict. c. 53.

[1] This section applies modern summary procedure for the recovery of penalties, and enacts all the provisions which are now required to supersede the anxious detail of sects. 109-118 of the Turnpike Act, and sects. 38-46 of the Statute Service Act.

Section 123.

SCHEDULE (C.)

Sections of 1 *&* 2 *Will.* 4. *c.* 43, *referred to in the foregoing Act.*[1]

Power to get materials.[2]

80. And be it enacted, that it shall be lawful for the trustees of any turnpike road, or any person authorised by them, to search for, dig, and carry away materials for making or repairing such road and the footpaths thereof or building, making, or repairing any toll-house, bridge, or any other work connected with such road, from any common land, open uncultivated land, or waste,[3] or to deposit mud or rubbish thereon, without paying any surface damages, or anything for such materials, except for stone to be used for building, and to carry the same through the ground of any person, such trustees or other persons authorised by them filling up the pits or quarries, levelling the ground wherefrom such materials shall be taken, or fencing off such pits or quarries so that the same shall not be dangerous to any person or cattle, and paying for or tendering the damage done by going through and over any enclosed [4] or arable lands for or with such materials, mud, or rubbish, such damages to be ascertained

as herein-after mentioned; and also that it shall be lawful for such trustees and other persons authorised by them as aforesaid to search for, dig, and carry away any such materials in or out of the enclosed land of any person where the same may be found, and to land or carry the same through or over the ground of any person (such materials not being required for the private use[5] of the owner or occupier of such land, and such land or ground not being an orchard, garden, lawn, policy, nursery for trees, planted walk, or avenue[6] to any house, nor enclosed ground planted as an ornament or shelter to a house, unless where materials have been previously in use to be taken by the said trustees), making or tendering such satisfaction for stones to be used for building, and for the surface damage done to the lands from whence such materials shall be dug and carried away, or over or on which the same[7] shall be carried or landed, as such trustees shall judge reasonable; and in case such trustees and the proprietor or occupier of such lands shall differ as to the amount of such payments and damages as aforesaid, it shall be competent to the sheriff or Justices of the Peace for the shire wherein the place from whence such materials shall have been taken, or on which the same shall have been landed or carried, shall be situate, on the application of either party, with an inducie of six days, to hear and determine all questions as to the amount of such payments and damages, and the expenses attending the same: Provided always, that before taking such materials from any enclosed land from which the same shall not previously have been in use to be taken,[8] fourteen days previous notice in writing, signed by two trustees, shall be given to or left at the usual residence of the proprietor and occupier of the land or quarry from which it is intended to take the same, or his or her known agent, to appear before the sheriff or any two Justices of the Peace acting for the shire where the said lands are situate, to show cause why such materials shall not be so taken; and in case such proprietor, occupier, or agent shall attend pursuant to such notice, or shall neglect or refuse to appear (proof on oath in such case being duly made of the service of such notice), such sheriff or Justices shall authorise or prohibit the trustees to take such materials, or make such order[9] as they shall think fit.[10]

Satisfaction.

Notice to be given before materials are taken from enclosed lands.

[1] Sect. 123.

[2] A similar law in South Africa is discussed in Divisional Council *v.* De Villiers, 2 App. Cas. 567.

[3] Including beds of rivers. The Court remitted to a man of skill to regulate the working—Lyell's Trs. *v.* Forfarshire Road Trs., 18th May 1882, 9 Ret. 792. The decision deserves reconsideration. The only remedy in the statute is, in the case contemplated, payment of surface damages by the trustees on agreement or decree; that remedy looks to injury immediately ascertainable in existence and extent; damage may be done by operations *in alveo* at an indefinite distance from this locus, and even on a different estate; and there is no warrant in the Act for the interference of a third party so injured, or in any case for supervision by a man of skill.

[4] See the authentic interpretation of the word in a similar English statute, given by 4 & 5 Vict. c. 51.

[5] Opinion (dub. L. Medwyn), that the habit of selling stone from a quarry for profit was private use in the sense of the Act—Graham *v.* Renfrewshire Road Trs., 21st Feb. 1849, 11 D. 682; but granite chips left in dressing blocks in a quarry were available, it being shown by the fact that they had accumulated in huge heaps, that they were not required either for private use or sale—Yeats *v.* Taylor, 9th Jan. 1863, 1 Macph. 221. The leading words of the bracketed part apply to all the rest thereof, and therefore whether materials have been in previous use to be taken or not; in

other words, the clause beginning 'unless' applies only to 'orchard, garden,' &c.—Lyell's Trs. *v.* Forfarshire Road Trs., *supra*.

[6] Ramsden *v.* Yeates, 6 Q.B.D. 583.

[7] *I.e.*, not only the materials last mentioned, but materials got in waste ground—Tapsell *v.* Crosskey, 7 M. and W. 441 *per* Parke B. Any wanton and unnecessary use of the landowner's ground for this purpose will be checked—Boyfield *v.* Porter, 13 East, 200.

[8] If there have been previous long continued use unchallenged, and known by the landowner, notice previous to its inception does not require to be proved—Graham *v.* Renfrewshire Road Trs., 29th May 1851, 13 D. 1012.

[9] In England the order must set forth the part of the lands from which the materials are to be obtained—R. *v.* Manning, 1 Burr. 377; and the damage to owner and occupier must be separately assessed, ibid.; and that only after it has been incurred, for till then the effect of wet or dry weather on the ground cannot be computed—Boyfield *v.* Porter, *supra*, [7], *per* L. Ellenborough. The order does not in England continue indefinitely, but is limited to the necessities of the particular occasion in respect of which it was granted—E. Manvers *v.* Bartholomew, 4 Q.B.D. 5; but this turned on the different wording of the English Act, 5 & 6 Will. IV. c. 50, sect. 53.

[10] Add the additional proviso at the end of sect. 123 of the present Act, *supra*, p. 799.

Penalty on taking away materials provided for repairing turnpike roads.

81. And be it enacted, that it shall not be lawful for any person to take away any materials which shall have been procured or provided or used for the repair or use of any turnpike road, or to take any materials out of any quarry which shall have been opened by any turnpike trustees for the purpose of getting materials for any turnpike road, so as to interrupt or interfere with the workings carried on by such trustees; and every person so offending shall for every such offence forfeit and pay any sum not exceeding five pounds.[1]

[1] Sect. 82, here omitted, is referred to in note to sect. 45 of this Act, *supra*, p. 796.

Power to use adjoining ground as a temporary road.

83. And be it enacted, that it shall be lawful for the trustees of any turnpike road to make a road through the grounds adjoining to any ruinous or narrow part of any turnpike road (not being an orchard, garden, lawn, policy, planted walk, or avenue to any house, or nursery for trees) to be made use of as a public highway whilst the old road is repairing or widening, making recompense to the proprietor and occupier of such grounds for the damages they may thereby sustain; and in case such trustees and such proprietor or occupier shall differ as to the amount of such damages, it shall be competent to the sheriff or Justices of the Peace for the shire where such damages or any part thereof shall have been incurred, on the application of either party, with an inducie of six days, to hear and determine all questions as to the amount of such damages, and the expenses attending the same.

Trustees to make side drains.

84. And be it enacted, that it shall be lawful for the trustees of every turnpike road to make sufficient side drains on any such road, with power to conduct the water therefrom into any adjoining land, ditch, or watercourse (such land not being the site of any house or garden) in such manner as shall be least injurious to the proprietor or occupier of such land; the said side drains to be maintained at the expense of the trustees.

Trustees to make ditches.

85. And be it enacted, that it shall be lawful for the trustees of every turnpike road to make sufficient ditches along the side of any such road, provided that if the land is enclosed on the side of such turnpike road, such ditch shall be made on the field side of the fence, and also to make

proper ditches and outlets from the said side ditches through any lands adjoining any such turnpike road (not being the site of any house or garden) in such manner as shall be least injurious to the proprietor and occupier of such land; and the occupier of such land (unless such land be unenclosed and waste) shall be obliged in all time thereafter to keep clear such side ditches and other ditches or outlets, as well as all such ditches already made along the sides of any turnpike road, when so required by the said trustees or their surveyor; and in case the proprietor or occupier shall neglect or refuse to cleanse such side ditches or other ditches or outlets, when duly required by such trustees or surveyors, such trustees or surveyors are hereby empowered to cleanse such side ditches or other ditches or outlets, and levy the expense thereof from the occupier of such grounds, in the same manner as other penalties by this Act imposed:[1] Provided always, that nothing herein contained shall prohibit any proprietor or occupier from substituting, to the satisfaction of the trustees, any other equally effectual ditch or outlet in place of that constructed by the trustees.[2]

[1] Now as stated, *supra*, p. 799.

[2] Sect. 86 refers to faulty junctions, chiefly caused by the diversity of road authorities, now happily removed.

Timber, stones, &c., left on roads may be seized.

87. And be it enacted, that it shall be lawful for any trustee or surveyor of any turnpike road, or other person authorised by the trustees of any such road, *brevi manu*, to seize and carry off any timber, stone, dung, rubbish, or other matter or thing whatsoever laid or left upon any such road or footpath or on any side drain or ditch of such road, and to sell or otherwise dispose of the same as a forfeiture, in such manner as the trustees shall direct, unless such matter or thing shall be previously redeemed by the owner thereof by payment of the penalty in such case enacted:[2] Provided always, that the proprietor or occupier of any lands or houses may lay down any materials for building or repairing any house or wall immediately adjoining any turnpike road, such materials occupying one fourth part of such road only, and such proprietor or occupier giving three days previous notice in writing to the clerk or surveyor of the road, and erecting such fence round such materials, and fixing and lighting lamps thereon, in such manner as the trustees may require.

[1] Sect. 96, *infra*, p. 806.

Owners of adjoining lands to cut the hedges and branches of trees prejudicing the road.

88. And be it enacted, that the owners or occupiers[1] of the lands next adjoining to every turnpike road shall prune and trim their hedges, and cut them down to the height of six feet from the surface of the ground, and also cut, prune, or lop the branches of trees, bushes, and shrubs growing in or near such hedges or other fences adjacent thereto,[2] (such fences, trees, bushes, or shrubs not being in any garden, orchard, policy, walk, or avenue to a house, nor any tree, bush, or shrub being an ornament or shelter[3] to a house, unless the same shall hang over the road or footpath or any part thereof in such manner as to impede or annoy any carriage or person travelling thereon,) in such manner that the turnpike road shall not be prejudiced by the shade thereof, and that the sun and wind may not be excluded from such turnpike road to the damage thereof; and that if such owner or occupier shall not, within ten days after

If neglected for ten days, surveyor may complain to the justices, who may order them to be cut.

notice given by the surveyor for that purpose, cut, prune, and trim such hedges, or cut, prune, or trim such branches of trees, bushes, and shrubs, in manner aforesaid, it shall and may be lawful for such surveyor, and he is hereby required to make complaint to the sheriff or Justices of the Peace, who shall grant warrant to summon the occupier of such lands and the owner thereof, or his agent or factor in his absence, ten days after service, to appear and answer the said complaint; and if it shall appear to such sheriff or Justices that such occupier or owner has not complied with the requisites of this Act in that behalf, it shall and may be lawful for such sheriff or Justices, upon hearing the surveyor and occupier or owner of such land, or an agent authorised to appear for either of them, or in default of their appearance, upon having due proof of the service of such summons, and considering the circumstances of the case, to order[4] such hedges to be cut, trimmed, and pruned, and such branches of trees, bushes, and shrubs to be cut, pruned, or trimmed, in such manner as may best answer the purposes aforesaid; and if the occupier of such lands shall not obey such order within ten days after it shall have been made, and he shall have had due notice thereof, he shall forfeit the sum of two shillings for every twenty-four feet in length of such hedge which shall be so neglected to be cut, trimmed, and pruned, and the sum of twopence for every tree, bush, or shrub which shall be so directed to be cut, pruned, or trimmed; and the surveyor, in case of such default made by the occupier, shall and he is hereby required to cut, prune, and trim such hedges, and to cut, prune, or trim such branches of trees, bushes, and shrubs in the manner directed by such order; and such occupier shall be charged with and pay, over and above such penalties, the expenses of such cutting, pruning, and trimming.

Penalty for neglect after order of justices.

[1] The corresponding English Act is read as if 'owner' included 'occupier'—Woodard *v.* Billericay Board, 11 Ch. D. 214.

[2] The words in a corresponding English statute, 'next adjoining,' were held to exclude the case of a slip of land intervening between the road and the trees—Jenny *v.* Brook, 8 Jur. 781.

[3] See Frompton *v.* Taffin, 2 Jur. 986.

[4] The order, in English law, should describe the extent of the cutting required, and also set forth that the trees ordered to be cut were not planted for ornament—Brook *v.* Jenny, 2 Q.B. 265, 6 Q.B. 323.

Time of cutting or pruning hedges.

89. And be it enacted, that no person or persons shall be compelled, nor any surveyor permitted, by virtue of this Act, to cut or prune any hedge at any other time than between the last day of September and the last day of March, nor to cut, prune, or lop the branches of any ornamental trees (unless the same shall hang over the road or footpath or any part thereof so as to impede or annoy any carriage or person travelling thereon), if the proprietor or tenant of the lands shall become bound to pay the additional expenses which their remaining uncut or unlopped may occasion the said trustees in keeping any such roads in repair.

Penalties on persons making encroachments.

90. And be it enacted, that if any person shall fill up or obstruct any ditch at the side of any turnpike road, or any ditch used for conveying water from the said road, or any side drain thereof, or ditch or drain under the same, or shall encroach by making any dwelling-house or other building, or any hedge, ditch, or other fence, or in any other manner whatever, on any turnpike road,[1] or shall make any drain,[2] gutter, sink,

or watercourse across, under, or upon, or shall turn or conduct any drain or water across, under, or upon, or in any way break up the surface of any turnpike road, without the consent in writing of the trustees of such road or of their surveyor, such person shall forfeit for every such offence a penalty not exceeding five pounds; and it shall be lawful for the trustees of any such road to cause such dwelling-house or other building, hedge, ditch, or fence, drain, sink, watercourse, gutter, or other encroachment, to be taken down or filled up at the expense of the person so offending.

[1] Either on the part actually used, or on the practicable sides—Evans *v.* Oakley, 1 C. and K. 125. The width of the road is *primâ facie* the space between the fences on enclosed ground, not merely the formed track—Elwood *v.* Bullock, 6 Q.B. 383, 409, *per* Denman C.-J.; R. *v.* Johnson, 1 F. and F. 657; R. *v.* Wright, 3 B. and Ad. 683, *per* L. Tenterden C.-J. But rebuilding a cottage, which had long stood within these limits, did not infer a conviction under the similar English section, since the public use had not been established—Chapman *v.* Robinson, 1 E. and E. 25.

[2] *E.g.*, water or gas pipes, without statutory authority—R. *v.* Sheffield Gas Co., 18 Jur. 146; R. *v.* Longton Gas Co., 29 L.J.M.C. 118. See cases of telegraph-posts—R. *v.* U.K. Co., 3 F. and F. 73, 31 L.J.M.C. 166.

No houses, &c., to be erected on the sides of any turnpike road within the distance of twenty-five feet from the centre thereof, without consent of the trustees.

91. And be it enacted, that no houses, walls, or other buildings above seven feet high shall be erected without the consent of the trustees previously obtained in writing, and no new enclosures or plantations shall be made, within the distance of twenty-five feet from the centre[1] of any turnpike road, without prejudice always to any farther powers and authorities vested in any turnpike trustees thereanent by any local Act of Parliament, and no place out of which the trustees of any turnpike road have been in the use of taking materials shall, without the consent of the trustees previously obtained in writing, be in any way shut up or enclosed, under the penalty of five pounds for every such offence, and the expense of demolishing such house, wall, or building, or of removing such enclosure or plantation; and the sheriff of the county and Justices of the Peace are hereby authorised and empowered, on application by any one of the turnpike trustees or their clerk, to order such house, wall, building, enclosure, or plantation to be pulled down or removed at the expense of the person erecting or making the same, or of the occupier or owner of the ground; nor shall the enclosing of such place out of which materials shall have been taken as aforesaid preclude the trustees of any turnpike road from re-opening and using the same.[2]

[1] The centre, in a corresponding English Act (5 & 6 Will. IV. c. 50, sect. 63) is the centre of the part repaired and maintained by the surveyor for twelve months previously.

[2] Sect. 80, *supra*, p. 800. By the present Act of 1878, sect. 102, minimum distances prescribed in any local Act are continued obligatory, if greater than that here mentioned, though in other respects the local Acts are superseded.

Power to water roads.

92. And be it enacted, that it shall be lawful for the trustees of any turnpike road to cause the whole or any part thereof to be watered, and for that purpose to take water from any pond, stream, or source, with the consent of the owner thereof, or other persons interested therein, and to dig and make ways and passages and erect pumps and engines for such purpose, and to make such compensation as may be agreed upon between the said trustees and such owners or persons as aforesaid.[1]

[1] Sect. 93 directed the erection of milestones and direction-posts on turnpike roads.

Trustees shall erect parapets, &c., where necessary.[1]

94. And be it enacted, that the trustees of every turnpike road shall erect sufficient parapet walls, mounds, or fences, or other adequate means of security, along the sides of all bridges,[2] embankments, or other dangerous parts of the said roads; and if they shall fail therein it shall be lawful for the procurator fiscal or any Commissioner of Supply for the shire in which the part of such road complained of is situated, such commissioner finding security to pay expenses of process if he shall fail in his action, to prosecute the trustees of any such turnpike road before the sheriff of the shire in which such road is situated, who shall judge and determine therein in a summary manner, and upon finding the complaint well founded, may compel the said trustees to remedy the matter complained of, and allow the prosecutor the expenses of process; but if such prosecution shall be found groundless, the private prosecutor shall be liable in expenses.[3]

[1] This is the only obligation on road authorities to erect fences. In other localities the adjoining owner erects and keeps them up for his own benefit.

[2] A bridge about 100 yards from a village was held to be insufficiently fenced with wooden posts 2 feet 8 inches high, 2 feet 9 inches apart, surmounted by an iron bar, and placed about a foot from the edge of the bridge, which rose 6 feet above a small burn; and the trustees were held liable in damages for the death of a child twenty-two months old, which, in playing, crept through, fell into the water, and was drowned—Greer *v.* Stirlingshire R. Trs., 7th July 1882, 9 Ret. 1069.

[3] Sect. 95, here omitted, threw liability for malicious mischief undetected on the parish.

Penalty on persons committing nuisances.

96. And be it enacted, that if any person shall ride upon any footpath or causeway on or by the side of any turnpike road made or set apart for the use or accommodation of foot passengers, or shall lead or drive any horse, ass, mule, swine, or cattle, or carriage of any description, or any wheelbarrow, truck, or sledge, or any single wheel of any waggon, cart, or carriage apart therefrom, upon any such footpath or causeway;[1] or shall wilfully obstruct or do or cause any injury or damage to be done to the same, or to the hedges, posts, rails, or fences thereof;[2] or shall wilfully pull down or damage any bridge, wall, toll bar, or any building, fence, or erection made by the trustees of any turnpike road or repaired or repairable by them; or shall break, injure, remove, or displace any tools, trestles, bars, stones, materials, or other article whatsoever belonging to such trustees, or used on any such road under their authority; or shall haul or draw or cause to be hauled or drawn, upon any part of any turnpike road, any timber, stone, or other thing otherwise than upon a wheeled carriage, or shall suffer any timber, stone, or other thing which shall be carried principally or in part upon a wheeled carriage to drag or trail upon such road; or in ploughing or harrowing any adjacent unenclosed land shall turn any horse, plough, or harrow in or upon any such road or the side drains or ditches thereof; or shall, in or upon such road, or by the side or sides thereof, or in any exposed situation near thereto, kill, slaughter, singe, scald, burn, dress, or cut up any beast, swine, calf, lamb, or other cattle; or if any person driving any carriage, cart, horse, or other beast on the said road, conveying any iron bar or rod, tree, wood, stone, basket, or pannier, or any other matter or thing, except hay and straw, suffer the same to project by more than thirty inches from the side of such horse or other beast, or more than one foot laterally beyond the wheels of such carriage, or so as in any manner to obstruct or impede the passage of any

person, or any horse, beast, or carriage travelling along such turnpike road; or if any person shall carry any timber or other article above twenty-five feet long on any cart or carriage not having more than two wheels; or if any hawker, higgler, gipsy, or other person shall pitch any tent or encamp upon or by the sides of any part of any turnpike road; or if any person occupying or using a blacksmith's shop, foundry, smelting house, iron or brass work, boiler-making work, glass work, soda, soap, or chemical work, shall not, by good and close shutters, every evening after it becomes twilight, or otherwise, bar and prevent the light from such shop shining into or upon the said road, and from being dangerous or detrimental to travellers; or if any person shall make or assist in making any fire or fires commonly called bonfires, or shall set fire to or let off or throw any squib, rocket, serpent, or other firework whatsoever within one hundred feet of the centre of such road, or shall discharge any gun, pistol, or other fire arms, fly kites, or bait or run for the purpose of baiting any bull, or play at football, tennis, fives, cricket, or any other game or games upon such road or on the side or sides thereof, or in any exposed situation near thereto, to the annoyance of any passenger or passengers;[3] or if any person shall leave any waggon, cart, or other carriage whatever upon such road or on the side or sides thereof,[4] without any proper person in the sole custody or care thereof, longer than may be necessary to load or unload the same, except in cases of accident, and in cases of accident for a longer time than may be necessary to remove the same, or shall not place such waggon or other carriage, during the time of loading or unloading the same, or of taking refreshments, as near to one side of the road as conveniently may be, either with or without any horse or beast of draught harnessed or yoked thereto; or shall lay any timber, stone, hay, straw, dung, manure, soil, ashes, rubbish, or other matter or thing whatsoever upon such road or on the side or sides thereof, or the footpaths or causeways adjoining; or shall hang or lay any linen clothes or other such article on any hedge or fence of any such road; or shall suffer any water, filth, dirt, or other offensive matter or thing whatsoever to run or flow into or upon such road or footpaths from any house, building, erection, lands, or premises adjacent thereto, or if any person driving any pigs or swine upon such road shall suffer such pigs or swine to root up or damage such road, or the fences, hedges, banks, or copse on either side thereof respectively; or if any person shall after having blocked or stopped any cart, waggon, or other carriage in going up a hill or rising ground, cause or suffer to be or remain on such road the stone or other thing with which such cart or other carriage shall have been blocked or stopped; or if any person shall pull down, damage, injure, or destroy any lamp or lamp post put up, erected, or placed in or near the side of any turnpike road, or toll house erected thereon, or shall extinguish the light of any such lamp;[3] every person offending in any of the cases aforesaid shall for each and every such offence forfeit and pay any sum not exceeding fifty shillings over and above the damages occasioned thereby.

[1] This applies only to riding, &c., on footpaths in this position, not on footpaths generally—Reg. *v.* Pratt, L.R. 3 Q.B. 64.

[2] Suffering trees to grow so as to be an obstruction to the footpaths, is not 'wilfully 'obstructing'—Walker *v.* Horner, 1 Q.B.D. 4 (diss. Cockburn L.C.-J.)

[3] These last words apply to the whole of the acts penalised in this clause of the

section; and in order to a conviction, the fact that discharging a gun within the limits here mentioned was to the annoyance of passengers had to be proved—Simon *v.* Reid, H.C., 20th March 1879, 4 Coup. 220.

[4] See action of damages for personal injury thereby, though somewhat remotely, occasioned—Harris *v.* Mobbs, 3 Ex. D. 268.

[5] There are few reported cases on nuisances on roads in Scotland; but in England, besides these enumerated nuisances, the following have been reached by the common law:—carrying unreasonable weights—R. *v.* Egerley, 3 Salk. 183; tramways—R. *v.* Train, 31 L.J.M.C. 169 (cf. 33 & 34 Vict. c. 78); gates across, unless sanctioned by usage—Davies *v.* Stephens, 7 C. and P. 571 (see the provision for byelaws in sect. 104, *supra*, p. 797); making the highway a coach-stance—R. *v.* Cross, 3 Camp. 224; loading carts, and so causing a material obstruction—Fritz *v.* Hobson, 14 Ch. D. 542; Stewart, Pott, & Co. *v.* Brown, 15th Oct. 1878, 6 Ret. 35; attracting a crowd—R. *v.* Carlile, 6 C. and P. 636; a hoarding jutting out unreasonably far—Bush *v.* Steinman, 1 B. & P. 404, 407; a man-trap leading into a cellar and left open—Proctor *v.* Harris, 4 C. and P. 337, Hadley *v.* Taylor, L.R. 1 C.P. 53; constant staling of horses—Benjamin *v.* Storr, L.R. 9 C.P. 400; not a fire lighted by a wheelwright for the purposes of his business within 50 feet of the centre of the highway, such fire being fed by lifting a lid in the wall on the outside of the premises—Stinson *v.* Browning, L.R. 1 C.P. 321. The use of locomotives on public roads is subjected to strict regulations by 24 & 25 Vict. c. 70, 28 & 29 Vict. c. 83, and 41 & 42 Vict. c. 58, continued annually; on which see the last Act, sect. 28; Stringer *v.* Sykes, 2 Ex. D. 240 and Body *v.* Jeffery, 3 Ex. D. 95 as to width of wheels; L. Aveland *v.* Lucas, 5 C.P.D. 211, 351, and other cases, *supra*, p. 685, as to excessive weight; Smith *v.* Wood, 6th Dec. 1882, 10 Ret. (Just.) 31 (boy of thirteen not a sufficient accompanying person); Parkyns *v.* Priest, 7 Q.B.D. 313 (steam-tricycle); Powell *v.* Fall, 5 Q.B.D. 597—a traction engine being a dangerous machine, liability for fire caused through sparks is not escaped by constructing it in conformity with statute.

Regulation of drivers.

97. And be it enacted, that if the driver of any cart, waggon, or other such carriage on any turnpike road shall ride on the shafts or in or on any other part of such carriage, without having and holding reins attached to each side of the bridle of each beast of draught drawing such cart or carriage,[1] or shall at any time leave the same travelling on any such road without having some person to guide the beast or beasts of draught drawing the same, or shall allow to go at large any dog that may be attending him, or his waggon, cart, or other such carriage, or shall not chain or fasten the same to such waggon, cart, or carriage; or if the driver of any sort of carriage shall not keep to the left or near side of such road on meeting or on being overtaken by any other carriage or any rider, or shall wilfully prevent any other person passing him or his carriage; such driver shall for every such offence forfeit and pay a sum not exceeding five pounds over and above the damages occasioned thereby.

[1] By 30 & 31 Vict. c. 121, sect. 4, this provision was explained or amended, but the enactment has been apparently overlooked or rejected in incorporating the above clauses. The section runs thus: 'From and after the passing of this Act (1867) no 'driver of any waggon or cart of any kind shall be liable to any penalty for riding 'upon such carriage in any turnpike road, provided such driver shall not ride upon 'the shafts of such carriage, but shall carefully drive such carriage by means of reins 'held in his hands, such reins being attached to every horse drawing the same.'

One driver may take charge of two carts.

98. And be it enacted, that if one person act as the driver of more than two carts, waggons, or other such carriages on any turnpike road, or if the hinder of two carts, waggons, or other such carriages, when under the care of only one person, shall be drawn by more than one horse, or if the horse of such hinder cart, waggon, or carriage shall not be attached by a rein to the back of the cart which shall be foremost, and follow in

the same line therewith, the horse drawing such hinder cart not being permitted to be further from the foremost than six feet, the owner or driver of every such waggon, cart, or other carriage shall for each transgression in any of the points aforesaid forfeit and pay a sum not exceeding forty shillings.

Children not to drive carts, &c.

99. And be it enacted, that no waggon or cart travelling on any turnpike road shall be driven by any person who shall not be of the full age of fourteen[1] years, under a penalty for each such offence not exceeding forty shillings, to be paid by the owner of such waggon or cart.

[1] Opinion *per* L. Craighill, that this applied to the tending of road-locomotives—Smith *v.* Wood, 6th Dec. 1882, 10 Ret. (Just.) 31.

Persons opening up or conveying water across the roads or causeways must repair them.

100. And be it enacted, that if the causeways and footpaths of any turnpike road or any part thereof shall be opened up by any person or persons, with leave of the said trustees, or otherwise having authority so to do, for the laying of pipes for water, gas, tunnels, or railroads, or for any other purposes whatever, and the same shall not be immediately thereafter repaired, renewed, and rendered completely sufficient and good by the person or persons opening up the same, to the satisfaction of the said trustees or their surveyor, then the said trustees or their surveyor shall have full power and they are hereby authorised to execute the necessary repairs on the part or parts of such road or footpath so opened up, and to restore the same completely, and to charge the expense thereof against the person or persons opening up the same, which shall be ascertained by an account under the hands of the said trustees or a quorum of them, or of their clerk or surveyor; and if any damage shall happen to the public from the operations of the persons opening up the road as aforesaid, such persons shall be solely liable for the same, and be obliged to relieve the said trustees thereof and of all expenses attending the same; and in all cases where any injury shall arise to any turnpike road from any drain, conduit, pipe, water, matter, or thing whatsoever being conveyed across, in, under, or upon, or by any thing done upon any part of any such road, by any person having leave or otherwise entitled so to do, and such injury shall not be immediately repaired to the satisfaction of the trustees, they or their surveyor are hereby authorised to repair the same, and charge the expense thereof as aforesaid against the person occasioning the said injury, or for whose uses or purposes the thing occasioning the same shall be done or kept.

Surveyors, &c., not to leave nuisances on roads.

101. And be it enacted, that if the surveyor of any turnpike road, or any contractor or other person employed on such road, shall lay on any part of any such road any heap of stones or other materials for the repair thereof, and shall permit the same to remain longer than necessary for the breaking and spreading of such materials; or shall lay on any such road any matter or thing, or shall knowingly permit to remain on any part of any such road any matter or thing, which may endanger the safety of any passenger; or shall dig any pit or make any cut on any turnpike road, without sufficiently fencing the same; such person shall for every such offence forfeit and pay a sum not exceeding five pounds over and above the damages occasioned thereby and expenses; and it shall be lawful for any person travelling along any turnpike road to

prosecute for such sum, damages, and expenses in manner herein-after provided: Provided always, that it shall be lawful for any such surveyor, contractor, or other person to have on any such road, during daylight, any trestles or bars in any such manner as the trustees of such road may judge necessary to prevent interruption of the work during the repairing of the road, or to prevent carts or carriages from running in tracks injurious to the road: Provided always, that such trestles or bars shall at all times be placed in such manner as not to be more inconvenient to passengers than may be necessary to prevent interruption to the work, or to prevent carts or carriages from running in tracks injurious to the road.

Proprietors to fence pits made near the roads.[1]

102. And be it enacted, that if the proprietor or occupier of any lands adjacent to any turnpike road shall dig any pit or make any cut upon or within twelve feet of the side of any such road, and shall leave the same unfenced so as to be dangerous to travellers, and shall not fence the same when required so to do by any two of the trustees of such road, or the procurator fiscal of the shire within which the said pit or cut is situated, such proprietor or occupier shall forfeit and pay a sum not exceeding five pounds for every day such pit or cut shall continue to be unfenced beyond three days after notice shall have been given as aforesaid, and it shall be lawful, after such notice, for the said trustees or procurator fiscal to cause the same to be fenced at the expense of such proprietor or occupier.

[1] See text, p. 521.

No animal to be pastured on the roads.

103. And be it enacted, that if any horse, cattle, ass, sheep, swine, or other beast of any kind shall be pastured, or left or permitted to remain, or found straying on any turnpike road or the sides thereof (except on such parts of any road as pass through or over any common or waste ground, or land not enclosed, or arable on both sides),[1] the person so pasturing or leaving such beast, or permitting the same to remain, or the person having the charge of such beast, or the owner thereof if such person cannot be found, shall forfeit and pay a sum not exceeding five shillings for every such beast; and it shall be lawful for any trustee of such road, or the surveyor of such trustees, or any other person authorised by them, *brevi manu*, to seize and detain the same until such penalty and the expenses of process and proceedings shall be paid; and in case the said penalty and expenses shall not be paid within three days after notice of such detention shall be given on the two nearest toll bars on the said road[2] where such animal shall be found, the said surveyor or other person shall sell the same, with the authority of the sheriff or any Justice of the Peace for the shire, who are hereby empowered to grant such authority; and after deducting the amount of the said penalty and expenses such surveyor or other person shall pay the surplus, if any, to the owner of such animal so detained.

[1] In sect. 33 of the Statute Service Act the words following 'enclosed' were 'unless 'it be arable on one side.' See the common law, text, p. 520.

[2] In the same section the words following 'given' are 'at the parish church nearest 'to the place;' and advertisement in two local newspapers is now substituted in the case of offences under the present Act by sect. 123, *supra*, p. 799.

Side ridges to be made in unenclosed lands.

104. And be it enacted, that every person in ploughing any unenclosed land adjoining any turnpike road shall make side ridges along the

sides of such road of the breadth of twelve feet at the least, under a penalty not exceeding five pounds.

Gates to open inwards.

105. And be it enacted, that no gate of any park, field, or enclosure whatsoever shall be made to open into or towards any part of any turnpike road, or of any footpath belonging thereto, or be suffered so to open except the hanging post thereof shall be fixed or placed so far from the centre of any part of such road as that no part of such gate shall when open project over any part of such road or of any footpath belonging thereto; and the occupier of any park, field, or enclosure, having any gate opening outwards contrary to the meaning of this Act, shall, within six days after notice to him or her given, either personally or in writing, from the trustees of any turnpike road, or their surveyor, cause such gate to be hung so that no part of the gate when open shall project over any part of such road or of any footpath belonging thereto; and if such occupier fail so to do, the surveyor of any such road shall cause the gate to be hung as herein-before directed, and charge the expense of making such alteration and hanging such gate against the said occupier, who shall, over and above such expense, forfeit and pay a further sum not exceeding five pounds for such neglect.

Weeds to be cut by trustees.

106. And be it enacted, that the trustees of every turnpike road shall cut or cause to be cut all weeds growing on the same or the sides thereof, when enclosed, at a proper season of the year, in order to prevent such weeds coming into seed; and if they fail so to do for eight days after being required by the proprietor or occupier of the adjoining land, by notice in writing given to their clerk or surveyor, such proprietor or occupier may cut the same, and charge the expense thereof against the said trustees.

No windmill, &c., to be erected within 100 yards of the turnpike road.

107. And be it enacted, that no person shall hereafter erect any windmill, watermill, steam engine,[1] or limekiln within the distance of one hundred yards from any part of any turnpike road under the penalty of five pounds for every day such windmill, watermill, steam engine, or limekiln shall continue, unless the same shall be so placed or screened as to prevent damage or detriment to any traveller on such turnpike road by frightening horses or otherwise; nor shall any person hereafter place any skinner's washing pond within the distance of one hundred yards from any part of any turnpike road under a penalty not exceeding five pounds for every day any such nuisance shall continue: Provided always, that nothing herein contained shall be construed to render legal the erection, re-erection, or continuance of any windmill, watermill, steam engine, limekiln, or skinner's washing pond in any case where, by the common law, the same shall be a public or private nuisance.

[1] This has been applied both in England and in Scotland to a portable steam-engine for driving a thrashing-machine—Smith *v.* Stokes, 32 L.J.M.C. 199; Macleish *v.* Crightons, 14th March 1883, 20 Sc. L.R. 503; but only if its erection within the prohibited distance can be brought home to the knowledge of the owner—case of Harrison, cited in Shelford on Highways, p. 174, and Pratt on H. p. 123.

Owners of waggons, carriages, &c., shall cause their names to

108. And be it enacted, that the owner of every waggon or cart,[1] and also of every coach, postchaise, or other carriage, let either in the whole, or in part to hire, shall paint in a straight line horizontally upon some conspicuous part on the off or right side of his waggon or cart, and upon

be painted thereon.

the panels of the doors of all such coaches, postchaises, or other carriages before the same shall be used upon any turnpike road, the Christian and surname and place of abode of such person, or the Christian and surname and place of abode of the principal partner or owner thereof, in large legible Roman letters, either of a dark colour upon a light ground or of a light colour on a dark ground, not less than one inch in height, with numbers beginning with number one where more of such carriages respectively than one shall belong to the same owner, and proceeding in regular progression, and shall continue the same thereupon as aforesaid so long as such waggon, cart, or other carriage shall be used upon any turnpike road; and every owner of any such waggon, cart, or other carriage using or allowing the same to be used upon any turnpike road without the names and descriptions painted thereon respectively as aforesaid, and every person driving the same, shall forfeit for every such offence a sum not exceeding forty shillings; and every waggon or cart, and every such coach, postchaise, or other carriage let for hire without the name, surname, and place of abode of the owner painted thereon as herein-before directed, or having the same or any part thereof covered or placed so as to be illegible, shall be liable to pay double toll duty; and every person driving any such waggon, cart, or other carriage who shall refuse to stop and permit the name to be read or uncovered by any person requiring him so to do, shall over and above forfeit for every such offence any sum not exceeding forty shillings.

[1] This does not apply to a light spring-cart on two wheels used frequently for carrying agricultural implements to market and for driving the owner's family about, and for which he paid duty under 32 & 33 Vict. c. 14, sect. 18—Danby *v.* Hunter, 5 Q.B.D. 20.

No. XIII.

8 VICTORIA, c. 19.

An Act for consolidating in One Act certain Provisions usually inserted in Acts authorising the taking of Lands for Undertakings of a public Nature in Scotland.—[*8th May* 1845.]

WHEREAS it is expedient to comprise in one general Act sundry provisions usually introduced into Acts of Parliament relative to the acquisition of lands in Scotland required for undertakings or works of a public nature,[1] and the compensation to be made for the same, and that as well for the purpose of avoiding the necessity of repeating such provisions in each of the several Acts relating to such undertakings as for ensuring greater uniformity in the provisions themselves: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that this Act shall apply to every undertaking in Scotland authorised by any Act of Parliament which shall hereafter[2] be passed, and which shall authorise the taking of lands for such undertaking, and the

This Act to apply to all undertakings authorised by

Act shall be incorporated with such Act;[3] and all the provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorised thereby, so far as the same shall be applicable to such undertaking, and shall, as well as the clauses and provisions of every other Act which shall be incorporated with such Act, form part of such Act, and be construed together therewith as forming one Act. Acts hereafter passed.

[1] Not applicable to a private Act for the erection of a hotel—Wale *v.* Westminster Pal. Hotel Co., 8 C.B.N.S. 276. As to the mode of construing this Act, it is not read so strictly when compulsory powers are given to an existing corporation, such as a city corporation, as when given to a body of adventurers such as a railway company —Galloway *v.* Mayor of London, L.R. 1 H.L. 34; and the compulsory powers of a railway company will not be so construed as to extend them beyond the express words or absolutely necessary implication of the special Act—Lamb *v.* N. London Ry., L.R. 4 Ch. 522. They must be exercised, when in derogation of individual rights, with moderation and discretion and not negligently—Biscoe *v.* G. E. Ry., L.R. 16 Eq. 636. As to the dovetailing of the special and this general Act, see Metropolitan District Ry. *v.* Sharpe, 5 App. Cas. 425.

[2] Not retrospective—*Re* Cherry, 31 L.J. Ch. 351, *per* L. Ch. Westbury; explained, *ex parte* Vicar of St Sepulchre's, 33 L.J. Ch. 372. An Extension Act, passed after 1845, applicable to an undertaking authorised before 1845, applies the present Act to the whole undertaking—*ex parte* Eton College, 20 L.J. Ch. 1; *Re* Ellison, 8 De G. M. and G. 62.

[3] See Railways Clauses Act, 8 & 9 Vict. c. 33, sects. 1 and 6. Though not expressly incorporated—Vicar of St Sepulchre's, *supra*, [2].

And with respect to the construction of this Act, and other Acts to be incorporated therewith, be it enacted as follows: Interpretation in this Act:

2. The expression 'the special Act' used in this Act shall be construed to mean any Act which shall be hereafter passed, and which shall authorise the taking of lands for the undertaking to which the same relates, and with which this Act shall be so incorporated as aforesaid;[1] and the word 'prescribed' used in this Act, in reference to any matter herein stated, shall be construed to refer to such matter as the same shall be prescribed or provided for in the special Act, and the sentence in which such word shall occur shall be construed as if instead of the word 'prescribed' the expression 'prescribed for that purpose in the 'special Act' had been used; and the expression 'the works' or 'the 'undertaking' shall mean the works or undertaking, of whatever nature, which shall by the special Act be authorised to be executed; and the expression 'the promoters of the undertaking' shall mean the parties, whether company, undertakers, commissioners, trustees, corporations, or private persons, by the special Act empowered to execute such works or undertaking. 'special Act:' 'prescribed:' 'the works:' 'Promoters of 'the undertak- 'ing.'

[1] See *supra*, sect. 1, note [3].

3. And be it enacted, that the following words and expressions both in this and the special Act shall have the several meanings hereby assigned to them, unless there be something either in the subject or context repugnant to such construction; (that is to say), Interpretations in this and the special Act.

Words importing the singular number only shall include the plural number; and words importing the plural number only shall include the singular number: Number:

Words importing the masculine gender only shall include females: Gender:

'Lands:' The word 'lands' shall extend to houses, lands, tenements, and heritages[1] of any description or tenure:

'Lease:' The word 'lease' shall include a missive of lease:

'Month:' The word 'month' shall mean calendar month:

'Lord Ordinary:' The 'Lord Ordinary' shall mean the Lord Ordinary of the Court of Session in Scotland officiating on the bills in time of vacation, or the junior Lord Ordinary, if in time of session, as the case may be:

'Oath:' The word 'oath' shall include affirmation in the case of Quakers, or other declaration or solemnity lawfully substituted for an oath in the case of any other persons exempted by law from the necessity of taking an oath:

'County:' The word 'county' shall include any ward or other like division of a county:

'Sheriff:' The word 'sheriff' shall include the sheriff-substitute:

'Justices:' The word 'Justices' shall mean Justices of the Peace acting for the county, city, liberty, or place where the matter requiring the cognisance of any such Justice shall arise, and who shall not be interested in the matter; and where such matter shall arise in respect of lands, being the property of one and the same party, situate not wholly in any one county, city, liberty, or place, the same shall mean a Justice acting for the county, city, liberty, or place where any part of such lands shall be situate, and who shall not be interested in such matter; and where any matter shall be authorised or required to be done by two Justices, the expression 'two Justices' shall be understood to mean two or more Justices assembled and acting together:

'Two Justices.'

'Owner:' Where, under the provisions of this or the special Act, or any Act incorporated therewith, any notice shall be required to be given to the owner of any lands, or where any act shall be authorised or required to be done with the consent of any such owner, the word 'owner' shall be understood to mean any person or corporation, or trustees or others, who, under the provisions of this or the special Act, would be enabled to sell and convey lands to the promoters of the undertaking:

'The bank.' The expression 'the bank' shall mean any one of the incorporated or chartered banks in Scotland.[2]

[1] Includes ferries—Reg. *v.* Cambrian Rys., L.R. 6 Q.B. 422; Hopkins *v.* G.N. Ry., 2 Q.B.D. 224; servitudes—D. Buccleuch *v.* Metrop. B. of Works, L.R. 5 H.L. 418; Pinchin *v.* London, &c., Ry., 5 De G. M. and G. 851: that is, compensation is due for injury to or destruction of a servitude right, Glover *v.* N. Staffordshire Ry., 16 Q.B. 912; Clark *v.* London School Board, L.R. 9 Ch. 120; but the company is not entitled to take compulsorily a servitude right, Pinchin, *supra*—Metropolitan D. Ry. *v.* Cosh, 13 Ch. D. 607, 616, per Jessel M.R. It does not apply to the strata merely of land through which the undertakers intend to tunnel: they must take the whole *a cœlo usque ad centrum*—Metropolitan Ry. *v.* Cosh, *supra*; Sparrow *v.* Oxford Ry., 2 D.M. and G. 94; Falkner *v.* Somerset, &c., Ry., L.R. 16 Eq. 458; Macbrayne *v.* Glasgow City Union Ry., 31st May 1883, 10 Ret. 894; but see clause in the special Act varying rights as to subsoil under a street—Glasgow Coal Exchange Co. *v.* Glasgow City Ry., 20th July 1883, 20 Sc. L.R. 855. As to other rights, see *infra*, sect. 48.

[2] Methvens *v.* E. P. and D. Ry., 1851, 13 D. 1262.

Short title of the Act.

4. And be it enacted, that in citing this Act in other Acts of Parlia-

ment and in legal instruments it shall be sufficient to use the expression 'the Lands Clauses Consolidation (Scotland) Act, 1845.'

Form in which portions of this Act may be incorporated with other Acts.

5. And whereas it may be convenient in some cases to incorporate with Acts of Parliament hereafter to be passed some portion only of the provisions of this Act; be it therefore enacted, that for the purpose of making any such incorporation it shall be sufficient in any such Act to enact that the clauses of this Act with respect to the matter so proposed to be incorporated (describing such matter as it is described in this Act in the words introductory to the enactment with respect to such matter)[1] shall be incorporated with such Act; and thereupon all the clauses and provisions of this Act with respect to the matter so incorporated shall, save so far as they shall be expressly varied or excepted by such Act, form part of such Act, and such Act shall be construed as if the substance of such clauses and provisions were set forth therein with reference to the matter to which such Act shall relate.

[1] The divisions so introduced are 'not logical or precise,' *per* L. P. Inglis in Bridge of Allan Water Co. *v.* Alexander, 4th Feb. 1868, 6 Macph. 320-324, illustrating by the position of sects. 15, 16, 90, 120. See Hammersmith, &c., Ry. *v.* Brand, L.R. 4 H.L. 171. The usual exception to the full incorporation of the Act is of the provisions which relate 'to the purchase and taking of lands otherwise than by agreement.' This means sections 17-66 incl. See Ferrar *v.* London Sewers Comrs., L.R. 4 Ex. 227, and contrast Broadbent *v.* Imperial Gas Co., 7 D. M. and G. 436, there cited.

Purchase of lands by agreement.

And with respect to the purchase of lands by agreement, be it enacted as follows:

Power to purchase lands by agreement.

6. Subject to the provisions of this and the special Act, it shall be lawful for the promoters of the undertaking to agree[1] with the owners of any lands by the special Act authorised to be taken, and which shall be required for the purposes of such Act, and with all parties having any right or interest in such lands, or by this or the special Act enabled to sell and convey the same, for the absolute purchase[2] of any such lands, or such parts thereof as they shall think proper, and for the purchase of all rights and interests in such lands of what kind soever.[3]

[1] *Semble*, that agreements made between promoters and landowners, in consideration of withdrawal of opposition by the latter, are not binding, unless incorporated in the Act subsequently obtained—see obs. of L. Cranworth, Stewart *v.* Sc. N.E. Ry., 1856, 18 D. 541, revd. 3 Macq. 382; Mags. of Helensburgh *v.* Caledonian Ry., 15 D. 148, revd. 2 Macq. 391, criticising Lord Cottenham's *dicta* in cases there cited; or unless the company actually reap the benefit of or adopt them—Eastern Counties Ry. *v.* Hawkes, 5 H.L. 331, 356, and cases there; or they come under 27 & 28 Vict. c. 121, sect. 30, which relates only to Railways. To be given effect to, they must also be not *ultra vires* of the Company—Mags. of Helensburgh *v.* Caledonian Ry., *supra*, 2 Macq. 416; and not conditional on the construction of the works—Preston *v.* Liverpool, &c., Ry., 5 H.L. 605, 620, and cases of Gage, Webb, and Stuart there quoted. It does not matter that the landowner is a peer or M.P., if the sum agreed on is not a bribe for his vote—E. Shrewsbury *v.* N. Stafford Ry., L.R. 1 Eq. 593, 613. The Special Act supersedes where it differs from the deposited plans and books of reference, which are to be disregarded except so far as they are incorporated therein—N.B. Ry. *v.* Tod, 23d July 1846, 5 B. Ap. 184.

[2] To be completed within a reasonable time, not merely before the expiry of compulsory powers—Baker *v.* Metropolitan Ry., 32 L.J. Ch. 7; unless a date be specially fixed, in which case it may be so worded as to be a suspensive condition, not merely *morata solutio*—Philip *v.* E. P. and D. Ry., 16 D. 1065, revd. 2 Macq. 514; Stewart *v.* Sc. N.E. Ry., *supra*, [1].

[3] Nothing being here enacted as to date of payment of price, &c., nor as to interest, there should be express provision made—Hutton *v.* L. and S.W. Ry., 18 L.J. Ch.

345. But the ordinary rules as to interest apply, *in re* Pigott, 18 Ch. D. 146. See *infra*, sect. 49. Non-payment will not stop the progress of the works.

Parties under disability enabled to sell and convey.[1]

7. It shall be lawful for all parties, being possessed of any lands, or any such right or interest therein, to contract for, sell, convey, and dispose of such lands, or of such right therein, to the promoters of the undertaking, and to enter into all necessary agreements for these purposes, and particularly it shall be lawful for the parties following so to do; (that is to say,) all corporations, heirs of entail, liferenters, or persons holding any other partial or qualified estate or interest, married women seised in their own right or entitled to terce or dower, or any other right or interest, husbands, tutors, curators, and other guardians for infants, minors, lunatics or idiots, fatuous or furious persons, or for persons under any other disability or incapacity, judicial factors, trustees or feoffees in trust for charitable or other purposes, executors, and administrators; and the power so to contract for, sell, convey, and dispose of as aforesaid may lawfully be exercised by all such parties, not only on behalf of themselves and their respective heirs, executors, administrators, and successors, but also for and on behalf of every person entitled in reversion or expectancy after them, and as to such married women as if they were sole, and as to such tutors, curators, guardians, judicial factors, and trustees, on behalf of those for whom they respectively act, whether infants, minors, issue unborn, bankrupts, lunatics, idiots, fatuous and furious persons, married women, or other incapacitated persons, and that to the same extent as such infants, minors, bankrupts, lunatics, idiots, fatuous and furious persons, married women, and other incapacitated persons respectively could have exercised the same power under the authority of this and the special Act if they had respectively been under no disability.

[1] Apart from this Act, these parties may also contract with the promoters of a *railway* for the sale of land, but cannot convey or deliver possession to them until a Board of Trade certificate comes into operation, 27 & 28 Vict., c. 121, sect. 3 (2).

Parties under disability may exercise other powers.

8. The power herein-after[1] given to discharge any lands from feu duties or casualties of superiority, as well as every other power required to be exercised by any superior pursuant to the provisions of this or the special Act, or any Act incorporated therewith, and the power to discharge lands from any rent, payment, charge, feu duties, ground annuals, or other real burdens or incumbrances, and to agree for the apportionment of any such rent, payment, charge, feu duties, ground annuals, or other real burdens and incumbrances, shall extend to and may lawfully be exercised by every party herein-before enabled to contract for, sell, dispose of, or convey lands or rights, or interests therein to the company.

[1] Sects. 107-11, 126.

Amount of compensation, in case of parties under disability, to be ascertained by valuation, and paid into the bank.

9. The purchase money or compensation to be paid for any lands, or any rights or interests therein, to be purchased or taken from any party under any disability or incapacity, and not having power to sell or convey such lands, or rights or interests therein, except under the provisions of this or the special Act, and the compensation to be paid for any permanent damage or injury to any such[1] lands, shall not, except where the same shall have been determined by the sheriff, or by the verdict of a

jury, or by arbitration, or by the valuation of a valuator appointed by the sheriff under the provision herein-after contained,[2] be less than shall be determined by the valuation of two able practical valuators, one of whom shall be nominated by the promoters of the undertaking,[3] and the other by the other party, and if such two[4] valuators cannot agree in the valuation then by such third valuator as the sheriff shall, upon application of either party, after notice to the other party, for that purpose nominate; and each of such two valuators, if they agree, or if not, then the valuator nominated by the said sheriff, shall annex to the valuation a declaration in writing, subscribed by them or him, of the correctness thereof; and all such purchase money or compensation shall be deposited in the bank, for the benefit of the parties interested, in manner herein-after mentioned.

[1] Stone *v.* Yeovil, 2 C.P.D. 99.

[2] The modes under the next division.

[3] This has been held directory, not imperative, and the Company cannot relieve themselves of a contract under sect. 7 by declining to name a valuator, *per* M.R. in Baker *v.* Metropolitan Ry., 31 Beav. 504, *sed quære.* L. Westbury—ibid. p. 511 n. —thought the remedy was, not for the court to judge of the fairness of the compensation, but to compel the company to nominate.

[4] The decreet of one valuator acting for both parties was found sufficient—Rector of Adderley, 10 L.T.N.S. 131—provided the interests of reversioners are duly protected.

Where vendor absolutely entitled lands may be sold on feu duties, &c.;

10. It shall be lawful for all parties entitled to dispose of absolutely any lands authorised to be purchased for the purposes of the special Act to convey such lands or any part thereof unto the promoters of the undertaking in consideration of an annual feu duty or ground annual payable by the promoters of the undertaking.[1]

[1] By 16 & 17 Vict. c. 94, this power is extended to heirs of entail, the feu-duties, &c., being payable to him and his successors in the lands (sect. 14), provided no grassum be taken (sect. 15). They are part of the entailed estate and a first charge on the revenues of the undertaking (sect. 16). By 23 & 24 Vict. c. 106, the power is extended to all cases of disability (sect. 3). The amount of the feu-duties, &c., is settled as in sect. 9, *supra;* being not less than one-fourth part greater than the net annual rent for the last seven years, *plus* five per cent on the gross estimated damage, and no grassum being taken. The feu-duties, &c., are to be settled in the same way as were the rents of the land, and are to be a first charge as above (sect. 4). This last Act is so general that the new enactments as to amount will apply to heirs of entail. See Sc. Midland Ry. *v.* Gray, 1850, 13 D. 410, and *infra*, Appx. No. 22.

payment of which to be charged on tolls.

11. The feu duties or ground annuals stipulated by any such conveyance shall be charged on the tolls or rates, if any, payable under the special Act, and shall be otherwise secured in such manner as shall be agreed between the parties, and shall be paid by the promoters of the undertaking as such feu duties or ground annuals become payable; and if at any time the same be not paid within thirty days after they so become payable, and after demand thereof in writing, the person to whom any such feu duties or ground annuals shall be payable may either recover the same from the promoters of the undertaking, with expenses of suit, by action in any competent court, or it shall be lawful for him to levy the same by poinding and sale of the goods and effects of the promoters of the undertaking.[1]

[1] Even though the undertaking is in the hands of a receiver—Eyton *v.* Denbigh &c., Ry., L.R. 6 Eq. 14, 488, 7 Eq. 439. As to railways, see 30 & 31 Vict. c. 126, sect. 4, made perpetual by 38 & 39 Vict. c. 31.

345. But the ordinary rules as to interest apply, *in re* Pigott, 18 Ch. D. 146. See *infra*, sect. 49. Non-payment will not stop the progress of the works.

Parties under disability enabled to sell and convey.[1]

7. It shall be lawful for all parties, being possessed of any lands, or any such right or interest therein, to contract for, sell, convey, and dispose of such lands, or of such right therein, to the promoters of the undertaking, and to enter into all necessary agreements for these purposes, and particularly it shall be lawful for the parties following so to do; (that is to say,) all corporations, heirs of entail, liferenters, or persons holding any other partial or qualified estate or interest, married women seised in their own right or entitled to terce or dower, or any other right or interest, husbands, tutors, curators, and other guardians for infants, minors, lunatics or idiots, fatuous or furious persons, or for persons under any other disability or incapacity, judicial factors, trustees or feoffees in trust for charitable or other purposes, executors, and administrators; and the power so to contract for, sell, convey, and dispose of as aforesaid may lawfully be exercised by all such parties, not only on behalf of themselves and their respective heirs, executors, administrators, and successors, but also for and on behalf of every person entitled in reversion or expectancy after them, and as to such married women as if they were sole, and as to such tutors, curators, guardians, judicial factors, and trustees, on behalf of those for whom they respectively act, whether infants, minors, issue unborn, bankrupts, lunatics, idiots, fatuous and furious persons, married women, or other incapacitated persons, and that to the same extent as such infants, minors, bankrupts, lunatics, idiots, fatuous and furious persons, married women, and other incapacitated persons respectively could have exercised the same power under the authority of this and the special Act if they had respectively been under no disability.

[1] Apart from this Act, these parties may also contract with the promoters of a *railway* for the sale of land, but cannot convey or deliver possession to them until a Board of Trade certificate comes into operation, 27 & 28 Vict., c. 121, sect. 3 (2).

Parties under disability may exercise other powers.

8. The power herein-after[1] given to discharge any lands from feu duties or casualties of superiority, as well as every other power required to be exercised by any superior pursuant to the provisions of this or the special Act, or any Act incorporated therewith, and the power to discharge lands from any rent, payment, charge, feu duties, ground annuals, or other real burdens or incumbrances, and to agree for the apportionment of any such rent, payment, charge, feu duties, ground annuals, or other real burdens and incumbrances, shall extend to and may lawfully be exercised by every party herein-before enabled to contract for, sell, dispose of, or convey lands or rights, or interests therein to the company.

[1] Sects. 107-11, 126.

Amount of compensation, in case of parties under disability, to be ascertained by valuation, and paid into the bank.

9. The purchase money or compensation to be paid for any lands, or any rights or interests therein, to be purchased or taken from any party under any disability or incapacity, and not having power to sell or convey such lands, or rights or interests therein, except under the provisions of this or the special Act, and the compensation to be paid for any permanent damage or injury to any such[1] lands, shall not, except where the same shall have been determined by the sheriff, or by the verdict of a

jury, or by arbitration, or by the valuation of a valuator appointed by the sheriff under the provision herein-after contained,[2] be less than shall be determined by the valuation of two able practical valuators, one of whom shall be nominated by the promoters of the undertaking,[3] and the other by the other party, and if such two[4] valuators cannot agree in the valuation then by such third valuator as the sheriff shall, upon application of either party, after notice to the other party, for that purpose nominate; and each of such two valuators, if they agree, or if not, then the valuator nominated by the said sheriff, shall annex to the valuation a declaration in writing, subscribed by them or him, of the correctness thereof; and all such purchase money or compensation shall be deposited in the bank, for the benefit of the parties interested, in manner herein-after mentioned.

[1] Stone *v.* Yeovil, 2 C.P.D. 99.
[2] The modes under the next division.
[3] This has been held directory, not imperative, and the Company cannot relieve themselves of a contract under sect. 7 by declining to name a valuator, *per* M.R. in Baker *v.* Metropolitan Ry., 31 Beav. 504, *sed quære.* L. Westbury—ibid. p. 511 n. —thought the remedy was, not for the court to judge of the fairness of the compensation, but to compel the company to nominate.
[4] The decreet of one valuator acting for both parties was found sufficient—Rector of Adderley, 10 L.T.N.S. 131—provided the interests of reversioners are duly protected.

Where vendor absolutely entitled lands may be sold on feu duties, &c.;

10. It shall be lawful for all parties entitled to dispose of absolutely any lands authorised to be purchased for the purposes of the special Act to convey such lands or any part thereof unto the promoters of the undertaking in consideration of an annual feu duty or ground annual payable by the promoters of the undertaking.[1]

[1] By 16 & 17 Vict. c. 94, this power is extended to heirs of entail, the feu-duties, &c., being payable to him and his successors in the lands (sect. 14), provided no grassum be taken (sect. 15). They are part of the entailed estate and a first charge on the revenues of the undertaking (sect. 16). By 23 & 24 Vict. c. 106, the power is extended to all cases of disability (sect. 3). The amount of the feu-duties, &c., is settled as in sect. 9, *supra;* being not less than one-fourth part greater than the net annual rent for the last seven years, *plus* five per cent on the gross estimated damage, and no grassum being taken. The feu-duties, &c., are to be settled in the same way as were the rents of the land, and are to be a first charge as above (sect. 4). This last Act is so general that the new enactments as to amount will apply to heirs of entail. See Sc. Midland Ry. *v.* Gray, 1850, 13 D. 410, and *infra*, Appx. No. 22.

payment of which to be charged on tolls.

11. The feu duties or ground annuals stipulated by any such conveyance shall be charged on the tolls or rates, if any, payable under the special Act, and shall be otherwise secured in such manner as shall be agreed between the parties, and shall be paid by the promoters of the undertaking as such feu duties or ground annuals become payable; and if at any time the same be not paid within thirty days after they so become payable, and after demand thereof in writing, the person to whom any such feu duties or ground annuals shall be payable may either recover the same from the promoters of the undertaking, with expenses of suit, by action in any competent court, or it shall be lawful for him to levy the same by poinding and sale of the goods and effects of the promoters of the undertaking.[1]

[1] Even though the undertaking is in the hands of a receiver—Eyton *v.* Denbigh &c., Ry., L.R. 6 Eq. 14, 488, 7 Eq. 439. As to railways, see 30 & 31 Vict. c. 126, sect. 4, made perpetual by 38 & 39 Vict. c. 31.

Power to purchase lands required for additional accommodation.

12. In case the promoters of the undertaking shall be empowered by the special Act to purchase lands for extraordinary purposes,[1] it shall be lawful for all parties who, under the provisions herein-before contained, would be enabled to sell, feu, and convey lands, to sell, feu, and convey the lands so authorised to be purchased for extraordinary purposes.

[1] *E.g.*, railways under 8 & 9 Vict. c. 33, sect. 38, for stations, offices, roads, &c., provided the lands are outside the limits of deviation—Sadd *v.* Maldon, &c., Ry., 6 Exch. 143, 149, *per* Parke B. The additional works of 26 & 27 Vict. c. 92, sect. 8, designed for the public safety, are fortified by compulsory powers. The lands can be used for no other than the prescribed 'extraordinary purposes'—Stockton, &c., Ry. *v.* Brown, 9 H.L. 246. See next clause.

Authority to sell and repurchase such lands.

13. It shall be lawful for the promoters of the undertaking to sell the lands which they shall have so acquired for extraordinary purposes, or any part thereof, in such manner and for such considerations and to such persons as the promoters of the undertaking may think fit, and again to purchase other lands for the like purposes, and afterwards sell the same, and so from time to time, but the total quantity of land to be held at any one time by the promoters of the undertaking for the purposes aforesaid shall not exceed the prescribed[1] quantity.

[1] See sect. 2.

Restraint on purchase from incapacitated persons.

14. The promoters of the undertaking shall not, by virtue of the power to purchase land for extraordinary purposes, purchase or acquire more than the prescribed quantity from any party under legal disability, or who would not be able to sell or convey such lands, except under the powers of this and the special Act; and if the promoters of the undertaking purchase or acquire the said quantity of land from any party under such legal disability, and afterwards sell or dispose of the whole or any part of the land so purchased, it shall not be lawful for any party, being under legal disability, to sell or convey to the promoters of the undertaking any other lands in lieu of the land so sold or disposed of by them.

Capital to be subscribed before compulsory powers of purchase put in force.[1]

15. Where the undertaking is intended to be carried into effect by means of a capital to be subscribed by the promoters of the undertaking,[2] the whole of the capital of the company or estimated sum for defraying the expenses of the undertaking shall be subscribed under contract binding the parties thereto, their heirs, executors, and administrators, for the payment of the several sums by them respectively subscribed before it shall be lawful to put in force any of the powers of this or the special Act, or any Act incorporated therewith, in relation to the compulsory[3] taking of land[4] for the purposes of the undertaking.

[1] See L.P. Inglis's obs. on this and the next section in note to sect. 5, *supra*.

[2] The section does not apply to an existing company obtaining powers of extension, and for raising new funds—Weld *v.* S.W. Ry., 33 L.J. Ch. 142; Reg. *v.* G.W. Ry., 1 E. & B. 253. It is no excuse for not proceeding with an extension that the capital is not fully subscribed (last case), though it is an excuse for not going on with the original undertaking—Reg. *v.* Ambergate, &c., Ry., 1 E. and B. 372; see 13 & 14 Vict. c. 83.

[3] Not voluntary; or where the notice to treat has been adopted by the landowner and he demands to go on—Guest *v.* Poole, &c., Ry., L.R. 5 C.P. 553.

[4] Not a servitude—G.W. Ry. *v.* Swindon, &c., Ry., 22 Ch. D. 677.

A certificate of the sheriff to be evidence

16. A certificate, under the hands of the sheriff, certifying that the whole of the prescribed sum has been subscribed, shall be sufficient evi-

dence thereof;[1] and on the application of the promoters of the undertaking, and the production of such evidence as such sheriff thinks proper and sufficient, such sheriff shall grant such certificate accordingly. that the capita has been subscribed.

[1] Conclusive, except on proof of fraud—Ystalyfera Iron Co. *v.* Neath, &c., Ry., L.R. 17 Eq. 142.

And with respect to the purchase and taking of lands otherwise than by agreement,[1] be it enacted as follows: *Purchase of lands otherwise than by agreement.*

[1] *I.e.*, compulsorily. The rule of construction—founded on the freedom of private property—is strict, as against the undertakers. They must strictly comply with the conditions under which their powers are granted—Moncreiffe *v.* Perth Harbour Comrs., 1843, 5 D. 879 (esp. *per* L. Moncreiff), affd. 5 B. Ap. 333. See cases under sect. 83—Dalgleish *v.* Stirling, &c., Ry., 1847, 9 D. 505.

17. When the promoters of the undertaking shall require to purchase any of the lands which by this or the special Act, or any Act incorporated therewith, they are authorised to purchase or take,[1] they shall give notice[2] thereof to all the parties interested in such lands, or to the parties enabled by this or the special Act to sell and convey the same,[3] or their rights and interests therein, or such of the said parties as shall, after diligent inquiry,[4] be known to the promoters of the undertaking, and by such notice shall demand from such parties the particulars of their interest in such lands, and of the claims made by them in respect thereof; and every such notice shall state the particulars of the land so required,[5] and that the promoters of the undertaking are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works.[6] Notice of intention to take lands.

[1] The authority is limited by the purposes, schedules, and books of reference of the special Act, by the powers of any general Act incorporated, and by this Act. As to railways, see Deas, p. 135; as to time, see sect. 116.

[2] The effect of this 'notice to treat' (as it is technically called) has been stated by judges in Scotland to be 'complete purchase;' the acceptance by the company of the offer of land made substantially by the special Act; a statutory purchase and sale, &c.—Ed. and Northern Ry. *v.* Leven, 1848, 10 D. 1013, 1019; Campbell *v.* E. and G. Ry., 1855, 17 D. 613, 619; Forth, &c., Ry. *v.* Ewing, 1864, 2 Macph. 684, 693; Mackenzie *v.* Inverness, &c., Ry., 1866, 4 Macph. 810, 817; Caled. Ry. *v.* Glasgow Union Ry., 1869, 7 Macph. 959, 963; Lockerby *v.* Glasgow Impr. Trs., 1872, 10 Macph. 971. In England the matter is complicated by the old technical rules of equity with reference to specific performance. But the nature of the transaction and the drift of the cases point to the guarded conclusion of Kindersley V.C. in Haynes *v.* Haynes, 1 Dr. and Sm. 426, 30 L.J. Ch. 578, where he examines all the cases down to 1861 (*q.v.*), and says: 'I consider that the notice to treat constitutes, as between the 'landowner and the company, the relation of vendor and purchaser to a certain 'extent, and for certain purposes, and that some of the consequences which flow from 'an actual contract also flow upon the notice to treat, such as that the particular 'lands . . . are fixed, and that neither party can get rid of the obligation, the 'one to take, the other to give up; . . . but . . . to no further extent does the 'notice constitute a contract, at least on the part of the landowner; but at the same 'time it is perfectly true that if the company and the landowner do, after the notice, 'come to an actual agreement for the purchase and sale of the land, that is a contract 'which the courts of law and equity will deal with just like any other contract for 'the sale and purchase of lands, notwithstanding its having originated in the exercise 'of compulsory powers.' See an example of this last in M'Laren *v.* Glasgow Union Ry., 1878, 5 Ret. 1042. One result of the notice is that any interest created in the land subsequent to it is not a subject for compensation—Glasgow Union Ry. *v.* M'Ewen, 1870, 8 Macph. 747, *Re* Marylebone Imp. Act, L.R. 12 Eq. 389; another, that the company can prevent a sale by auction—Metropolitan Ry. *v.* Woodhouse, 34 L.J. Ch. 297. Another result is that the land must be taken without drawback or

condition ; it is not competent for the undertakers, in order to diminish the compensation, to enforce the acceptance of servitudes in favour of the landowner over the land taken (such as *s. non ædificandi*, or of way) for the benefit of lands retained and injuriously affected ; in other words, they cannot enforce acceptance of a re-grant of a servitude. The decision was founded by some of the judges on the distinction between public trustees and undertakers for profit, but the rule seems to be general—Oswald *v.* Ayr Harbour Trs., 24th January 1883, 10 Ret. 472, aff. 8 App. Cas. 623. The contract is complete only when the price is ascertained by arbitration, &c.—Regent's Canal Co. *v.* Ware, 26 L.J. Ch. 566 ; by the claim being neglected—Inge *v.* Birmingham, &c., Ry. 3 De G. M. and G. 658 ; or if consignation has been made—Mason *v.* Stokes B. Pier, &c., Co., 32 L.J. Ch. 110 ; see Harding *v.* Metrop. Ry., L.R. 7 Ch. 154. The notice should state accurately the quantities and situation of the lands required ; but small clerical errors in the schedule to the notice will not be fatal, or at least not give rise to interdict—Dowling *v.* Pontypool, &c., Ry., L.R. 18 Eq. 714. 'Or thereabouts,' in the limits of deviation may justify taking one-third more than the prescribed space—Corp. of Huddersfield, L.R. 10 Ch. 92. The notice is effectual as a contract of sale of such lands only as are really required for the (permanent) statutory purposes of the undertakers ; but this rule does not apply with the same force to public corporations as to adventurers for gain—Galloway *v.* London Corp., L.R. 1 H.L. 34. Possession for temporary purposes is regulated by the Railways Clauses Act, sects. 25-37, or by the Special Act. The notice binds the landowner till expiry of the time for completion of works, or at least till completion within this period is obviously impossible, or there be other proof of abandonment—Loosemore *v.* Tiverton Ry., 22 Ch. D. 25, and cases there. When the contract is complete, and then only, is the subject converted from heritable to moveable in questions of succession. Cf. Haynes, *supra*, and Righton *v.* Righton, 36 L.J. Ch. 61, with *ex parte* Hawkins, 13 Sim. 569 ; and Watts *v.* Watts, L.R. 17 Eq. 217 ; and in Scotland, Moncrieff *v.* Miln, 1856, 18 D. 1286, where the submission as to price had lapsed, with Heron *v.* Espie, 1856, 18 D. 917, where decreet-arbitral had been pronounced before the landowner's death. The notice may be held to be abandoned through unreasonable delay in following it up—Hedges *v.* Metrop. Ry., 28 Beav. 109 ; Stretton *v.* G.W., &c., Ry., L.R. 5 Ch. 751 (regarded as non-existent by both parties). The interest of a feuar in a piece of ground adjoining his feu, arising out of an obligation of his superior to form a street on it, is not such as entitles him to a notice to treat ; nor has he a claim for damage at common law : in a railway case he should proceed under the Railways Clauses Act, sect. 6—Lawson *v.* Caledonian Ry., 27th January 1881, 8 Ret. 443. Contrast with this a very special case, in which a vested right in certain accesses in contemplation to be made by a superior, was held not to have been made out by the feuar—Newport Ry. *v.* Fleming, 12th Nov. 1879, 7 Ret. 179, aff. 19th March 1882, 8 App. Cas. 265.

[3] Sect. 7 *et seq.*

[4] See sect. 117.

[5] A second notice for more land is allowed, so long as within the limits of deviation —Stamps *v.* Birmingham, &c., 7 Hare, 251 ; Simpson *v.* Lancaster, &c., Ry. 15 Sim. 580. The subjects taken must be neither more nor less than those specified in the notice—Stone *v.* Commercial Ry., 4 M. & Cr. 122 ; Barker *v.* N. Staffordshire Ry., 2 De G. and Sm. 55 ; see sect. 90.

[6] Note to sect. 48, *infra*.

Service of notices on owners and occupiers of lands.

18. All notices required to be served by the promoters of the undertaking upon the parties interested in or entitled to sell any such lands shall either be served personally on such parties, or left at their last usual place of abode, if any such can, after diligent inquiry, be found ; and in case any such parties shall be absent from the United Kingdom, or cannot be found after diligent inquiry, such notices when the same are to be given to an owner of lands shall be served on the factor or agent, if any, of such owner, and shall also be left with the occupier of such lands, or, if there be no such occupier, shall be affixed upon some conspicuous part of such lands.

If parties fail to treat, or in case of dispute, question to be

19. If for twenty-one days after the service of such notice any such party shall fail to state the particulars of his claim in respect of any such land, or to treat with the promoters of the undertaking in respect thereof,

or if such party and the promoters of the undertaking shall not agree as to the amount of the compensation to be paid by the promoters of the undertaking for the interests in such lands belonging to such party, or which he is by this or the special Act enabled to sell, or for any damage that may be sustained by him by reason of the execution of the works,[1] the amount of such compensation shall be settled in the manner hereinafter provided for settling cases of disputed compensation. settled as after mentioned.

[1] Note to sect. 48, *infra*.

20. If no agreement be come to between the promoters of the undertaking and the owners of or parties by this or the special Act enabled to sell and convey any lands taken or required for or injuriously affected by the execution of the undertaking, or any interest in such lands, as to the value of such lands, or of any interest therein, or as to the compensation to be made in respect thereof, it shall be lawful for the parties to refer the same to arbitration. Dispute as to compensation may be referred to arbitration.

21. If the compensation claimed and disputed shall not exceed fifty pounds, unless both parties agree to refer such compensation to arbitration, the same shall[1] be settled by the sheriff. If claim does not exceed £50, to be settled by the sheriff.

[1] Imperative. See also sect. 114.

22. It shall be lawful for the sheriff, upon the application of either party with respect to any such question of disputed compensation, to issue an order for the other party to appear before such sheriff, at a time and place to be named in the order; and upon the appearance of such parties, or in the absence of any of them upon proof of due service of the order, it shall be lawful for such sheriff to hear and determine such question, and for that purpose to examine such parties or any of them, and their witnesses, upon oath, without written pleadings or reducing the evidence to writing; and the expenses of every such inquiry, excepting the remunerative expenses of the sheriff, shall be in the discretion of such sheriff, and he shall settle the amount thereof; and the determination of the sheriff upon such question shall be final and conclusive, and not subject to review or appeal in any form or court whatever. Method of proceeding for settling disputes as to compensation by sheriff.

23. If the compensation claimed or offered in any case shall exceed fifty pounds, and if the party claiming such compensation desire to have the same settled by arbitration, and signify such desire to the promoters of the undertaking, before they have presented their petition to the sheriff to summon a jury in respect of such lands, under the provisions hereinafter contained, by a notice in writing, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed, and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose, then, within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein-after provided. Where compensation claimed exceeds £50, it may be settled by arbitration if claimant so desire.[1]

[1] See cases in the succeeding sections, where the parties were held at liberty to renounce the procedure there laid down, it being introduced for their benefit; and Palmer *v.* Metrop. Ry., 31 L.J.Q.B. 259. Nothing can be awarded except money—Oswald *v.* Ayr Harbour Trustees, *supra*, sect. 17, note [2].

Appointment of arbiters when questions are to be determined by arbitration.

24. When any question of disputed compensation by this or the special Act, or any Act incorporated therewith, authorised or required to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbiter,[1] each party, on the request of the other party, shall nominate and appoint an arbiter, to whom such dispute shall be referred; and every appointment of an arbiter shall be made on the part of the company[2] under the hand of the secretary or any two of the directors of the company, and on the part of any other party under the hand of such party, or if such party be a company or corporation under the hand of the proper officer or person authorised by such company or corporation, and such appointment shall be delivered to the arbiters and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and after any such appointment shall have been made neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as such revocation;[3] and if for the space of fourteen days after any such dispute shall have arisen, and after a request in writing, in which shall be stated the matters so required to be referred to arbitration, shall have been served by the one party on the other party to appoint an arbiter, such other party fail to appoint an arbiter, then upon such failure the party making the request, and having himself appointed[4] an arbiter, may appoint such arbiter to act on behalf of both parties, and such arbiter may proceed to hear and determine the matters which shall be in dispute, and in such case the award or determination of such single arbiter shall be final.

[1] This should be but does not require to be attempted—Yates *v.* Mayor, &c., of Blackburn, 29 L.J. Ex. 447, Eagle *v.* Charing Cross Ry., 36 L.J.C.P. 297; if successfully, the previous forms need not have been strictly complied with, for there is agreement—Collins *v.* S. Staffordshire Ry., 21 L.J. Ex. 247.

[2] As to objections to the company's arbiter, see *Re* Elliot, &c., 2 De G. and Sm. 17. They should be given up, or the objector should retire from the arbitration.

[3] Even though the statutory procedure has been innovated on by prorogations—Caledonian Ry. *v.* Lockhart, 1849, 12 D. 338, 19 D. 527, affd. 3 Macq. 808.

[4] The fact that such an appointment has been made, not an intention to appoint, must be stated—Bradley *v.* L.N.W. Ry., 20 L.J. Ex. 3.

Vacancy of arbiter to be supplied.[1]

25. If, before the matters so referred shall be determined, any arbiter appointed by either party die, or become incapable, the party by whom such arbiter was appointed may nominate and appoint in writing some other person to act in his place, and if for the space of seven days after notice in writing from the other party for that purpose he fail to do so, the remaining or other arbiter may proceed *ex parte;* and every arbiter so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbiter at the time of such his death or disability as aforesaid.

[1] Cf. sect. 28.

Appointment of oversman.

26. Where more than one arbiter shall have been appointed such arbiters shall, before they enter upon the matters referred to them, nominate and appoint, by writing under their hands, an oversman[1] to decide on any such matters on which they shall differ, or which shall be referred to him under the provisions of this or the special Act; and if such oversman shall die, or become incapable to act, they shall forthwith

after such death or incapacity appoint another oversman in his place; and the decision of every such oversman on the matters on which the arbiters shall differ shall be final.

[1] He does not require to be an expert—*In re* Hawley, 2 De G. and Sm. 33. Assuming that parties had a right to prorogate a submission, the oversman is not thereby reappointed. If not expressly reappointed before the arbiters set to work after any prorogation, the arbitration is bad—Glasgow, &c., Ry. *v.* Nitshill Coal Co., 1848, 11 D. 327, revd. 7 B. Ap. 325. As to declinature by the oversman, see Anderson *v.* Deeside Ry., 1853, 15 D. 713; cf. sect. 35. He may be appointed within the three months mentioned in sect. 35, not necessarily within the 21 days of sect. 30—Holdsworth *v.* Wilson, 4 B. & S. 1.

Lord Ordinary empowered to appoint an oversman on neglect of the arbiters.

27. If in either of the cases aforesaid the said arbiters shall refuse, or shall, for seven days after request of either party to such arbitration, neglect to appoint an oversman, it shall be lawful for the Lord Ordinary, on the application of either party to such arbitration, to appoint an oversman, and the decision of such oversman on the matters on which the arbiters shall differ, or which shall be referred to him under this or the special Act, shall be final.

In case of death of single arbiter, the matter to begin *de novo*.

28. If, when a single arbiter shall have been appointed, such arbiter shall die, or become incapable to act, before he shall have made his award, the matters referred to him shall be determined by arbitration, under the provisions of this or the special Act, in the same manner as if such arbiter had not been appointed.[1]

[1] See sects. 24 *in init.*, and 25.

If either arbiter refuse to act, the other to proceed *ex parte*.

29. If, when more than one arbiter shall have been appointed, either of the arbiters refuse or for seven days neglect to act, the other arbiter may proceed *ex parte*, and the decision of such arbiter shall be as effectual as if he had been the single arbiter appointed by both parties.[1]

[1] This section did not apply to a case where an arbiter did not attend at an adjourned meeting fixed for the day after that of a meeting at which he had been present. —*In re* Hawley, 2 De G. and Sm. 33.

If arbiters fail to make their award within 21 days, the matter to go to the umpire.

30. If, where more than one arbiter shall have been appointed, and neither of them shall refuse or neglect to act as aforesaid, such arbiters shall fail to make their award within twenty-one days after the day on which the last of such arbiters shall have been appointed, or within such extended time as shall have been appointed for that purpose by both such arbiters under this Act, the matters referred to them shall be determined by the umpire to be appointed as aforesaid.[1]

[1] This loss of power to award does not involve loss of power to appoint a first or a new oversman under sect. 26—E. and W. India Docks Ry. *v.* Bradshaw, 5 R.C. 527, 536. This sect. is reconciled with sect. 35, so as to give the oversman in all cases three months to perform his duty—Skerrat *v.* N. Staffordshire Ry., 17 L.J. Ch. 161.

Power of arbiters to call for books, &c.

31. The said arbiters or their oversman may call for the production of any documents in the possession or power of either party which they or he may think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose, and take all evidence competent according to the law of Scotland.

Costs of arbitration how to be borne.

32. All the expenses of any such[1] arbitration and incident thereto, to be settled by the arbiters or oversman,[2] as the case may be, shall be borne by the promoters of the undertaking, unless the arbiters or oversman

shall award the same sum as or a less sum than shall have been offered by the promoters of the undertaking,[3] in which case each party shall bear his own expenses incident to the arbitration; and in all cases the expenses of the arbiters or oversman, as the case may be, and of recording the decreet arbitral or award in the books of the Council and Session, shall be borne by the promoters of the undertaking.[4]

[1] *I.e.*, an arbitration otherwise than by agreement—*Ex parte* Raynal, 5 R.C. 60.

[2] Not necessarily in the award, nor within the three months of sect. 35—Gould *v.* Staffordshire Potteries Co., 19 L.J. Ex. 281. Where the special Act and the award said nothing of costs, they were still held due—Metrop. District Ry. *v.* Sharpe, 5 App. Cas. 425. Costs are payable to the landowner within a reasonable time after the award, and execution of a conveyance is not a condition precedent to payment—Capell *v.* G.W. Ry., 9 Q.B.D. 459.

[3] The claimant is entitled to his expenses, if no tender was made, provided some compensation is awarded—Martin *v.* Leicester Waterworks Co., 27 L.J. Ex. 432; otherwise if none is awarded—Mills *v.* Midland Ry., 16 Jur. 640 (see there as to mixed claims, in which expenses are due as to part only). The offer, original or amended, will be in time if made at time of announcing appointment of an arbiter—Fitzhardinge *v.* Gloucester, &c., Canal, L.R. 7 Q.B. 776; not after two extensions of time under sect. 30—Gray *v.* N. E. Ry. 1 Q.B.D. 696. The offer should not include expenses—Ball *v.* Metropol. Board, L.R. 1 Q.B. 337.

[4] See also sects. 50, 66. In the case of railways, either party may get the account taxed by the auditor of the Court of Session, 30 & 31 Vict. c. 126, sect. 37. There is no vendor's right of retention for the costs—E. Ferrers *v.* Stafford, &c., Ry., L.R. 13 Eq. 524.

Award to be delivered to the promoters of the undertaking.

33. The arbiters shall make their decreet arbitral or award in writing, and shall cause the same to be recorded in the books of Council and Session, or shall deliver the same to the promoters of the undertaking, to be by them so recorded, and the said promoters shall, on demand, at their own expense, furnish an extract thereof from the said books to the other party to the arbitration; and extracts of decreets arbitral or awards shall bear faith in all courts and cases the same as the original writings, unless the originals be improven.[1]

[1] The sum awarded cannot be sued for until the conveyance is executed—E. London Union *v.* Metropolitan Ry., L.R. 4 Exch. 309.

Award not to be set aside for error in form.

34. No award made with respect to any question referred to arbitration under the provisions of this or the special Act, shall be set aside for irregularity or error in matter of form.[1]

[1] Nor for any except the old grounds of 'corruption, bribery, or falsehood.' See Bell on Arbitration, pp. 30, 323, 370; Alexander *v.* B. of Allan Water Co., 1869, 7 Macph. 492. Under the first head are included—going beyond the question of value into that of title, and declining to let the consequent exclusion of a subject appear in the award (ibid.) The English authorities are therefore of doubtful application. See *infra*, sect. 48, notes, as to what may be properly included, &c. Objections to arbiters on the ground of interest have been repelled in cases with contractors—Trowsdale *v.* N.B. Ry., 1864, 2 Macph. 1334, 4 Macph. 31, and cases there. The arbiter will be allowed to be examined, or his notes referred to, only in cases where one of the grounds referred to is averred—Alexander, *supra*. See Guthrie *v.* G. and S.W. Ry., 1858, 20 D. 825, where there was no conclusion for reduction of the award, and D. Buccleuch *v.* Metrop. B. of Works, L.R. 5 H.L. 418. The award will stand so far as sound, if this part be separable from the unsound portion—Laing *v.* Caledonian Ry., 1846, 9 D. 70, 74; Caledonian Ry. *v.* Lockhart, 1849, 12 D. 338, 19 D. 527, affd. 3 Macq. 808, 813, where it was also decided that compensation for damage which might be reasonably foreseen and estimated, though contingent and prospective, might be awarded, and that matters might be introduced into the award of consent, which were not statutory, proceeding thus on the common law as well. But if the award give a lump sum for claims, some bad, others good, it is null *in toto*—Beckett *v.*

Midland Ry., L.R. 1 C.P. 241. Damages and price may be lumped—cf. sect. 48; *Re* E. and W. India Docks, 5 R.C. 527; cf. sect. 62.

If arbitration or award not made within a limited time, compensation to be settled by a jury.

35. If the party claiming compensation shall not, as herein-before provided, signify his desire to have the question of such compensation settled by arbitration, or if, when the matter shall have been referred to arbitration, the arbiters or their umpire shall for three months[1] have failed to make their or his award, the question of such compensation shall be settled by the verdict of a jury, as herein-after provided.[2]

[1] Prorogation of consent is competent—Caledonian Ry. *v.* Lockhart, *supra;* and consent may be proved by homologation—D. P. and A. Jn. Ry. *v.* Richardson, 1851, 13 D. 552; Hill *v.* D. P. and A. Jn. Ry., 1852, 24 Sc. Jur. 642; but only where a common-law submission was competent—N.B. Ry. *v.* Renton, 1864, 2 Macph. 442 (heir of entail); cf. sect. 30, and case of Skerrat there. The appointment of an oversman who declines, does not stop the lapse of this period—Glasgow, &c., Railway *v.* Nitshill Coal Co., *supra*, sect. 26—which, so far as the oversman is concerned, runs from the date of his appointment, not from the date at which the arbiter's powers ceased—Pullen, 51 L.J.Q.B. 285.

[2] Falconer *v.* Aberdeen Ry., 1853, 15 D. 352; Anderson *v.* Deeside Ry., 1853, 15 D. 713.

Party claiming compensation may require a jury to be summoned.

36. But if any party entitled to any compensation in respect of any such lands or interest therein, exceeding fifty pounds as aforesaid, shall desire[1] to have the amount of such compensation determined by a jury, it shall in like manner[2] be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed by him;[3] and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose, then, within twenty-one days after the receipt of any such notice from any party so entitled, they shall, unless the question shall previously have been agreed to be settled by arbitration, present their petition to the sheriff to summon a jury for settling the same in the manner herein-after provided, and in default thereof they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any competent court.

[1] This is the third case; the other two have just been given in sect. 35. Mr Deas, p. 325, is of opinion, very plausibly, that the second does not apply to sums not exceeding £50.

[2] Anderson *v.* Deeside Ry., and Falconer *v.* Aberdeen Ry., *supra*, sect. 35, whether the company has entered under sect. 84 or not, ibid.

[3] If the claim be bad—Fife, &c., Ry. *v.* Deas, 1859, 21 D. 1205—or the claimant not entitled—Edinburgh, &c., Glass Co. *v.* N.B. Ry., 1862, 24 D. 1236, the company should get suspension and interdict against proceeding to trial. Yet the claim, not being a necessary proceeding, does not require to be formal—Forth and Clyde Ry. *v.* Ewing, 1864, 2 Macph. 684. It should be for a definite sum down—Falconer *v.* Aberdeen Ry., *supra;* and embrace all damages present and contingent—*infra*, sect. 48.

Promoters of the undertaking to give notice before summoning a jury.

37. Before the promoters of the undertaking shall present their petition for summoning a jury for settling any case of disputed compensation they shall[1] give not less than ten days notice to the other party of their intention to cause such jury to be summoned; and in such notice the promoters of the undertaking shall state what sum of money they are

willing to give for the interest in such lands sought to be purchased by them from such party, and for the damage to be sustained by him by the execution of the works.

[1] Imperative; so that failure makes the company's petition a nullity, and they must pay the whole claim, as laid down in sect. 36, *ad fin.*—Ed. P. and D. Ry. *v.* Leven, 1848, 10 D. 1013, affd. 1 Macq. 284.

Petition for summoning jury to be addressed to the sheriff.

38. In every case in which any such question of disputed compensation shall be required to be determined by the verdict of a jury the promoters of the undertaking shall present their petition to the sheriff to summon a jury for that purpose; and such petition shall, if the promoters be a company or corporation, be signed by the secretary or proper officer or person authorised by such company or corporation, and if they be not a company or corporation such petition shall be signed by the promoters, or any two of them if more than one.

Jurymen to be summoned.

39. Upon the receipt of such petition as aforesaid the sheriff shall summon a jury of twenty-five indifferent persons, duly qualified to act as common jurymen for the trial of civil causes in the Court of Session, to meet at a time and place to be named by the sheriff in the warrant for that purpose.

Notice of inquiry.

40. Not less than ten days notice[1] of the time and place of the inquiry shall be given in writing by the promoters of the undertaking to the other party, or to his known agent.

[1] See a case in which a claimant by his actings was held to have dispensed with this—Lang *v.* Glasgow Court Comrs., 1871, 9 Macph. 768. It is not merely directory, but imperative, and applies to special jury trial under sect. 53, as well as to common (ibid.)

Jury to be impannelled.

41. Out of the jurors appearing upon such summons a jury of thirteen persons shall be drawn by ballot; and if a sufficient number of jurymen do not appear in obedience to such summons the sheriff shall return other indifferent men, duly qualified as aforesaid, of the bystanders, or others that can speedily be procured, to make up the jury to the number aforesaid; and all parties concerned may have their lawful challenges for cause against any of the jurymen; and each party may have three peremptory challenges.

Sheriff to preside; jury may view.

42. The sheriff shall preside on the said inquiry; and the party claiming compensation shall be deemed the pursuer, and the proceedings at such trials shall be conducted in like manner as in criminal trials; and, if either party so request, the sheriff shall order the jury, or any seven or more of them, to view the place or matter in controversy.

Penalty on jury for default.

43. If any person summoned and returned upon any jury under this or the special Act, whether common or special, do not appear, or if appearing he refuse to make oath, or in any other manner unlawfully neglect his duty, he shall, unless he show reasonable excuse to the satisfaction of the sheriff, forfeit a sum not exceeding ten pounds; and every such penalty shall be applied in satisfaction of the costs of the inquiry, so far as the same will extend; and, in addition to the penalty hereby imposed, every such juryman shall be subject to the same regulations, pains, and penalties as if such jury had been returned for the trial of a civil cause in the Court of Session.

Witnesses to be summoned.

44. If either party so request in writing, the sheriff shall summon before him any person considered necessary to be examined as a witness touching the matters in question.

Penalty on witnesses making default.

45. If any person duly summoned to give evidence upon any such inquiry, and to whom a tender of his reasonable expenses shall have been made, fail to appear at the time and place specified in the summons, without sufficient cause, or if any person, whether summoned or not, who shall appear as a witness, refuse to be examined on oath touching the subject matter in question, every person so offending shall forfeit to the party aggrieved a sum not exceeding ten pounds, and, in addition to the penalty hereby imposed, shall be subject to the same regulations, pains, and penalties, as if such witness, having been duly summoned, had failed to appear, or having appeared had refused to be examined in any other cause.

If the party make default the inquiry not to proceed.

46. If the party claiming compensation[1] shall not appear at the time appointed for the inquiry[2] such inquiry shall not be further proceeded in, but the compensation to be paid shall be such as shall be ascertained by a valuator appointed by the sheriff in manner hereinafter provided.[3]

[1] In England this applies to one *non compos*, but not cognosced—*In re* E. Lincoln Ry. Act, 1 Sim. N.S. 260.

[2] Appearance to the first of a number of similar notices to treat, held to apply to all —*Re* Ms. Donegal's Trs., 12 Ir. L.R. 539.

[3] Sect. 56.

Jury to be sworn.

47. Before the jury proceed to inquire of and assess the compensation or damage in respect of which their verdict is to be given they shall make oath that they will truly and faithfully inquire of and assess such compensation or damage; and the sheriff shall administer such oaths, as well as the oaths of all persons called upon to give evidence.

Sums to be paid for purchase of lands and for damage, to be assessed separately.

48. Where such inquiry shall relate to the value of lands to be purchased, and also to compensation claimed for injury done or to be done to the lands held therewith, the jury shall deliver their verdict by a majority of their number separately[1] for the sum of money to be paid for the purchase of the lands required for the works, or of any interest therein belonging to the party with whom the question of disputed compensation shall have arisen, or which under the provisions herein contained such party is entitled to sell or convey, and for the sum of money to be paid by way of compensation for the damage, if any, to be sustained by the owner of the lands by reason of severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting[2] such lands by the exercise of the powers of this or the special Act, or any Act incorporated therewith: Provided always, that if the parties agree to dispense with such separation the verdict may be returned for one sum.

[1] Cf. sect. 34, note. In no case may separate interests be lumped together, sect. 62—Norwich, &c., Road Trs., 5 A. and E. 563; but this separation of price and damages seems to be only directory, and subject to waiver, London and Greenwich Ry., 2 A. and E. 678. The verdict may be 'no damages'—R. *v.* Lancashire, &c., Ry., 6 Q.B. 759. It must deal with values only, not with title, for that belongs elsewhere, sect. 36, note [2]—R. *v.* L.N.W. Ry., 23 L.J.Q.B. 185; R. *v.* Metropolitan Ry., 32 L.J.Q.B. 367; and Read *v.* Victoria Stn. Co. there cited; Lockerby *v.* Glasgow Impr. Trs., 1872, 10 Macph. 971 (arbitration). It should therefore be given on the footing that the land is to be taken, ibid., and on the footing of the value to the

landholder, not to the undertakers—Stebbing *v.* Metrop. Ry., L.R. 6 Q.B. 37—including even increment of value arising from obligation of tenant to sell only the landlord's beer—Bourne *v.* Liverpool Corp., 33 L.J.Q.B. 15. It should include interest, if any be justly due; if it does not, the court cannot supply the defect—Carmichael *v.* Caledonian Ry., 1868, 6 Macph. 671, revd. 8 Macph. H.L. 119 (verdict in 1864, of a value as at 1852). It is conclusive as to the *quantum*, if some damage is proved; but does not bar showing that no damage has been done—Read, and R. *v.* Metrop. Ry., *supra*. It will be applied, so far as sound, if this be separable—Glasgow Union Ry. *v.* Hunter, 1869, 7 Macph. 408, var. 8 Macph. H.L. 156, and see *supra*, sect. 34, note.

[2] A distinction has been drawn both in Scotland—Caledonian Ry. *v.* Barr, 1855, 17 D. 312; Don *v.* N.B. Ry., 1878, 5 Ret. 972—and in England—Hammersmith, &c., Ry. *v.* Brand, L.R. 4 H.L. 171, 203, 207, 209—between the words 'injuriously 'affecting' as used here, and as used in the Railways Clauses Act, sect. 6, arguing chiefly on the difference between the wording of the headings of the *fasciculi* in which each is included. Here they are confined, in the other Act they are not confined, to injury to lands, part of which has been taken by the company. With this caution the meaning put upon the words, under this and other statutes, is here shortly stated. The said section begins thus:—'In exercising the power given to the company by the 'special Act to construct the railway and to take lands for that purpose, the company 'shall be subject to the provisions and restrictions contained in this Act and in the 'said Lands Clauses Consolidation (Scotland) Act, and this company shall make to 'the owners and occupiers of and all other parties interested in any lands taken or 'used for the purposes of the railway or injuriously affected by the construction 'thereof, full compensation for the value of the lands so taken or used, and for all 'damage sustained by such owners, occupiers, and other parties by reason of the exercise, as regards such lands, of the powers by this or the special Act, or any Act incorporated therewith, vested in the company' [procedure as in the Lands Clauses Act].

There has been, especially in England, a long *catena* of decisions regarding the right to compensation in this class of cases. It may be as well to state the definition, put forward by counsel, and practically approved by the House of Lords in a recent case—Metrop. B. of Works *v.* M'Carthy, L.R. 7 H.L. 243—'Where, by the construction of works, there is a physical interference with any right, public or private, 'which the owner or occupier of any property is by law entitled to make use of in 'connection with that property, and which right gives it a marketable value apart 'from the uses to which any particular occupier might put it, there is a title to compensation, if by reason of such interference the property, as a property, is lessened 'in value.' Taking this test to pieces: 1. *Construction*, not use of the works—Railways Clauses Act, sect. 6; Hammersmith, &c., Ry. *v.* Brand, L.R. 4 H.L. 171, and cases there (vibration from use of a railway); Glasgow Union Ry. *v.* Hunter, 1869, 7 Macph. 408, affd. 8 Macph. H.L. 156; whether part of the claimant's land were taken or not; and this seems to apply to a bridge which injuriously affects a neighbouring ferry, by diverting the traffic—Hopkins *v.* G.N. Ry., 2 Q.B.D. 224; and to a piece of new line which supersedes a former rent-producing way-leave—Aikman *v.* Caledonian Ry., 1877, 4 Ret. 1020. 2. *Physical.*—This may be by a permanent obstruction to access, though no part of the claimant's property be taken—E. and W. India Docks *v.* Gattke, 3 Mac. and G. 155, explained by L. Chelmsford in Ricket, *infra;* Beckett *v.* Midland Ry., L.R. 3 C.P. 82; Walker's Trs. *v.* Caledonian Ry., 1881, 8 Ret. 405, affd. 1882, 9 Ret. H.L. 19 (considerable detour in access to a principal city thoroughfare and deprivation of one route thereto); question in the last case if mere change of gradient in the access would entitle to claim; not a temporary obstruction—Ricket, *infra;* D. Buccleuch *v.* Metrop. B. of Works, L.R. 5 H.L. 418. Or it may be injury to light and air—Eagle *v.* Charing Cross Ry., L.R. 2 C.P. 638; D. Bedford *v.* Dawson, L.R. 20 Eq. 353; and Brand, Ricket, Beckett, and Hunter, *supra;* or damage to water-rights (cases in the following heads). 3. *Public or private*, &c.—Not a right which the claimant merely shares with the public—Caledonian Ry. *v.* Ogilvy, 1850, 12 D. 999, revd. 2 Macq. 229 (level-crossing on a public road which formed the chief access to a gentleman's residence—*dicta* in this case are inconsistent with later ascertained law, but the decision itself is justified by the rule in Brand's case and the consideration that placing rails across a road was not an actionable obstruction—see obs. in Walker's Trs., *supra*); unless the interference affects the market value of the property in a peculiar way, on the principle of Ashby *v.* White, 1 Sm. L.C. 251; M'Carthy's case, *supra* (filling up a public dock, and thus damaging trade premises used in connection with it); Walker's Trs., *supra;* and Lyon *v.* Fishmongers' Co., 1 App. Cas. 662. 4. *By law entitled.*—The interference, to entitle to compensation, must be such as to be actionable but for the statute, at least where no land is

taken. Otherwise it is *damnum sine injuria*, the words 'injuriously affecting' being construed in this sense—Ricket, Ogilvy, Brand, Hunter, M'Carthy, *supra*. This strict construction was opposed by L. Westbury in Ricket and Hunter; the First Division in Hunter; and L. O'Hagan in M'Carthy,—and does not seem to hold where land is taken and damage is done by acts thereon to the lands retained—*In re* Stockport, 33 L.J.Q.B. 251, D. Buccleuch, *supra*. If the act causing the injury be not authorised by the statute, an action will lie, but there is no right to compensation under the statute—Colt *v.* Caledonian Ry., 1859, 21 D. 1108, revd. 3 Macq. 833; Lawrence *v.* G.N. Ry., 20 L.J.Q.B. 293; Ware *v.* Regent's Canal Co., 28 L.J. Ch. 153; Loosemore *v.* Tiverton Ry., 22 Ch. D. 25. 5. *Particular occupier.*—Therefore, not for a temporary obstruction to access, where no land is taken—Ricket *v.* Metrop. Ry., L.R. 2 H.L. 175, and cases there reviewed by L. Chelmsford; the damage must be to the land, not to any particular use; but if the obstruction permanently depreciates the land, compensation is due—Beckett *v.* Midland Ry., *supra*. These points were otherwise put by L. Chan. Selborne in Walker's Trs., *supra*, as fixed by judgments of the House of Lords, thus:—'1. Where the right of action which would have existed if 'the work in respect of which compensation is claimed had not been authorised by 'Parliament, would have been merely personal, without reference to land or its inci-'dents, compensation is not due under the Acts. 2. Where damage arises, not out 'of the execution, but only out of the subsequent use of the work, then also there is 'no case for compensation. 3. Loss of trade or custom by reason of a work not other-'wise directly affecting the house or land in or upon which a trade has been carried on, 'or any right properly incident thereto, is not by itself a proper subject for compen-'sation. 4. The obstruction by the execution of the work of a man's direct access to 'his house or land, whether such access be by a public road or by a private way, is a 'proper subject for compensation.' See also L. Blackburn's *dicta* in this case; which established the further proposition that the obstruction last mentioned need not be *ex adverso* of the claimant's property in order to entitle him to compensation.

The practice, in fixing the amount of compensation, is to estimate the price at 45 years' purchase—30 years' purchase being taken as market price, and 15 as *solatium* for expulsion, where the subjects are not already in the market. There is no rule as to houses, but 10 per cent has been the usual *solatium* over and above the market price, and was not disturbed even when calculated on the gross rental instead of the net—Hunter's case, *supra*. The price of business premises should include loss of profits, &c.—Jubb *v.* Hull Dock Co., 9 Q.B. 443. See unreported cases and practical remarks in Deas on Rys., Part IV. ch. 1.

There may be severance without contiguity—Holt *v.* Gaslight, &c., Co., L.R. 7 Q.B. 728 (rifle range). Prospective value may be taken into account, as for feuing—Reg. *v.* Brown, L.R. 2 Q.B. 630; or water-supply—Ripley *v.* G.N. Ry., L.R. 10 Ch. 435; Bush *v.* Trowbridge Waterworks Co., 10 Ch. 459. Landlord and tenant may each have a claim, and that different in kind, as well as in amount—N.B. Ry. *v.* Renton, 1864, 2 Macph. 442. Other elements of claim where land is taken may be deterioration on account of detour in access, of diminution of water-supply, and by reason of decreased amenity, vibration, noise, dust, &c., caused by the working of the undertaking, &c., but where no land is taken the phrase 'injuriously affecting' does not cover decrease of amenity, or injury by vibration, &c. The compensation is as a rule assessed once for all; it is only in exceptional cases, where some sort of damage could not have been fairly foreseen, that a second claim for 'injuriously affecting' will be entertained—Croft *v.* L.N.W. Ry., 3 B. and S. 436; Todd *v.* Metropol. D. Ry., 19 W.R. 720; D. Buccleuch, *supra*. Where the owner of a clayfield reserved power in leasing it to 'resume and except' any part of it at pleasure, and a company took part, the tenant was entitled to compensation, since the taking had been, not under the owner's powers of resumption, but under the statutory powers—Solway Jn. Ry. *v.* Jackson, 1874, 1 Ret. 831, approved in Fleming *v.* Newport Ry., 1883, 8 App. Cas. 281.

49. The sheriff before whom such inquiry shall be held shall give judgment for the purchase money or compensation assessed by such jury; and the verdict and judgment shall be signed by the sheriff, and being so signed shall be kept by the clerk of the sheriff court among the records of that court,[1] and such verdicts and judgments shall be deemed records, and the same or official copies thereof shall be good evidence in all courts and elsewhere; and all persons may inspect the said verdicts and judgments, and may have copies thereof or extracts therefrom on

Verdict and judgment to be recorded.

paying for each inspection thereof one shilling, and for every one hundred words copied or extracted therefrom sixpence.

[1] Interest at 4 per cent runs from date of verdict, though possession was not actually taken till the expiry of certain tenancies—Eccleshill Local Board, 13 Ch. D. 365; and from date of taking possession if earlier—Rhys *v.* Dare Valley Ry., L.R. 19 Eq. 93. See sect. 84.

Expenses of the inquiry how to be borne.

50. On every such inquiry before a jury all the expenses of such inquiry[1] shall be borne by the promoters of the undertaking, unless the verdict of the jury be given for the same or a less sum than the sum previously[2] offered by the promoters of the undertaking, or unless the owner of or party interested in the lands shall have failed to appear at the time and place appointed for the inquiry, having received due notice thereof, in either of which cases one-half of the expenses of the promoters of the undertaking[3] shall be defrayed by the owner of or party interested in the lands.

[1] See next sect. The inquiry does not include one under sect. 92—Cobb *v.* Mid Wales Ry., L.R. 1 Q.B. 342.

[2] *I.e.*, previous to the ten days' notice of sect. 40—Metrop. Ry. *v.* Turnham, 32 L.J.M.C. 249; Hayward *v.* Metrop. Ry., 33 L.J.Q.B. 73. There may be any number of tenders before that date—ibid. If, though damages are assessed, it is afterwards held that nothing was really owing, no expenses are due—Todd *v.* Metrop. District Ry., 19 W.R. 720. The sum assessed by the jury must be taken without interest, though calculated as at a date long before that of the inquiry—Carmichael *v.* Caledonian Ry., 1868, 6 Macph. 671, revd. 8 Macph. H.L. 119.

[3] Cf. sect. 32, 60, 66.

Particulars of the expenses.

51. The expenses of any such inquiry shall, in case of difference, be settled by the sheriff on the application of either party; and such expenses shall include all reasonable charges and expenses incurred in summoning, impannelling, and returning the jury, taking the inquiry, the attendance of witnesses,[1] the employment of counsel and agents, recording the verdict and judgment thereon, and otherwise incident to[2] such inquiry, including the remuneration[3] to the sheriff for his time and labour, and his reasonable travelling expenses, which remuneration for time and labour, exclusive of travelling expenses, shall be five guineas and no more for any inquiry as aforesaid, whether with or without a jury, unless such inquiry shall occupy more than one day or period of eight hours, in which case there shall be paid to the sheriff a sum of five guineas for each day or period of eight hours the inquiry may occupy, including the time necessarily occupied in travelling to and from the place of trial: Provided always, that the time occupied in travelling shall not in reference to any inquiry be computed at more than two days; and in all cases of inquiry as aforesaid before the sheriff, with or without a jury, the remuneration or expenses of the sheriff shall be borne by the promoters of the undertaking.

[1] Amenity witnesses, who are not in business, are only maintained, not feed, at the expense of the company—Younger *v.* Caledonian Ry., 1847, 10 D. 133.

[2] 'Incident to' is widely construed—ibid. See cases quoted by Mr Deas, p. 331 *et seq.*, from Sc. Law Mag. vi. 89, 90.

[3] The part of this section relating to remuneration of sheriffs is repealed, 40 & 41 Vict. c. 50, sect 13.

Payment of expenses.

52. If any such costs shall be payable by the promoters of the undertaking, and if within seven days after demand such expenses be not

paid to the party entitled to receive the same, they shall be recoverable by poinding and sale, and on application to the sheriff he shall issue his warrant accordingly; and if any such expenses shall be payable by the owner of the lands, or of any interest therein, the same may be deducted and retained by the promoters of the undertaking out of any money awarded by the jury to such owner or party interested, or determined by the valuation of a valuator under the provision herein-after contained;[1] and the payment or deposit of the remainder, if any, of such money shall be deemed payment and satisfaction of the whole thereof, or, if such expenses shall exceed the amount of the money so awarded or determined, the excess shall be recoverable by poinding and sale, and on application to the sheriff he shall issue his warrant accordingly.

[1] Sect. 57.

Special jury to be summoned at the request of either party.[1]

53. If either party desire any such question of disputed compensation as aforesaid to be tried before a special jury, such question shall be so tried, provided that notice of such desire, if coming from the other party,[2] be given to the promoters of the undertaking before they have presented their petition to the sheriff; and for that purpose the promoters of the undertaking shall, by their petition to the sheriff, require him to nominate a special jury for such trial; and thereupon the sheriff shall, as soon as conveniently may be after the receipt by him of such petition, summon both the parties to appear before him, by themselves or their agents, at some convenient time and place appointed by him, for the purpose of nominating a special jury (not being less than five days from the service of such summons); and at the place and time so appointed the sheriff shall proceed to nominate a special jury in the manner in which such juries shall be required by the laws for the time being in force to be nominated by the sheriff in other cases, and the sheriff shall appoint a day for the parties or their agents to appear before him to reduce the number of such jury, and thereof shall give four days notice to the parties; and on the day so appointed the sheriff shall proceed to reduce the said special jury to the number of twenty, in the manner used and accustomed in reducing special juries in the Court of Session.

[1] Cf. sect. 36 *et seq.*, and *dicta* in Lang *v.* Glasgow Court Ho. Comrs., *supra*, sect. 40, note.

[2] This notice is not a waiver of a previous notice by him (for a jury *simpliciter* under sect. 36), and does not relieve the company from presenting their petition within 21 days of receipt of the first—Glyn *v.* Aberdare Ry., 28 L.J.C.P. 271. The company does not require to give any notice.

Deficiency of special jurymen.

54. The special jury on such inquiry shall consist of thirteen of the said twenty who shall first appear on the names being called over, the parties having their lawful challenges against any of the said jurymen; and if a full jury do not appear, or if after such challenges a full jury do not remain, then, upon the application of either party, the sheriff shall add to the list of such jury the names of any other disinterested persons, qualified to act as special or common jurymen, who shall not have been previously struck off the aforesaid list, and who may then be attending the court, or can speedily be procured so as to complete such jury, all parties having their lawful challenges against such persons; and the sheriff shall proceed to the trial and adjudication of the matters in

question by such jury; and such trial shall be attended in all respects with the like incidents and consequences, and the like penalties shall be applicable as herein-before provided in the case of a trial by common jury.

Other inquiries before same special jury by consent.

55. Any other inquiry than that for the trial of which such special jury may have been struck and reduced as aforesaid may be tried by such jury, provided the parties thereto respectively shall give their consent to such trial.

Compensation to absent parties to be determined by a valuator, appointed by the sheriff.[1]

56. The purchase money or compensation to be paid for any lands to be purchased or taken by the promoters of the undertaking from any party who, by reason of absence from the kingdom, is prevented from treating, or who cannot after diligent inquiry be found, or who shall not appear at the time appointed for the inquiry before the jury, after due notice thereof, and the compensation to be paid for any permanent injury to such lands, shall be such as shall be determined by the valuation of such valuator as the sheriff shall nominate for that purpose as herein-after mentioned.

[1] Cf. sects. 9, 46.

Sheriff to nominate a valuator.

57. Upon application by the promoters of the undertaking to the sheriff, and upon such proof as shall be satisfactory to him that any such party is, by reason of absence from the kingdom, prevented from treating, or cannot after diligent inquiry be found, or that any such party failed to appear on such inquiry before a jury as aforesaid, after due notice to him for that purpose, such sheriff shall, by writing under his hand, nominate a valuator for determining such compensation as aforesaid, and such valuator shall determine the same accordingly, and shall annex to his valuation a declaration in writing, subscribed by him, of the correctness thereof.

Declaration to be made by the valuator.

58. Before such valuator shall enter upon the duty of making such valuation as aforesaid he shall, in the presence of such sheriff, make and subscribe the oath following at the foot of such nomination; (that is to say,)

'I *A.B.* do solemnly swear, that I will faithfully, impartially, and honestly, according to the best of my skill and ability, execute the duty of making the valuation hereby referred to me. So help me GOD. *A.B.*

'Sworn and subscribed in the presence of .'

And if any valuator shall corruptly make such oath, or having made such oath shall wilfully act contrary thereto, he shall be guilty of and incur the pains of perjury.

Valuation, &c., to be produced to the owner of the lands, on demand.

59. The said nomination and declaration shall be annexed to the valuation to be made by such valuator, and shall be preserved together therewith, by the promoters of the undertaking, and they shall at all times produce the said valuation and other documents, on demand, to the owner of the lands comprised in such valuation, and to all other parties interested therein.

Expense to be borne by the promoters.

60. All the expenses of and incident to every such valuation shall be borne by the promoters of the undertaking.

Purchase money and compensation how to be estimated.[1]

61. In estimating the purchase money or compensation to be paid by the promoters of the undertaking in any of the cases aforesaid regard shall be had not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also to the damage,[2] if any, to

be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands by the exercise of the powers of this or the special Act, or any other Act incorporated therewith.

[1] Cf. sect. 48.

[2] These do not require to be separated by arbiters or valuators, as is the direction in sect. 48—*Re* E. & W. India Docks, 5 R.C. 527.

Compensation may be apportioned among different parties.

62. On estimating the purchase money or compensation to be paid by the promoters of the undertaking in any of the cases aforesaid, the sheriff, arbiters, valuator, or jury, as the case may be, shall apportion [1] the said compensation among the parties who may be interested in the said lands as joint owners or lessees, or as holding some security or burden or claim thereon or interest therein, and who shall have been parties to the said trial or arbitration or valuation: Provided always, that nothing herein contained shall prevent any person having a separate interest from having the same separately tried.

[1] Cf. sect. 48, note [1].

Where compensation to absent party has been determined by a valuator the party may have the same submitted to arbitration.

63. When the compensation payable in respect of any lands, or any interest therein, shall have been ascertained by the valuation of a valuator, and deposited in the bank under the provisions herein contained,[1] by reason that the owner of or party entitled to convey such lands, or such interest therein as aforesaid, could not be found, or was absent from the kingdom, and if such owner or party shall be dissatisfied with such valuation, it shall be lawful for him, before he shall have applied to the Court of Session for payment or investment of the monies so deposited under the provisions herein contained, by notice in writing to the promoters of the undertaking, to require the question of such compensation to be submitted to arbitration, and thereupon the same shall be so submitted to and settled by arbitration in the manner herein-before provided for settling disputes by arbitration.

[1] Sects. 56, 67, 71.

Question to be submitted to the arbiters.

64. The question to be submitted to the arbiters in the case last aforesaid shall be, whether the said sum so deposited as aforesaid by the promoters of the undertaking was a sufficient sum, or whether any and what further sum ought to be paid or deposited by them.

If further sum awarded, promoters to pay or deposit same within 14 days.

65. If the arbiters shall decide that a further sum ought to be paid or deposited by the promoters of the undertaking they shall pay or deposit, as the case may require, such further sum within fourteen days after the making of such decreet arbitral or award, or in default thereof the same may be enforced by diligence, or recovered, with expenses, by action in any competent court.

Expenses of the arbitration.[1]

66. If the arbiters shall determine that the sum so deposited was sufficient, the expenses of and incident to such arbitration, to be determined by the arbiters, shall be in the discretion of the arbiters; but if the arbiters shall determine that a further sum ought to be paid or deposited by the promoters of the undertaking, all the expenses of and incident to the arbitration shall be borne by the promoters of the undertaking.

[1] Cf. sect. 32.

Application of compensation.[1]

And with respect to the purchase money or compensation coming to parties having limited interests, or prevented from treating, or not making title, be it enacted as follows:[2]

[1] On expenses, sect. 79.

[2] The cases in which consignation must be made are those treated in sect. 7 (the subject of the next sections); in sect. 56 (see sect. 75); in sect. 75, when a title is not made out; and in sect. 84.

Purchase money payable to parties under disability, amounting to £200, to be deposited in the bank.

67. The purchase money or compensation which shall be payable in respect of any lands, or any interest therein, purchased or taken by the promoters of the undertaking from any corporation,[1] heir of entail,[2] life-renter, married woman seised in her own right or entitled to terce or dower, or any other right or interest, husband, tutors, curators, or other guardians for any infant, minor, lunatic, or idiot, fatuous or furious person, or for any person under any other disability or incapacity, judicial factor, trustee, executor, or administrator, or person having a partial or qualified interest only in such lands, and not entitled to sell or convey the same, except under the provisions of this or the special Act or the compensation to be paid for any permanent[3] damage to any such lands, shall,* if it amount to or exceed the sum of two hundred pounds, the same shall* be paid into the bank,[4] to the intent that such monies shall be applied, under the authority of the Court of Session, to some one or more of the following purposes; (that is to say,)

* *Sic.*

* *Sic.*

Application of monies deposited.

In the purchase or redemption of the land tax,[5] or the discharge of any debt or incumbrance[6] affecting the land in respect of which such money shall have been paid, or affecting other lands settled therewith on the same heirs,[7] or for the same trusts or purposes, or affecting succeeding heirs of entail in any such lands,[8] whether imposed and constituted by the entailer, or in virtue of powers given by the entail, or in virtue of powers conferred by any Act of Parliament;

In the purchase of other lands[9] to be conveyed, limited, and settled upon the same heirs, and the like trusts and purposes, and in the same manner, as the lands in respect of which such money shall have been paid stood settled; or

If such monies shall be paid in respect of any buildings taken under the authority of this or the special Act, or injured by the proximity of the works, [or][10] in removing or replacing such buildings, or substituting others in their stead, in such manner as the said court shall direct;[11] or

In payment to any party becoming absolutely entitled to such money.[12]

[1] Including a Railway Company—Caledonian Ry. *v.* Glasgow City Union Ry., 1869, 7 Macph. 1072.

[2] Additional facilities are conferred on heirs of entail by the Entail Acts of this century. It is proposed to defer consideration of these to a later page (Act 1848, s. 26, Appx. No. 21), and to give here only the rules common to all cases of disability. See sect. 73.

[3] See sect. 71, *ad fin.*

[4] Sect. 3, *ad fin.*—Methven *v.* E. P. and D. Ry., 1851, 13 D. 1242.

[5] In England, also in reimbursing a limited owner who has already redeemed it—*Ex parte* Northwick, 1 Y. and Coll. 166.

[6] In England this may include a lease—*Ex parte* Corp. of Sheffield, 25 L.J. Ch 587; Mayor of London, 37 L.J. Ch. 375.

[7] Case of diverging entails, in regard to improvement expenditure—Cochrane, 1850, 13 D. 293, *infra*, Appx. No. 21.

[8] *E.g.*, constituted Montgomery improvements—Bute, 1847, 19 Sc. Jur. 414.

[9] In England, of the same tenure—*Ex parte* Macaulay, 23 L.J. Ch. 815. See sect. 73.

[10] *Sic.* The word is omitted in the English Act, sect. 69.

[11] In special circumstances the Court allowed consigned money to be applied in rebuilding a ruinous house on the estate, part of which had been taken—D. Portland, 1852, 14 D. 496. In England, the Lords Justices went so far as to allow money consigned for houses taken on one estate to be applied in rebuilding houses on another, both being included in the same trust—*Re* Davies's Estate, 27 L.J. Ch. 712, and cases there. New farmhouses will not be sanctioned to be erected out of the price of land, unless there be a case of necessity—cf. *Re* Rudyerd's Estate, 6 Jur. N.S. 816, with *Ex parte* Milward, 29 L.J. Ch. 245; *Ex parte* Corp. of Liverpool, L.R. 1 Ch. 596. See *In re* Leigh's Estates, L.R. 6 Ch. 887; *Ex parte* Rector of Claypole, L.R. 16 Eq. 574. *Improvements* are only lawful under the Entail Acts, *infra*, unless made out of a small surplus—under £20—after investment of the bulk of the money,—*Re* Bateman, 21 L.J. Ch. 691.

[12] *E.g.*, trustees with powers of sale—Hobson, 7 Ch. D. 708.

Order for application, and investment meanwhile.

68. Such money may be so applied as aforesaid upon an order of the Court of Session, made on the petition[1] of the party who would have been entitled to the rents and profits of the lands in respect of which such money shall have been deposited; and until the money can be so applied it shall be retained in the bank at interest, or shall be laid out and invested in the public funds or in heritable securities,[2] and the interest, dividends, and annual proceeds thereof shall from time to time, under the like order, be paid to the party who would for the time being have been entitled to the rents and profits of the lands.

[1] As to service thereof, see Entail Acts, *infra*. In England, *Ex parte* Staples, 21 L.J. Ch. 251.

[2] When the compensation is due to an entailed estate, it cannot be secured *ad interim* on a bond over the fee-simple property of the heir in possession—Innes, 1848, 10 D. 870.

Sums from £20 to £200 to be deposited, or paid to trustees.

69. If such purchase money or compensation shall not amount to the sum of two hundred pounds,[1] and shall exceed the sum of twenty pounds, the same shall either be paid into the bank, and applied in the manner herein-before directed with respect to sums amounting to or exceeding two hundred pounds, or the same may lawfully be paid to two trustees to be nominated by the parties entitled to the rents or profits of the lands in respect whereof the same shall be payable, such nomination to be signified by writing under the hands of the parties so entitled; and in case of the coverture, infancy, lunacy, or other incapacity of the parties entitled to such monies, such nomination may lawfully be made by their respective husbands, guardians, tutors, curators, judicial factors, or trustees; but such last-mentioned application of the monies shall not be made unless the promoters of the undertaking approve thereof, and of the trustees named for the purpose; and the money so paid to such trustees, and the produce arising therefrom, shall, at the expense of the promoters of the undertaking, be by such trustees applied in the manner herein-before directed with respect to money paid into the bank, but it shall not be necessary to obtain any order of court for that purpose.

[1] Cf. the surplus under the Entail Acts, *infra*, Act 1848, sect. 26, Appx. No. 21.

Sums not exceeding £20 to

70. If such money shall not exceed the sum of twenty pounds the same shall be paid to the parties entitled to the rents and profits of the

be paid to parties.

lands in respect whereof the same shall be payable, for their own use and benefit; or in case of the coverture, infancy, idiotcy, lunacy, or other incapacity of any such parties, then such money shall be paid, for their use, to the respective husbands, guardians, tutors, curators, judicial factors, or trustees of such persons.

All sums payable under contract with persons not absolutely entitled to be paid into the bank.

71. All sums of money exceeding twenty pounds which may be payable by the promoters of the undertaking, in respect of the taking, using, or interfering with any lands under a contract or agreement with any person who shall not be entitled to dispose of such lands, or of the interest therein contracted to be sold by him, absolutely for his own benefit, shall be paid into the bank or to trustees in manner aforesaid;[1] and it shall not be lawful for any contracting party, not entitled as aforesaid, to retain to his own use any portion of the sums[2] so agreed or contracted to be paid for or in respect of the taking, using, or interfering with any such lands, or for assenting to or not opposing the passing of the bill authorising the taking of such lands, or in lieu of bridges, tunnels, or other accommodation works, but all such monies shall be deemed to have been contracted to be paid for and on account of the several parties interested in such lands, as well in possession as in succession or expectancy: Provided always, that it shall be in the discretion of the Court of Session or the said trustees, as the case may be, to allot to any liferenter or person holding for any other partial or qualified right or interest, for his own use, a portion of the sum so paid into the bank or to such trustees as aforesaid as compensation for any injury, inconvenience, or annoyance which he may be considered to sustain, independently of the actual value of the lands to be taken, and of the damage occasioned to the lands held therewith by reason of the taking of such lands and the making of the works.[3]

[1] Sects. 67, 69.

[2] Though they far exceed the value as subsequently ascertained by the statutory valuation—E. Mansfield *v.* Glasgow, &c., Ry., 1850, 13 D. 235. (The point was waived, but the statute is clear.)

[3] This is the only compensation which a limited owner can appropriate exclusively to himself—Stewart *v.* Sc. N.E. Ry., 1856, 18 D. 541, alt. 3 Macq. 382, 417; Rector of Little Steeping, 5 R.C. 207. In England, small sums expended in current outlays, and costs properly incurred, though not chargeable against the undertakers, are allowed as deductions from the consigned fund to the tenant in life—*Re* D. Marlborough, 13 Jur. 733; *In re* E. Berkeley's Will, L.R. 10 Ch. 56.

Court of Session may direct application of money in respect of leases or reversions as they may think just.

72. Where any purchase money or compensation paid into the bank under the provisions of this or the special Act shall have been paid in respect of any lease for lives or years, or any right or interest in lands less than the fee thereof, or of any reversion dependent on any such lease, or right or interest, it shall be lawful for the Court of Session, on the petition of any party interested in such money, to order that the same shall be laid out, invested, accumulated, and paid in such manner as the said court may consider will give to the parties interested in such money the same benefit therefrom as they might lawfully have had from the lease, right, interest, or reversion in respect of which such money shall have been paid, or as near thereto as may be.

On the purchase of lands

73. If such money shall be laid out and invested in the purchase of lands to be held under entail, or under uses, trusts, intents, and purposes,

it shall not be necessary to ingross verbatim in the titles to such new lands the provisions of the entail or other investiture of the said old lands, or to mention specifically the uses, trusts, intents, and purposes for and upon which the said new lands are to be held, but it shall be sufficient to state the dates of executing and recording the deed or deeds containing the provisions and conditions subject to which, or the uses, trusts, intents, and purposes to, for, and upon which, the said old lands were held, and to declare that the said new lands shall be held subject to the same provisions and conditions,[1] and to, for, and upon the like uses, trusts, intents, and purposes, and to record the title deed containing such general reference in the register of tailzies, sasines, or other proper record, according to the nature of such title deed, which the keepers of the said registers are hereby authorised and required to do without a special order to that effect: Provided always, that upon the first occasion of completing titles to the said entailed estates the land acquired to the estate may be introduced into the titles then completed, after which they shall descend regularly as part and portion of the entailed estates.

to be entailed, not necessary to insert the provisions verbatim.

[1] They are treated, as to disentail, &c., just as if parts of the original estate—Buchanan, 1864, 2 Macph. 1197. If the lands proposed to be purchased are the fee-simple estate of the heir in possession, they must be valued irrespective of minerals, trade premises, and growing wood—D. Hamilton, 1858, 20 D. 1134. See an application of new compensation money in payment of a balance of price of fee-simple lands similarly purchased with compensation money previously—Duff, 1863, 2 Macph. 117.

74. Upon deposit in the bank in manner herein-before provided[1] of the purchase money or compensation agreed or awarded to be paid in respect of any lands purchased or taken by the promoters of the undertaking, under the provisions of this or the special Act, or any Act incorporated therewith, the owner of such lands, including in such term all parties by this Act enabled to sell or convey lands, shall, when required so to do by the promoters of the undertaking, duly convey such lands to the promoters of the undertaking, or as they shall direct; and in default thereof, or if he fail to adduce a good title to such lands, it shall be lawful for the promoters of the undertaking, if they think fit, to expede an instrument under the hands of a notary public, containing a description of the lands in respect of which such default shall be made, and reciting the purchase or taking thereof by the promoters of the undertaking, and the names of the parties from whom the same were purchased or taken, and the deposit made in respect thereof, and declaring the fact of such default having been made; and such instrument shall be stamped with the stamp duty which would have been payable upon a conveyance to the promoters of the undertaking of the lands described therein; and thereupon all the estate and interest in such lands of or capable of being sold and conveyed by the party between whom and the promoters of the undertaking such agreement shall have been come to, or as between whom and the promoters of the undertaking such purchase money or compensation shall have been determined by the sheriff, by a jury, or by arbiters, or by a valuation appointed by the sheriff, as herein provided, and shall have been deposited as aforesaid, shall vest absolutely in the promoters of the undertaking; and as against such parties, and all parties on behalf of whom they are herein-before enabled to sell and convey, the promoters

Upon deposit being made, the owners of the lands to convey, or in default the lands to vest in the promoters of the undertaking, upon a notarial instrument being executed.

of the undertaking shall be entitled to immediate possession of such lands; and such instrument, being registered in the register of sasines in manner herein-after provided in regard to conveyances of lands, shall have the same effect as a conveyance so registered.[2]

[1] This section is concerned with cases in which deposit of the money is provided for by other—the foregoing—sections; sect. 75 with cases where such deposit requires to be otherwise provided for. Neither is applicable to the deposit in security of sect. 84. Both apply only 'to proper neglect or refusal or inability to convey'—Graham *v.* Caledonian Ry., 1848, 10 D. 495, 500. Deposit under sects. 67 and 69 does not effect a conversion from heritable to moveable; deposit under sect. 75 (and, it may be presumed, payment under 70) does. See *Re* Harrop's Estate, 26 L.J. Ch. 516, and cases there.

[2] As to other conveyances, see sect. 80.

Where parties refuse to convey, or do not show title, or cannot be found, the purchase money to be deposited.

75. If the owner of any such lands purchased or taken by the promoters of the undertaking, or of any interest therein, on tender of the purchase money or compensation either agreed or awarded to be paid in respect thereof, refuse to accept the same, or neglect or fail to make out a title to such lands,[1] or to the interest therein claimed by him, to the satisfaction of the promoters of the undertaking, or if he refuse or is unable validly to convey such lands as directed by the promoters of the undertaking, or to discharge or obtain a discharge of any burden or incumbrance thereon which was not specially excepted from discharge, or if any such owner be absent from the kingdom, or cannot after diligent inquiry be found, or fail to appear, on the inquiry before a jury, as herein provided for, it shall be lawful for the promoters of the undertaking to deposit the purchase money or compensation payable in respect of such lands or any interest therein in the bank, to be placed, except in the cases herein otherwise provided for, to an account to be opened in the name of the parties interested in such lands (describing them, so far as the promoters of the undertaking can do), subject to the control and disposition of the Court of Session.

[1] This does not apply to a title which is undoubted, and merely incomplete in form —Graham *v.* Caledonian Ry., *supra;* nor if the true owner is known (the undertakers having purchased land, a strip of which did not belong to the vendor)—Wells *v.* Chelmsford Board, 15 Ch. D. 108; nor again, to a title positively bad. In the last case, the proper course is to go to a jury, and if the true owner does not then appear, deposit may be made under the last case mentioned in this section—Douglas *v.* L.N.W. Ry., 3 K. and J. 173, 180. The court, after deposit, not the jury, determines as to the title—Brandon *v.* Brandon, 11 Jur. N.S. 30. See cases of substantial title to a deposit under sect. 84—Miles, 1867, 5 Macph. 402; Thomson *v.* N.B. Ry, 1867, 5 Macph. 410. The titles were enough at the worst to enable the company to make up a formal title. See sect. 78. See case of Crown claiming, *In re* Lowestoft Manor, 13th June 1883, W.N. 113.

Upon deposit being made, a receipt to be given, and the lands to vest, upon a notarial instrument being executed.

76. Upon any such deposit of money as last aforesaid being made, the cashier or other proper officer of such bank shall give to the promoters of the undertaking, or to the party paying in such money by their direction, a receipt for such money, specifying therein for what and for whose use (described as aforesaid) the same shall have been received, and in respect of what purchase the same shall have been paid in; and it shall be lawful for the promoters of the undertaking, if they think fit, to expede an instrument under the hands of a notary public, containing a description of the lands in respect whereof such deposit shall have been made, and declaring the circumstances under which and the names of the parties to

whose credit such deposit shall have been made, and such instrument shall be stamped with the stamp duty which would have been payable upon a conveyance to the promoters of the undertaking of the lands described therein; and thereupon all the estate and interest in such lands of the parties for whose use and in respect whereof such purchase money or compensation shall have been deposited shall vest absolutely in the promoters of the undertaking, and as against such parties they shall be entitled to immediate possession of such lands;[1] and such instrument, being registered in the register of sasines in manner hereinafter directed in regard to conveyances of lands, shall have the same effect as a conveyance so registered.

[1] Not till a notarial instrument has been executed. Even then it is doubtful whether the company can enter into possession *viâ facti*, or only under sect. 89—Alexander *v.* B. of Allan Water Co., 1868, 6 Macph. 324.

Application of monies so deposited.

77. Upon the application by petition of any party making claim to the money so deposited as last aforesaid, or any part thereof, or to the lands in respect whereof the same shall have been so deposited, or any part of such lands, or any interest in the same, the said Court of Session may, in a summary way, as to such court shall seem fit, order such money to be laid out or invested in the public funds, or on heritable securities, or may order distribution thereof, or payment of the dividends thereof, according to the respective estates, titles, or interests of the parties making claim to such money or lands, or any part thereof, and may make such other order in the premises as to such court shall seem fit.

Party in possession to be deemed to be the owner.

78. If any question[1] arise respecting the title to the lands in respect whereof such monies shall have been so paid or deposited as aforesaid, the parties respectively in possession of such lands, as being the owners thereof, at the time of such lands being purchased or taken, shall be deemed to have been lawfully entitled to such lands, until the contrary be shown to the satisfaction of the court; and unless the contrary be shown as aforesaid the parties so in possession, and all parties claiming under them, or consistently with their possession, shall be deemed entitled to the money so deposited, and to the dividends or interest of the annuities or securities purchased therewith, and the same shall be paid and applied accordingly.

[1] If raised by the company, the proper procedure is deposit under sect. 75—Methven *v.* E. P. and D. Ry. 1851, 13 D. 1262; after which the money will be paid to the possessor if no competitor appears—ibid. This section is intended to guide the court in case it should be unable to reach a satisfactory conclusion in regard to title—*Ex parte* Freemen, &c., of Sunderland, 1 Drew. 184; or in order to avoid going into the question of title, unless it be plain that there must be litigation about the title to the whole estate—*per* L. Hatherley V.C., *In re* St Pancras Burial Ground, L.R. 3 Eq. 173, 183. And see *Ex parte* Winder, 6 Ch. D. 696.

Expenses in cases of money deposited.[1]

79. In all cases of monies deposited in the bank under the provisions of this or the special Act, or any Act incorporated therewith, except where such monies shall have been so deposited by reason of the wilful[2] refusal of any party entitled thereto to receive the same, or to feu or convey the lands in respect whereof the same shall be payable, or by reason of his refusal or inability to discharge or obtain a discharge of any burden on such lands which was not specially excepted from discharge, or by reason

of the failure or neglect of any party to make out a good title to the land required, it shall be lawful[3] for the Court of Session to order the expenses of the following matters, including therein all reasonable charges and expenses incident thereto,[4] to be paid by the promoters[5] of the undertaking; (that is to say), the expense of the purchase or taking of the lands, or which shall have been incurred in consequence thereof, other than such expenses as are herein otherwise provided for, and the expense of the investment of such monies in government or real securities[6] and of the re-investment thereof in the purchase of other lands,[7] and of re-entailing any of such lands, and incident thereto, and also the expense of obtaining the proper orders for any of the purposes aforesaid, and of the orders for the payment of the dividends and interest of the securities upon which such monies shall be invested,[8] and for the payment of the principal of such monies, or of the securities whereon the same shall be invested, and of all proceedings relating thereto, except such as are occasioned by litigation between adverse claimants:[9] Provided always, that the expense of one application only for reinvestment in land[10] shall be allowed, unless it shall appear to the Court of Session that it is for the benefit of the parties interested in the said monies that the same should be invested in the purchase of lands in different sums and at different times,[11] in which case it shall be lawful for the court, if it think fit, to order the expenses of any such investment to be paid by the promoters of the undertaking.

[1] This section governs expenses under the Entail Acts. See Act of 1848, sects. 26, 35, *infra*, Appx. No. 21.

[2] *I.e.*, capricious or unreasonable; *e.g.*, on the ground that he had not been paid his costs—*Re* Turner, 5 L.T.N.S. 524. Refusal will be reasonable if there be division or difficulty on the Bench—*Ex parte* Bradshaw, 16 Sim. 174; *Ex parte* Railston, 15 Jur. 1028; or even if it proceeds *bonâ fide* on opinion of counsel—*Ex parte* Dashwood, 3 Jur. N.S. 103. See *In re* Windsor, &c., Ry., 12 Beav. 522. See as to expenses, caused by fault of the company, cases of Miles and Thomson in note to sect. 75. In a case where the title was made up by notarial instrument, but not for this 'reason,' the company was held liable—Moncrieff, 1857, 19 D. 283.

[3] There is a discretion—see the end of the section, and Jones *v.* Lewis, 2 M. and G. 163.

[4] As to charge of agent for settling, when payment is tendered without approval of auditor's report—Maitland, 17th Oct. 1882, 20 Sc.L.R. 35.

[5] If several companies have taken land, and there be one application only, the expenses (except the *ad valorem* stamp and surveyor's fee) will be borne equally; but if there be great inequality, rateably—*Ex parte* C.C.C. Oxford, L.R. 13 Eq. 334; *Ex parte* Bartholomew's Hospital, L.R. 20 Eq. 369, and cases there. As to effect of compensation, see *Ex parte* Gaskell, 2 Ch. Div. 360.

[6] Either *ad interim*—*In re* Smith's Estate, L.R. 9 Eq. 178; and then a second investment is, as respects expenses, regarded as permanent—Flemon's Trusts, L.R. 10 Eq. 612; though this is no longer expressed in the order—Stewart's Estate, L.R. 18 Eq. 278, and case of Blyth's Trs. there; or originally permanent, sect. 77. Including brokerage—Trinity Ho., 3 Hare, 95. Not necessary to serve petition on holders of charges on the land, and expenses thereof disallowed—Morris's Estates, L.R. 20 Eq. 470.

[7] Or redemption of land-tax—*In re* Bethlem Hospital, L.R. 19 Eq. 457 (as to buildings, see sect. 67, note); or entail improvements—Grant, 1851, 13 D. 1015. But not so far as unnecessarily incurred—D. Hamilton, 1858, 21 D. 124; Gore Langton's Estates, L.R. 10 Ch. 328; Leigh's Estates, L.R. 6 Ch. 887. The expense of abortive purchases may or may not go against the company, according to circumstances—Rector of Holywell, 2 Dr. and Sm. 463. The company is not liable beyond the expenses effeiring to the sum consigned, if the price paid in the purchase exceeds it—Corp. of Carlisle, 20 L.T. 166. It is liable for the expense of an entry with the superior of the land substituted—M. Titchfield *v.* G.S.W. Ry. 1853, 15 D. 908.

[8] Incumbent of Guilden-Sutton, 2 Jur. N.S. 793; *Re* Lye, 13 L.T.N.S. 664.

[9] Or in which other persons, and not the company, are alone concerned—*e.g.*, con-

stitution of improvement expenditure on an entailed estate—L. Torphichen *v.* Caledonian Ry., 1851, 13 D. 1400; Erskine *v.* Aberdeen, &c., Ry., 1851, 14 D. 119; or appointment of a *curator ad litem* to a substitute heir—Moncreiffe, 1859, 21 D. 1359. See as to inquiry concerning a mortgagee's right, *In re* Bareham, 17 Ch. D. 329.

[9] Including feu-duties, which are 'lands under burden of the feu-rights'—*per* L. Curriehill (2d), Stewart, 1875, 12 S.L.R. 303.

[10] Grant, 1850, 13 D. 1015 (in land and for improvements under different petitions)—*Re* Woolley, 17 Jur. 850; St Bartholomew's Hospital, 4 Drew. 425; Brandon *v.* Brandon, 32 L.J. Ch. 20, 34 L.J. Ch. 333.

Conveyances.

Form of conveyances.

And with respect to the conveyances of lands, be it enacted as follows:

80. Feus and conveyances of lands so to be purchased as aforesaid may be according to the form in the Schedules (A.) and (B.) respectively to this Act annexed or as near thereto as the circumstances of the case will admit; which feus and conveyances, being duly executed, and being registered in the particular register of sasines kept for the county,[1] burgh, or district in which the lands are locally situated, or in the general register of sasines for Scotland kept at Edinburgh, within sixty days from the last day thereof, which the respective keepers of the said registers are hereby authorised and required to do,[2] shall give and constitute a good and undoubted right and complete and valid feudal title in all time coming to the promoters of the undertaking, and their successors and assigns, to the premises therein described, any law or custom to the contrary notwithstanding: Provided always, that it shall not be necessary for the promoters of the undertaking to record in any register of sasines any feus or conveyances in their favour which shall contain a procuratory of resignation or precept of sasine, or which may be completed by infeftment; and the title of the company under such last-mentioned feus or conveyances shall be regulated by the ordinary law of Scotland, until the said feus or conveyances, or the instruments of sasine thereon, shall have been recorded in a register of sasines.[3]

[1] Altered 31 & 32 Vict. c. 64, sect. 3.

[2] All conveyances, whether feu or burgage, now require to have a warrant of registration—32 & 33 Vict. c. 116, sects. 3, 15; 37 & 38 Vict. c. 94, sect. 25. It will be safe to regard these Acts as applicable to the title here provided for.

[3] The proviso is rendered obsolete by the Titles Acts last quoted. As to feu-duties, &c., see sects. 107 *et seq.*, 126; as to mines, see text, p. 419.

Expenses of conveyances.

81. The expenses of all conveyances of lands shall be borne by the promoters of the undertaking; and such expenses shall include all charges and expenses, incurred on the part as well of the seller as of the purchaser, of all conveyances of any such lands, and of any interests therein, and of establishing the title to such lands,[1] and all other reasonable expenses incident to the investigation of such title.

[1] The court practically denies effect to the foregoing words. If the landowner has not made up a title, he may either—(1) refuse to do so, and then the company proceeds under sect. 75; or (2) make it up, and then the company is not liable for the expense thereby incurred—Graham *v.* Caledonian Ry., 1848, 10 D. 495. The rule is just, but does violence to the wording of the clause. The English Act, sect. 82, throws this expense more distinctly on the company.

Taxation of expenses of conveyances.

82. If the promoters of the undertaking and the party entitled to any such expenses shall not agree as to the amount thereof, such amount shall be ascertained and decerned for by the Lord Ordinary,[1] on a summary petition presented to him by the party entitled to recover the same;

and the promoters of the undertaking shall pay to the party entitled thereto what the said Lord Ordinary shall decree for or in respect of such expenses, or in default thereof the same may be recovered in the same way as any other expenses payable under an order or decree of the court, or the same may be recovered by poinding and sale in the manner hereinbefore provided in other cases of expenses; and the expense of taxing such expenses shall be borne by the promoters of the undertaking, unless upon such taxation one sixth part of the amount of such expenses shall be disallowed, in which case the expenses of such taxation, and of or incident to the application to the Lord Ordinary, shall be borne by the party whose expenses shall be so taxed, and the amount thereof shall be ascertained by the said Lord Ordinary, and deducted by him accordingly in his judgment or decerniture.

[1] As to review by the Inner House, see Graham *v.* Caledonian Ry., *supra*, sect. 81.

Entry on Lands.

And with respect to the entry upon lands by the promoters of the undertaking, be it enacted as follows:

Payment of price to be made previous to entry, except to survey, &c.

83. The promoters of the undertaking shall not, except by consent[1] of the owners and occupiers, enter upon[2] any lands which shall be required to be purchased or permanently used for the purposes and under the powers of this or the special Act, until they shall either have paid to every[3] party having any interest in such lands, or deposited in the bank in the manner herein mentioned, the purchase money or compensation agreed or awarded to be paid to such parties respectively for their respective interests therein: Provided always, that for the purpose merely of surveying and taking levels of such lands, and of probing or boring to ascertain the nature of the soil, and of setting out the line of the works,[4] it shall be lawful for the promoters of the undertaking, after giving not less than three nor more than fourteen days notice to the owners or occupiers thereof, to enter upon such lands[5] without previous consent, making compensation for any damage thereby occasioned to the owners or occupiers thereof.

[1] Tacit consent is proved (so far as the company's operations are confined within the limits of their notice, but no further) by the landowner allowing the works to proceed nearly to completion without objection—Renton *v.* N.B. Ry., 1845, 8 D. 247; see Fooks *v.* Wilts, &c., Ry., 5 Hare, 199, especially if the entry were by mistake—Wood *v.* Charing Cross Ry., 33 Beav. 290; or again, by receiving part payment—Capps *v.* Norwich, &c., Ry., 9 Jur. N.S. 635; or by agreement to take payment on a future day with interest—Pell *v.* Northampton, &c., Ry., 36 L.J. Ch. 319; Pryse *v.* Cambrian Ry., 36 L.J. Ch. 565; or even by negotiations never completed—Hare *v.* Cork, &c., Ry., 17 L.T. 21. The remedy where there is no consent is by interdict—Renton, *supra;* but in dubious cases such as the above, an order for deposit under sect. 84, or for proceeding to a valuation, may suffice. Consent bars ejection—Hudson *v.* Leeds Ry., 20 L.J.Q.B. 486; and cannot be revoked—ibid.; Knapp *v.* L.C. and D. Ry., 32 L.J. Ex. 236.

[2] Not 'injuriously affect.' This is not forbidden—Hutton *v.* L.S.W. Ry., 7 Hare, 259.

[3] Inge *v.* Birmingham, &c., Ry., 3 De G.M. and G. 658; Perks *v.* Wycombe Ry., 3 Giff. 662 (fiar, liferenter, mortgagee); Armstrong *v.* Waterford, &c., Ry., 10 Ir. Eq. R. 60; Carter *v.* G.E. Ry., 9 Jur. N.S. 618 (landlord and tenant).

[4] Depositing waggons and materials, with consent of the occupier but not of the owner, is allowed—Standish *v.* Mayor, &c., of Liverpool, 1 Drew. 11. So also sinking pits and excavating the soil—Fleming *v.* Caledonian Ry., 1847, 9 D. 792; but not making a permanent tunnel—Ramsden *v.* Manchester, &c., Ry., 1 Exch. 723, or

throwing a bridge over the land, though no part of it be taken—Pinchin *v.* Blackwall Ry., 1 K. and J. 35.

[5] *I.e.*, such as the company is bound to take permanently, either having completed an agreement to that effect, or having included them in a notice to treat—Dalgleish *v.* Stirling, &c., Ry., 1847, 9 D. 505.

Promoters to be allowed to enter on lands before purchase, on making deposit by way of security and giving bond.[1]

84. Provided also, that if the promoters of the undertaking shall be desirous of entering upon and using any such lands before an agreement shall have been come to, or an award made or verdict given, for the purchase money or compensation to be paid by them in respect of such lands, it shall be lawful for the promoters of the undertaking to deposit in the bank by way of security, as hereinafter-mentioned, either the amount of purchase money or compensation claimed by any party interested in or entitled to sell and convey such lands, and who shall not consent to such entry, or such a sum[2] as shall, by a valuator appointed by the sheriff in the manner herein-before[3] provided in the case of parties who cannot be found, be determined to be the value of such lands, or of the interest therein which such party is entitled to, or enabled to sell and convey, and also, if required so to do, to give to such party a bond, under the hand of the secretary or proper officer or person authorised, if the promoters be a company or corporation, or if they be not a company or corporation under the hand of the promoters, or any two of them if more than one, with two sufficient securities,[4] to be approved of by the sheriff in case the parties differ, for a sum equal to the sum so to be deposited, for payment of such party, or for making a deposit in the bank for the benefit of the parties interested in such lands, as the case may require, under the provisions herein contained,[5] of all such purchase money or compensation as may in manner herein-before provided be determined to be payable by the promoters of the undertaking in respect of the lands[6] so entered upon, together with interest[7] thereon at the rate of five pounds *per centum per annum*, from the time of entering on such lands until such purchase money or compensation shall be paid to such party, or deposited in the bank for the benefit of the parties interested in such lands, under the provisions herein contained;[8] and upon such deposit by way of security being made as aforesaid, and such bond being delivered or tendered to such non-consenting party as aforesaid, it shall be lawful for the promoters of the undertaking to enter upon and use such lands, without having first paid or deposited the purchase money or compensation in other cases required to be paid or deposited by them before entering upon any lands to be taken by them under the provisions of this or the special Act.

[1] Does this section only apply in cases of urgency—Willey *v.* S.E. Ry., 6 R.C. 100, Field *v.* Carnarvon Ry., L.R. 5 Eq. 190? The compensation should include not only the value of the land, but severance damages, &c.—Field *v.* Carnarvon &c., Ry., *supra*; and include the value of the whole subject, part only of which is to be entered—Barker *v.* N. Staffordshire Ry., 5 R.C. 401. The deposit being merely an estimate does not prevent the landowner from forcing on a valuation—Adams *v.* London, &c., Ry., 2 M. and G. 118; nor when the value is ascertained, but not paid, does it deprive him of his lien on the lands—Walker *v.* Ware, &c., Ry., L.R. 1 Eq. 195—for this subsists wherever the company has taken possession without payment. The remedies apply even to cases where the land has been used for profit, and include sale of the land—Walker, *supra*; appointment of a receiver—Pell, in note [1] to sect. 83; Bishop of Winchester *v.* Mid Hants Ry., L.R. 5 Eq. 17; but not now interdict against its use, that being matter of public concern—Munns *v.* Isle of Wight Ry., L.R. 5 Ch. 414;

Lycett *v.* Stafford; &c. Ry., L.R. 13 Eq. 261. Where the Special Act authorised tunnelling if a jury approved, the sum had to be calculated on the value of the servitude, not of the whole land—Hill *v.* Midland Ry., 21 Ch. D. 143. Entry at a time when manifestly the railway cannot be made over the land within the prescribed period (here thirteen days before expiry thereof) is not entry for the execution of works under its statutory powers, is an abuse of the Act, and can confer no right beyond the said period which the Company would not have otherwise had; therefore it cannot proceed with its notice to treat (already given), and the landowner is entitled to resume possession. Op. *per* Jessel M.R. and Cotton L.J. that the same would have been the result though the entry had been rightful if the land had not become the Company's, or the railway on it completed at the end of the period—Loosemore *v.* Tiverton Ry., 22 Ch. D. 25.

[2] As to the *quantum*, see sects. 90, 106; and in the case of railways, 30 & 31 Vict. c. 126, sect. 36, which clause, applicable only to railway companies, substitutes the Board of Trade for the sheriff, and requires seven days' notice of an application for a valuator. Except under this last Act, no notice is required of proceedings under sect. 84—Bridges *v.* Wilts, &c., Ry., 16 L.J. Ch. 335; in England even of the appointment or approval of the two securities—Poynder *v.* G.N. Ry., 5 R.C. 196. This point might be reconsidered in Scotland, since provision is made for the parties differing.

[3] Sect. 57. As to objections to the mode of valuing—Cotter *v.* Metrop. Ry., 10 Jur. N.S. 1014; Stamps *v.* Birmingham, &c., Ry., 7 Hare, 251, 256.

[4] In all cases—Radcliffe *v.* Glasgow, &c., Ry., 1847, 9 D. 1462 (incorporated Railway Co.) See note [2].

[5] Sects. 67 *et seq.*, 80.

[6] Not including minerals under sects. 78 and 81 of the Railways Clauses Act—*Ex parte* Neath, &c., Ry., 2 Ch. D. 201.

[7] Rhys *v.* Dare Valley Ry., L.R. 19 Eq. 93.

[8] The bond should be strictly in terms of the statute—Hosking *v.* Phillips, 3 Exch. 168, 181; Poynder, Cotter, *supra;* Langham *v.* G.N. Ry., 1 De G. and Sm. 486.

Deposit to be paid into bank, and cashier to give a receipt.

85. The money so to be deposited as last aforesaid shall be paid into the bank,[1] to be placed to an account to be opened in the name of the parties interested in or entitled to sell and convey the lands so to be entered upon, and who shall not have consented to such entry, subject to the control and disposition of the Court of Session; and upon such deposit being made the cashier or other proper officer of the bank shall give to the promoters of the undertaking, or to the party paying in such money by their direction, a receipt for such money, specifying therein for what purpose and to whose credit the same shall have been paid in.

[1] Sec. 3, *ad fin.*

Deposit to remain as a security, and to be applied under the direction of the court.

86. The money so deposited as last foresaid shall remain in the bank by way of security to the parties whose lands shall so have been entered upon for the performance of the bond to be given by the promoters of the undertaking, as herein-before mentioned, and the same may, on the application by petition of the promoters of the undertaking, be ordered to be invested in the public funds or upon heritable securities, and accumulated; and upon the conditions of such bond being fully performed it shall be lawful for the Court of Session,[1] upon a like application, to order the money so deposited, or the funds in which the same shall have been invested, together with the accumulation thereof, to be repaid or transferred to the promoters of the undertaking, or, if such conditions shall not be fully performed, it shall be lawful for the said court to order the same to be applied in such manner as it shall think fit for the benefit of the parties for whose security the same shall so have been deposited.[2]

[1] Not the sheriff, though both parties so desire—E.P. and D. Ry., 1850, 22 Sc. Jur. 573. Service on the landowner, or proof of his being fully paid, is required in England—*Ex parte* S. Wales Ry., 6 R.C. 151; E. Counties Ry., 5 R.C. 210.

[2] If the conditions are broken, the landowner may apply to uplift the deposit adversely to the undertakers—Mutlow's Estate, 10 Ch. D. 131. Payment to the landowner will not be stopped by the raising of a reduction of the decreet-arbitral, which is his title—Fortune, 1849, 11 D. 531.

Penalty on the promoters of the undertaking entering upon lands without consent, before payment of the purchase money.

87. If the promoters of the undertaking or any of their contractors shall, except as aforesaid, wilfully enter upon and take possession of any lands which shall be required to be purchased or permanently used for the purposes of the special Act, without such consent as aforesaid, or without having made such payment for the benefit of the parties interested in the lands, or such deposit by way of security as aforesaid, the promoters of the undertaking shall forfeit to the party in possession of such lands the sum of ten pounds, over and above the amount of any damage done to such lands by reason of such entry and taking possession as aforesaid, such penalty and damage respectively to be recovered before the sheriff; and if the promoters of the undertaking or their contractors shall, after conviction in such penalty as aforesaid, continue in unlawful possession of any such lands, the promoters of the undertaking shall be liable to forfeit the sum of twenty-five pounds for every day they or their contractors shall so remain in possession as aforesaid, such penalty to be recoverable by the party in possession of such lands, with expenses, by action in any competent court: Provided always, that nothing herein contained shall be held to subject the promoters of the undertaking to the payment of any such penalties as aforesaid, if they shall *bonâ fide* and without collusion have paid the compensation agreed or awarded to be paid in respect of the said lands to any person whom the promoters of the undertaking may have reasonably believed to be entitled thereto, or shall have deposited the same in the bank for the benefit of the parties interested in the lands, or made such deposit by way of security in respect thereof as herein-before mentioned, although such person may not have been legally entitled thereto.

Decision of sheriff not conclusive as to the right of the promoters.

88. On the trial of any action for any such penalty as aforesaid the decision of the sheriff, under the provision herein-before contained, shall not be held conclusive as to the right of entry on any such lands by the promoters of the undertaking.

Proceedings in case of refusal to deliver possession of lands.[1]

89. If in any case in which, according to the provisions of this or the special Act, or any Act incorporated therewith, the promoters of the undertaking are authorised to enter upon and take possession of any lands required for the purposes of the undertaking, the owner or occupier of any such lands, or any other person, refuse to give up the possession thereof, or hinder the promoters of the undertaking from entering upon or taking possession of the same, it shall be lawful for the promoters of the undertaking to apply by petition to the sheriff for possession of the same, and upon such application the sheriff may authorise and order possession of any such lands accordingly; and the expenses accruing by reason of such application, to be settled and decerned for by the sheriff, shall be paid by the person wrongfully refusing to give or hindering possession; and the amount of such expenses[2] shall be deducted and retained by the promoters of the undertaking from the compensation, if any, then payable by them to such party; or if no such compensation be payable to such party, or if the same be less than the amount of such

expenses, then such expenses, or the excess thereof beyond such compensation, if not paid on demand, may be levied by poinding and sale, and the sheriff may issue his warrant accordingly.

[1] Bridge of Allan Water Trs. *v.* Alexander, 1868, 6 Macph. 321; see sect. 139, and case between the same parties, 6 Macph. 324, under sect. 76. There is no necessity to go to the sheriff, if the landowner merely refuses to allow, but does not actively resist, entry—Loosemore *v.* Tiverton Ry., 22 Ch. D. 25, *per* Fry J.

[2] Along with, it would seem, damages for deterioration of the land in the interval through the owner's negligence—Regent's Canal Co. *v.* Ware, 26 L.J. Ch. 566.

Parties not to be required to sell part of a house.

90. And be it enacted that no party[1] shall at any time be required[2] to sell or convey to the promoters of the undertaking a part only of any house[3] or other building or manufactory,[4] if such party be willing and able to sell and convey the whole[5] thereof.

[1] Including parties under disability—St Thomas's Hosp. *v.* Charing Cross Ry., 30 L.J. Ch. 395; and lessees—M'Gregor *v.* Metrop. Ry., 14 L.T.N.S. 354; Pulling, *infra.*

[2] *I.e.*, compelled—Gardner *v.* Charing Cross Ry., 31 L.J. Ch. 181. So claiming a certain sum for part does not bar demanding purchase of the whole, if the said sum is refused—ibid. This demand enables the company to abandon purchasing—R. *v.* L. S.W. Ry., 12 Q.B. 775. It does not necessitate a second notice to treat—Schwinge *v.* London, &c., Ry., 24 L.J. Ch. 405, where see the relation of this section to sect. 17 *et seq.*; nor waive any right to quarrel the original notice—Pinchin *v.* Eand. 1 K. and J. 34, 64, *per* Wood V.C., *dub.* The latter is only suspended till the company decides to abandon or take the whole—ibid. p. 66. The counter notice is not barred by protecting clauses (as that the land should be arched over) in the Special Act—Sparrow, *infra.*

[3] Taken in its legal meaning, as it would be construed in a grant—Stone *v.* Commercial Ry., 9 Sim. 621, 627; including garden ground, front or back, if occupied with the house—in short, all that is necessary for the convenient use of the house, and not merely for the personal convenience of the owner or occupier; and including the whole substratum (if not separately owned) directly underlying the house; therefore undertakers proposing to tunnel under part of a house come under the section, and the question whether damage would be done to the house or not is irrelevant; Glasgow City Union Ry. *v.* Macbrayne, 31st May 1883, 10 Ret. 694. The cases are collected in Steele *v.* Midland Ry., L.R. 1 Ch. 275; Marson *v.* L.C. and D. Ry., L.R. 6 Eq. 101, 7 Eq. 546. The last case is explained in Grierson *v.* Cheshire Lines, L.R. 19 Eq. 83. It is not necessary for land to be actually built on, if within the original design; Grosvenor *v.*, Hampstead Ry., 1 De G. and J. 446. Contrast Salter *v.* Metrop. D. Ry., L.R. 9 Eq. 432, with Falkner *infra*, Fergusson *infra.* Continuity is not required where separate buildings are necessary parts of one institution—St Thomas's Hosp. *v.* Charing Cross Ry., 30 L.J. Ch. 395; but semi-detached villas separately occupied are not the same house—Harvie *v.* S. Devon Ry., 32 L.T.N.S. 1. The intervention of a road is of importance; Steele, *supra*; Fergusson *v.* L.B. Ry., 33 Beav. 103; but not conclusive, Spackman *v.* G.W. Ry., 1 Jur. N.S. 790.

[4] Including whatever is essential to the factory, whether within its walls or not—cases collected in Furniss *v.* Midland Ry., L.R. 6 Eq. 473—though it is intended only to cross the subjects by bridges or a tunnel—ibid.; Sparrow *v.* Oxford, &c., Ry., 2 De G.M. and G. 94; Pinchin, *supra*; Falkner *v.* Somerset, &c., Ry., L.R. 16 Eq. 458. Even trade fixtures must be included in the purchase; Gibson *v.* Hammersmith Ry., 32 L.J. Ch. 337. The three words refer to three distinct things, and the counter-notice does not require to state which—Richards *v.* Swansea, &c., Co., 9 Ch. D. 425. Here it was doubtful whether premises consisting of a front house and cottages behind on a parallel lane used, the one as dwelling and shop, the others as factory and stores, should be denoted as 'house' or 'manufactory,' but the company had to take the whole.

[5] Not some greater part only—Pulling *v.* L.C. and D. Ry., 33 L.J. Ch. 505.

Intersected lands.

And with respect to small portions of intersected land, be it enacted as follows:

91. If any lands, not being situate in a town[1] or built upon, shall be so cut through and divided by the works as to leave, either on both sides or on one side thereof, a less quantity of land than half a statute acre, and if the owner of such small parcel of land require the promoters of the undertaking to purchase the same along with the other land required for the purposes of the special Act, the promoters of the undertaking shall purchase the same accordingly, unless the owner thereof have other land adjoining to that so left into which the same can be thrown; and if such owner have any other land so adjoining, the promoters of the undertaking shall, if so required by the owner, at their own expense, throw the piece of land so left into such adjoining land, by removing the fences and levelling the sites thereof, and by soiling the same in a sufficient and workmanlike manner. Power to owners of intersected lands to insist on sale.

[1] The meaning of 'town' in sect. 121 is fixed by decisions, *q.v.* It is similarly construed here—Falkner *v.* Somerset, &c., Ry., L. R. 16 Eq. 458.

92. If any such[1] land shall be so cut through and divided as to leave on either side of the works a piece of land of less extent than half a statute acre, or of less value than the expense of making a bridge, culvert, or such other communication between the land so divided as the promoters of the undertaking are, under the provisions of this or the special Act, or any Act incorporated therewith, compellable to make, and if the owner of such lands have not other lands adjoining such piece of land, and require the promoters of the undertaking to make such communication, then the promoters of the undertaking may require such owner to sell to them such piece of land; and any dispute as to the value of such piece of land, or as to what would be the expense of making such communication, shall be ascertained as herein provided for cases of disputed compensation; and on the occasion of ascertaining the value of the land required to be taken for the purposes of the works, the sheriff, or the jury, or the arbiters, as the case may be, shall, if required by either party, ascertain by their verdict or award the value of any such severed piece of land, and also what would be the expense of making such communication. Power of promoters of the undertaking to insist on purchase where expense of bridges, &c., exceeds the value.

[1] The reference is to the heading above sect. 91; and this section is not restricted, as is sect. 91, to lands not situated in a town, &c.—E.C. Ry. *v.* Marriage, 9 H.L. 32. As to expenses, see sect. 50, note.

And with respect to such lands as shall be of the nature of commonty,[1] be it enacted as follows: *Common lands.*

[1] It is doubtful whether this applies to lands held by magistrates, over which townsmen have right of walking, golfing, &c.—Cunningham *v.* Edinburgh, &c., Ry., 1847, 9 D. 1469; or to cases where compulsory powers cannot be employed—ibid. On the English Act, see Stoneham *v.* L.B.S.C. Ry., L.R. 7 Q.B. 1.

93. The promoters of the undertaking may convene a meeting of the parties entitled to any rights of property or servitude, or other rights, in or over such lands, to be held at some convenient place in the neighbourhood of the lands, for the purpose of their appointing a committee to treat with the promoters of the undertaking for the compensation to be paid for the extinction of such rights; and every such meeting shall be called by public advertisement, to be inserted once at least in two con- Proceedings in regard to lands in commonty, &c.

secutive weeks in some newspaper circulating in the county or in the respective counties and in the neighbourhood in which such lands shall be situate, the last of such insertions being not more than fourteen nor less than seven days prior to any such meeting; and notice of such meeting shall also, not less than seven days previous to the holding thereof, be affixed upon the door of the church of the parish where such meeting is intended to be held, or, if there be no such church, some other place in the neighbourhood to which notices are usually affixed; and if such lands be part of a barony a like notice shall be given to the superior or baron.

Meeting to appoint a committee.

94. The meeting so called may appoint a committee, not exceeding five in number, of the parties entitled to any such rights; and at such meeting the decision of the majority of the persons entitled to such rights present shall bind the minority and all absent parties; but such meeting shall not be effectual for the purpose unless five at least of the parties entitled attend the same, if there be so many as five in all of the parties entitled to such rights.

Committee to agree with promoters of the undertaking.

95. It shall be lawful for the committee[1] so chosen to enter into an agreement with the promoters of the undertaking for the compensation to be paid for the extinction of such rights, and all matters relating thereto, for and on behalf of themselves and all other parties interested therein, and all such parties shall be bound by such agreement, and it shall be lawful for such committee to receive the compensation so agreed to be paid; and the receipt of such committee, or of any three of them for such compensation, shall be an effectual discharge for the same; and such compensation, when received, shall be apportioned by the committee among the several persons interested therein, according to their respective interests; but the promoters of the undertaking shall not be bound to see to the apportionment or to the application of such compensation, nor shall they be liable for the misapplication or non-application thereof.

[1] The whole of it, *per* L. Kinloch, in Fife, &c., Ry. *v.* Deas, 1859, 21 D. 187, 1205. The case turned on the informality of the claim made by it—see sect. 36, note.

Disputes to be settled as in other cases.

96. If upon such committee being appointed they shall fail to agree with the promoters of the undertaking as to the amount of the compensation to be paid as aforesaid, the same shall be determined as in other cases of disputed compensation, the said committee being deemed and held to be the proprietors of the said rights, with reference to all proceedings for ascertaining the value thereof.

If no committee be appointed, the amount to be determined by a valuator.

97. If, upon being duly convened by the promoters of the undertaking, no effectual meeting of the parties entitled to such rights shall take place, or if, taking place, such meeting fail to appoint such committee, the amount of such compensation shall be determined by a valuator, to be appointed by the sheriff as herein-before provided in the case of parties who cannot be found.[1]

[1] Sect. 56 *et seq.*

Upon payment of compensation payable to commoners, the lands to vest.

98. Upon payment or tender to such committee, or any three of them, or if there shall be no such committee, then upon deposit in the bank in the manner provided in the like case, of the compensation which shall have been agreed upon or determined in respect of such rights, and * it

* *Sic.*

shall be lawful for the promoters of the undertaking, if they think fit, to execute a disposition, duly stamped, in the manner herein-before provided in the case of the purchase of lands by them, and thereupon the lands in respect of which such compensation shall have been so paid or deposited shall vest in the promoters of the undertaking freed and discharged from all such rights, and they shall be entitled to immediate possession thereof; and it shall be lawful for the Court of Session, by an order made upon petition, to order payment of the money so deposited as aforesaid, and to make such other order in respect thereto, for the benefit of the parties interested, as it shall think fit.

Lands in mortgage.

And with respect to lands subject to any security by real lien, wadset, heritable bond, redeemable bond of annuity, or other right in security, be it enacted as follows:

Power to redeem heritable securities.

99. It shall be lawful[1] for the promoters of the undertaking to purchase or redeem the interest of any holder of any security upon such lands the whole or part of which may be required for the purposes of the special Act, and that whether such promoters shall have previously purchased the right to such lands under burden of the security thereon or not, and whether the holder of such security be entitled thereto in his own right or in trust for any other party, and whether he be in possession of such lands by virtue of such security or not, and whether such security affect such lands solely, or jointly with any other lands not required for the purposes of the special Act; and in order thereto the promoters of the undertaking may pay or tender to the holder of such security the principal and interest due on such security, together with his expenses and charges, if any, and also six months additional interest, and thereupon such holder shall immediately convey his interest in the lands comprised in such security to the promoters of the undertaking, or as they shall direct; or the promoters of the undertaking may give notice in writing to such holder that they will pay off the principal and interest due on such security at the end of six months, computed from the day of giving such notice; and if they shall have given any such notice, or if the party entitled to the lands under burden of such security shall have given six months notice of his intention to redeem the same, then, at the expiration of either of such notices, or at any intermediate period, upon payment or tender by the promoters of the undertaking to the holder of such security of the principal money thereon due, and the interest which would become due at the end of six months from the time of giving either of such notices, together with his expenses and charges, if any, such holder shall convey or discharge his interest in the lands comprised in such security to the promoters of the undertaking, or as they shall direct.

[1] Where a company, aware of an existing mortgage, served notice to treat on the landowner only, deposited and granted bonds in favour of both under sect. 85 (84 of the Scotch Act), and went to a jury without any notice to the mortgagees, it was held that the latter were not affected by the proceedings, and were entitled to an assignment of the land by the company and landowner—Martin *v.* L.C.D. Ry. L.R. 1 Ch. 501. The committee of a lunatic was authorised to surrender a rent-charge belonging to him on consideration of a Government annuity of the same amount—Brewer, 1 Ch. D. 409.

Deposit of

100. If, in either of the cases aforesaid, upon such payment or tender,

money on refusal to accept redemption.

any holder of such securities shall fail to convey or discharge his interest therein as directed by the promoters of the undertaking, or if he fail to adduce a good title thereto, then it shall be lawful for the promoters of the undertaking to deposit in the bank, in the manner provided by this Act in like cases,[1] the principal and interest, together with the expenses, if any, due on such security, and also, if such payment be made before the expiration of six months notice as aforesaid, such further interest as would at that time become due; and it shall be lawful for them, if they think fit, to expede an instrument under the hands of a notary public, duly stamped, and to register the same in the manner herein-before provided in the case of the purchase of lands by them; and thereupon, as well as upon such conveyance by the holder of the security, if any such be made, all the estate and interest of such holder, and of all persons in trust for him, or for whom he may be a trustee, in such lands, shall vest in the promoters of the undertaking, and they shall be entitled to immediate possession thereof in case such holder were himself entitled to such possession.

[1] Sect. 75 *et seq.*

Sum to be paid when security exceeds value of lands.

101. If any such lands subject to such security as aforesaid shall be of less value than the principal, interest, and expenses secured thereon, the value of such lands, or the compensation to be made by the promoters of the undertaking in respect thereof, shall be settled by agreement between the holder of such security and the party claiming or entitled to the lands under burden on the one part, and the promoters of the undertaking on the other part; and if the parties aforesaid fail to agree respecting the amount of such value or compensation the same shall be determined as in other cases of disputed compensation; and the amount of such value or compensation, being so agreed upon or determined, shall be paid by the promoters of the undertaking to the holder of the security, in satisfaction of his claim, so far as the same will extend; and upon payment or tender thereof such holder shall, at the expense of the promoters of the undertaking, dispone and assign his debt, so far as paid, and his security, and all his interest in such lands, to the promoters of the undertaking, or as they shall direct, and thereupon the party claiming or entitled to the said lands under burden of the security shall cease to be interested in or have any right thereto, or to any part thereof.

Deposit of money when refused on tender.

102. If upon such payment or tender as aforesaid being made any holder of such security fail so to convey his interest therein, or to adduce a good title thereto to the promoters of the undertaking, it shall be lawful for them to deposit the amount of such value or compensation in the bank in the manner provided by this Act in like cases;[1] and every such payment or deposit shall be accepted by the holder of the security in satisfaction of his claim, so far as the same will extend, and shall be a full discharge of the lands from all money due thereon; and it shall be lawful for the promoters of the undertaking to expede an instrument under the hands of a notary public, duly stamped, and to register the same in the manner herein-before provided in the case of the purchase of lands by them; and thereupon such lands, as to all such right and interest as were then vested in the holder of the security, or any person

in trust for him, or in the party claiming or entitled to the lands under burden of the security, shall become absolutely vested in the promoters of the undertaking, and they shall be entitled to immediate possession thereof; nevertheless, all rights and remedies possessed by the holder of such security for recovering payment of his debt, or the residue thereof, (as the case may be,) or the interest thereof respectively, and all expenses, shall remain in force as a claim against the grantor of such security, and against all other parties bound for the same, but not as a claim on the said lands or against the promoters of the undertaking.

[1] Sect. 75 *et seq.*

Sum to be paid where part only of lands under security taken.

103. If a part only of any such lands subject to any security as aforesaid be required for the purposes of the special Act, and if the part so required be of less value than the principal money, interest, and costs secured on such lands, and the holder of the security shall not consider the remaining part of such lands a sufficient security for the money charged thereon, or be not willing to discharge the part so required, and if the promoters of the undertaking be unwilling to advance the debt on an assignment thereto, then the value of such part, and also the compensation (if any) to be paid in respect of the severance thereof, or otherwise, shall be settled by agreement between the holder of the security and the party entitled to the land under burden of the security on the one part, and the promoters of the undertaking on the other; and if the parties aforesaid fail to agree respecting the amount of such value or compensation, the same shall be determined as in other cases of disputed compensation; and the amount of such value or compensation, being so agreed upon or determined, shall be paid by the promoters of the undertaking to the holder of the security, in satisfaction of his debt, so far as the same will extend, and thereupon such holder shall convey or discharge to them, or as they shall direct, all his interest in such lands the value whereof shall have been so paid, and the party claiming or entitled to the said lands under burden of the security shall cease to be interested in or have any right thereto or to any part thereof; and a memorandum of what shall have been so paid shall be indorsed on the deed or instrument creating such security, and shall be signed by the holder thereof; and a copy of such memorandum shall at the same time (if required) be furnished by the promoters of the undertaking, at their expense, to the party entitled to the lands under burden of the security.

Deposit of money when refused on tender.

104. If upon payment or tender to any holder of such security of the amount of the value or compensation so agreed upon or determined such holder shall fail to convey or discharge to the promoters of the undertaking, or as they shall direct, his interest in the lands in respect of which such compensation shall so have been paid or tendered, or if he shall fail to adduce a good title thereto, it shall be lawful for the promoters of the undertaking to pay the amount of such value or compensation into the bank in the manner provided by this Act in the case of monies required to be deposited in such bank; and such payment or deposit shall be accepted by the holder of such security in satisfaction of his claim, so far as the same will extend, and shall be a full discharge of the portion of the lands so required from all money due thereon, and shall bar the

claim of the party claiming or entitled to the said lands under burden of the security; and it shall be lawful for the promoters of the undertaking, if they think fit, to expede an instrument under the hands of a notary public, duly stamped, and to register the same in the manner herein-before provided in the case of the purchase of lands by them, and thereupon such lands shall become absolutely vested in the promoters of the undertaking, as to all such right and interest as were then vested in the holder of such security, or any person in trust for him, and in case such holder were himself entitled to such possession they shall be entitled to immediate possession thereof; nevertheless, every such holder shall have the same powers and remedies for recovering or compelling payment of his claim, or the residue thereof, (as the case may be,) and the interest thereof respectively, upon and out of the residue of the lands subject to such security, or the portion thereof not required for the purposes of the special Act, as he would otherwise have had or been entitled to for recovering or compelling payment thereof upon or out of the whole of the lands originally comprised in such security.

If sums secured paid off before the stipulated time, promoters to pay expenses incidental to reinvestment.

105. Provided always, that in any of the cases herein-before provided with respect to lands subject to securities, if in the deed or instrument creating the same a time shall have been limited within which the holder of the security shall not be obliged to receive payment of the principal money thereby secured, and under the provisions herein-before contained the holder of the security shall have been required to accept payment of his claim, or of part thereof at a time earlier than the time so limited, the promoters of the undertaking shall pay to the holders of the security, in addition to the sum which shall have been so paid off, all such expenses as shall be incurred by him in respect of or which shall be incidental to the reinvestment of the sum so paid off; such expenses, in case of difference, to be taxed, and payment thereof enforced, in the manner herein provided with respect to the expenses of conveyances.

Compensation in respect of loss of interest.

106. If the rate of interest secured by such deed be higher than at the time of the same being so paid off can reasonably be expected to be obtained on reinvesting the same, regard being had to the then current rate of interest, the holder of such security shall be entitled to receive from the promoters of the undertaking, in addition to the principal and interest herein-before provided for, compensation in respect of the loss to be sustained by him by reason of his claim being so prematurely paid off, the amount of such compensation to be ascertained, in case of difference, as in other cases of disputed compensation; and until payment or tender of such compensation as aforesaid the promoters of the undertaking shall not be entitled, as against such holder, to possession of the lands under the provision herein-before contained.[1]

[1] See as to what, in such a case, the company has to pay in under sect. 84—Ranken *v.* E. and W. India Docks Co., 12 Beav. 298.

Lands subject to rent-charges.

And with respect to any lands which shall be charged with any feu duty, ground annual, casualty of superiority, or any rent or other annual or recurring payment or incumbrance not herein-before provided for, be it enacted as follows:[1]

[1] A decree of irritancy *ob non solutum canonem* obtained after lands have been 'in-

'juriously affected' gives no right to compensation to the superior, the claim being personal to the vassal—Caledonian Ry. *v.* Watt, 1875, 2 Ret. 917.

Company to continue the payment of feu duties, &c.

107. It shall be lawful for the promoters of the undertaking to enter upon and continue in possession of such lands, without redeeming the charges thereon, provided they pay the amount of such annual or recurring payment when due, and otherwise fulfil all obligations accordingly, and provided they shall not be called upon by the party entitled to the charge to redeem the same.

Discharge of lands from such charge.

108. If any difference shall arise between the promoters of the undertaking and the party entitled to any such charge upon any lands required to be taken for the purposes of the special Act, respecting the consideration to be paid for the discharge of such lands therefrom, or from the portion thereof affecting the lands required for the purposes of the special Act, the same shall be determined as in other cases of disputed compensation.

Discharge of part of lands from charge.

109. If part only of the lands charged with any such feu duty, ground annual, casualty of superiority, or any rent, payment, or incumbrance, be required to be taken for the purposes of the special Act, the apportionment of any such charge may be settled by agreement between the party entitled to such charge and the owner of the lands on the one part, and the promoters of the undertaking on the other part, and if such apportionment be not so settled by agreement the same shall be settled by the sheriff; but if the remaining part of the lands so jointly subject be a sufficient security for such charge, then, with consent of the owner of the lands so jointly subject, it shall be lawful for the party entitled to such charge to discharge therefrom the lands required, on condition or in consideration of such other lands remaining exclusively subject to the whole thereof.

Deposit in case of refusal to discharge.

110. Upon payment or tender of the compensation so agreed upon or determined to the party entitled to any such charge as aforesaid, such party shall execute to the promoters of the undertaking a discharge thereof; and if he fail so to do, or if he fail to adduce a good title to such charge, it shall be lawful for them to deposit the amount of such compensation in the bank in the manner herein-before provided in like cases;[1] and also, if they think fit, to expede an instrument under the hands of a notary public, duly stamped, and to register the same in the manner herein-before provided in the case of the purchase of lands by them; and thereupon the feu duty, ground annual, casualty of superiority, rent, payment, or incumbrance, or the portion thereof in respect whereof such compensation shall so have been paid, shall cease and be extinguished.

[1] Sect. 75 *et seq.*

Charge to continue on lands not taken.

111. If any such lands be so discharged from any such charge or incumbrance, or portion thereof, to which they were subject jointly with other lands, such last-mentioned lands shall alone be charged with the whole of such charge, or with the remainder thereof, as the case may be, and the party entitled to the charge shall have all the same rights and remedies over such last-mentioned lands, for the whole or for the remainder of the charge, as the case may be, as he had previously over the

whole of the lands subject to such charge; and upon any such charge or portion of charge being so discharged the promoters of the undertaking, if required so to do, shall execute and grant in due form a probative deed or instrument, declaring what part of the lands originally subject to such charge shall have been purchased by virtue of the special Act, and if the lands be discharged from part of such charge, what proportion of such charge shall have been discharged, and how much thereof continues payable, or if the lands so required shall have been discharged from the whole of such charge, then that the remaining lands are thenceforward to remain exclusively charged therewith; and such deed or instrument shall be made and executed at the expense of the promoters of the undertaking, and shall be competent evidence in all courts and elsewhere of the facts therein stated.[1]

[1] See sect. 126.

Lands subject to leases.

And with respect to lands subject to leases, be it enacted as follows:[1]

[1] The relation of this part to the rest of the Act is this: In the ordinary case a lessee claims and is compensated exactly like any other party 'interested' (sects. 6, 17, 113), under the specialty caused by his paying a rent, sect. 112; but a separate procedure is enacted in case of yearly tenants, &c. (sect. 114), and those who are presumed to be such (sect. 115).

Where part only of lands under lease taken, the rent to be apportioned.

112. If any lands shall be comprised in a lease or missive of lease for a term of years unexpired, part only of which lands shall be required for the purposes of the special Act, the rent payable in respect of the lands, comprised in such lease or missive of lease shall be apportioned between the lands so required and the residue of such lands, and such apportionment may be settled by agreement[1] between the lessor and lessee of such lands on the one part, and the promoters of the undertaking on the other part, and if such apportionment be not so settled by agreement between the parties such apportionment shall be settled by the sheriff;[2] and after such apportionment[3] the lessee of such lands shall, as to all future accruing rent, be liable only to so much of the rent as shall be so apportioned in respect of the lands not required for the purposes of the special Act; and as to the lands not so required, and as against the lessee, the lessor shall have all the same rights and remedies for the recovery of such portion of rent as previously to such apportionment he had for the recovery of the whole rent reserved by such lease or missive of lease;[4] and all the obligations, conditions, and agreements of such lease or missive of lease, except as to the amount of rent to be paid, shall remain in force with regard to that part of the land which shall not be required for the purposes of the special Act, in the same manner as they would have been in case such part only of the land had been included in the lease or missive of lease.[5]

[1] The lessor's assent to an agreement as to apportionment made between the company and the lessee is not required, even if there be a clause in the lease excluding assignees—Slipper *v.* Tottenham, &c., Ry., L.R. 4 Eq. 112.

[2] And by him only; therefore not by a compensation arbiter—*Re* Ware, 9 Exch. 395.

[3] Failing apportionment, he is liable for the rent to the end of the term—Wainwright *v.* Ramsden, 5 M. and W. 602.

[4] Neither party has a lien on the other's compensation money—Carey, 10 L.T. 37; Nadin, 17 L.J. Ch. 421; Peddie *v.* Brown, 1857, 3 Macq. 65.

[s] See cases under a similar clause in a special Act—Hunter *v.* N. B. Ry. 1849, 12 D. 37; N.B. Ry. *v.* Renton, 1864, 2 Macph. 449.

Tenants to be compensated.

113. Every such lessee as last aforesaid shall be entitled to receive from the promoters of the undertaking compensation for the damage done to him in his tenancy by reason of the severance of the lands required from those not required, or otherwise by reason of the execution of the works.

Compensation to be made to tenants for a year, &c.

114. If any such lands shall be in the possession of any person having no greater interest therein than as tenant for a year or from year to year,[1] and if such person be required to give up possession[2] of any lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands,[3] and for any just allowance which ought to be made to him by any incoming tenant, and for any loss or injury he may sustain, or if a part only of such lands be required, compensation for the damage done to him in his tenancy by the severing of the lands held by him, or otherwise injuriously affecting the same, and the amount of such compensation shall be determined by the sheriff, in case the parties differ about the same; and upon payment or tender of the amount of such compensation all such persons shall respectively deliver up to the promoters of the undertaking, or to the person appointed by them to take possession thereof, any such lands in their possession required for the purposes of the special Act.

[1] This includes tenants with leases for more than a year, but having only a year or less to run at the date of the notice to quit, not at the date of removing thereby fixed —Tyson *v.* Mayor, &c., of London, L.R. 7 C.P. 18; Reg. *v.* G.N. Ry., 2 Q.B.D. 151; followed by the parties in Ferguson *v.* Hood *infra.*[3]

[2] Notice to treat is not such requisition—R. *v.* Stone, L.R. 1, Q.B. 529. See sect. 17, note, as to effect of notice to treat on landlord's powers, and Glasgow Union Ry. case there and case at end hereof. In Carter *v.* G.E. Ry., 9 Jur. N.S. 618, the tenant did not know of a notice to treat having been given. In England, the equivalent section is held not to apply to cases of 'injuriously affecting' (see sect. 48, notes), without taking the land—R. *v.* Sheriff of Middlesex, &c., 31 L.J.Q.B. 261. In Scotland *contra*, in an earlier case—Caledonian Ry. *v.* Barr, 1855, 17 D. 312. Is possession necessary to entitle a tenant to compensation?—N.B. Ry. *v.* Lindsay, 1875, 3 Ret. 168.

[3] That is, he is entitled to full compensation, and remains liable to his landlord for the full rent—Ferguson *v.* Hood, 29th Nov. 1881, 9 Ret. 168; Wainwright *v.* Ramsden, 5 M. and W. 602. If, after notice to quit, the tenant be allowed to remain in possession beyond one and into another term, he is entitled to compensation for the difference of his present position—liable to be ejected at any moment—and his former one of tenant from year to year,—Cranwell *v.* Mayor, &c., of London, L.R. 5 Ex. 284; unless there be some arrangement to the contrary—R. *v.* London, &c., Ry., 10 A. and E. 3; but not to compensation for loss of profits caused by the execution of the works, for he might have left—R. *v.* Vaughan, L.R. 4 Q.B. 190.

Where greater interest claimed than from year to year, the lease or missive to be produced.

115. If any party, having a greater interest than as tenant for a year or from year to year, claim compensation in respect of any unexpired term or interest under any lease, missive of lease, or grant of any such lands, the promoters of the undertaking may require such party to produce the lease, missive of lease, or grant in respect of which such claim shall be made, or other legal evidence thereof in his power; and if, after demand made in writing by the promoters of the undertaking, such lease, missive of lease, or grant, or other legal evidence thereof, be not produced within twenty-one days, the party so claiming compensation shall be con-

sidered as a tenant holding only from year to year, and be entitled to compensation accordingly.

Limit of time for compulsory purchase.

116. And be it enacted, that the powers of the promoters of the undertaking for the compulsory purchase or taking of lands for the purposes of the special Act shall not be exercised [1] after the expiration of the prescribed period, and if no period be prescribed not after the expiration of three years from the passing of the special Act.[2]

[1] The clause is complied with if notice to treat has been given even a single day before the expiration of the statutory period—R. *v.* Birmingham, &c., Ry., 15 Q.B. 634; Ms. Salisbury *v.* G.N. Ry., 17 Q.B. 840; E. and G. Ry. *v.* Monklands Ry., 1850, 12 D. 1304 (effect of appeal to the House of Lords, 13 D. 145). But the statutory rights may be altered by agreement—Glasgow, &c., Canal *v.* Glasgow, &c., Ry., 11 D. 1212, 13 D. 182. The subsequent proceedings may go on after the expiry, but within a 'reasonable time,' and the time suggested, but not actually fixed, is the expiration of the time for completing the works,—Richmond *v.* N. London Ry., L.R. 5 Eq. 352, 3 Ch. 679—*per* L. Chan. Cairns. The company cannot get rid of its obligations under agreements by allowing its compulsory powers to expire—Webb *v.* Direct London, &c., Ry., 9 Hare, 129.

[2] In the case of railways, compulsory powers may be revived in the interests of public safety by a Board of Trade order under 5 & 6 Vict. c. 55, sect. 15, 26 & 27 Vict. c. 92, sect. 8, and extended in a similar way under 31 Vict. c. 18, as well as the limit for completion.

Interests omitted to be purchased.

And with respect to interest in lands which have by mistake been omitted to be purchased, be it enacted as follows:

Promoters of the undertaking empowered to purchase interests in lands the purchase whereof may have been omitted by mistake.

117. If at any time after the promoters of the undertaking shall have entered upon any lands which under the provisions of this or the special Act, or any Act incorporated therewith, they were authorised to purchase, and which shall be permanently required for the purposes of the special Act, any party shall appear to be entitled to any estate, right, or interest in or charge affecting such lands which the promoters of the undertaking shall through mistake or inadvertency [1] have failed or omitted duly to purchase or to pay compensation for, then, whether the period allowed for the purchase of lands shall have expired or not, the promoters of the undertaking shall remain in the undisturbed possession of such lands, provided, within six months after notice of such estate, right, interest, or charge, in case the same shall not be disputed by the promoters of the undertaking, or in case the same shall be disputed, then within six months after the right thereto shall have been finally established by law [2] in favour of the party claiming the same, the promoters of the undertaking shall purchase or pay compensation for the same, and shall also pay to such party, or to any other party who may establish a right thereto, full compensation for the profits or interest which would have accrued to such parties respectively in respect thereof during the interval between the entry of the promoters of the undertaking thereon and the time of the payment of such purchase money or compensation by the promoters of the undertaking, so far as such profits or interest may be recoverable in law; and such purchase money or compensation shall be agreed on or awarded and paid in like manner as according to the provisions of this Act the same respectively would have been agreed on or awarded and paid in case the promoters of the undertaking had purchased such estate, right, interest, or charge before their entering upon such land, or as near thereto as circumstances will admit.

[1] In Hyde *v.* Mayor, &c., of Manchester, 5 De G. and Sm. 249, 262, the mistake was

induced by the imperfect information supplied by the landlord himself. It does not matter whether the company's title has been got by agreement or by exercise of compulsory powers, ibid. In Stretton *v.* G. Western, &c., Ry., L.R. 5 Ch. 751, and Martin *v.* L.C.D. Ry., L.R. 1 Ch. 501, there was no mistake or inadvertence proved.

[2] *E.g.*, on court refusing to grant a new trial in reference to the right of ownership —Hyde, *supra*.

How value of such lands to be estimated.

118. In estimating the compensation to be given for any such last-mentioned lands, or any estate or interest in the same, or for any profits thereof, the jury, or arbiters, or sheriff, as the case may be, shall assess the same according to what they shall find to have been the value of such lands, estate, or interest, and profits, at the time such lands were entered upon by the promoters of the undertaking, and without regard to any improvements or works made in the said lands by the promoters of the undertaking, and as though the works had not been constructed.

Promoters of the undertaking to pay the expenses of litigation as to such lands.

119. In addition to the said purchase money, compensation, or satisfaction, and before the promoters of the undertaking shall become absolutely entitled to any such estate, interest, or charge, or to have the same merged or extinguished for their benefit, they shall, when the right to any such estate, interest, or charge shall have been disputed by the company, and determined in favour of the party claiming the same, pay the full expenses[1] of any proceedings at law or in equity for the determination or recovery of the same to the parties with whom any such litigation in respect thereof shall have taken place; and such expenses shall, in case the same shall be disputed, be settled by the proper officer of the court in which such litigation took place.

[1] As between agent and client—Hyde, *supra*.

Sale of superfluous lands.

And with respect to lands acquired by the promoters of the undertaking, under the provisions of this or the special Act, or any Act incorporated therewith, but which shall not be required for the purposes thereof,[1] be it enacted as follows:

[1] *I.e.*, of the undertaking. This may come about in four ways—1. Miscalculation of quantity at the original taking; 2. Under sects. 90, 91; 3. Taken for works eventually abandoned; and 4. Taken for temporary works—*per* L. Ch. Cairns in G. W. Ry. *v.* May, L.R. 7 H.L. 283. A fifth case is that of Norton *v.* L.N.W. Ry., 13 Ch. D. 268, where a strip between the original rail fence of a railway and the permanent hedge had for twenty-one years been cultivated by the original owner, the rail being allowed to disappear. Space under the arches of a railway is not 'superfluous land,' and the railway cannot grant even a right of way over it—Mulliner *v.* Midland Ry., 11 Ch. D. 611: nor land above a tunnel—Metrop. District Ry. *v.* Cosh, 13 Ch. D. 607 (the soil had been removed and then replaced). The period to look to in testing the character of the lands in this respect, is that mentioned in sect. 120 *in initio*—May; Glover's Trs. *v.* Glasgow Union Ry., 1869, 7 Macph. 338; unless the company plainly show earlier that it regards them as superfluous, as by attempting to sell, or using them for unauthorised purposes. Until then the company is sole judge of their being 'required' or not; it would savour of 'prophecy' in any other—ibid.; L.S.W. Ry. *v.* Blackmore, L.R. 4 H.L. 610; L. Carington *v.* Wycombe Ry., L.R. 3 Ch. 377; Betts *v.* G.E. Ry., 3 Exch. D. 182; Brown *v.* Stockton, &c., Ry., 9 H.L. C. 246. But use by the company for a purpose not originally contemplated does not render the land superfluous, so long as the purpose is not *ultra vires*—Astley *v.* Manchester, &c., Ry., 27 L.J. Ch. 478; Beauchamp, L.R. 3 Ch. 745. Use for temporary purposes which have been satisfied does not save the land from being superfluous (the 4th mode, *supra*)—G.W. Ry. *v.* May; while letting the land during the period to yearly tenants is not conclusive of its being so—Betts, *supra*. In Hooper *v.* Bourne, 3 Q.B.D. 258, 5 App. Cas. 1, the ten years ran out in 1863, and the lands were actually required in 1868 for additional sidings necessitated by increased traffic. It was held that the burden lay on the claimant of proving superfluousness, that it was not removed by

showing actual non-use, or even want of intention to use formed within the period, and that the question was one of circumstances and *bonâ fides*. The further question was not decided, whether, if the company has acquired the minerals as well as the surface, and they were not necessary for support, they must be regarded as superfluous. But in an earlier case, it was held that the rules of this part applied only to lands separated by a vertical 'not by a horizontal' boundary—Metrop. District Ry. *v.* Cosh, *supra*. In N.B. Ry. *v.* Moon's Trs., 8th Feb. 1879, 6 R. 640, at the end of the period the land might have been reasonably expected to be required, but was not actually required till sixteen years later. Both there and in Hooper's case the company prevailed. The fact of sale by the company within the period, *ultra vires*, to another company, of land to be used for the purposes of both does not infer superfluousness—Hobbs *v.* Midland Ry., 20 Ch. D. 418. If the whole undertaking (and not, as in the 3d mode, *supra*, only part of the land taken) be abandoned, it seems the better opinion that sects. 120 *et seq.* do not apply—Smith *v.* Smith, L.R. 3 Ex. 282; cf. Astley, *supra*. As to railways, this case is provided for by 13 & 14 Vict. c. 83, sect. 27. The present Part only applies to lands which the company had a right to acquire compulsorily, whether they actually so acquired them or not—Caledonian Ry. *v.* Glasgow Union Ry., 1869, 7 Macph. 959, 1072, affd. 9 Macph. H.L. 115. See as to sale of lands purchased for extraordinary purposes, sects. 12, 13, *supra*, and as to the wider powers of improvement trusts—Quinton *v.* Mayor, &c., of Bristol, L.R. 17 Eq. 524.

Lands not wanted to be sold, or in default to vest in owners of adjoining lands.

120. Within the prescribed period, or if no period be prescribed within ten years after the expiration of the time limited by the special Act for the completion of the works,[1] the promoters of the undertaking shall absolutely sell and dispose of[2] all such superfluous lands in such manner as they may deem most advantageous, and apply the purchase money arising from such sales to the purposes of the special Act, and in default thereof all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property[3] of the owners of the lands adjoining thereto in proportion to the extent of their lands respectively adjoining the same.[4]

[1] As to extension of time, see sect. 116, note, and note[3] to the present section.

[2] Shall have contracted to do so, though the details have not been adjusted—Caledonian Ry. *v.* Glasgow Union Ry., *supra*, 7 Macph. 964. They may apparently sell, subject to conditions of user, *e.g.*, as to buildings and their use. *In re* Higgins, 21 Ch. D. 95, but not under condition of option to re-purchase, for the sale must be absolute in that sense—L.S.W. Ry. *v.* Gomm, 20 Ch. D. 562. This is the only power to sell in the Act, and a company not thus or specially empowered cannot either gratuitously or onerously alienate land or any servitude over it (here an archway on which the stations was built, and the passage through it)—Mulliner *v.* Midland Ry., 11 Ch. D. 611.

[3] *Ipso facto* by lapse of time, without any act of the owners, and unaffected by any extension Act passed subsequently to this vesting—Moody *v.* Corbett, L.R. 1 Q.B. 510; G.W. Ry. *v.* May, L.R. 7 H.L. 283.

[4] According to frontage—see Moody *v.* Corbett, *supra*; and Smith *v.* Smith, L.R. 3 Ex. 282 (a peculiar case).

Lands to be offered to owner of lands from which they were severed, or to adjoining owners.

121. Before the promoters of the undertaking dispose of any such superfluous lands they shall, unless such lands be situate within a town,[1] or be lands built upon,[2] or be used for building purposes,[3] first offer to sell the same to the person then[4] entitled to the lands (if any) from which the same were originally severed; or if such person refuse to purchase the same, or cannot, after diligent inquiry, be found, then the like offer shall be made to the person or to the several persons whose lands shall immediately adjoin[5] the lands so proposed to be sold, such persons being capable of entering into a contract for the purchase of such lands; and where more than one such person shall be entitled to such right of pre-emption such offer shall be made to such persons in succes-

sion, one after another, in such order as the promoters of the undertaking shall think fit.[6]

[1] See sect. 90. The test is thus put by Lord Hatherley: 'Where there is such an 'amount of continuous occupancy of the ground by houses that persons may be said 'to be living as it were in the same town or place continuously.'—L.S.W. Ry. *v.* Blackmore, L.R. 4 H.L. 610, referring to Reg. *v.* Cottle, 16 Q.B. 412, 420, 421. It is not enough to be within a burgh if the land is at some distance from the mass of houses forming the town—L. Carington *v.* Wycombe Ry., L.R. 3 Ch. 377, and in its earlier stage, L.R. 2 Eq. 825.

[2] This phrase is similarly construed, and does not apply to an open field containing a cottage—L. Carington, *supra*.

[3] Not merely advertised to feu, or staked out—L.S.W. Ry., *supra*; Coventry *v.* L.B.S.C. Ry. L.R. 5 Eq. 104.

[4] Though he acquired after the taking by the company—L. Carington, *supra*.

[5] Where by agreement a wall has been built on the march between the company's and its neighbour's land, as this is joint property it does not prevent the latter from being the adjoining owner—L.S.W. Ry. *v.* Blackmore, *supra*. Junction at a mere corner would not be enough—ibid., L.R. 4 H.L. 618. Case of private road not being sufficient to separate, where the neighbour had exclusive use during his term—Coventry, *supra*.

[6] Where one adjoining owner objected to a proposed sale by the company, his right to do so was affirmed, but inquiry was ordered as to whether any other in a similar position was willing to purchase—L.S.W. Ry., *supra*.

Right of pre-emption to be claimed within six weeks.

122. If any such persons be desirous of purchasing such lands, then, within six weeks after such offer of sale, they shall signify their desire in that behalf to the promoters of the undertaking; or if they decline such offer, or if for six weeks they neglect to signify their desire to purchase such lands, the right of pre-emption of every such person so declining or neglecting, in respect of the lands included in such offer, shall cease; and a declaration in writing, made before the sheriff by some person not interested in the matter in question, stating that such offer was made, and was refused, or not accepted within six weeks from the time of making the same, or that the person or all the persons entitled to the right of pre-emption were out of the country, or could not, after diligent inquiry, be found, or were not capable of entering into a contract for the purchase of such lands, shall in all courts be sufficient evidence of the facts therein stated.

Differences as to price to be settled by arbitration.

123. If any person entitled to such pre-emption be desirous of purchasing any such lands, and such person and the promoters of the undertaking do not agree as to the price thereof, then such price shall be ascertained by arbitration, and the expenses of such arbitration shall be in the discretion of the arbiters.

Lands to be conveyed to the purchasers.

124. Upon payment or tender to the promoters of the undertaking of the purchase money so agreed upon or determined as aforesaid they shall convey such lands to the purchasers thereof by deed, under the common seal of the promoters of the undertaking, if they be a corporation, or if not a corporation under the hands of the promoters of the undertaking or any two of the directors or managers thereof acting by the authority of the body; and a deed so executed shall be effectual to vest the lands comprised therein in the purchaser of such lands for the estate which shall so have been purchased by him, and a receipt under such common seal, or under the hands of two of the directors or managers of the undertaking, as aforesaid, shall be a sufficient discharge to the purchaser of any such lands for the purchase money in such receipt expressed to be received.

Effect of word 'dispone' in conveyances.

125. And be it enacted, that in every conveyance of lands to be made by the promoters of the undertaking under this or the special Act the word 'dispone' shall operate as a clause of absolute warrandice by the promoters of the undertaking, for themselves and their successors, or for themselves, their heirs, executors, administrators, and assigns, as the case may be, to the respective disponees therein named, and the successors, heirs, executors, administrators, and assigns of such disponees, according to the quality or nature of such conveyances, and of the estate or interest therein expressed to be thereby conveyed, except so far as the same shall be restrained or limited by express words contained in such conveyance.

Superiorities not to be affected.[1]

126. And be it enacted, that the rights and titles to be granted in manner herein mentioned in and to any lands taken and used for the purposes of this Act shall, unless otherwise specially provided for, in nowise affect or diminish the right of superiority in the same, which shall remain entire in the person granting such rights and titles; but in the event of the lands so used or taken being a part or portion of other lands held by the same owner under the same titles, the said company shall not be liable for any feu duties or casualties to the superiors thereof, nor shall the said company be bound to enter with the said superiors: Provided always, that before entering into possession of any lands full compensation shall be made to the said superiors for all loss which they may sustain by being deprived of any casualties,[2] or otherwise by reason of any procedure under this Act.

[1] See sect. 107 *et seq.* See Macfarlane *v.* Monklands Ry., 1864, 2 Macph. 519, for the object of this clause in election law.

[2] If this has not been done, and the composition is untaxed, the mode of calculating the annual value of the land taken for the works (here part of a line of railway) is to take 4 per cent on the price paid (excluding severance damages and compulsion percentage) and on the cost of construction, and to deduct therefrom feu-duty, public burdens, and the landlord's share of the cost of maintenance and repair—Hill *v.* Caledonian Ry., 1877, 5 Ret. 386.

Land tax and poor's rate to be made good.

127. And be it enacted, that if the promoters of the undertaking become possessed, by virtue of this or the special Act, or any Act incorporated therewith, of any lands charged with the land tax, or liable to be assessed to the poor's rate or prison assessment, they shall from time to time, until the works[1] shall be completed and assessed[2] to such land tax and poor's rate and prison assessment, be liable to make good the deficiency[3] in the several assessments for land tax and poor's rate and prison assessment by reason of such lands having been taken or used for the purposes of the work; and such deficiency shall be computed according to the rental at which such lands, with any building thereon, were valued or rated at the time of the passing of the special Act;[4] and on demand of such deficiency the promoters of the undertaking or their treasurer shall pay all such deficiencies to the collector of the said assessments respectively; nevertheless, if at any time the promoters of the undertaking think fit to redeem such land tax, they may do so, in accordance with the powers in that behalf given by the Acts for the redemption of the land tax.

[1] The entire works contemplated in the special Act within a particular parish or county, though other parts of the works in other parishes are incomplete—East London Ry. *v.* Whitechurch, L.R. 7 H.L. 81, overruling Reg. *v.* Metrop. D. Ry., L.R.

6 Q.B. 698. As to the valuation and assessment of railways, see Deas, p. 551 *et seq* Prison assessment abolished, 40 & 41 Vict. c. 53.

[2] In the case of lands taken as additions under powers conferred by Acts subsequent to the incorporating Act, these words mean—'until the additional land shall 'have been made part of the undertaking, and so liable to be assessed'—Hall *v.* Glasgow City Union Ry., 20th March 1883, 10 Ret. 857. Case of certificate by chairman being conclusive evidence of completion—Stratton *v.* Metrop. Board, L.R. 10 C.P. 76. The fact that the works when finished would not be assessable, is of no consequence—ibid.

[3] Looking to the company's undertaking under the special Act within the parish as a whole, in the case of poor-rates, not at each part thereof which may for the time have no assessable value, as being vacant or superfluous land, or land with incomplete works—Hall *v.* Glasgow City Union Ry., 18th March 1881, 8 Ret. 687.

[4] Under deduction of the value of portions at the time converted to the purposes of the undertaking, and of those on which the old buildings are still standing—Hall *v.* Glasgow City Union Ry., 20th March 1883, 10 Ret. 857; Stratton, *supra.*

And with respect to the giving of notices, be it enacted as follows:[1] *Notices.*

[1] Sect. 128 differs only slightly from sect. 137 of the Companies Clauses Act, and sect. 130 of the Railways Clauses Act. Sect. 129 is identical with sects. 143 and 131 of these Acts respectively.

128. Any summons or notice, or any writ or other proceeding at law or equity required to be served upon the promoters of the undertaking, may be served by the same being left at, or transmitted through the post directed to, the principal office[1] of the promoters of the undertaking, or one of the principal offices where there shall be more than one, or being given personally, or transmitted through the post directed, to the secretary,[2] or in case there be no secretary then by being given to the solicitor of the said promoters. Service of notices upon the promoters of the undertaking.

[1] As to 'principal office,' Garton *v.* G.W. Ry., 27 L.J.Q.B. 375 (Paddington, not Bristol); chief office here of a foreign corporation—Newby *v.* Von Oppen, L.R. 7 Q.B. 293.

[2] Stewart *v.* Sc. Midland Ry., 1852, 14 D. 594; Wilson *v.* Caledonian Ry., 20 L.J. Ex. 6, 5 Exch. 822 (though not at the office); not a booking-clerk at a place where the company had only running powers—Mackereth *v.* G.S.W. Ry., L.R. 8 Ex. 149.

129. And be it enacted, that if any party shall have committed any irregularity, trespass, or other wrongful proceeding in the execution of this or the special Act, or any Act incorporated therewith, or by virtue of any power or authority thereby given, and if, before action brought in respect thereof, such party make tender of sufficient amends to the party injured, such last-mentioned party shall not recover in any such action; and if no such tender shall have been made it shall be lawful for the defender, by leave of the court where such action shall be pending, at any time before the record is closed to pay into court such sum of money as he shall think fit, and thereupon such proceedings shall be had as in other cases where defenders are allowed to pay money into court. Tender of amends.

And with respect to the recovery of forfeitures, penalties, and expenses, be it enacted as follows:[1] *Recovery of penalties.*

[1] Sects. 130, 131, 133-6, 137—to the end of the Act, are similar to sects. 149, 150, 152-5, 160—to the end of the Companies Clauses Act, and to the corresponding sections of the Railway Clauses Act. See the Summary Procedure Acts, 27 & 28 Vict. c. 53, 44 & 45 Vict. c. 33.

130. Every penalty or forfeiture imposed by this or the special Act, or any Act incorporated therewith, or by any byelaw made in pursuance thereof, the recovery of which is not otherwise provided for, may be Penalties to be summarily recovered before the sheriff or two justices.

recovered by summary proceeding before the sheriff or two Justices; and on complaint being made to any sheriff or Justice he shall issue an order requiring the party complained against to appear before himself, if the order be issued by a sheriff, or before two or more Justices, if the order be issued by a Justice, at a time and place to be named in such order; and every such order shall be served on the party offending either in person or by leaving the same with some inmate at his usual place of abode; and upon the appearance of the party complained against, or in his absence, after proof of the due service of such order, it shall be lawful for any sheriff or two Justices to proceed to the hearing of the complaint; and upon proof of the offence, either by the confession of the party complained against, or upon the oath of one credible witness or more, it shall be lawful for such sheriff or Justices to convict the offender, and upon such conviction to adjudge the offender to pay the penalty or forfeiture incurred, as well as such expenses attending the conviction as such sheriff or Justices shall think fit.

Penalties to be levied by poinding and sale.

131. If forthwith upon any such adjudication as aforesaid the amount of the penalty or forfeiture, and of such expenses as aforesaid, be not paid, the amount of such penalty and expenses may be levied by poinding and sale, and such sheriff or Justices shall issue his or their warrant of poinding and sale accordingly.

Poinding, &c., against the treasurer.

132. If any such sum shall be payable by the promoters of the undertaking, and if sufficient goods of the said promoters cannot be found whereon to levy the same, it may, if the amount thereof do not exceed twenty pounds, be recovered by poinding and sale of the goods of the treasurer of the said promoters, and the sheriff, on application, shall issue his warrant accordingly; but no such poinding and sale shall be executed against the goods of such treasurer unless seven days previous notice in writing, stating the amount so due, and demanding payment thereof, have been given to such treasurer, or left at his residence; and if such treasurer pay any money under such poinding and sale as aforesaid he may retain the amount so paid by him, and all expenses occasioned thereby, out of any money belonging to the promoters of the undertaking coming into his custody or control, or he may sue the promoters of the undertaking for the same.

Poinding, &c., how to be levied.

133. Where in this or the special Act, or any Act incorporated therewith, any sum of money, whether in the nature of penalty, expenses, or otherwise, is directed to be levied by poinding and sale, such sum of money shall be levied by poinding and sale of the goods and effects of the party liable to pay the same, and the overplus arising from the sale of such goods and effects, after satisfying such sum of money, and the expenses of the poinding and sale shall be returned, on demand, to the party whose goods shall have been used.

Poinding not unlawful for want of form.

134. No poinding and sale made by virtue of this or the special Act, or any Act incorporated therewith, shall be deemed unlawful, nor shall any party making the same be deemed a trespasser or wrong-doer, on account of any defect or want of form in the summons, conviction, warrant, or other proceeding relating thereto, but all persons aggrieved by such defect or irregularity may recover full satisfaction for the special damage in an action before the sheriff court.

Application of penalties.

135. The sheriff or Justices by whom any such penalty or forfeiture shall be imposed, where the application thereof is not otherwise provided for, may award not more than one half thereof to the informer, and shall award the remainder to the kirk-session, or treasurer or collector of the funds for the poor, of the parish in which the offence shall have been committed, for the benefit of the poor of such parish.

Penalties to be sued for within six months.

136. No person shall be liable to the payment of any penalty or forfeiture imposed by virtue of this or the special Act, or any Act incorporated therewith, for any offence made cognisable before the sheriff or Justices, unless the complaint respecting such offence shall have been made before such sheriff or some Justice within six months next after the commission of such offence.

Form of conviction.

137. The sheriff or Justice or Justices before whom any person shall be convicted of any offence against this or the special Act, or any Act incorporated therewith, may cause the conviction to be drawn up according to the form in the Schedule (C.) to this Act annexed.[1]

[1] And see Schedules to the Summary Procedure Act, 27 & 28 Vict. c. 53.

Proceedings not to be quashed for want of form, &c.

138. No proceeding in pursuance of this or the special Act, or any Act incorporated therewith, shall be quashed or vitiated for want of form, nor shall the same be removed by suspension or otherwise into any superior court.[1]

[1] Provided the inferior court did not exceed its powers. See case under the similar section of the Railways Clauses Act, Caledonian Ry. *v.* Fleming, 1869, 7 Macph. 554, 1 Coup. 193. Now a case may be stated, as to point of law, under the Appeals Act of 1875.

Power of appeal from sheriff substitute to sheriff.

139. In all cases which may come before any sheriff substitute under this or the special Act, or any Act incorporated therewith, in which written pleadings shall have been allowed, and a written record shall have been made up, and where the evidence which has been led by the parties shall have been reduced to writing, but in no other case whatever, it shall be competent for any of the parties thereto, within seven days after a final judgment shall have been pronounced by such sheriff substitute, to appeal against the same to the sheriff of the county, by lodging a minute of appeal with the sheriff clerk of such county or his depute; and the said sheriff shall thereupon review the proceedings of the said sheriff substitute, and whole process, and, if he think proper, hear the parties *vivâ voce* thereon, and pronounce judgment; and such judgment shall in no case be subject to review by suspension or advocation, or by reduction, on any ground whatever.[1]

[1] This section applies to petitions for authority to enter possession under sect. 89; and is not restricted by being included under the headnote before sect. 130—B. of Allan Water Co. *v.* Alexander, 1868, 6 Macph. 321.

Parties allowed to appeal from justices to Quarter Sessions, on giving security.

140. If any party shall feel aggrieved by any determination or adjudication of any Justice or two or more Justices, with respect to any penalty or forfeiture under the provisions of this or the special Act, or any Act incorporated therewith, such party may appeal to the general Quarter Sessions for the county or place in which the cause of appeal shall have arisen; but no such appeal shall be entertained unless it be made within four months next after the making of such determination or

adjudication, nor unless ten days notice in writing of such appeal, stating the nature and grounds thereof, be given to the party against whom the appeal shall be brought, nor unless the appellant forthwith after such notice enter into recognisances, with two sufficient sureties, before a Justice, conditioned duly to prosecute such appeal, and to abide the order of the court thereon.

Court to make such order as they think reasonable.

141. At the Quarter Sessions for which such notice shall be given the court shall proceed to hear and determine the appeal in a summary way, or they may, if they think fit, adjourn it to the following sessions; and upon the hearing of such appeal the court may, if they think fit, mitigate any penalty or forfeiture, or they may confirm or quash the adjudication, and order any money paid by the appellant, or levied by distress upon his goods, to be returned to him, and may also order such further satisfaction to be made to the party injured as they may judge reasonable, and they may make such order concerning the expenses, both of the adjudication and of the appeal, as they may think reasonable.

Access to special Act.

And with respect to the provision to be made for affording access to the special Act by all parties interested, be it enacted as follows:

Copies of special Act to be kept and deposited, and allowed to be inspected.

142. The company shall at all times, after the expiration of six months after the passing of the special Act, keep in their principal office of business a copy of the special Act, printed by the printers to her Majesty, or some of them; and where the undertaking shall be a railway, canal, or other like undertaking, the works of which shall not be confined to one county, shall also within the space of such six months deposit in the office of each of the sheriff clerks of the several counties into which the works shall extend a copy of such special Act, so printed as aforesaid; and the said sheriff clerks shall receive, and they and the company respectively shall retain, the said copies of the special Act, and shall permit all persons interested to inspect the same, and make extracts or copies therefrom in the like manner, and upon the like terms, and under the like penalty for default, as is provided in the case of certain plans and sections by an Act passed in the first year of the reign of her present Majesty, intituled *An Act to compel Clerks of the Peace for Counties and other persons to take the Custody of such Documents as shall be directed to be deposited with them under the Standing Orders of either House of Parliament.*

7 W. 4. & 1 Vict. c. 83.

Penalty on company failing to keep and deposit Act.

143. If the company shall fail to keep or deposit, as herein-before mentioned, any of the said copies of the special Act, they shall forfeit twenty pounds for every such offence, and also five pounds for every day afterwards during which such copy shall be not so kept or deposited.

SCHEDULES referred to in the foregoing Act.

SCHEDULE (A.)

Form of Conveyance.

I of in consideration of the sum of paid to me [*or, as the case may be,* into the Bank (*or* to *A.B.* of and *C.D.* of two

trustees appointed to receive the same)], pursuant to an Act passed, *&c.*, intituled, *&c.*, by the [*here name the company*], incorporated by the said Act, do hereby sell, alienate, dispone, convey, assign, and make over from me, my heirs and successors, to the said company, their successors and assignees, for ever, according to the true intent and meaning of the said Act, all [*describing the premises to be conveyed*], together with all rights and pertinents thereto belonging, and all such right, title, and interest in and to the same as I and my foresaids are or shall become possessed of, or are by the said Act empowered to convey. [*Here insert the conditions (if any) of the conveyance, and a registration clause for preservation and diligence, and a testing clause according to the form of the law of Scotland.*]

SCHEDULE (B.)

Form of Conveyance in consideration of Feu Duty or Rent-Charge.

I of in consideration of the feu duty or rent to be paid to me, my heirs and assigns, as herein-after mentioned, by the [*here name the company*], established and incorporated by virtue of an Act passed, *&c.*, intituled, *&c.*, do hereby dispone, convey, and make over from me, my heirs and successors, to the said company, their successors and assignees, for ever, according to the true intent and meaning of the said Act, all [*describing the premises to be conveyed*], together with all rights and pertinents thereunto belonging, and all my right, title, and interest in and to the same and every part thereof, they the said company, their successors and assignees, yielding and paying unto me, my heirs and assignees, one clear annual feu duty or rent of by equal half-yearly portions henceforth on the [*stating the days. Here insert conditions of the conveyance (if any), and insert a registration clause for preservation and diligence, and a testing clause, according to the form of the law of Scotland.*]

SCHEDULE (C.)

Form of Conviction before

to wit.

BE it remembered, that on the day of in the year of our Lord *A.B.* is convicted before me *C.*, the sheriff [*or* before us *D.*, *E.*, two of her Majesty's Justices of the Peace] for the county of [*here describe the offence generally, and the time and place when and where committed*], contrary to the [*here name the special Act*]. Given under my hand [*or* under our hands], the day and year first above written.

C.
D.
E.

No. XIV.

39 & 40 VICTORIA, c. 75.

An Act for making further Provision for the Prevention of the Pollution of Rivers.—[15*th August* 1876.]

WHEREAS it is expedient to make further[1] provision for the prevention of the pollution[2] of rivers, and in particular to prevent the establishment of new sources of pollution:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

[1] Existing rights and powers are preserved—sects. 16, 17, 19.
[2] Pollution in the sense of the Act is not defined. It is only provided that 'polluting shall not include innocuous discoloration'—sect. 20. See the remarks in the text, p. 473.

Short title of Act.

1. This Act may be cited for all purposes as the Rivers Pollution Prevention Act, 1876.

PART I.

Law as to Solid Matters.[1]

Prohibition as to putting solid matter into streams.

2. Every person[2] who puts or causes to be put or to fall or knowingly permits to be put or to fall or to be carried into any stream,[3] so as either singly or in combination with other similar acts of the same or any other person to interfere with its due flow,[4] or to pollute its waters, the solid refuse of any manufactory, manufacturing process or quarry,[5] or any rubbish or cinders,[6] or any other waste or any putrid solid matter, shall be deemed to have committed an offence against this Act.[7]

In proving interference with the due flow of any stream, or in proving the pollution of any stream, evidence may be given of repeated acts which together cause such interference or pollution, although each act taken by itself may not be sufficient for that purpose.

[1] 'Solid matter' shall not include particles of matter in suspension in water, sect. 20.
[2] Includes any body of persons, whether corporate or unincorporate, sect. 20.
[3] Defined, sect. 20.
[4] See text, p. 453. Rights of impounding and diverting are saved, sect. 17.
[5] Solid matters from mines are provided for in sect. 5.
[6] See Reports of Rivers Pollution Commissioners, i. pp. 42, 136; iii. p. 14.
[7] Sects. 10, 11.

PART II.

Law as to Sewage Pollutions.

Prohibition as to drainage into streams of sewers.

3. Every person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream[1] any solid or liquid sewage matter,[2] shall (subject as in this Act mentioned)[3] be deemed to have committed an offence against this Act.

Where any sewage matter falls or flows or is carried into any stream along a channel used, constructed, or in process of construction at the date of the passing of this Act[4] for the purpose of conveying such sewage matter, the person causing or knowingly permitting the sewage matter so to fall or flow or to be carried shall not be deemed to have committed an offence against this Act if he shows[5] to the satisfaction of the court having cognisance of the case that he is using the best practicable and available means to render harmless the sewage matter so falling or flowing or carried into the stream.

Where the Local Government Board[6] are satisfied after local inquiry that further time ought to be granted to any sanitary authority,[7] which at the date of the passing of this Act is discharging sewage matter into any stream, or permitting it to be so discharged by any such channel as aforesaid, for the purpose of enabling such authority to adopt the best practicable and available means for rendering harmless such sewage matter, the Local Government Board may by order declare that this section shall not, so far as regards the discharge of sewage matter by such channel, be in operation until the expiration of a period to be limited in the order.

Any order made under this section may be from time to time renewed by the Local Government Board, subject to such conditions, if any, as they may see fit.

A person other than a sanitary authority[7] shall not be guilty of an offence under this section in respect of the passing of sewage matter into a stream along a drain communicating with any sewer belonging to or under the control of any sanitary authority, provided he has the sanction of the sanitary authority for so doing.

[1] Defined, sect. 20, and case in note thereto.
[2] Pollution is assumed for the purposes of the Act.
[3] *I.e.*, unless he comes under one or other of the exceptions provided in the sequel of this section, and in sect. 19.
[4] 15th August 1876.
[5] An inspector's certificate will be conclusive proof, sect. 12. The court may remit to skilled parties to report on the best 'practicable and available means,' sect. 10.
[6] In Scotland, the Secretary of State, sect. 21.
[7] The Local Authority under the Public Health Act, 1867, 30 & 31 Vict. c. 101; ibid.

PART III.

LAW AS TO MANUFACTURING AND MINING POLLUTIONS.

Prohibition as to drainage into streams from manufactories.

4. Every person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream[1] any poisonous, noxious, or polluting[2] liquid[3] proceeding from any factory or manufacturing process shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act.

Where any such poisonous, noxious, or polluting liquid as aforesaid falls or flows or is carried into any stream along a channel used, constructed, or in process of construction at the date of the passing of this Act, or any new channel constructed in substitution thereof, and having its outfall at the same spot, for the purpose of conveying such liquid, the person causing or knowingly permitting the poisonous, noxious, or polluting liquid so to fall or flow or to be carried shall not be deemed to

have committed an offence against this Act if he shows to the satisfaction of the court having cognisance of the case that he is using the best practicable and reasonably available means to render harmless the poisonous, noxious, or polluting liquid so falling or flowing or carried into the stream.[4]

[1] Sect. 20.
[2] Sect. 20.
[3] Solid matters from manufactories and quarries are provided for by sect. 2.
[4] See notes [4] and [5] to sect. 3, and remark the differences between this part of the section and the corresponding part of sect 3. There is here the alternative of a substituted channel, and the introduction of the word 'reasonably.' The first is certainly, the second possibly, intended by the Legislature to put the manufacturer in a more favourable position than sewage polluters.

Prohibition as to drainage into streams from mines.

5. Every person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream[1] any solid matter from any mine in such quantities as to prejudicially[2] interfere with its due flow, or any poisonous, noxious, or polluting[1] solid or liquid matter proceeding from any mine, other than water in the same condition as that in which it has been drained or raised from such mine, shall be deemed to have committed an offence against this Act, unless in the case of poisonous, noxious, or polluting matter he shows to the satisfaction of the court having cognisance of the case that he is using the best practicable and reasonably available means to render harmless the poisonous, noxious, or polluting matter so falling or flowing or carried into the stream.[3]

[1] Sect. 20.
[2] Omitted in the corresponding sect. 2.
[3] See notes to the corresponding words in the last two sections.

Restriction on proceedings under this part of the Act.[1]

6. Unless and until Parliament otherwise provides the following enactments shall take effect, proceedings shall not be taken against any person[2] under this part of this Act save by a sanitary authority,[3] nor shall any such proceedings be taken without the consent of the Local Government Board:[4] Provided always, that if that sanitary authority, on the application of any person interested alleging an offence to have been committed, shall refuse to take proceedings or apply for the consent by this section provided, the person so interested may apply to the Local Government Board, and if that Board on inquiry is of opinion that the sanitary authority should take proceedings, they may direct the sanitary authority accordingly, who shall thereupon commence proceedings.

The said Board in giving or withholding their consent shall have regard to the industrial interests involved in the case and to the circumstances and requirements of the locality.

The said Board shall not give their consent to proceedings by the sanitary authority of any district which is the seat of any manufacturing industry,[5] unless they are satisfied, after due inquiry, that means for rendering harmless the poisonous, noxious, or polluting liquids proceeding from the processes of such manufactures are reasonably practicable and available[6] under all the circumstances of the case, and that no material injury will be inflicted by such proceedings on the interests of such industry.

Any person within such district as aforesaid against whom proceed-

ings are proposed to be taken under this part of this Act, shall, notwithstanding any consent of the Local Government Board, be at liberty to object before the sanitary authority to such proceedings being taken, and such authority shall, if required in writing by such person, afford him an opportunity of being heard against such proceedings being taken so far as the same relate to his work or manufacturing processes. The sanitary authority shall thereupon allow such person to be heard by himself, agents, and witnesses, and after inquiry such authority shall determine, having regard to all the considerations to which the Local Government Board are by this section directed to have regard, whether such proceedings as aforesaid shall or shall not be taken; and where any such sanitary authority has taken proceedings under this Act, it shall not be competent to other sanitary authorities to take proceedings under this Act till the party against whom such proceedings are intended shall have failed in reasonable time to carry out the order of any competent court[7] under this Act.

[1] This is a restriction on the power of 'any person aggrieved' to institute proceedings (sects. 8, 20).
[2] Sect. 20.
[3] Local authority, sect. 21.
[4] Secretary of State, ibid.
[5] This applies only to sect. 4.
[6] See notes to sects. 3, 4.
[7] Sects. 10, 11, 21.

PART IV.

ADMINISTRATION OF LAW.

Sanitary authority to afford facilities for factories draining into sewers.

7. Every sanitary or other local authority[1] having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into such sewers:

Provided that this section shall not extend to compel any sanitary or other local authority to admit into their sewers any liquid which would prejudicially affect such sewers or the disposal by sale, application to land, or otherwise, of the sewage matter conveyed along such sewers, or which would from its temperature or otherwise be injurious in a sanitary point of view:

Provided also, that no sanitary authority shall be required to give such facilities as aforesaid where the sewers of such authority are only sufficient for the requirements of their district, nor where such facilities would interfere with any order of any court of competent jurisdiction respecting the sewage of such authority.

[1] Sect. 21.

Power of sanitary authority to enforce Act.

8. Every sanitary authority[1] shall, subject to the restrictions in this Act contained,[2] have power to enforce the provisions of this Act in relation to any stream[3] being within or passing through or by any part of their district, and for that purpose to institute proceedings[4] in respect of any offence against this Act which causes interference with the due flow[5] within their district of any such stream, or the pollution within their district of any such stream, against any other sanitary authority or person, whether such offence is committed within or without the district of the first-named sanitary authority.

Any expenses incurred by a sanitary authority in the execution of this Act shall be payable as if they were expenses properly incurred by that authority in the execution of the Public Health Act, 1875.[6]

Proceedings may also, subject to the restrictions in this Act contained, be instituted in respect of any offence against this Act by any person aggrieved by the commission of such offence.

[1] Local authority, sect. 21.
[2] In sect. 3, clauses 3 and 4; sects. 6 *ad fin.*, 13 *ad fin.*, 17, 19.
[3] Sect. 20.
[4] Sect. 10 *et seq.*
[5] See text, p. 420 *et seq.*
[6] *I.e.*, Public Health (Scotland) Act, 1867, 30 & 31 Vict. c. 101, sects. 94, 95, amended 34 & 35 Vict. c. 38, 38 & 39 Vict. c. 74, 42 & 43 Vict. c. 15, and 45 Vict. c. 11.

9. *Power of Lee Conservancy Board to enforce Act.*

LEGAL PROCEEDINGS. SAVING CLAUSES. DEFINITIONS.

(1.) *Legal Proceedings.*

Offences to be restrained by summary order of county court.

10. The county[1] court having jurisdiction in the place where any offence against this Act is committed may by summary order require any person[2] to abstain from the commission of such offence,[3] and where such offence consists in default to perform a duty under this Act may require him to perform such duty in manner in the said order specified; the court may insert in any order such conditions as to time or mode of action as it may think just, and may suspend or rescind any order on such undertaking being given or condition being performed as it may think just, and generally may give such directions for carrying into effect any order as to the court seems meet. Previous to granting such order the court may, if it think fit, remit to skilled parties to report on the 'best practicable and available means'[4] and the nature and cost of the works and apparatus required, who shall in all cases take into consideration the reasonableness of the expense involved in their report.

Any person making default in complying with any requirement of an order of a county court made in pursuance of this section shall pay to the person complaining, or such other person as the court may direct, such sum, not exceeding fifty pounds a day for every day during which he is in default, as the court may order; and such penalty shall be enforced in the same manner as any debt adjudged to be due by the court; moreover, if any person so in default persist in disobeying any requirement of any such order for a period of not less than a month or such other period less than a month as may be prescribed by such order, the court may in addition to any penalty it may impose appoint any person or persons to carry into effect such order, and all expenses incurred by any such person or persons to such amount as may be allowed by the county court shall be deemed to be a debt due from the person in default to the person or persons executing such order, and may be recovered accordingly in the county court.

[1] Sheriff, sect. 21.
[2] Sect. 20.
[3] See case noted *infra*, sect. 20.
[4] See sects. 3, 4, 5, 6, 12.

Appeal from county court, and removal of case into High Court of Justice.

11. If either party in any proceedings before the county[1] court under this Act feels aggrieved by the decision of the court in point of law or on the merits, or in respect of the admission or rejection of any evidence, he may appeal from that decision to the High Court of Justice.[2]

The appeal shall be in the form of a special case to be agreed upon by both parties or their attorneys, and, if they cannot agree, to be settled by the judge of the county court upon the application of the parties or their attorneys.[3]

The court of appeal may draw any inferences from the facts stated in the case that a jury might draw from facts stated by witnesses.

Subject to the provisions of this section, all the enactments, rules, and orders relating to proceedings in actions in county courts, and to enforcing judgments in county courts and appeals from decisions of the county court judges, and to the conditions of such appeals, and to the power of the superior courts on such appeals, shall apply to all proceedings under this Act, and to an appeal from such action, in the same manner as if such action and appeal related to a matter within the ordinary jurisdiction of the court.

Any plaint entered in a county court[4] under this Act may be removed into the High Court of Justice by leave of any judge of the said High Court, if it appears to such judge desirable in the interests of justice that such case should be tried in the first instance in the High Court of Justice and not in a county court, and on such terms as to security for and payment of costs, and such other terms (if any) as such judge may think fit.[5]

[1] Sheriff, sect. 21. The statute is hybrid, being purely civil in the first place, and only criminal in case of disobedience to the orders of the court. Therefore, the procedure must go on as in ordinary civil causes before the sheriff, and an appeal lies from the sheriff-substitute to the sheriff, and a note of the evidence should be taken—Portobello Mags. *v.* Edinburgh Mags., *infra*, sect 20.

[2] The Court of Session in either division of the Inner House thereof, sect. 21.

[3] See an analogous procedure with reference to registration of voters, 31 & 32 Vict. c. 48, sect. 22 ; text. p. 184.

[4] Petition or complaint presented in a sheriff court, sect. 21.

[5] See the procedure in the Sheriff Court Act, 1877, 40 & 41 Vict. c. 50, sect. 9.

Certificate of inspector of Local Government Board as to best practicable means.

12. A certificate granted by an inspector of proper qualifications appointed for the purposes of this Act by the Local Government Board[1] to the effect that the means used for rendering harmless any sewage matter or poisonous, noxious, or polluting solid or liquid matter falling or flowing or carried into any stream,[2] are the best or only practicable and available means[3] under the circumstances of the particular case, shall in all courts, and in all proceedings under this Act be conclusive evidence of the fact;[4] such certificate shall continue in force for a period to be named therein, not exceeding two years, and at the expiration of that period may be renewed for the like or any less period.

All expenses incurred in or about obtaining a certificate under this section shall be paid by the applicant for the same.[5]

Any person aggrieved by the grant or the withholding of a certificate under this section may appeal to the Local Government Board against the decision of the inspector; and the Board may either confirm, reverse, or modify his decision, and may make such order as to the party or

parties by whom the costs of the appeal are to be borne as to the said Board may appear just.

[1] Secretary of State, sect. 21.
[2] Sect. 20.
[3] Sects. 3, 4, 5, 6, 10.
[4] This does not apply to solid matters under sect. 2.
[5] See sect. 14.

Restrictions on proceedings for offences.

13. Proceedings shall not be taken under this Act against any person for any offence against the provisions of Parts II. and III. of this Act until the expiration of twelve months after the passing of this Act; nor shall proceedings in any case be taken under this Act for any offence against this Act until the expiration of two months after written notice of the intention to take such proceedings has been given to the offender, nor shall proceedings under this Act be taken for any offence against this Act while other proceedings in relation to such offence are pending.

Orders as to costs of inquiries.

14. The Local Government Board [1] may make orders as to the costs incurred by them in relation to inquiries instituted by them under this Act and as to the parties by whom such costs shall be borne; and every such order and every order for the payment of costs made by the said Board under section twelve of this Act may be made a rule of her Majesty's High Court of Justice.[2]

[1] Secretary of State, sect. 21.
[2] See provision for the Court of Session, in lieu of this, interponing authority, sect. 21 (8).

15. *Power of Inspectors of Local Government Board.*[1]

[1] As applied to Scotland, see sect. 21 (9).

(2.) *Saving Clauses.*

Powers of Act cumulative.[1]

16. The powers given by this Act shall not be deemed to prejudice or affect any other rights or powers now existing or vested in any person or persons by Act of Parliament, law,[2] or custom, and such other rights or powers may be exercised in the same manner as if this Act had not passed; and nothing in this Act shall legalise any act or default which would but for this Act be deemed to be a nuisance or otherwise contrary to law: Provided nevertheless, that in any proceedings for enforcing against any person such rights or powers the court before which such proceedings are pending shall take into consideration any certificate granted to such person under this Act.[3]

[1] See text, p. 473.
[2] In the case of the *Figgate Burn* (*infra*, note to sect. 20), none of the primary uses had been destroyed for the period of the long negative prescription. Lord Young there hinted the inclination of his opinion to be that the Act absolutely prohibits the discharge of solid or liquid sewage into a stream, even though such a discharge might have been lawful before the Act, subject to the exceptions in the Act itself; that is, it is presumed, those contained in sects. 3 and 19. *Sed quære*, A decree of court is a right 'vested by law;' and a decree of declarator of right to pollute is only a recognition of an 'existing' right vested by law though not yet cognosced.
[3] Sect. 12, and notes thereto.

Saving of rights of im

17 This Act shall not apply to or affect the lawful exercise of any rights of impounding or diverting water.

18. *Saving of certain Conservancy Acts.*[1] pounding and diverting water.

[1] These are English Acts.

19. Where any local authority or any urban or rural sanitary authority has been empowered or required by any Act of Parliament to carry any sewage into the sea or any tidal waters, nothing done by such authority in pursuance of such enactment, shall be deemed to be an offence against this Act. Saving of works of certain local authorities.

(3.) *Definitions.*

20. In this Act, if not inconsistent with the context, the following terms have the meanings herein-after respectively assigned to them; that is to say, Definitions.

'Person' includes any body of persons, whether corporate or unincorporate:

'Stream' includes the sea to such extent, and tidal waters to such point, as may, after local inquiry and on sanitary grounds, be determined by the Local Government Board,[1] by order published in the London[2] Gazette. Save as aforesaid, it includes rivers, streams, canals, lakes, and watercourses, other than watercourses at the passing of this Act mainly used as sewers,[3] and emptying directly into the sea, or tidal waters which have not been determined to be streams within the meaning of this Act by such order as aforesaid:[4]

'Solid matter' shall not include particles of matter in suspension in water:

'Polluting' shall not include innocuous discoloration.

[1] Secretary of State, sect. 21.

[2] Edinburgh, ibid.

[3] A stream whose water at the date of the Act, though not well fitted for culinary purposes, was available for washing and for watering cattle, was joined by a stream (as augmented by sewage, about one-third of the size of the other in ordinary weather) which had for forty years received town sewage, during the last half of which period there was a large increase in the amount carried. Thirty years before the date of the question, the combined stream near its mouth had been used for drinking purposes systematically; thereafter, only occasionally for domestic uses. On complaint by the Local Authority at the mouth against the Local Authority of the sewage-discharging district seeking a summary order to desist from sewage pollution under sects. 3-10, *held* that though the smaller stream might be described as a watercourse 'mainly 'used as a sewer,' it was different with the combined stream. The words meant 'a 'water*course* which has been converted into a sewer, and [of which], although water 'still runs in it, yet that is the main and primary use;' not merely that sewage has been conveyed into it, but that it is *used* as a sewer, and is therefore no longer fit for any other public use—Portobello Mags. *v.* Edinburgh Mags., 9th Nov. 1882, 10 Ret. 130.

[4] The Act does not seem to extend to waters flowing in no definite course. See text, pp. 425, 429.

PART V.

APPLICATION OF THE ACT TO SCOTLAND.

21. In the application of this Act to Scotland the following provisions shall have effect: Modifications of Act in Scotland.

(1.) The expression 'sanitary authority' shall mean and include the local authority in any parish or burgh in Scotland, acting under the Public Health (Scotland) Act, 1867:[1]

(2.) The expression 'London Gazette' shall mean Edinburgh Gazette:

(3.) The expression 'the Public Health Act, 1875,' shall mean the Public Health (Scotland) Act, 1867, and any Acts amending the same:[2]

(4.) This Act shall be read and construed as if for the expression 'the 'Local Government Board' wherever it occurs therein, the expression 'the Secretary of State' were substituted; and the expression 'the Secretary of State' shall mean one of her Majesty's Principal Secretaries of State:

(5.) The expression 'the county court' shall mean the sheriff of the county, and shall include sheriff substitute; and the expression 'plaint entered in a county court' shall mean petition or complaint presented in a sheriff court:

(6.) The expression 'the High Court of Justice' shall mean the Court of Session in either division of the Inner House thereof:

(7.) All the jurisdiction, powers, and authorities necessary for the purposes of this Act are hereby conferred on sheriffs and their substitutes.[3]

(8.) The Court of Session may, on the application of the Lord Advocate, on behalf of the Secretary of State, interpone their authority to any order made by the Secretary of State as to the costs incurred by him in relation to inquiries instituted by him under this Act, and as to the parties by whom such costs shall be borne; and may grant decree conform thereto, upon which execution and diligence may proceed in common form:

(9.) An inspector appointed for the purposes of this Act by the Secretary of State shall, for the purposes of any inquiry directed by the Secretary of State under this Act, be entitled, by a summons signed by him, to require the attendance of all persons he may think fit to call before him in regard to the matters of the inquiry, and to administer oaths to, and examine upon oath, all such persons, and to require and enforce the production upon oath of all documents, accounts, or papers in anywise relating to such inquiry; and shall also have, in relation to the inspection of places and matters required to be inspected, similar powers to those which sanitary inspectors have under the Public Health (Scotland) Act, 1867.[4]

[1] 30 & 31 Vict. c. 101.

[2] The amending Acts are 34 & 35 Vict. c. 38, 38 & 39 Vict. c. 74, 42 & 43 Vict. c. 15, and 45 Vict. c. 11.

[3] See note [1] to sect. 11.

[4] Sect. 17 thereof.

No. XV.

8 & 9 VICTORIA, c. 26.

An Act to prevent fishing for Trout or other Fresh-water Fish by Nets in the Rivers and Waters in Scotland.—[30*th June* 1845.]

WHEREAS it is expedient that provision should be made for preventing the destruction of trout and other fresh-water fish by nets [1] in the rivers, waters, and lochs of Scotland: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that it shall not be lawful for any person whatsoever, not being the proprietor of the land through or by which any river or water flows, or on which any loch is wholly or partially situated, or not having a right there to fish for trout or fresh-water fish, or not having a written permission [2] from some such proprietor or person entitled to fish as aforesaid, at any time after the passing of this Act, to fish for trout or other fresh-water fish in any such river, water, or loch in Scotland, with any net of any kind or description; and if any person, not being a proprietor or having right or permission as aforesaid, shall wilfully take, fish for, or attempt to take, or aid and assist in taking or fishing for or attempting to take or fish for, in or from any such river, water, or loch, any trout or other fresh-water fish, by or with any net of any kind or description, such person shall forfeit and pay any sum not exceeding five pounds for every such offence, besides forfeiting the trout or fish taken, and also every boat or net in or by which the same may have been taken or attempted to be taken, and shall also pay the full expenses of the conviction.

Prohibiting fishing for trout, &c., by means of nets in any rivers, &c., in Scotland.

[1] Other modes are prohibited by the next Act, *infra*, p. 878.

[2] A tenant under an ordinary agricultural lease comes under none of these categories, and will be liable to be prosecuted—D. Richmond *v.* Dempster, 14th Jan. 1861, 4 Irv. 10. Cf. next Act, sect. 1, *ad fin.*

2. And be it enacted, that if any person shall trespass upon any ground, enclosed or unenclosed, or in or upon any river, water, or loch, with intent to take with any net any trout or other fresh-water fish, such persons shall forfeit and pay a sum not exceeding five pounds for every such offence.

Penalty for trespassing on any ground or river to fish with net.

3. And be it enacted, that if any such trespasser shall have in his possession any net of any description whereby trout or other fresh-water fish may be taken or killed, the possession thereof shall be held to be sufficient evidence of the intent of such trespasser to commit such offence.

Possession of nets evidence of intent.[1]

[1] There is no similar enactment in the next statute.

4. And be it enacted, that it shall be lawful for any person, without any warrant or other authority than this Act, *brevi manû*, to seize and detain any person who shall be found committing any offence against

Persons trespassing may be seized.

this Act, and to carry such person before the sheriff or any Justice of the Peace in the county within which the offence shall take place, or to deliver such person to a constable, who is hereby required to carry such person before such sheriff or Justice, and the sheriff or Justice of the Peace before whom such offender shall be brought shall forthwith examine and discharge or commit such offender until caution *de judicio sisti* be found, as the case may require;[1] and it shall in like manner be lawful[2] to seize and detain any boat or net of any description used or intended to be used in the commission of any such offence, and also any fish taken by any such offender, and to give information thereof to the sheriff.

[1] There is no similar enactment in the next statute.

[2] In said statute this power is given only to persons having the authority of the proprietor of riparian land, sect. 3.

Justices and proprietors not to be disqualified.

5. And be it enacted, that all Justices of the Peace shall and may act in the execution of this Act notwithstanding that such Justices shall be the proprietors of land through or by which any river or water may flow, or upon which any loch may be wholly or partially situated, or shall otherwise have a right of trout or fresh-water fishing in any such river, water, or loch, except in cases in which any such Justice is a party to the prosecution of the case,[1] or is directly interested in the result thereof; and no such proprietor or party having right as aforesaid shall be incompetent as a witness to prove any offence committed against this Act by reason of his being such proprietor or having such right.

[1] The next Act adds, as a further disqualification, one which was really included in the two here imposed—viz., where the offence has been committed on the Justice's land, sect. 4.

For the recovery of penalties.

6. And for the recovery of the penalties and forfeitures imposed by this Act, be it enacted, that any such penalties or forfeitures may be recovered by summary proceeding upon complaint in writing made[1] by any party prosecuting for the same to the sheriff[2] of the county in which such offence shall be committed, or to the sheriff of any county in which the offender may be found, and on such complaint such sheriff shall issue a warrant for bringing the party complained against immediately before him, or shall issue an order requiring such party to appear at a time and place to be named in such order; and every such order shall be served on the party complained against either in person or by leaving with some inmate at his usual place of abode a copy of such order and of the complaint whereon the same has proceeded; and either upon the appearance or on the default to appear of the party complained against it shall be lawful for the sheriff to proceed to the hearing of the complaint, and upon proof of the offence, either by the confession of the party complained against, or upon the oath of one credible witness, or more, and without any written pleadings or record of evidence,[3] to convict the offender, and upon such conviction to decern, adjudge, and sentence him to pay the penalty or forfeiture incurred, and the expenses attending the conviction, and to grant warrant for imprisoning him until such penalty or forfeiture and expenses shall be paid: Provided always, that such warrant shall specify the amount of such penalty or forfeiture and expenses, and shall also specify a period at the expiration of which the

party shall be discharged, notwithstanding such penalty or forfeiture and expenses shall not have been paid, and which period shall in no case exceed two calendar months; and it shall be lawful for the sheriff to make such orders concerning the immediate disposal of any boat, net, or fish seized or forfeited under the provisions of this Act as may be necessary.

[1] The Act 1860, sect. 5, here adds, 'by the procurator-fiscal or,' *infra*, p. 879.
[2] The Act 1860, sect. 5, adds, 'or any Justice of the Peace;' and this jurisdiction is not cut down by the Game Laws (Scotland) Amendment Act, 1877, 40 & 41 Vict. c. 28.
[3] See next section. The proceedings are now taken under the Summary Procedure Act, 1864.

Appeal.[1]

7. And be it enacted, that it shall be lawful for any person who shall think himself aggrieved by any judgment of the sheriff pronounced in any case arising under this Act to appeal from the same to the next Circuit Court of Justiciary, or, where there are no Circuit Courts, to the High Court of Justiciary at Edinburgh, in the manner, and by and under the rules, limitations, conditions, and restrictions contained in an Act passed in the twentieth year of the reign of his Majesty King George the Second, for taking away and abolishing heritable jurisdiction in Scotland, with this variation, that such person shall, in place of finding caution in the terms prescribed by the said Act, be bound to find caution to pay the penalty or forfeiture and expenses awarded against him by the sentence appealed from, in the event of the appeal being dismissed or not insisted in, together with any additional expenses that may be awarded by the court on deciding or dismissing the appeal; and it shall not be competent to appeal from or bring the judgment of any sheriff acting in the execution of this Act under review, by advocation or suspension or by reduction, or in any other way than as herein provided.

[1] This is not an appeal on the merits, since there is no provision for a note of the evidence being taken, even if, at the request of the parties, a note was actually taken —Wright *v.* Bowers, 16th March 1875, 3 Coup. 99. The Summary Procedure Act, sect. 16, does not alter this. See Moncreiff on Criminal Appeal, p. 91, and cases there. As to the new appeal on points of law under the Summary Prosecutions Appeal Act, 1875 (38 & 39 Vict. c. 62), see Moncreiff, p. 190 *et seq.*

Application of penalties.

8. And be it enacted, that all penalties and forfeitures imposed under the authority of this Act shall, when levied, be paid, the one half thereof to the prosecutor, and the other half to the poor of the parish within which the offence shall have been committed.

Limitation of actions.

9. And be it enacted, that no prosecution or other proceeding whatever shall be brought or commenced against any person for any offence against this Act, unless the same shall be commenced within six[1] calendar months after such offence shall have been committed.

[1] In Act 1860, sect. 8, three.

Interpretation of Act.

10. And be it enacted, that the words 'river,' 'water,' or 'loch' occurring in this Act shall mean and include any stream, burn, mill-pool, mill-lead, mill-dam, sluice, pond, cut, canal, and aqueduct, and every other collection or run of water in which trouts and other fresh-water fish breed, haunt, or are found or preserved; that the word 'sheriff' shall mean the sheriff of the county in which the offence happens or case arises, and shall include the sheriff substitutes of such sheriffs; that

the singular shall include the plural number, and words importing the plural number shall include the singular; and words importing the masculine gender shall include females.

Saving the laws regarding the salmon fisheries.

11. And be it enacted, that nothing herein contained shall affect any Act of Parliament, general or local, passed for the preservation of the salmon fisheries in Scotland, or in relation to the fishing of salmon or fish of the salmon kind in Scotland.

No. XVI.

23 & 24 VICTORIA, c. 45.

An Act to extend the Act of the Eighth and Ninth Years of Victoria, Chapter Twenty-six, for preventing fishing for Trout or other Fresh-water Fish by Nets in the Rivers and Waters in Scotland.—[23*d July* 1860.][1]

8 & 9 Vict. c. 26.

WHEREAS by the Act eighth and ninth Victoria, chapter twenty-six, intituled *An Act to prevent fishing for Trout or other Fresh-water Fish by Nets in the Rivers and Waters in Scotland*, provision is made for preventing the destruction of trout and other fresh-water fish by nets in the rivers, waters, and lochs of Scotland: And whereas there are various other ways by which trout and other fresh-water fish may be destroyed which have not yet been declared illegal: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same:

[1] No part of the Act of 1845 is hereby repealed, but it is practically superseded. See notes to the corresponding sections of that Act.

Fishing for trout, &c., by means of nets, &c., in any rivers, &c., in Scotland prohibited.

1. That it shall not be lawful for any person whatsoever, (except as herein-after provided), at any time after the passing of this Act, to fish for trout or other fresh-water fish in any river, water, or loch in Scotland, with any net of any kind or description, or by what is known as double rod fishing, or cross line fishing, or set lines, or otter fishing, or burning the water, or by striking the fish with any instrument, or by pointing, or to put into the water lime or any other substance destructive to trout or other fresh-water fish with intent to destroy the same; and if any person shall wilfully take, fish for, or attempt to take, or aid and assist in taking or fishing for, or attempting to take or fish for, in or from any such river, water, or loch, any trout or other fresh-water fish by or with any net of any kind or description, or by double rod fishing, or cross line fishing, or by set lines, or otter fishing, or by burning the water, or striking the fish with any instrument, or by pointing, or by putting into the water lime or any other substance destructive to trout or other fresh-water fish with intent to destroy the same, such person shall forfeit and pay any sum not exceeding five pounds for every such offence, besides forfeiting the trout

Penalty.

or fish taken, and also every boat or net, tackle, instrument, or other article in or by which the same may have been taken or attempted to be taken, and shall also pay the full expenses of the conviction: Provided that nothing in this Act contained shall prevent any person having the right to fish in any river, water, or loch in Scotland, or any person having permission from such person, from exercising the right of fishing in such river, water, or loch in any mode not prohibited by law prior to the passing of this Act.

Nothing to prevent persons having rights, &c., to fish.

2. If any person shall trespass upon any ground, enclosed or unenclosed, or in or upon any river, water, or loch, with intent to take any trout or other fresh-water fish, with any net, double rod, cross line, set line, or otter, or by burning the water, or by striking the fish with any instrument, or by pointing, or to destroy the fish by putting lime or other substance destructive to trout or other fresh-water fish into the water, such person shall forfeit and pay a sum not exceeding five pounds for every such offence.

Penalty for trespassing on any ground or river to fish with net, &c.

3. It shall be lawful for any person, having the authority of the proprietor of land through or past which the river or water flows or upon which the loch is wholly or partially situate, to seize and detain any boat or net of any description, double rod, cross line, set line, or otter, or materials for burning the water, or instruments for striking the fish, or for pointing, or lime or other substance destructive to trout or other fresh-water fish, used or intended to be used in the commission of any such offence, and also any fish taken by any such offender, and to give information thereof to the sheriff or Justice of the Peace.

Power to persons having authority to seize boats, nets, &c., used in commission of offences.

4. All Justices of the Peace shall and may act in the execution of this Act notwithstanding that such Justices shall be the proprietors of land through or past which any river or water may flow, or upon which any loch may be wholly or partially situated, or shall otherwise have a right of trout or fresh-water fishing in any such river, water, or loch, except in cases in which the offence has been committed on the property of such Justice, or in which such Justice is a party to the prosecution of the case, or is directly interested in the result thereof; and no such proprietor or party having right as aforesaid shall be incompetent as a witness to prove any offence committed against this Act by reason of his being such proprietor or having such right.

Justices who are proprietors not to be disqualified from acting.

5. And for the recovery of the penalties and forfeitures imposed by this Act, be it enacted, that any such penalties or forfeitures may be recovered by summary proceeding upon complaint in writing made by the procurator fiscal or by any party prosecuting for the same to the sheriff or any Justice of the Peace for the county in which such offence shall be committed, or to the sheriff or any Justice of the Peace for any county in which the offender may be found, and on such complaint such sheriff or Justice of the Peace shall issue a warrant for bringing the party complained against immediately before him, or shall issue an order requiring such party to appear at a time and place to be named in such order; and every such order shall be served on the party complained against by any county officer, either by delivering to such party personally or by leaving with some inmate at his usual place of abode a copy of such order, and of the complaint whereon the same has pro-

For the recovery of penalties.

ceeded; and either upon the appearance or the default to appear of the party complained against it shall be lawful for the sheriff or Justice to proceed to the hearing of the complaint; and upon proof of the offence, and without any written pleadings or record of evidence, to convict the offender, and upon such conviction to decern, adjudge, and sentence him to pay the penalty or forfeiture incurred, and the expenses attending the conviction, and to grant warrant for imprisoning him until such penalty or forfeiture and expenses shall be paid: Provided always, that such warrant shall specify the amount of such penalty or forfeiture and expenses, and shall also specify a period at the expiration of which the party shall be discharged, notwithstanding such penalty or forfeiture and expenses shall not have been paid, and which period shall in no case exceed two months; and it shall be lawful for the sheriff or Justice to make such orders concerning the immediate disposal of any boat, net, double rod, cross line, set line, or otter, or materials for burning the water, or instruments for striking the fish, or for pointing, or lime or other substance destructive to trout or other fresh-water fish, or fish seized or forfeited under the provisions of this Act, as may be necessary.

Power to appeal in manner as in 20 Geo. 2. c. 43.[1]

6. It shall be lawful for any person who shall think himself aggrieved by any judgment of the sheriff or Justice of Peace pronounced in any case arising under this Act to appeal from the same to the next Circuit Court of Justiciary, or, where there are no Circuit Courts, to the High Court of Justiciary at Edinburgh, in the manner and by and under the rules, limitations, conditions, and restrictions contained in an Act passed in the twentieth year of the reign of his Majesty King George the Second, for taking away and abolishing heritable jurisdiction in Scotland, with this variation, that such person shall, in place of finding caution in the terms prescribed by the said Act, be bound to find caution to pay the penalty or forfeiture and expenses awarded against him by the sentence appealed from in the event of the appeal being dismissed or not insisted in, together with any additional expenses that may be awarded by the court on deciding or dismissing the appeal; and it shall not be competent to appeal from or bring the judgment of any sheriff or Justice of Peace acting in the execution of this Act under review, by advocation or suspension or by reduction, or in any other way than as herein provided.

[1] See note to similar sect., *supra*, p. 877.

Application of penalties.

7. All penalties and forfeitures imposed under the authority of this Act shall, when levied, be paid, the one half thereof to the prosecutor and the other half to the inspector of the poor of the parish within which the offence shall have been committed, on behalf of such poor.

Limitation of actions.

8. No prosecution or other proceeding whatever shall be brought or commenced against any person for any offence against this Act, unless the same shall be commenced within three months after such offence shall have been committed.

Interpretation of terms.

9. The words 'river,' 'water,' or 'loch' occurring in this Act shall mean and include any stream, burn, millpool, mill-lead, mill-dam, sluice, pond, cut, canal, and aqueduct, and every other collection or run of water in which trouts and other fresh-water fish breed, haunt, or are found or preserved; the word 'sheriff' shall mean the sheriff or steward of the

county in which the offence happens or case arises, and shall include the sheriff-substitutes of such sheriffs; the expression 'Justice of the Peace' shall mean a Justice of the Peace of the county in which the offence happens or case arises; and the expression 'county officer' shall mean and include sheriff's officer, constable, or any officer of the county police force.

Saving the laws regarding the salmon fisheries.

10. Nothing herein contained shall affect any Act of Parliament, general or local, passed for the preservation of the salmon fisheries in Scotland, or in relation to the fishing of salmon or fish of the salmon kind in Scotland.

Saving the laws regarding fishing with single rod.

11. Nothing herein contained shall affect or apply to the killing of trout or other fresh-water fish with single rod and line which shall be regulated by the laws in existence prior to the passing of this Act.

ENTAIL ACTS.

No. XVII.

ACT 1685, c. 22.

OUR Sovereign Lord, with advice and consent of his Estates of Parliament, statutes and declares, that it shall be lawful to his Majesty's subjects to tailzie their lands and estates, and to substitute heirs in their tailzies, with such provisions and conditions as they shall think fit, and to affect the said tailzies with irritant and resolutive clauses, whereby it shall not be lawful to the heirs of tailzie to sell, annailzie, or dispone the said lands or any part thereof, or contract debt, or do any other deed whereby the samen may be apprized, adjudged, or evicted from the other substitutes in the tailzie, or the succession frustrate or interrupted, declaring all such deeds to be in themselves null and void, and that the next heir of tailzie may, immediately upon contravention, pursue declarators thereof, and serve himself heir to him who died last infeft in the fee and did not contravene, without necessity any ways to represent the contravener; it is always declared, that such tailzies shall only be allowed, in which the foresaid irritant and resolutive clauses are insert in the procuratories of resignation, charters, precepts, and instruments of sasine; and the original tailzie once produced before the Lords of Session judicially, who are hereby ordained to interpose their authority thereto; and that a record be made in a particular register book to be kept for that effect, wherein shall be recorded the names of the maker of the tailzie, and of the heirs of tailzie, and the general designations of the lordships and baronies, and the provisions and conditions contained in the tailzie, with the foresaid irritant and resolutive clauses, subjoined thereto, to remain in the said register *ad perpetuam rei memoriam;* and for which record there shall be paid to the clerk of register and his deputies the same dues as is paid for the registration of sasines; and which provisions and irritant clauses shall be repeated in all the subsequent conveyances

of the said tailzied estate, to any of the heirs of tailzie; and being so insert, his Majesty, with advice and consent foresaid, declares the same to be real and effectual, not only against the contraveners and their heirs, but also against their creditors, comprizers, adjudgers, and other singular successors whatsoever, whether by legal or conventional titles: It is always hereby declared, that if the said provisions and irritant clauses shall not be repeated in the rights and conveyances, whereby any of the heirs of tailzie shall brook or enjoy the tailzied estate, the said omission shall import a contravention of the irritant and resolutive clauses against the person and his heirs who shall omit to insert the same, whereby the said estate shall, *ipso facto*, fall, accresce, and be devolved to the next heir of tailzie, but shall not militate against creditors and other singular successors, who shall happen to have contracted *bona fide* with the person who stood infeft in the said estate, without the said irritant and resolutive clauses in the body of his right: And it is further declared, that nothing in this Act shall prejudge his Majesty as to confiscations or other fines as the punishment of crimes, or his Majesty or any other lawful superior, of the casualties of superiority which may arise to them out of the tailzied estate, but these fines and casualties shall import no contravention of the irritant clause.

No. XVIII.

10 GEORGE III. c. 51.

An Act[1] *to encourage the Improvement of Lands, Tenements, and Hereditaments, in that part of Great Britain called Scotland, held under Settlements of strict Entail.*

Preamble reciting an Act of the Scottish Parliament, 1685.

WHEREAS by an Act of the Parliament of Scotland, made in the year one thousand six hundred and eighty-five,[2] intituled *Act concerning Taillies*, all his Majesty's subjects are empowered to taillie their lands and estates in Scotland with such provisions and conditions as they shall think fit, and with such irritant and resolute clauses as to them shall seem proper; and which taillies, when completed and published [3] in the manner directed by the said Act, are declared to be real and effectual against purchasers, creditors, and others whatsoever: And whereas many taillies of lands and estates in Scotland, made as well before as after passing the said Act,[4] do contain clauses limiting the heirs of entail from granting tickets or leases of a longer endurance than their own lives, or for a small number of years only, whereby the cultivation of land in that part of this kingdom is greatly obstructed, and much mischief arises to the public; and which must daily increase, so long as the law allowing such entails subsists, if some remedy be not provided: Wherefore, to prevent a mischief and inconveniency so hurtful to the public, be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Com-

mons, in this present Parliament assembled, and by the authority of the same, that it shall and may be lawful to every proprietor of an entailed estate within that part of Great Britain called Scotland, to grant tacks or leases of all or any part or parts thereof, for any number of years not exceeding fourteen years from the term of Whitsunday next after the date thereof, and for the life of one person to be named in such tacks or leases, and in being at the time of making thereof; or for the lives of two persons to be named therein, and in being at the time of making the same, and the life of the survivor of them; or for any number of years, not exceeding thirty-one years from the term aforesaid.

Proprietors of entailed estate may grant tacks for 14 years, and one existing life;

or for 2 lives, and life of survivor;

or for 31 years.

[1] Commonly called the Montgomery Act. It deals with five matters—viz., improving agricultural leases, sects. 1-3, 6-8; building leases, sects. 4-8; certain estate improvements, sects. 9-26; building and repairing mansion-house and offices, sects. 27-31; and excambions, sects. 32-34. See observations on the nature of the Act in Miller *v.* Carrick, 29th March 1867, 5 Macph. 715.

[2] C. 22, *supra*, p. 881.

[3] This Act does not apply to unrecorded entails—Paget *v.* E. Galloway, 24th Feb. 1837, 15 S. 667; L. Macdonald *v.* Macdonald, 26th May 1840, 2 D. 889, affd. 1 B. Ap. 819.

[4] See sect. 34.

2. Provided always, that every such lease for two lives shall contain a clause obliging the tenant or tenants to fence and enclose, in a sufficient and lasting manner, all the lands so leased within the space of thirty years, and two third parts thereof within the space of twenty years, and one third part thereof within the space of ten years, if the said lease shall continue for such respective terms; and that every such lease for any term of years exceeding nineteen years,[1] shall contain a clause, obliging the tenant or tenants to fence[2] and enclose in like manner all the lands so leased during the continuance of such term, and two third parts thereof before the expiration of two third parts of such term, and one third part thereof before the expiration of one third part of such term.

Specification of terms in which lands so leased are to be enclosed.

[1] Does this imply the authorisation of a non-improving lease for 19 years or under, where there is a lower limit of duration in the entail?—Mure *v.* Mure, 22d Dec. 1808, F.C.

[2] If he erects fences before the lapse of the statutory period, he must keep them in good repair—Hamilton *v.* Hamilton, 13th Nov. 1846, 9 D. 53.

3. And provided also, that every such lease for two lives, or for any term of years exceeding nineteen years, shall contain a clause obliging the tenant or tenants to keep and preserve the fences, when made, in good and sufficient repair during the lease, and to leave them so at the expiration thereof; and that no enclosures which shall be made, shall comprehend more than forty acres in one field; excepting where the lands consist of hills or other grounds, incapable or improper by their nature for culture by the plough; in which case, the enclosures may be made of such extent as the nature of the ground shall require.

Lease for 2 lives, or more than 19 years, to oblige tenant to keep fences in repair, and to leave them so at expiration. Not more than 40 acres to be comprehended in one field, except where lands are improper for culture by the plough.

4. And whereas the building of villages and houses upon entailed estates may, in many cases, be beneficial to the public, and might often be undertaken and executed, if heirs of entail were empowered to encourage the same, by granting long leases[1] of lands for the purpose of building; be it therefore enacted by the authority aforesaid, that it shall

Building leases

may be granted for 99 years :

be, and it is hereby declared to be in the power of every proprietor of an entailed estate, to grant leases of land for the purpose of building, for any number of years not exceeding ninety-nine years.[2]

[1] See further as to long leases—Act 1848, sects. 4 and 24; Act 1853, sect. 6; Act 1868, sects. 3-5; Act 1875, sect. 6; Act 1882, sects. 4, 5, 6; and the text, *supra*, p. 586.

[2] See Act 1868, sect. 3. The tenant is entitled so far as necessary (a matter of circumstances in each case) for his reasonable enjoyment of the subject to cut down timber growing thereon—Gordon *v.* Rae, 8th Nov. 1883, 21 Sc. L.R. 61.

but not for more than 5 acres to one person; conditionally that one dwelling-house be built, &c., for every half acre.[1]

5. Provided always, that not more than five acres shall be granted to any one person, either in his own name, or to any other person or persons in trust for him; and that every such lease shall contain a condition that the lease shall be void, and the same is hereby declared void, if one dwelling-house at least, not under the value of ten pounds sterling, shall not be built within the space of ten years from the date of the lease, for each one half acre of ground comprehended in the lease;[2] and that the said houses shall be kept in good, tenantable, and sufficient repair; and that the lease shall be void whenever there shall be a less number of dwelling-houses than one, of the value aforesaid, to each one half acre of ground kept in such repair as aforesaid, standing upon the ground so leased.

[1] Cf. Act 1868, sect. 5.

[2] This is an absolute nullity, not a purgeable irritancy. It cuts down the lease entirely, and does not leave it standing *quoad* the term allowed by the entail. And it may be enforced by a succeeding heir though the grantor of the lease has, by back-letter or otherwise, dispensed with the erection of dwelling-houses—Miller *v.* Carrick, 29th March 1867, 5 Macph. 715.

Manor-place not to be leased,

6. Provided also, that the power of leasing hereby given shall not in any case extend to, or be understood to comprehend, a power of leasing, or setting in tack, the manor-place, office-houses, gardens, orchards, or enclosures adjacent to the manor-place, which have usually been in the natural possession of the proprietor, or have not been usually let for a longer term than seven years, when the heir in possession was of lawful age; and that no lease of lands shall be granted under the authority of this Act, for the purpose of building villages or houses within three hundred yards of the manor-place usually in the natural possession of the proprietor.

nor village built within 300 yards thereof.

Lease not to be granted for less rent than was payable for the last lease; nor till determination thereof, &c.

7. Provided always, and be it enacted, that all leases made or to be granted under the authority of this Act, shall be made or granted for a rent not under the rent payable by the last lease or sett,[1] and without grassum, fine, or foregift,[2] or any benefit whatsoever,[3] directly or indirectly, reserved or accruing to the grantor, except the rent payable by the lease; and that no such lease shall be granted till after the end or other determination of any former lease of the same premises; or that such lease, if granted for a time certain, shall be within one year of being determined; and that all leases otherwise granted shall be void and null.

[1] See the statutory elimination (here inapplicable) of prohibitions in deeds of entail against leases, unless granted without diminution of rental—Act 1882, sect. 8, *infra*, Appx. No. 26.

[2] See a very special case, in which the 'last lease or sett' had been granted with a grassum; part of the land was taken on building lease *in bona fide*, without calculating in a proportion of the grassum; and the lease was upheld—D. Buccleuch *v.* Ewart, 24th Nov. 1827, 6 S. 128.

[3] *E.g.*, an obligation to pay the lessor's debts—Mure *v.* Mure, 22d Dec. 1808, F.C.

Taillie containing ample powers, heir in possession may exercise the same.

8. And be it provided and declared by the authority aforesaid, that if any taillie shall, either expressly or by implication, contain powers of leasing more ample than are hereby given, the heirs of entail in possession shall be at liberty to exercise all such powers, in the same manner as if this Act had never been made.

Proprietor laying out money for improvement of estate, to be a creditor to succeeding heir for three-fourths thereof,

9. And whereas it may be highly beneficial to the public, if proprietors of entailed estates were encouraged to lay out money in enclosing, planting, or draining, or in erecting farm-houses, and offices or out-buildings [1] for the same, upon their entailed lands and heritages: And whereas such proprietors may be induced and encouraged so to do, if they, their executors and assigns, were secured in recovering a reasonable satisfaction, for the money expended in making such improvements, from the succeeding heirs of entail; be it therefore enacted by the authority aforesaid, that every proprietor of an entailed estate who lays out money in enclosing, planting, or draining, or in erecting farm-houses, and offices or out-buildings for the same,[2] for the improvement of his lands and heritages, shall be a creditor to the succeeding heirs of entail for three-fourth parts of the money laid out in making the said improvements.[3]

[1] Commonly called Montgomery Improvements. Compare the 'permanent' improvements of Act 1848, sect. 26, and note thereto. The improvement sections (9-31) of the present Act have not been repealed, but have been practically superseded by later legislation. Thus the list of improvements which may be charged on the estate has been greatly extended, and the mode of constituting the debt simplified, by the Acts 1848, sect. 20, and 1875, sects. 3 and 7: while the form of the charge has been improved by Acts 1848, sects. 13-19; 1853, sect. 23; 1875, sect. 8; 1882, sects. 5, 6, 23 (7); and the Act of 1875, sect. 9, permits the old form of charge to be converted.

[2] See last note. This enumeration, as amplified by Act 1848, sect. 20, has been held not to extend to engines for working minerals—E. Glasgow, 27th Nov. 1850, 13 D. 187; a tilework—D. Athole, 4th March 1856, 18 D. 730; Ms. Ailsa, 21st Jan. 1853, 15 D. 308; making a well—Munro, 1849, Dunc. 150; to such operations, not necessary for draining, as trenching—Ramsay, 21st Nov. 1854, 17 D. 74; Farquharson, 19th June 1856, 18 D. 1044; or embanking—Kinnaird, 29th May 1849, 21 Sc. Jur. 406; Bailie, 17th July 1850, 13 D. 42; Stirling, 17th July 1852, 24 Sc. Jur. 647; D. Athole, 3d July 1855, 17 D. 1015; Anderson, 1852, Dunc. 146; or making ponds—Porterfield, 24th Feb. 1853, 15 D. 428. Private roads include bridges—Porterfield; farm-roads—Hamilton, 11th March 1857, 19 D. 723; and roads for developing feuing-ground—Wyndham, 17th June 1865, 3 Macph. 977; but not a public road made partly from private resources—Mackenzie, 1st June 1860, 22 D. 1137; nor a steamboat-pier—Wyndham. As to fencing, see Mackenzie, 24th March 1871, 9 Macph. 698. As to labourers' cottages, see Dunlop, 19th June 1855, 17 D. 956, 1071; 23 & 24 Vict. c. 95; Act 1868, sect. 12; and Act 1875, sect. 3 (7 b).

[3] Though he takes grassums instead of raising the rent—Elliot's Trs. *v.* Elliot, 1793, M. 15622. The claim may be compensated by a debt due by him as heir of entail—Stirling *v.* Dalrymple, 14th Dec. 1814, F.C. The whole of this proportion may now be made a permanent charge on the estate, Act 1882, sect. 6 (1).

provided the same do not exceed 4 years free rent, after deduction of burdens, &c.

10. Provided always, that the sum or sums of money laid out upon such improvements, by any one heir of entail during his or her possession, shall not, in any case whatever, be effectual to constitute a claim against the succeeding heir of entail, for more than four years free rent [1] of the said entailed estate, after deduction of all public burdens, liferents, and interests of debts which may affect the said estate, as the same shall happen to be at the first term of Whitsunday after the death of the heir who expended the money claimed.

[1] See sects. 13, 28. As to 'free rent,' see note to Act 1824, sect. 1, and Act 1848, sect. 16. It does not include interest on permanent improvement expenditure under

Act 1848, sect. 26—Fleeming, 3d Dec. 1855, 17 D. 451; nor on debentures for land taken compulsorily; nor the rent of the mansion-house and policies—Heriot, 1856, Dunc. 391; and contingent provisions are not deducted—Bs. Keith, 9th July 1850, 13 D. 43.

Proprietor intending to lay out money on improvements, to give notice thereof;

11. Provided also, that every proprietor of an entailed estate who intends to lay out money on such improvements, shall, three months at least before he begins to execute the same, give notice in writing to the heir of entail next entitled to succeed to the said estate after the heirs of the body of the said proprietor, if within Great Britain or Ireland, and if the heir next entitled to succeed is not within Great Britain or Ireland, shall give notice in writing to the nearest male relation by his father of lawful age, or to his known factor or attorney,[1] of such his intention, specifying in such notice the kind of improvement intended and the farms or parts of the estate upon which the improvements are intended to be made;[2] and shall lodge a copy thereof with the sheriff or steward clerk of the county wherein the lands lie.

and lodge a copy thereof with sheriff or steward clerk;

[1] A misstatement of the character in which the party receives the notice will be fatal—Finlayson *v.* Munro, 12th Dec. 1821, F.C. and 1 Sh. 208 (N.E. 196); and the same is true of a notice to a wrong person—Thomson *v.* Mowatt, 11th Dec. 1824, 3 S. 385 (N.E. 272). A judicial factor will not be appointed to receive intimation—Knight, 7th Feb. 1833, 11 S. 366. No fresh intimation is required on the death of the next heir—Williamson *v.* Ewart, 18th Feb. 1841, 3 D. 570; nor yearly of a continuing work—Fraser *v.* Fraser, 2d Dec. 1835, 14 S. 89; cf. Torrance, *infra*.

[2] See terms sufficiently specific in Campbell *v.* Douglas, 15th May 1822, 1 S. 409; cf. Elliot's Trs. *v.* Elliot, 1793, M. 15622.

and, laying out money with intent to become a creditor,

to lodge annually with the sheriff or steward clerk, an account of money expended, &c.

12. Provided likewise,[1] that the proprietor of an entailed estate, who lays out money in making improvements upon his entailed estate, with an intent of being a creditor to the succeeding heirs of entail in the manner above expressed, shall annually, during the making such improvements, within the space of four months after the term of Martinmas,[2] lodge with the sheriff or steward clerk of the county within which the lands and heritages improved are situated, an account of the money expended by him in such improvement during twelve months preceding that term of Martinmas, subscribed by him,[3] with the vouchers[4] by which the account is to be supported when payment shall be demanded or sued for.

[1] The procedure in this and the following sections must be strictly followed—Torrance, Abercorn, *infra*.

[2] Cf. Campbell *v.* Douglas, 15th May 1822, 1 S. 409; Ms. Abercorn, 11th July 1840, 2 D. 1382; Williamson *v.* Ewart, *supra*. If the disburser dies before lapse of this space, his representatives may sign and lodge the accounts—Hopkins, 11th March 1851, 13 D. 958; Breadalbane's Trs. *v.* Campbell, 6th June 1866, 4 Macph. 775, affd. 6 Macph. H.L. 43.

[3] Or by his factor, not by his law-agent—Fraser *v.* Fraser, 2d Dec. 1835, 14 S. 89; Fraser *v.* L. Lovat, 27th Nov. 1840, 2 D. 684; or by his representatives, as in last note—see Stirling's Trs. *v.* Stirling, 23d May 1862, 24 D. 993.

[4] See Act 1875, sect. 7. These must be rendered by the contractors or others who actually do the work, and must mention the sort of work done—Stirling *v.* Dalrymple, 14th Dec. 1814, F.C.; Torrance *v.* Crawfuird, 1st Dec. 1820, F.C., revd. 2 W.S. 429; Williamson *v.* Ewart, *supra*; E. Kintore's Trs. *v.* E. Kintore, 30th June 1847, 9 D. 1394. As to vouching wages, see Munro, 7th June 1856, 18 D. 994.

Heir of entail laying out 4 years free rent,

13. Provided also, and be it further enacted, that when a sum equal to four years free rent shall have been laid out, in manner above-mentioned, by one or more heir or heirs of entail, and shall remain a subsist-

ing charge against the succeeding heirs; it shall not be lawful for any subsequent heir or heirs[1] to lay out any more money under the authority of this Act, for any of the improvements afore-mentioned. subsequent heir not to lay out more.

[1] Much less the same heir, who has assigned the exhausting claim—Cochrane *v.* Cochrane, 30th June 1836, 14 S. 1040.

14. And be it enacted by the authority aforesaid, that all sheriff or steward clerks, with whom the accounts, vouchers, and copies of notice shall be lodged, shall, within the space of one month thereafter, record them in a book to be kept for that purpose, and return them when called for; and shall make the book patent to all persons desirous to see the same; and shall give certified copies or extracts of all accounts, vouchers, and copies of notice recorded, they receiving for their trouble the usual fees for recording writings and giving out extracts, and sixpence sterling from each person who shall have inspection of the book wherein the accounts, vouchers, and copies of notice shall be recorded. Sheriff and steward clerks to record vouchers, and make copies thereof. Fees for the same.

15. And be it enacted by the authority aforesaid, that the executor or executors,[1] assignee or assigns, or other person or persons, having right to the claim arising from money expended by the proprietor of an entailed estate in the improvement thereof, may after the expiration of one year from the death of the heir who expended the money, require the heir next succeeding to the estate, to pay such part thereof as is due by the authority of this Act, with the legal interest, from the term at which the succeeding heir's right to the rents of the estate did commence, upon receiving a proper discharge and assignment of the said claim; and if the money is not paid within three months of such requisition, it shall then be lawful for the person or persons having right, to institute an action in the Court of Session against the heir then in possession, for compelling him to pay the money, and interest thereof; and upon obtaining a decree, he, she, or they shall be at liberty to use every kind of diligence or execution authorised by the law of Scotland in recovering payment of debts, excepting adjudication against the entailed estate improved; and in all questions of competition for the rents of the entailed estate, the person or persons who have sued for and obtained a decree under the authority of this Act, or the person or persons having right to such decree, shall be preferred to the other creditors of the heir of entail who has succeeded to the estate. Successive claims may be made for money expended, with interest. On non-payment within 3 months, action may be instituted against heir in possession. Persons obtaining decree, to have preference of other creditors.

[1] It is the scheme of the Act to set up a rent-charge on the estate subsequent to the death of the heir-disburser. It was not till the passing of the Rutherfurd Act, 1848, sect. 13 *et seq.*, that it was competent to charge the estate during his lifetime. He is entitled to his election, but if he adopt the mode of the later Act as to part of the outlay, he is held to relinquish the powers conferred by this Act—Breadalbane's Trs. *v.* Campbell, 6th June 1866, 4 Macph. 775, revd. 6 Macph. H.L. 43; but a mode is provided, with consent of the creditor, of converting the rent-charge into a bond—Act 1875, sect. 9; Act 1882, sect. 6 (4).

16. Provided always, that when any heir in possession is sued for the money due on account of improvements made upon an entailed estate, under the authority of this Act, he shall be discharged in all cases from such suit, upon his assigning and effectually conveying to the creditor or creditors one third part of the clear rents of the entailed estate, during his life, or until the money so due shall thereby be paid off and discharged. Heir sued for money due for improvements, to be discharged, on conveying to creditors one-third of clear rents, &c.

17. And whereas it may happen that the heir of entail, who next succeeds the proprietor who expended the money in the improvement of the entailed estate, may die, before the money due by him on account of improvements made upon the estate is paid, by which the person or persons in the right of the money due may be embarrassed in recovering payment: For remedy whereof, be it enacted by the authority aforesaid, that the person or persons in the right of the money due, may either sue the heirs and successors of the said next heir of entail in any other than the entailed estate, or the heir of entail next succeeding to him, or both, and use every kind of diligence or execution, authorised by the law of Scotland in the recovering payment of debts, against them and their estates, excepting adjudication against the entailed estate, until the money due is fully satisfied and paid; and the person or persons in the right of the money due shall, in any competition for the rents of the entailed estates, be preferred to the personal creditors of the heir of entail in possession; and the person or persons in the right of the money due, in like manner shall be entitled to sue every succeeding heir of entail, until the money is satisfied and paid; and shall have the same preference to the rents of the entailed estate in competition, with the creditors of such heirs of entail.

Persons in the right of money due, may sue the heirs of next heir, or heir next succeeding,

and, in competition, shall be preferred to personal creditors,

and likewise succeeding heirs, with like preference.

18. Provided always, and be it enacted by the authority aforesaid, that the heir who next succeeds in the entailed estate to the proprietor who expended the money, under the authority of this Act, in making improvements upon the estate, and the heirs and successors of such heir, shall be bound to relieve all subsequent heirs of all or such parts of the debt, incurred by the improvement of the estate under the authority of this Act, as shall be paid by them, to the extent of one third part of the rents which have come to the use of such first succeeding heir, or to the use of his heirs or executors; and when the third part of the rents which have come to the use of the first succeeding heir, or to his heirs or executors are exhausted, then the next succeeding heir, and his heirs and successors, shall in like manner be bound to relieve all subsequent heirs, to the extent of one third part of the rents which have come to their use; and relief shall in like manner be competent to every succeeding heir who shall pay, against the heir and successors of the preceding heir.

Relief competent to successive heirs, to the extent of one third part of the rents.

19. Provided also, and be it enacted by the authority aforesaid, that when the heirs and successors of an heir of entail, in any other than the entailed estate, are sued for the money due on account of improvements made upon an entailed estate under the authority of this Act, they shall be discharged in all cases from such suits, upon making payment of one third part of the rents of the entailed estate which have come to the use of such heir of entail, or to the use of his said heirs or successors.

Heirs of entail, &c., sued on account of improvements,

shall be discharged on payment of one third of their rents.

20. And whereas inconveniences and confusion might arise from the executor, assignee, or other person or persons, having right to the claim arising from money expended by the proprietor of an entailed estate in the improvement thereof, their not timeously requiring the heir next succeeding in the estate to pay what they are entitled to receive by authority of this Act, and suing such heir to compel him to pay, if payment is not made: For remedy whereof, be it enacted by the authority aforesaid, that the executor, assignee, or other person or persons having right to

Claimant of money expended by pro-

the claim arising from money expended by the proprietor of an entailed estate in the improvement thereof, shall be obliged, within the space of two years after the death of the proprietor who expended the money, to require payment from the succeeding heir; and within the space of six months after the lapse of the said two years, to institute an action, if the money is not paid, in the Court of Session; and to proceed without delay in recovering a decree for the sum due, and doing exact diligence for recovering payment thereof, or at least to the amount of one third part of the free rents of the estate which shall have become due to such succeeding heir.

prietor, to require payment, within 2 years after his decease, of succeeding heir; and on non-payment for 6 months, to institute action, &c.;

21. Provided always, and be it enacted by the authority aforesaid, that the executor, assignee, or other person or persons, having right to the claim arising from money expended by the proprietor of an entailed estate, who shall neglect to require the next, or any other succeeding heir or heirs to pay, and shall allow such succeeding heir or heirs to die without recovering payment from him or them to the amount of one third part, at least, of the rents that shall have become due to such heir or heirs, shall cease to be creditor to the subsequent succeeding heir or heirs respectively, to the extent of one third part of the rents which shall have become due to the heir or heirs so deceasing as aforesaid; and shall be entitled to recover payment of his claim to the extent of such third part of the rents, from the executors or heirs only of the first, or any other succeeding heir or heirs, in any other estate than the entailed estate; and shall be entitled to recover payment of the surplus of his claim, if any be, and no more, from the subsequent succeeding heir or heirs respectively.[1]

but neglecting so to do, and not recovering one third part of rents, &c., before his decease, shall cease to be creditor to subsequent heirs for such sum; and such third part to be recoverable only from executors, &c., of first heirs, &c., and surplus, from subsequent succeeding heirs.

[1] See Dalrymple; Dickson, 10th Jan. 1862, 24 D. 288, 291.

22. And whereas it may happen that the heir, who next succeeds to the proprietor who expended money in making improvements upon an entailed estate, may pay all or part of the money due on account of such improvements, and may not live so long as to be indemnified by the third part of the rents which shall come to his use, or to the use of his heirs or executors; be it therefore enacted by the authority aforesaid, that if the heir who first succeeds in the entailed estate to the proprietor who expended the money, does pay all or part of the money due on account of the improvements made, and shall not live long enough to be indemnified of what he pays by one third part of the rents that shall come to his use, or to the use of his heirs or executors, it shall be competent to his executors or assigns to sue the succeeding heir of entail for relief of such part of the money as shall not be repaid by the third part of the rents which have come to his use, or to the use of his heirs or executors; and relief shall in like manner be competent to the executors or assigns of every heir of entail who pays more than is repaid by the third part of the rents which have come to his use, or to the use of his heirs and executors.

Heir first succeeding, not living long enough to be indemnified for what he pays, his executors may sue succeeding heir of entail for relief, &c. Like relief to executors of every heir who is not repaid.

23. And be it further enacted by the authority aforesaid, that no money expended in making improvements upon an entailed estate, for which a decree shall be obtained in the Court of Session, shall be made use of as a ground of debt for adjudging the estate upon which the improvements have been made; and if any decree of adjudication shall be

Money expended in making improvements, not to be made use of as a ground of debt

for adjudging estates.

obtained against the entailed estate for such debts, every such decree shall and is hereby declared to be void.

Heir of entail succeeding to estate upon which improvements have been made,

excluded from making claim of debt.

24. And be it also enacted by the authority aforesaid, that if the heir of entail who shall succeed to an entailed estate upon which improvements have been made, shall have right to a claim of debt arising from the making of such improvements as next of kin, or by the will or settlements of the heir of entail who expended the money; in every such case, the claim of debt shall and is hereby declared to be extinguished for ever, and shall never be set up as a debt against any succeeding heir.[1]

[1] Where a succeeding heir was residuary on the trust-estate (including an improvement claim) of the disburser, the claim was not extinguished *confusione*, there having been no residue—Mackenzie's Trs. *v.* Macdowall, 14th Feb. 1852, 24 Sc. Jur. 304.

On judgment obtained against heir for whole debt created by improvements,

defender to be liable in full costs;

if otherwise, court to award costs at discretion.

25. And be it further enacted by the authority aforesaid, that if any heir of entail, against whom a debt is created for improvements made on the entailed estate to which he succeeds, shall refuse to pay the money required of him under the authority of this Act, and that decreet shall be obtained against him for the whole of the sum or sums of money of which he shall be required to make payment; in every such case the defender shall be liable in full costs of suit; and if decree is not obtained for the full sum or sums of money of which payment has been required, it shall be in the discretion of the court to award costs of suit to either party, as the justice of the case shall direct.

26. And whereas questions may arise concerning the amount of the sums laid out under the authority of this Act, at a great distance of time, when the material witnesses may be dead: For remedy whereof, and for ascertaining, in due time, the amount of the sums so expended; be it therefore further enacted, that it shall and may be lawful for every heir of entail, after he shall have laid out money upon the improvement of his entailed estate as aforesaid, and shall have completed the improvement of all or any particular part of such estate, to bring, if he shall think proper, an action of declarator[1] before the Court of Session, or a process before the sheriff, in which he shall call the heir next entitled to succeed after the heirs of his own body, and shall in such suit produce proper evidence of the money laid out in such improvements; and the said next heir, or any other heir of entail, shall be entitled to produce proper evidence to set aside or diminish the said claim: And it shall and may be lawful for the said Court of Session, or for the said sheriff, to pronounce a decree for such part of the said sum, as, by the true intent and meaning of this Act, is intended to become a charge against the succeeding heirs in the said entailed estate; which decree, if pronounced by the sheriff, shall become final, unless carried to the Court of Session by suspension within six months after the same shall have been pronounced; and if pronounced by the Court of Session, either in such process of declarator or suspension, shall be final, if an appeal is not brought within twelve months.[2]

Heir of entail, after having completed improvements,

may bring action of declarator, &c.

and produce evidence of money laid out.

Court of Session, &c., may decree what sum shall be a charge on succeeding heirs, &c.

[1] This action of constitution is not necessary for setting up a claim under the Act, but it is the best proof of the disburser's intention to charge the improvements, and the most convenient mode of fixing their amount. Expenses cannot be given against an opposing heir, as in the preceding section—Torrance *v.* Craufuird, 1st Dec. 1820, F.C. revd. 2 W.S. 429. A decree obtained against the heirs after the only son of the disburser imports a total abandonment if the son succeeds—Breadalbane's Trs. *v.* Ds.

of Buckingham, 26th May 1842, 4 D. 1259. Cf. the new procedure of Act 1848, sect. 16.

[2] Unless the decree itself is invalid, or fraud is properly alleged—L. Macdonald *v.* Macdonald, 17th Feb. 1831, 9 S. 460, sequel, 2 D. 889, 1 B. Ap. 819; Lindsay *v.* Anstruther, 30th May 1834, 12 S. 657; Macpherson *v.* Tytler, 14th May 1839, 1 D. 718; Stirling's Trs. *v.* Stirling, 23d May 1862, 24 D. 993. If *ex facie* the decree is invalid in part, it is useless for constituting any debt at all—ibid. Form of decree—Campbell, 7th Dec. 1864, 3 Macph. 195, and next case. If good, it is *res judicata* against all succeeding heirs, *semble*—Breadalbane's Trs. *v.* Campbell, 6th June 1866, 4 Macph. 775, var. 6 Macph. H.L. 43. See the procedure when decree has been obtained but is not final, the next heirs are under age, and a petition to charge under Act 1848 is brought—Johnston, 21st Nov. 1856, 19 D. 68, and case in note thereto.

27. And whereas it frequently happens that there are not, upon entailed estates, mansion-houses and offices suitable to the estates,[2] and fit for the accommodation of the heirs of entail; and that mansion-houses and offices upon entailed estates are sometimes destroyed by fire, or from other accidental causes, or become insufficient by length of time; and it being beneficial to the public to encourage heirs of entail, in such cases, to build houses and offices suitable to their estates, and fit for the accommodation of their families; be it therefore enacted by the authority aforesaid, that every heir of entail who lays out money in building a mansion-house or offices, or in repairing or adding to the mansion-house or offices upon his estate,[3] shall be a creditor to the next succeeding heir of entail for three fourth parts of the money expended by him.

Heir of entail building mansion-house, &c., to be a creditor to succeeding heir for three fourth parts of the expense; [1]

[1] See note to sect. 9.

[2] See cases of more than one estate or mansion-house—Stirling *v.* Dalrymple, 14th Dec. 1814, F.C.; M'Donald *v.* Lockhart, 15th Dec. 1835, 14 S. 150; Ailsa, Agnew, Davidson, *infra*. The two sorts of Montgomery improvements may be embraced in the same decree—Cochrane *v.* Cochrane, 19th Nov. 1840, 3 D. 85.

[3] These words do not embrace mansion-houses which have come to be occupied by factors—Ms. Ailsa, 21st Jan. 1853, 15 D. 308; a shooting-lodge—D. Athole, 3d July 1855, 17 D. 1015; Davidson, 1st July 1859, 21 D. 1086; a game-watcher's house at a distance from the mansion—Huntly, 12th June 1857, 19 D. 818; nor a racquet-court—E. Eglinton, 31st Jan. 1857, 19 D. 346. On the other hand, they include a jointure-house—Agnew, 9th March, 1858, 20 D. 787; dog-kennels—Huntly, *supra* (but see Munro, 7th June 1856, 18 D. 994; D. Athole, 4th March 1856, 18 D. 730); a hydraulic ram and gas-work—Eglinton; and perhaps a gamekeeper's house near the mansion—Huntly. Buildings beyond the 'offices' are not included—Athole; Fleeming, 16th Feb. 1855, 17 D. 451; Hamilton, 11th March 1857, 19 D. 723. And the repairs must go beyond the restoration of ordinary tear and wear—Fraser *v.* L. Lovat, 16th Dec. 1841, 4 D. 266; Johnston, 21st Nov. 1856, 19 D. 68; Muirhead, 10th March 1853, 15 D. 517. See a narrow case relating to repairs on a mausoleum—Fraser *v.* L. Lovat, 27th Feb. 1840, 2 D. 684.

28. Provided always,[1] that the sum or sums of money laid out by any one heir of entail, in the building a mansion-house or offices, or in the repairing or adding to the mansion-houses or offices, shall not, in any case whatever, be effectual to constitute a claim against the succeeding heir of entail for more than two years rent of the said entailed estate, after deduction of all public burdens, liferents, and interest of debts, which may affect the said estate, as the same shall happen to be at the first term of Whitsunday after the death of the heir who expended the money claimed.

but the same is not to exceed 2 years rent, after burdens, &c., deducted.

[1] Cf. sect. 11.

29. Provided also, that the proprietor of the entailed estate, who lays out the money, shall, previous thereto, give notice in writing to the heir of

Proprietors laying out

money, to give notice, and record copies thereof.

entail next entitled to succeed to the said estate after the heirs of his own body; and record copies of the same, together with the accounts of the money expended, and the vouchers thereof, in the sheriff or steward court books of the county within which the mansion-houses and offices are situated, in the form and manner above directed with regard to moneys expended in making improvements upon entailed estates.[1]

[1] Cf. sects. 12, 14.

Persons having right to claim for money expended by proprietor in building mansion-house, &c. may, within a year after decease, require heir succeeding to pay the whole, with interest; and on non-payment for 3 months, may sue.

30. And be it enacted by the authority aforesaid, that the executor or executors, assignee or assignees, or other person or persons having right to the claim arising from money expended by the proprietor of an entailed estate, in the building a mansion-house or offices, or in the repairing or adding to the mansion-house or offices upon his estate, may, after the expiration of one year from the death of the heir who expended the money, require the heir next succeeding to the estate to pay the whole, or such part thereof as is due by the authority of this Act, with the legal interest from the term at which the succeeding heir's right to the rents of the estate did commence, upon receiving a proper discharge and assignment of the said claim; and if the money is not paid within three months of such requisition, it shall be lawful for the person or persons having right to sue the next succeeding heir, in the manner above directed for the recovering of money expended in the improvement of entailed estates.[1]

[1] Cf. sect. 15 *et seq.*

Rules enacted with respect to proprietors making improvements, extended to claims here mentioned.

31. And be it further enacted by the authority aforesaid, that the same rules of relief among succeeding heirs of entail, and their heirs and successors, of the claim of debt, and of preference in competition for rents, and in subjecting defenders to the payment of costs, and for ascertaining the amount of the sum laid out,[1] shall take place with regard to moneys expended in the building, repairing, or adding to the mansion-houses or offices upon entailed estates under the authority of this Act, as are before enacted, with respect to moneys expended by proprietors of entailed estates in making improvements upon their estates for increasing the rents and value of them.

[1] Cf. sect. 18 *et seq.*

Proprietors of entailed estates empowered to exchange lands.

32. And whereas it may frequently happen, that the enclosing of lands in Scotland may be retarded or prevented, or at least rendered inconvenient, by heirs of entail not having it in their power to exchange small parcels of the lands of their entailed estates for other lands convenient for the entailed estate, and more conducive to the improvement of the country in general:[1] For remedy whereof, be it enacted by the authority aforesaid, that it shall and may be lawful for proprietors of entailed estates to excamb or make exchanges of land,[2] with all and every person or persons, for the conveniency and advantage of the said estates, and for the improvement of the country where such estates are situated, by enclosing or otherways.

[1] See on 1669, c. 17, in this relation — Ramsay *v.* Primrose, 1702, M. 10477; text, p. 514.

[2] This power of excambion has been practically superseded by the Rosebery Act, 6 & 7 Will. IV. c. 42, sects. 3 and 4; Act 1848, sects. 5, 37; Act 1875, sect. 6, *infra*, Nos. 20, 21, 24, which refer not to land alone, but to 'estates and heritages.' Now that the limitation at the beginning of next section has been relaxed, there is no reason why the cheap remedy in a local court here afforded should not be taken advantage of, at least in cases where nothing but land is to be exchanged.

33. Provided, [that not more than thirty acres of arable land, nor more than one hundred acres of lands consisting of hills or other grounds incapable or improper by their nature for culture by the plough, of such entailed estates, lying together in one place or plot, shall be given in exchange; and that an equivalent in land, contiguous to the entailed estate with which the exchange is to be made, shall be received in place of the land given in exchange:][1] And for ascertaining and adjusting the value of the lands proposed to be exchanged, an application shall be made for that purpose, by the proprietor of the entailed estate, to the sheriff or steward of the county within which the entailed estate is situated, who thereupon shall appoint two or more skilful persons to inspect and adjust the value of the lands proposed to be excambed or exchanged; and upon such persons settling the marches of the lands proposed to be exchanged, and reporting upon oath that the exchange will be just and equal, the sheriff or steward may and is hereby required to authorise the exchange to be made by a contract of excambion; and which being executed and recorded in the sheriff or steward books within three months after the execution thereof, the same shall be effectual to all intents and purposes; and the land given in exchange to the entailed estate shall be held to be a part thereof, and shall be subject to all the prohibitory, irritant, and resolutive clauses of the entail, in the same manner as if it had been originally a part of the estate; and the lands given from the entailed estate shall from thenceforth be held as out of the entail, and be liberated from all the prohibitory, irritant, and resolutive clauses thereof.

Limitation of quantity to be exchanged;

for which an equivalent is to be made from lands contiguous.

Value of lands exchanged, how to be adjusted,

and property thereof determined.

[1] The bracketed part is repealed, and replaced by the enactment, 'That not more 'than 300 acres of lands of such entailed estates lying together in one place or plot 'shall be given in exchange, and that an equivalent in land shall be received in place 'of the land given in exchange.'—Act 1868, s. 14. See M'Kechnie *v.* Graham, 11th July 1821, 1 S. 116 (N.E. 114). It is allowable to reserve the minerals *hinc inde*, or to let them follow the surface, but it is doubtful if one party may reserve them and the other not. There must be no surplus in money, as under 1669, c. 17, and the Rosebery Act, *infra*, p. 903—Hamilton *v.* Chancellor, 13th Nov. 1833, 12 S. 22; cf. E. Stair's Trs. *v.* Hamilton, 26th Nov. 1822, 2 S. 37 (N.E. 33).

34. And be it further enacted and declared by the authority aforesaid, that this Act shall extend to, and comprehend, all taillies of lands or heritages in that part of Great Britain called Scotland, made or to be made, and whether prior or posterior to the said Act made in the year one thousand six hundred and eighty-five.

This Act to extend to all taillies made in Scotland, whether prior or posterior to the Act of 1685.

No. XIX.

5 GEORGE IV. c. 87.

An Act to authorise the Proprietors of Entailed Estates in Scotland to grant Provisions to the Wives or Husbands and Children of such Proprietors.—[21*st June* 1824.][1]

Act of the Parliament of Scotland, 1685, c. 22.

WHEREAS by an Act of the Parliament of Scotland, made in the year one thousand six hundred and eighty-five, intituled *Act concerning Tailzies*, it is statuted and declared, that it shall be lawful to his Majesty's subjects to tailzie their lands and estates, with such provisions and conditions as they shall think fit, and to affect the said tailzies with irritant and resolutive clauses, which tailzies, when completed and recorded in manner by the said Act directed, are declared to be real and effectual against creditors, comprisers, adjudgers, and other singular successors whomsoever: And whereas by an Act of Parliament passed in the tenth year of the reign of his late Majesty King George the Third, intituled *An Act to encourage the Improvement of Lands, Tenements, and Hereditaments, in that part of Great Britain called Scotland, held under Settlement of strict Entail*,[2] the proprietors of entailed estates in Scotland were empowered to burden their estates and the subsequent heirs of entail, for the improvement of their entailed estates, in manner specified in that Act: And whereas sundry entails of lands and estates in Scotland contain no powers in regard to the granting of provisions[3] to the wives or husbands and children of the proprietors thereof; and in many other entails, by reason of the change in the value of money, the improved value of lands and estates in Scotland, and other causes, the powers of granting provisions to the wives or husbands and children of the proprietors of such entailed estates have become entirely inadequate for those purposes; and it has become expedient that the powers of granting such provisions should be conferred or enlarged,[4] as the case may be, under certain regulations and conditions, in all entails already made or hereafter to be made: May it therefore please your Majesty that it may be enacted; and be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that it shall and may be lawful to every heir[5] of entail in possession[6] of an entailed estate under any entail already made or hereafter to be made, in that part of Great Britain called Scotland, under the limitations and conditions after mentioned, to provide and infeft[7] his wife in a liferent provision out of his entailed lands and estates by way of annuity; provided always that such annuity shall not exceed one-third part of the free yearly rent of the said lands and estates,[8] where the same shall be let, or of the free yearly value thereof where the same shall not be let, after deducting[9] the public burdens, liferent provisions, the yearly interest of debts and provisions, including the interest of provisions to children herein-after specified, and the

10 Geo. 3. c. 51.

Provision to be granted to a wife.

yearly amount of other burdens of what nature soever affecting and burdening the said lands and estates or the yearly rents or proceeds thereof, and diminishing the clear yearly rent or value thereof to such heir of entail in possession, all as the same may happen to be at the death of the grantor.[10]

[1] Known as the Aberdeen Act. It authorises provisions on the one hand for husbands and wives, and as to this, the only changes in later legislation are an additional power to provide for the wife of an heir-apparent, and to provide out of entailed money—Act 1868, sects. 6 and 8; another form of encumbering the estate, with certain consents—Act 1848, sect. 4, Act 1875, sect. 6, Act 1882, sect. 4; and an enactment for securing such provisions on the fund arising out of the sale of the estate—Act 1882, sect. 24: and on the other hand for children. The latter share in the benefits of these amendments; they now have the benefit of representation—Act 1875, sect. 10; their provisions may be charged against the fee by bond and disposition in security—Act 1848, sect. 21, Act 1853, sect. 7, or transferred to another estate destined to the same line of heirs—Act 1882, sect. 10; and this charge on the fee, again, lets in the power of sale contained in Act 1848, sect. 25. In all cases, provisions may be protected against the effects of a disentail by inhibition within a year of recording the instrument—Act 1848, sect. 7. The present Act is regarded as being incorporated in every deed of entail—Callendar *v.* Callendar, 21st May 1869, 7 Macph. 777; Act 1868, sect. 8, repealing Act 1848, sect. 12 and Act 1853, sect. 12.

[2] *Supra*, pp. 881, 882.

[3] As to the right of wives, husbands, and children, prior to this Act, and as to such provisions, when powers are given in the entail, see text, p. 587.

[4] See sect. 12.

[5] Including institute—Hamilton, 11th March 1857, 19 D. 723. It is a question whether powers in the deed of entail itself would be similarly construed—see *per* L. Brougham in Morehead *v.* Morehead, 1 Sh. and M'L. 51. Probably they would, since the strict rule set up in the case of Edmonstoune, 1769, M. 4409, 15461, revd. 2 Pat. 255, seems inapplicable to powers relaxing the fetters. An heir who possesses subject to the risk of having to relinquish the entail under a clause of devolution, may nevertheless validly provide, though one whose title is defeasible by the birth of a nearer heir cannot—E. Kinnoull's Trs. *v.* Drummond, 26th Feb. 1869, 7 Macph. 576, and cases there; but see Bruce, 6th March 1874, 1 Ret. 740.

[6] See a case of an heir of entail in possession validly providing for his widow, though the estate was only in the hands of trustees with directions to accumulate interest. The interest was taken *in computo*—Dickson *v.* Dickson, 8th June 1855, 17 D. 814; cf. Hope Johnstone, 19th May 1880, 7 Ret. 766.

[7] As to form of annuity, see Bonar *v.* Anstruther, 6th June 1868, 6 Macph. 910. The infeftment makes the widow's right preferable to that of an adjudger of the succeeding heir's life-interest—Boyd *v.* Boyd, 5th July 1851, 13 D. 1302. Since the Conveyancing Act, 1874, sect. 9, the bond is valid, though the granter being in possession after the Act died without making up a title—M'Adam *v.* M'Adam, 15th July 1879, 6 Ret. 1256.

[8] Including feu-duties, the rent of a pendicle possessed with the lands in which the heir was infeft, and the produce of mines, in regard to which a variable rent, by way of royalty, is taken at an average of years prior to the death of the heir, so as fairly to represent the value of the subject—Wellwood *v.* Wellwood, 12th July 1848, 10 D. 1480; 20th Dec. 1848, 11 D. 248 (7 years); Douglas *v.* Scott, 17th Dec. 1869, 8 Macph. 360 (3 years, the whole duration of the current lease): always provided the mining rent can be said to have a 'reasonable permanence'—Christie, 10th Dec. 1878, 6 Ret. 301. 'Estate' embraces all that can be entailed (L.P. in Wellwood, 10 D. 1485). Salmon-fishings, let or unlet, are therefore included; but not the mansion-house, gardens, offices, and policy, which are presumed to yield no profit, and to be no more than suitable for the heir's station in life—Leith *v.* Leith, 10th June 1862, 24 D. 1059. See as to game under special provisions in entails, text, *supra*, p. 592.

[9] As to deductions and the meaning of free rent in special powers contained in the deed of entail itself, see text, *supra*, p. 592. On the present statute it has been determined that there cannot be deducted:—income-tax—Maclaine *v.* Maclaine, 29th Nov. 1845, 8 D. 150; nor personal debt of the heir in possession, though laid on him by the entailer—Cochrane *v.* Cochrane, 25th Nov. 1845, 9 D. 173. There ought to be deducted prior annuities (see sect. 3), and the interest on prior provisions to children, whether granted under the Act or under a clause in the entail—Boyd *v.* Boyd, 5th July 1851, 13 D. 1302; Dunbar *v.* Dunbar, 7th Dec. 1872, 11 Macph. 200. Where,

under such a clause, a surviving husband is entitled to the liferent of the whole estate, there is no 'free rent' to found Aberdeen provisions—Maitland *v.* Maitland, 22d Dec. 1849, 12 D. 416.

[10] It has been seen that this part of the clause has been construed according to its spirit, not its letter, in relation to royalties of minerals, *supra*, note [8]. See Douglas *v.* Douglas, 15th May 1882, 1 S. 408 (N.E. 382); E. *v.* Cs. Dowager of Rothes, 29th Jan. 1829, 7 S. 339; Campbell *v.* Campbell, 21st May 1831, 9 S. 624 (grain rent). The first payment is usually at the term succeeding the provisor's death, and then it does not matter that on account of the incidence of the rents it falls on the executors and not on the heir of entail, at least if there be warrandice—Cruikshanks *v.* Sandeman, 16th Feb. 1843, 5 D. 643. See as to apportionment of the burden—Learmonth *v.* Sinclair's Trs., 23d Jan. 1878, 5 Ret. 548.

Provision to be granted to a husband.

2. And be it further enacted, that it shall and may be lawful to every heir female in possession of such entailed estate as aforesaid, to provide and infeft her husband in a liferent provision out of her entailed lands and estates by way of annuity; provided always, that such annuity shall not in any case exceed one half of the free yearly rent or free yearly value as aforesaid of the whole of the said lands and estates, after all deductions to be made from the same in manner before mentioned; but in case the said lands and estates shall already be burthened with a prior existing annuity, granted to a wife or husband under the authority of this Act, the annuity to be granted to a husband in manner before mentioned shall not exceed one-third part of the said yearly rent or yearly value to be taken as aforesaid.[1]

[1] See sect. 1.

Only two liferent provisions to be subsisting at one time.

3. Provided always, and be it enacted, that where two liferents to wives or husbands, granted under the powers herein-before contained, shall be subsisting at any one time upon an entailed estate, it shall not be competent to grant a third liferent to take effect till one of the former subsisting liferents shall cease or expire; but the power of granting a liferent may be exercised so as to increase a former liferent, or grant a new liferent to the extent herein-before authorised to be granted upon the ceasing or expiration[1] of any former or subsisting liferent, although the same may not take place in the lifetime of the person granting such prospective or increased liferent.

[1] This lapsing liferent need not be one granted under this Act—Bonar *v.* Anstruther, 6th June 1868, 6 Macph. 910.

Provision in certain cases to children.

4. And be it further enacted, that it shall and may be lawful to the heir of entail in possession[1] of any such entailed estate as aforesaid, to grant bonds of provision[2] or obligations, binding the succeeding heirs of entail in payment, out of the rents or proceeds of the same, to the lawful child or lawful children[3] of the person granting such bonds or obligations, who shall not succeed to such entailed estate, of such sum or sums of money, bearing interest from the grantor's death, as to him or her shall seem fit: Provided always, that the amount[4] of such provision shall in no case exceed the proportions following of the free yearly rents or free yearly value[1] of the whole of the said entailed lands and estates, after deducting[1] the public burdens, liferent provisions, including those to wives or husbands authorised to be granted by this Act, the yearly interest of debts and provisions,[5] and the yearly amount of other burdens of what nature soever, affecting or burdening the said lands and estates,

or the yearly rents or proceeds thereof, and diminishing the clear yearly rent or yearly value thereof as aforesaid to the heir of entail in possession; (that is to say), for one child, one year's free rent or value; for two children, two years' free rent or value; and for three or more children, three years' free rent or value in the whole: Provided always, that such provision shall, except in the case of the settlement thereof by a marriage contract as herein-after mentioned,[6] be valid and effectual only to such child or children as shall be alive at the death of the grantor, or to the child or children of which the wife of the grantor shall be then pregnant; and upon any such child succeeding to the entailed estate, the provision granted to him or her, in so far as not previously paid, shall be extinguished for ever, and shall never be set up as a debt against any succeeding heir.

[1] *Supra*, sect. 1.

[2] It appears to be competent to make the provision conditional—Campbell *v.* Campbell, 13th Dec. 1860, 23 D. 159; and it need not specially refer to this Act—Antrobus, *infra*; cf. Lockhart *v.* Lockhart, 15th July 1853, 15 D. 914; but the Act cannot be taken advantage of if, expressly or by plain implication, the powers sought to be exercised are those of the entail itself—Callander *v.* Callander, 21st May 1869, 7 Macph. 777.

[3] The heir may exhaust the power in favour of one child—Antrobus *v.* Innes, 25th Nov. 1830, 9 S. 70. It is incompetent to provide under this section a sum to a child in liferent, and the heirs of her body in fee, whom failing to others than the provisor's younger children—Breadalbane's Trs. *v.* E. Breadalbane, 26th May 1840, 2 D. 904, 944. There was much division of opinion in this case; but it seems to settle that the Act does not contemplate a liferent provision or a provision to grandchildren. See later alterations in the law, Act 1868, sect. 6; Act 1875, sect. 10; cf. the rules under special clauses in entails, text, p. 591. A bond binding personal representatives in a similar provision does not prevent the execution of a valid Aberdeen provision—Breadalbane's Trs., *supra*. Cf. Maxwell *v.* Grierson, 12th Dec. 1843, 6 D. 203, where the provision was to the child, and she settled it in her marriage-contract; and this was held to be different from the earlier case, and no fraud on the entail. An obligation to grant Aberdeen provisions to children may be undertaken, as in a marriage-contract, and may be discharged by the children wholly or *pro parte*. See a case in which the discharged right revived through the testamentary dispositions of the parent—D. Roxburghe *v.* Russell, 28th June 1881, 8 Ret. 862; and see next section.

[4] See sect. 12.

[5] These words include the interest on provisions due to children of a former heir in possession, whether charged on the fee of the estate or not—Brodie, 6th Dec. 1867, 6 Macph. 92; Dunbar, 7th Dec. 1872, 11 Macph. 200.

[6] Sect. 5.

Provision settled in consideration of marriage.

5. Provided always, and be it further enacted, that if any child to whom any such provision as aforesaid may be granted shall marry, and that * such provision, or any part thereof, shall, with the consent of the grantor of the same, be settled in the contract made in consideration of the marriage of such child, and such child so marrying shall die before the grantor of such provision, then and in all such cases the provision, or any part thereof, so settled in consideration of such marriage, shall remain and be effectual, as if such child had survived the grantor.

* *Sic.*

Death of children before grantor not to affect the provision.

Where provisions to children granted to the full extent, no further provisions to be granted till the former are diminished, &c.

6. Provided always, and be it enacted and declared, that where the powers herein-before contained[1] of granting provisions to a child or children shall have been exercised by one or more heir or heirs in possession of any such entailed lands and estates as aforesaid, to the full extent of three years free rent or value of the entailed estate as aforesaid, it shall not be in the power of any heir, in possession of the same lands and estates, to grant further provisions to his or her child or children, till

some part of the provisions granted to the extent of three years free rent or value as aforesaid shall have been paid or extinguished; but upon the payment or extinction thereof, or of any part thereof, it shall be in the power of such heir in possession to grant provisions to his or her child or children, to the extent of the provisions so paid or extinguished as aforesaid; the heir in possession of any such entailed lands and estates as aforesaid being always hereby empowered to grant provisions to his or her child or children, to such extent of the power of granting provisions to a child or children herein-before contained as may be open or unexercised for the time, so that the provisions to be granted do not in any case exceed the proportions aforesaid of one year's free rent or value for one child, of two years' free rent or value for two children, and of three years' free rent or value for three or more children: And provided always, that such provision shall (except in the case of the settlement thereof by a marriage contract as herein-before mentioned) be valid and effectual only to such child or children as shall be alive at the death of the grantor, or to the child or children of which the wife of the grantor shall be then pregnant; and that upon any such child succeeding to the entailed estate, the provision granted to him or her, in so far as not previously paid, shall be extinguished for ever, and shall never be set up as a debt against any succeeding heir.

[1] This section only applies to prior provisions granted under the statute, not to those granted under a power in the entail—Lockhart *v.* Lockhart, 15th July 1853, 15 D. 914; E. Eglinton, 7th Feb. 1863, 1 Macph. 386. If an heir in possession has charged the fee of the estate—under Act 1848, sect. 21—with Aberdeen provisions to children, these are regarded not as provisions, but as debts, the interest on which is deducted in calculating the 'free rental,' in reference to which a succeeding heir may exercise this power—Brodie, 6th Dec. 1867, 6 Macph. 92; cf. sect. 12.

Excess in provisions granted to be regulated by the Court of Session.

7. Provided always, and be it enacted, that in every case in which the provision granted to a wife or husband, or to a child or children, under the authority of this Act, shall exceed such proportions of the rent or value of any entailed estate as herein-before mentioned, such provision shall not be deemed to be null and void, but the same shall be voidable at the instance of the heir of entail next in the order of succession, or of any other heir of entail, to such extent as such provision shall exceed those herein authorised in each respective case to be granted, but no further; and the Court of Session in either Division thereof is hereby authorised and required to make the necessary order to that effect, on advising a petition to be presented to that court by the heir of entail next in the order of such session,* or any other heir of entail.

* *Sic.*

No security or provision to affect the fee.

8. Provided always, and be it further enacted and declared, that no securities or provisions to be granted under the authority of this Act, to a wife or husband, or to a child or children of the proprietors of any such entailed lands and estates as aforesaid, shall affect, or be made by any process of law whatsoever to affect, the fee [1] of the same lands and estates, but such securities and provisions shall only affect the yearly rents or proceeds of the said lands and estates.

[1] Altered, as to provisions to children, by Act 1848, sect. 21; 1853, sect. 7; see *supra*, note [1] to sect. 1.

After death of

9. And be it enacted, that after the expiration of one year from the

death of the grantor of such provisions to children as aforesaid, it shall and may be lawful for the person or persons having right to the same, to require the heir succeeding to the estate to make payment of the said provisions, with the legal interest thereof, from the term at which the right of such succeeding heir to the rents of the estate did commence, after receiving a proper discharge thereof, or assignment to the same; and if the money shall not be paid within three months after requisition of payment shall be made as aforesaid, it shall then be lawful for the person or persons having right to any such provision, to institute an action in the Court of Session against the heir then in possession, for compelling him or her to pay the money and interest thereof; and on obtaining a decree, the person or persons in whose favour decree shall be made, shall be at liberty to use every kind of diligence or execution authorised by the law of Scotland, in recovering the payment of debts, except adjudication against the entailed estate.

the grantor of provisions to children, heir succeeding to estate to make payment thereof, with interest.

10. And be it enacted, that in case any heir in possession of an entailed estate shall be sued for payment of the provisions granted under the authority of this Act to the child or children of any former heir or heirs, he or she shall be discharged in all cases from such suit, upon assigning or effectually conveying to a trustee[1] to be named by the Court of Session, one third part of the clear rents or proceeds of the entailed estate, payable to such heir in possession during his or her life[2] or until the provisions aforesaid shall be paid off; and the rents so assigned and conveyed shall be applied in payment of the whole subsisting provisions to a child or children, granted under the authority of this Act.

Heir sued for provisions to children to be discharged on conveying one third of clear rents.

[1] Maxwells *v.* Maxwell, 26th June 1840, 2 D. 1225; Miller, 1876, 14 Sc. L.R. 132.
[2] Cf. Montgomery Act, sect. 16, *supra*, p. 888.

11. And be it further enacted and declared, that for and notwithstanding of any clause prohibitory, irritant, or resolutive, proviso, matter, or thing in any deed of entail contained to the contrary, no proprietor of any entailed estate in Scotland shall be held to have committed any contravention, or to have incurred any irritancy or forfeiture, for or by reason of such proprietor having granted any of the provisions upon or out of an entailed estate herein-before authorised to be granted.

Granting provisions not to infer contravention, &c.

12. And be it further enacted, that nothing herein contained shall be held or construed to diminish or abridge the powers of the heir in possession of any such entailed estate in Scotland as aforesaid, in regard to the granting of provisions to his or her wife or husband, or to his or her child or children, if empowered by the deed of entail under which he or she shall hold such entailed estate, to grant provisions to a larger extent than those herein-before specified; but it shall not be lawful in any case to grant any such provision as is herein-before authorised to be granted in addition to any provision authorised to be granted to a wife or husband, or to a child or children, under any deed of entail, so as to exceed in the whole the proportions of the yearly rent or yearly value of any entailed estate herein-before mentioned and authorised to be granted for making such provisions as aforesaid.[1]

Act not to diminish more extensive powers.

[1] This applies not to provisions granted by a former, but by the same heir—Lockhart *v.* Lockhart, 15th July 1853, 15 D. 914; E. Eglinton, 7th Feb. 1863, 1

Macph. 386. It cuts down any excess attempted for the benefit of a second family in a second marriage-contract—Cumming *v.* Cumming, 16th July 1858, 20 D. 1280.

The heir in possession not to be deprived of more than two third parts of the clear annual income.

13. And be it enacted and declared, that the powers given and granted by this Act, and by the said recited Act of the tenth year of the reign of his said late Majesty, shall in no case be exercised to such an extent as to deprive the heir in possession of any entailed lands and estates in Scotland of more than two third parts of the free yearly rent or free yearly proceeds of the same;[1] and the Court of Session, in either Division thereof, is hereby authorised and required in each respective case to give all necessary orders for relieving the heir in possession from the payment of more than such two third parts of the said free yearly rent or yearly proceeds as aforesaid, by authorising such heir to retain any excess beyond the same, from the security or provision, or securities or provisions, on such entailed lands and estates which shall be least entitled by the law of Scotland to legal preference.

[1] Unless it be for arrears of the widow's or husband's annuity, since for these the whole rents uplifted and to be uplifted are applicable—Boyd *v.* Boyd, 5th July 1851, 13 D. 1302.

No. XX.

6 & 7 WILLIAM IV. c. 42.

An Act to grant certain Powers to Heirs of Entail in Scotland, and to authorise the Sale of Entailed Lands for the Payment of certain Debts affecting the same.—[28*th July* 1836.][1]

WHEREAS by an Act of the Parliament of Scotland, made in the year one thousand six hundred and eighty-five, intituled *Act concerning Tailzies*, it is statuted and declared that it shall be lawful to his Majesty's subjects to tailzie or entail their lands and estates, and to substitute heirs in their tailzies or entails, with such provisions and conditions as they shall think fit, and to affect the said entails with irritant and resolutive clauses, whereby it shall not be lawful to the heirs of entail to sell, analzie, or dispose of the said lands or any part thereof, to contract debt, or do any other deed whereby the same might be apprised, adjudged, or evicted from the other substitutes in the entail, or the succession frustrate or interrupted, declaring all such deeds to be in themselves null and void; and provision is made by the said Act for the recording such entails in the manner therein set forth:[2] And whereas it is expedient that certain powers should be conferred upon heirs of entail in relation to granting tacks and making excambions, and to selling portions of entailed estates for payment of the entailer's debts: Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and

by the authority of the same, that, notwithstanding any prohibitory, irritant, and resolutive clauses contained in any entails already made and established, or which may hereafter be made and established, pursuant to the directions of the said Act passed in the Parliament of Scotland in the year one thousand six hundred and eighty-five, it shall be lawful for the respective heirs of entail in possession to grant tacks[3] of any parts of the lands, estates, or heritages therein contained, for the fair rent of such lands or heritages at the period of letting, either by public auction or private bargain, and notwithstanding any prohibition against diminution of the rental, for any period not exceeding twenty-one years, and to grant tacks of any mines and minerals contained in such lands and estates for any period not exceeding thirty-one years: Provided always, that nothing herein contained shall authorise any heir of entail in possession of any entailed lands, estates, or heritages to take any grassum or valuable consideration, other than the tack duty or rent, for granting any tack, or to grant any tack of the home farm, nor of the mansion-house and offices, or of the garden, lawn, park, or policy attached thereto, for any period beyond his own life; and in case any such grassum or consideration shall be taken, or in case any tack hereby prohibited shall be granted, such tack shall be null and void.

Heirs of entail in possession empowered to grant tacks of any part of entailed estates under the restrictions herein contained.

[1] Commonly called the Rosebery Act. It deals with three different powers: (1) to lease—sects. 1, 2; (2) to excamb—sects. 3-6, 21; (3) to sell for payment of entailer's debts—sects. 7-21. The mode in which the powers here given are affected by later legislation is pointed out in the notes to each section.

[2] The provisions of this Act as to leases and excambions are extended to unrecorded entails by 1 & 2 Vict. c. 70.

[3] This section relates, not to improving leases, like the Montgomery Act, sect. 1, nor to long leases in the proper sense of the term, like the Rutherfurd Act, sects. 4 and 24; Act 1853, sect. 6; Act 1868, sects. 3-5; Act 1875, sects. 5-6; Act 1882, sects. 4-6; but to leases of ordinary duration, which are here allowed, in spite of less extensive powers in the entail, under certain conditions. The heir in possession is now entitled to ignore a prohibition in the tailzie against diminution of rental, Act 1882, sect. 8, and may grant a new lease, binding on his successors, at any time within two years of the ish of a lease for seven years or more, ibid. sect. 9; under the limitation in both cases that the rent shall be a fair one and no grassum shall have been taken. The ordinary terms in the mind of the Legislature were those of agricultural and mineral leases; but the words of the section are very ample. No application to the court is required. See, as to a mineral lease, Muirhead *v.* Young, 13th June 1855, 17 D. 875.

2. Provided also, and be it enacted, that nothing herein contained shall prevent or be construed to prevent any heir of entail in possession from exercising any power of granting tacks which may be contained in the entail under which he possesses more extensive than the power of granting tacks hereby conferred.

This Act not to restrain any more extensive powers contained in any entail.

3. And be it enacted that, notwithstanding any prohibitory, irritant, and resolutive clauses contained in any entail already made and established, or which may hereafter be made and established, pursuant to the directions of the said Act passed in the Parliament of Scotland in the year one thousand six hundred and eighty-five, it shall be lawful for the respective heirs of entail in possession of any entailed lands, estates, or heritages, having made up a feudal title thereto, to make excambion, without the consent of any other heir,[1] of any portion of the entailed lands, estates, or heritages, for an equivalent[2] in lands, estates, or heritages lying contiguous to the

Heirs in possession may make excambions of entailed estates in the mode herein named.

same or to some other part of the said entailed estate, or being convenient to be holden with the same, and whether the same shall belong to himself in fee simple or to any other person, and that although the heritages to be given and taken in exchange may consist of different descriptions of heritable property:[3] Provided always,[4] that notice of the intention to make such excambion shall, three months previous to the application to the Court of Session to that effect, as herein-after required, be given to the five heirs of entail, or to the whole heirs of entail, if their number be less than five, of the said entailed lands, estates, or heritages next in the order of succession to the heir so applying; and if any of the said five heirs of entail shall be under age, or under any mental or other legal disability, then to the legal guardians, curators, or administrators of such heirs; and if three or more of the said five heirs shall be under age, or under any mental or other legal disability, then to their respective guardians, curators, or administrators, and also to the two heirs next in the order of succession, after five such heirs, who shall be of lawful age and not under any mental or other legal disability; and if any of the said heirs to whom notice is thus directed to be given shall be forth of the United Kingdom, then to the known agent or factor of such absent heir or heirs; and for ascertaining and adjusting the value of the lands, estates, or heritages proposed to be exchanged, an application shall be made for that purpose by the heir of entail in possession, and feudally vested in such lands, estates, or heritages after such notice as is herein directed to be given, by summary petition, setting forth the objects of the said excambion, and the advantages expected to be derived therefrom, to one or other of the Divisions of the Court of Session, praying for such excambion; and the said court shall, after proof made to them of notice to the heirs of entail as aforesaid, take into consideration the expediency of such excambion, and the other circumstances of or affecting the lands, estates, or heritages proposed to be excambed, and the interests of the succeeding heirs of entail therein, and after such notice as is herein-after directed to be given, and hearing any party having a title and interest to be heard, if any such shall appear, shall appoint two or more skilful persons to inspect and adjust the value and settle the marches of the said lands, estates, or heritages proposed to be excambed; and upon receiving the report upon oath of such persons, and being satisfied of the respective values of such lands, estates, or heritages and of the expediency of such excambion, the said court shall thereupon give judgment authorising the said excambion; and thereupon the contract of excambion shall be executed[5] at the sight and with the approbation of the said court, and recorded in the sheriff court books[6] of each of the shires or stewartry in which the lands or heritages to be excambed are situated, and also within three months in the register of tailzies: Provided also, that after hearing any party having a title or interest, and appearing as aforesaid, it shall be competent to the said court to decern the expenses to be incurred by such party in such appearance to be borne either by such party or by the heir of entail applying for the excambion, as to the said court shall seem just.

[1] There are three sorts of excambions under the Entail Acts: 1. That of the Montgomery Act, sects. 32, 33, which is limited in extent by acreage, and confined to lands. 2. That of Act 1848, sect 5, and 1875, sect. 6, unlimited in extent and in subject, but

requiring consents. 3. That of this and the following sections, as simplified in procedure by Act 1848, sect. 37, limited in extent by value, but unlimited in subject, except as to the mansion-house, &c.

[2] The adventitious value arising from lands lying in the middle of another property must be taken into account—L. Macdonald, 5th July 1838, 16 S. 1259.

[3] Thus a vice of patronage, before its abolition—E. Rosebery, 30th Nov. 1852, 15 D. 126; or the whole—E. Kinnoull, 16th July 1840, 2 D. 1458. As to servitudes, cf. cases in Duncan, p. 73, with Mags. of Dysart *v.* E. Rosslyn, 27th Nov. 1832, 11 S. 94. As to mines, see note to Montgomery Act, sect. 33, *supra*, p. 893.

[4] The procedure here detailed is now superseded by that of the Act 1848—see sects. 37, 33 *et seq.*; Act 1875, sects. 6, 12; Act 1882, sect. 11; but the court proceeds on a remit to men of skill, as herein directed—see petition in Dunc. p. 273. The new procedure does not introduce a necessity for consents—D. Athole; Stewart, 1849, 12 D. 918. See further, as to procedure, Boswell, 1837, 15 S. 425, 490; Burton, 1851, 13 D. 955; L. Wharncliffe, 1852, 24 Sc. Jur. 553; Marjoribanks, 1852, 14 D. 935; Gray, 1852, 14 D. 843.

[5] It does not require to contain the destination and fetters, but only a reference to the original entail by its date of execution and recording, Act 1853, sect. 11. See 4 & 5 Vict. c. 24, repealed by the Revision Act, 1874.

[6] Recording in the sheriff court books is no longer required—Act 1848, sect. 37; except, it would seem, in the case of the entail itself being unrecorded—1 & 2 Vict. c. 70, sect. 2.

Provision as to excambion of mansion-houses, &c.

4. Provided further, and be it enacted, that it shall not be lawful to excamb the principal mansion-house or offices, or the garden, park, lawn, home farm, or policy of any entailed estate, nor more than one-fourth in value of such entailed lands, estate, or heritages in all; and declaring that after excambions have been made under the authority of this Act to the extent in all of one-fourth part in value of the whole entailed lands, estates, or heritages, it shall not be in the power of any heir of entail to make any further excambions of any part of the said lands, estate, or heritages.

Tenure of excambed lands.

5. And be it enacted, that all contracts of excambion executed and recorded in terms of this Act shall be effectual to all intents and purposes; and the lands and heritages given or received in excambion shall be held to be a part of the entailed estate or of the entailed estates respectively, and shall be subject to all the prohibitory, irritant, and resolutive clauses of the entail or entails, in the same manner as if it or they had been originally a part of such estate or estates respectively; and the lands and heritages given from the entailed estate or estates shall from thenceforth be held as out of the entail or entails under which it was previously held, and be liberated from all the prohibitory, irritant, and resolutive clauses thereof: Provided always, that no debt contracted by any heir of entail during the period between the execution of any such contract of excambion and the recording of such contract in the register of tailzies as aforesaid shall affect or be capable of affecting the lands contained in such contract, and thereby added to the entailed estate: And provided further, that if in any such excambion as aforesaid there shall be any excess of value on either side, not exceeding two hundred pounds, such excess shall go and be paid to the proprietor, whether heir of entail in possession or proprietor in fee simple, to whom the lands of smaller value shall be awarded; and that if any party to any such excambion shall give or shall receive any consideration or value of any kind whatever, other than the lands to be exchanged, or such excess as aforesaid not exceeding two hundred pounds, such excambion shall be null and void.

Excess of value in any excambion to the amount of £200 to be paid to the proprietors.

In case of any larger excess excambion void.

As to excambion of entailed estates under more than one entail.

6. Provided always, and be it further enacted, that where any such heir in possession shall apply as aforesaid for the excambion of any part or parts of any entailed estate or estates under more than one deed of entail, descendible to the same series of heirs, such deeds of entail shall in reference to such application be held and construed to be one deed of entail, and the estates settled by such entail to be one entailed estate: Provided also, that an Act passed in the tenth year of the reign of his 10 Geo. 3. c. 51. Majesty King George the Third, intituled *An Act to encourage the Improvement of Lands, Tenements, and Hereditaments in that Part of Great Britain called Scotland, held under Settlements of strict Entail*,[1] shall remain in full force and effect, excepting in so far as the same is altered or repealed by any of the provisions of this Act.

[1] The Montgomery Act, *supra*, p. 882. No part of it seems to be altered or repealed by this Act.

Part of entailed estates may be sold for payment of entailer's debts affecting the estate.

7. And for effecting the sale of portions of entailed estates for payment of the entailer's debts,[1] be it enacted, that from and after the passing of this Act it shall and may be lawful for the heir of entail in the possession of any entailed estate liable to be adjudged or evicted for the debts or obligations of the maker of the entail, and for the tutors or curators or legal guardians of any such heir, if under twenty-one years of age or under any mental or other legal disability, to apply by summary petition to the Court of Session in either of the Divisions of the said Court, setting forth the entail, and the debts or obligations affecting or which may be made to affect the lands or heritages contained in the said entail as aforesaid, and praying the said Court that so much of the said lands or heritages may be sold as will produce a sum adequate to discharge the debts so affecting the said estate.[2]

[1] The estate, or part of it, may be sold (apart from private Act, see Act 1853, sect. 10, the Clan Acts, the Land Tax Redemption Acts, and the Lands Clauses Act, as to which see text, p. 579) in four different modes—(1) in that which is the subject of the remaining sections of this Act; (2) under Act 1848, sect. 4, Act 1875, sect. 6, and Act 1882, sect. 4, with certain consents; (3) under Act 1848, sect. 25, Act 1853, sect. 9, Act 1868, sects. 9, 10,—provisions which, *inter alia*, apply to entailer's debts; and (4) under the absolute powers of sale contained in Act 1882, sect. 19 *et seq.* The third mode has practically superseded this part of the present statute, but there has been no repeal. It will suffice, therefore, to note the few cases which have been decided under the following sections, without any more minute examination.

[2] The Act was applied in a case where, after a trust for payment of debt and entail of lands to be purchased had been wound up, additional debt was discovered—Gillespie, 28th May 1842, 4 D. 1305; to the payment of arrears of the jointure of the entailer's widow—Dalrymple, 17th July 1846, 8 D. 1217; but not to an institute's debts contracted prior to the recording of the entail—Scott, 14th Feb. 1845, 7 D. 445. See text, p. 580, and Acts 1848, 1853, 1868, 1882, *supra citat.*

Court of Session to inquire into the particulars, and direct what portion of estate shall be sold;

8. And be it enacted, that it shall and may be lawful for the judges of the said Court, sitting in either of the Divisions thereof, and they are hereby authorised and required, upon such petition presented to them as aforesaid, to direct due notice, according to the practice of the said Court,[1] to be given of such petition to all concerned, to hear all parties that shall appear for their interest, to inquire into and take an account of the debts, obligations, and other burdens due by or binding upon the entailer of such estate, which affect or may be made to affect such estate as aforesaid, and to fix and ascertain the amount of such debts, obligations, and

burdens and interest, if any due thereupon, by interlocutors or judgments, and thereupon to inquire into and ascertain, by the investigation and evidence or report of such surveyors or other skilful persons as the said Court shall think fit to nominate and appoint for that purpose, what portions of such entailed estate sufficient to produce a price adequate to the payment of all such debts, obligations, and burdens affecting or capable of being made to affect the said entailed estate as aforesaid may be sold with the least detriment or injury to the remainder of such estate,[2] and to take all necessary proof thereof, and of the value at which such portions of such estate ought either in whole or in lots to be exposed to sale, and thereupon to order and decern that such portions of such estate shall be sold by public roup or auction.

[1] It is intimated on the walls, and served on the next heir who is not a descendant of the petitioner's body—Torrance, 9th Feb. 1837, 15 S. 506.
[2] See this procedure followed in Torrance, 2d Dec. 1837, 16 S. 174.

and cause notice of sale to be given, and adjust the conditions thereof.

9. And be it enacted, that the said judges shall cause notice of the intended sale or auction of such portions of such estates to be inserted in one of the newspapers published in the county or counties in which the lands or heritages to be sold lie, and also in three of the newspapers published in Edinburgh, three times, at least three weeks previous to the day of sale, and shall otherwise advertise and notify such sale as to the said judges shall seem necessary and proper; and the articles and conditions of roup or sale of such portions of such estates shall be adjusted at the sight and with the approbation of the said judges, and the lands or heritages be exposed to sale in such manner as the said judges shall direct; and the said judges may authorise and direct such sales respectively to be adjourned from time to time, and to be again from time to time advertised and notified as herein-before directed.[1]

[1] The procedure subsequent to the ascertainment of the parts to be sold is similar to that which obtains in a process of judicial sale—Torrance, 3d July 1838, 16 S. 1258. See next section.

Court of Session to adjudge the lands sold to the purchaser, and direct the disposition of the purchase money;

10. And be it enacted, that upon the sale of such portions of such estates as aforesaid the said judges shall adjudge and decern the same, freed from all the burdens, conditions, restrictions, and provisions, clauses irritant and resolutive, and other clauses of such entail, to belong to and be the property of the purchaser or respective purchasers thereof, when and as soon as such purchaser or purchasers shall have completed such purchase or purchases by payment or consignation of the purchase money, or price or prices at or for which he, she, or they shall have purchased the same, to or with the treasurer, cashier, or manager or other proper officer of the Bank of Scotland, the Royal Bank of Scotland, Bank of the British Linen Company of Scotland, Commercial Bank of Scotland, or National Bank of Scotland respectively, to whom the said judges shall order such payment or consignation to be made, to be placed to an account to be raised in the books of such bank in the name or names of such person or persons as the said judges shall direct; and which monies shall, when so paid in, produce the highest interest that can be obtained for the same, which interest shall by such person or persons be annually accumulated and added to the principal sum, to carry interest together

until applied, by a warrant or warrants of the said judges in either Division of the said Court as aforesaid, for the purposes of this Act; and the said judges shall further pronounce such interlocutor or interlocutors and hold such other proceedings in the said matter as the judges of the Court of Session are in use to pronounce and hold in judicial sales, or as shall appear to the said judges necessary for fully carrying the purposes of this Act into execution.

Purchasers upon payment of the money to have a good right to the lands, &c., freed from the entail.

11. And be it enacted, that the purchaser or purchasers in pursuance of this Act, and their heirs and assignees, shall, by the interlocutors or decrees of sale to be pronounced by the said judges, and upon full payment of the price or prices for which they shall respectively purchase to such person or persons or in such way as they shall by the articles and conditions of sale be taken bound to pay the same, have a good and undoubted right to the lands and heritages so to be purchased by them, freed and discharged of all the conditions, provisions, limitations, and restrictions of such entail, and of all the debts, obligations, and burdens by which the said lands and heritages were affected, and from every other incumbrance, defect of title, or ground of eviction whatsoever, in as full and ample a manner, sort, and form as any purchaser of lands at a judicial sale before the Court of Session may, can, or ought to have by the law and practice of Scotland; and the heir of entail of the estate for the time being, or his or her tutors or curators or other legal guardians as aforesaid, shall and is or are hereby required to execute and deliver, under the authority of the said judges of the Court of Session in either Division thereof as aforesaid, all such dispositions and conveyances of such portions of such estates as shall be so sold, containing procuratories of resignation, precepts of sasine, and other usual and necessary clauses as shall by the said judges be deemed necessary and proper, in favour of such purchaser or purchasers, his, her, or their heirs and assignees, without incurring any irritancy or forfeiture, any thing in such deed of entail to the contrary notwithstanding.

Lands not sold to continue subject to the entail.

12. Provided always, and be it enacted, that such parts of such entailed estate as shall not be sold under the authority of this Act, in the manner herein directed, shall remain and continue settled and entailed to and upon the same series of heirs, under the same prohibitory, irritant, and resolutive clauses, provisions, and conditions as are contained in such deed of entail, but subject to the powers and provisions herein-before given by this Act.

Court of Session to direct purchase money to be applied to payment of debts, &c.

13. And be it enacted, that after such sale or sales are accomplished, and the purchase money paid or consigned as aforesaid, the said judges of the Court of Session in either Division thereof shall issue their warrants or decrees for payment, out of the money so paid or consigned, of the expenses of the proceedings attending such petition, inquiry, and sale, and also of the amount of such debts, obligations, or burdens, affecting or which might be made to affect such entailed estate as aforesaid of which such portions have been sold as aforesaid; and every creditor in such debt, obligation, or burden shall upon receiving payment be obliged to execute a complete discharge of his or her debt, right, or claim: and the several discharges shall be registered in the Books of Council and Session.

14. Provided always, and be it enacted, that if any party interested in such entailed estate shall have appeared and been heard before the said Court, it shall be competent for the said Court to decern the expenses incurred by such party in such appearance and hearing to be borne, either by such party, or by the heir applying for such sale, either out of the price of the lands to be so sold, or otherwise as to the said Court shall seem just. By whom the costs of parties interested and appearing shall be paid.

15. Provided always, and be it enacted, that if any surplus exceeding two hundred pounds shall remain of the price of the lands and heritages so sold, after defraying such expenses, debts, obligations, or burdens directed to be paid as aforesaid, the said judges of the said Court in either of the Divisions thereof shall and they are hereby empowered and required to direct and order that such surplus shall be laid out and employed in the purchase of other lands or heritages, which shall be limited and settled to the same uses and purposes, and under the like prohibitory, irritant, and resolutive clauses, as by the deed of entail in relation to which such proceedings have been held the lands and heritages therein described stand limited and settled. Any surplus exceeding £200 to be laid out in purchase of other land, to be limited to same uses, &c., as lands sold;

16. And be it enacted, that when such surplus shall be laid out and employed in the purchase of other lands or heritages to be settled as aforesaid, the disposition, deed, or settlement of entail thereof to or in favour of the heir of entail in possession for the time being, and the other heirs of entail entitled to succeed to the entailed estate to which the lands or heritages so purchased are to be added, shall be framed at the sight and with the approbation of the judges of the said Court, and shall be so framed as to bind the heir in possession or person in whose favour the same is executed as well as the succeeding heirs of entail. and the deed of entail thereof to be framed at the sight of the Court of Session;

17. And be it enacted, that after such disposition, conveyance, or entail shall be so made and executed, the same shall be directed by the said judges to be forthwith recorded in due form in the register of tailzies, for the benefit of all the persons interested therein, and infeftment shall be taken by virtue of the procuratory of resignation or the precept of sasine therein contained, and shall be registered agreeably to the forms and practice of the law of Scotland, upon all which the said Court shall interpose its authority by declaring that the directions by this Act given have been complied with according to the true intent and meaning thereof. and recorded in register of tailzies, &c.

18. And be it enacted, that until such surplus as aforesaid shall be applied in the purchase of other lands or heritages as aforesaid, the said judges shall order and direct that the same shall remain in one or other of the aforesaid banks respectively, subject to the direction of the said judges of that Division of the said Court to which application shall have been originally made, in the name of such person or persons as they shall have appointed, who shall receive the highest interest which can be got for the same; and the interest[1] arising from the money so paid in shall be laid out in the name or names of such persons as aforesaid, and shall annually accumulate and be added to the principal sum so that they may carry interest together until a proper purchase in lands or heritages shall be found, to be limited and settled in the manner herein-before directed, and until the same shall be ordered to be paid by the treasurer, Application of surplus monies till invested in land.

cashier, or manager or other proper officer of the Bank of Scotland, the Royal Bank of Scotland, Bank of the British Linen Company of Scotland, Commercial Bank of Scotland, or National Bank of Scotland respectively, for completing the said purchase in such manner as the said Court shall think just and direct; and if the money arising by the principal and accumulated interest of such sum or sums shall exceed the amount of the original purchase money, then and in that case only the surplus which shall remain, after discharging the expense of the applications to the Court, shall be paid to the person or persons respectively who would have been entitled to receive the rents and profits of the entailed lands or heritages.

[1] Cf. the treatment of interest under Act 1848, sect. 25; note [9] thereto, *infra*, p. 923.

If under £200 to be paid to heir in possession.

19. And be it enacted, that if such surplus as aforesaid shall be under two hundred pounds sterling, the same shall be paid, by order of the said Court, to the heir in possession of such entailed estate for the time being.

Definition of terms used in the Act.

20. And be it enacted, that any matter or thing permitted or prohibited to be done by any heir of entail by virtue of this Act is and shall be permitted or prohibited to be done by any trustees or trustee holding lands in trust under obligations to entail the same; and that where the words 'heir' or 'heirs of entail' are used in any part of this Act, such word or words shall be held and construed to include the institute equally as any substitute heir of entail.

How notices to be given of applications under this Act to Court of Session, &c.

21. Provided always, and be it further enacted, that notice of all applications, either to the Court of Session or any Lord Ordinary of the said Court, or to any sheriff of any county under the provisions of this Act, by any heir of entail, shall be inserted once at least in the London and Edinburgh Gazettes, and in two or more newspapers published in Edinburgh and usually circulated in the part of Scotland in which the entailed lands and estates to which such application relates lie, and also in any one newspaper published (if any so be) in such part of Scotland at least three months previous to the making such application; [and where such application shall be to the Court of Session, the said Court or the Lord Ordinary shall, if they or he shall see cause, cause such further intimation thereof to be made in the minute book of the said Court, or on the walls of the Parliament House, or otherwise, as the said Court or Lord Ordinary shall think proper].[1]

[1] The bracketed part is repealed by the Revision Act, 1874.

No. XXI.

11 & 12 VICTORIA, c. 36.

An Act for the Amendment of the Law of Entail in Scotland.—[14*th August* 1848.][1]

WHEREAS the law of entail in Scotland has been found to be attended with serious evils, both to heirs of entail and to the com-

munity at large, and it is expedient that the same be amended in manner herein-after provided for: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that[2] where any estate in Scotland shall be entailed by a deed of tailzie dated on or after the first day of August one thousand eight hundred and forty-eight it shall be lawful for any heir of entail born after the date of such tailzie, being of full age, and in possession of such entailed estate by virtue of such tailzie,[3] to acquire such estate, in whole or in part, in fee simple,[4] by applying to the Court of Session for authority to execute[5] and executing, and recording in the register of tailzies, under the authority of the Court, an instrument of disentail in the form and manner herein-after provided;[6] and it shall be lawful for any heir of entail, being of lawful age, and in possession of such entailed estate by virtue of such tailzie, though born before the date of such tailzie, with the consent,[7] and not otherwise, of the heir next in succession, being heir apparent[8] under the entail of the heir in possession, to acquire such estate, in whole or in part, in fee simple, by applying to the Court for authority to execute and executing, and recording in the register of tailzies, under the authority of the Court, an instrument of disentail in the form and manner herein-after provided: Provided always, that such consent to such instrument of disentail shall not be valid and effectual unless granted by a person of the age of twenty-five[9] years complete, not subject to any legal incapacity, and born after the date of the tailzie to which such instrument applies.[10]

Heir born after the date of any future entail may disentail the estate; born before, may do so with consent of heir next in succession, being heir apparent under the entail.

[1] This statute, commonly called the Rutherfurd Act, is the most important of the Entail statutes, with the exception, perhaps, of the recent Act of 1882, which cuts the roots, where the present Act intended only to prune. It introduces a distinction between old and new entails (entails dated before and after 1st August 1848); the English law of settlement (see note [2]); powers of total and partial disentail, sects. 1-11; new modes of charging for improvements, sects. 13-20, and for provisions to younger children, sects. 21-23; power to grant feus and long leases, sect. 24; powers of sale, and of applying settled money, sects. 25-30. It facilitates the bringing of estates under entail, sect. 39, but sweeps away imperfect entails, sect. 43; it secures against evasion, by directing similar provisions against new trusts, liferents, and leases, and by applying the Thellusson Act to Scotch heritage, sects. 41, 47-49; and contains some miscellaneous regulations regarding earlier statutes, sects. 12, 37, 46; procedure, sects. 31-37, 50, 51; and the effect of contraventions, and of proceedings under the Act, sects. 38, 40, 45. The Act applies to all entails, recorded or not, and whether the heir in possession be infeft or not, sect. 42.

There is an interpretation clause, sect. 52, *q.v.* In addition to the terms there explained, the import has been determined of certain phrases which continually occur in this Act and its amendments, such as 'heir in possession of an entailed estate,' see sects. 2, 28, and 'entail dated' (or created, or executed), see sect. 3.

The alterations introduced by later Acts are noticed in the notes appended to the section altered.

[2] The object of the Act is 'to prevent persons making entails for the future from 'affecting with fetters persons not born or in existence at the date of the entail.' For this purpose, in new entails the actual date is taken (sect. 1). In old entails 1st August 1848 is taken to be their date (sect. 2); and additional modes are added in their case by sect. 3. These additional modes are now extended to new entails, Act 1882, sect. 3. And the same object is harmoniously aimed at by sections enacted to prevent evasion, sects. 47-49, and as to trust-money, &c., in sects. 27, 28. See *per* L.P. Inglis in Black *v.* Auld, 5th Nov. 1873, 1 Ret. 133, 144. See also sect. 41, and Act 1868, sect. 17. The rubric is misleading; cf. rubric to sect. 2.

[3] See notes to next section. That the applicant (though not the consenter) should be of full age is still required, Act 1882, sect. 11.

[4] The first introduction of this term of English law into a Scotch statute.

[5] The universal practice now is to execute the deed first, and then apply for authority to record under Act 1853, sect. 4. Where, as in the case here, no consents are required, the petition is served on the next heirs, according to the discretion of the Court; on the three next, if there be no difficulty in so doing—Davys, 29th Oct. 1870, 9 Macph. 44; see Riddell, 13th July 1853, 15 D. 904, *per curiam*.

[6] See sects. 32, 37, 44, and schedule; and see the procedure sections, 31 *et seq.*

[7] See sect. 50. This, like all other consents, may be dispensed with by the Court on terms, Act 1882, sect. 13.

[8] See the same expression in sect. 3, and note [10] thereto. As to disentailing trust-money, see *infra*, sect. 27.

[9] Now 21, Act 1875, sect. 4; but consent may now be given by a curator *ad litem* (the ordinary guardian or another) for any one under disability from non-age or other legal incapacity, Act 1882, sect. 12.

[10] See a case in which a disentail, erroneously obtained under sect. 3, was reduced by the heir-apparent of the disentailer, born after the disentail, on the ground that, as the entail was a new one, his consent was necessary—V. Fincastle *v.* E. Dunmore, 14th Jan. 1876, 3 Ret. 345. But this case could not now occur, *supra*, [2].

Heir in possession under an existing entail born after 1st August 1848 may disentail; born before that date, may do so with consent of heir next in succession, being heir apparent born after 1st August 1848.

2. And be it enacted,[1] that where any estate in Scotland is held by virtue of any tailzie dated prior to the said first day of August one thousand eight hundred and forty-eight it shall be lawful for any heir of entail born on or after the said first day of August, being of full age, and in possession of such entailed estate by virtue of such tailzie,[2] to acquire such estate, in whole or in part, in fee simple, by applying to the Court of Session for authority to execute and executing, and recording in the register of tailzies, under the authority of the Court, an instrument of disentail, in the form and manner herein-after provided;[3] and it shall be lawful for any heir of entail, though born before the said first day of August one thousand eight hundred and forty-eight, being of full age, and in possession of such entailed estate by virtue of such tailzie dated prior to the said first day of August with the consent[4] (and not otherwise) of the heir next in possession, being heir apparent under the entail of the heir in possession, he being born on or after the said first day of August one thousand eight hundred and forty-eight, and being of the age of twenty-five[5] years complete at the time of granting such consent, and not subject to any legal incapacity, to acquire such estate, in whole or in part, in fee simple, by executing, under authority of the Court, an instrument of disentail as aforesaid, in the form and manner herein-after provided.

[1] See notes to sect. 1.

[2] Note [3] to last section. Even though his title is defeasible by the emergence of a nearer heir—Bruce, 6th March 1874, 1 Ret. 740. See the cases there examined. As to the effect of the disentail, see the op. of the Lord President, and sect. 32, *infra*. It has been held, on sect. 3, that he must make up his title before the petition can proceed—Shirrefs, 1853, Dunc. 306. See Maule, 14th June 1876, 3 Ret. 831. As to the effect of a clause of devolution on disentailing, see Home *v.* Home, 15th March 1876, 3 Ret. 591.

[3] Note [6] to last section. It is not competent, by propelling part of an entailed estate to the next heir, *alioqui successurus*, to make him 'heir in possession' in the sense of these sections; and it is extremely doubtful whether a partial propulsion is valid to any effect—V. Dupplin *v.* Hay, 15th Nov. 1871, 10 Macph. 89.

[4] Note [7] to last section.

[5] Now 21, Act 1875, sect. 4; but see note [9] to last section.

Heir of entail under an existing entail may disentail

3. And be it enacted,[1] that it shall be lawful for any heir of entail, being of full age, and in possession[2] of an entailed estate in Scotland holden by virtue of any tailzie [dated[3] prior to the said first day of August

one thousand eight hundred and forty-eight,] to acquire such estate,[4] in whole or in part, in fee simple, by applying to the Court of Session for authority to execute and executing, and recording in the register of tailzies, under the authority of the Court, an instrument of disentail in the form and manner herein-after provided:[5] Provided always, that such heir of entail in possession shall be the only heir of entail in existence for the time,[6] [and unmarried] or otherwise shall have obtained the consents[7] of the whole heirs of entail, if there be less than three[8] in being at the date of such consents and at the date of presenting such application,[9] or otherwise shall have obtained the consents of the three nearest heirs who at the said dates are for the time entitled to succeed to such estate in their order successively immediately after such heir in possession, or otherwise shall have obtained the consents of the heir apparent under the entail and of the heir or heirs in number not less than two, including such heir apparent, who in order successively would be heir apparent:[10] Provided also, that the nearest heir of entail for the time entitled to succeed to such estate immediately after such heir in possession, where any such other heir exists, shall be of the age of twenty-five[11] years complete, and not subject to any legal incapacity.[12] with certain consents.

[1] See notes to sects. 1, 2.

[2] See a case of a fiduciary fee giving place on the ascertainment of an 'heir in possession,' Maule, 14th June 1876, 3 Ret. 831. See note[3] to sect. 1.

[3] The date of a *mortis causâ* disposition and deed of tailzie, which did not fall under sect. 28, was the date of its execution, not the date of the death of the maker—Riddell, 6th Feb. 1874, 1 Ret. 462; Riddell *v.* L. Polwarth, 24th June 1876, 3 Ret. 879. A mere alteration in the destination, pursuant to a reserved power, made after 1848, on an entail dated before 1848, did not make the entail a new one. What would be a sufficient innovation to have that result?—Blair, 24th Jan. 1877, 4 Ret. 308. But the bracketed words are now struck out by Act 1882, sect. 3, which extends these further modes of disentailing to new entails.

[4] Including, under the law before 1882, such lands as after 1848 were brought under the entail—(1) as purchased with railway compensation money got for land which had been under the old entail; (2) excambed for such land; but not (3) lands acquired under a condition adjected to consents in a former disentail—Buchanan, 11th June 1864, 2 Macph. 1197.

[5] Note [6] to sect 1. The right to proceed is personal to the heir in possession, and the mere delivery of consents does not transmit a title to sue to his representatives if he dies before the court grants authority to record. It would seem, also, that actual recording—that is, completed disentail—would be required to give them any right—Robertson, 10th June 1864, 2 Macph. 1178. The case is excepted in Act 1875, sect. 12 (3).

[6] See a case in which this fact was disputed, and ascertained by declarator—Gordon *v.* Mosse, 11th March, 19th Dec. 1851, 13 D. 954, 14 D. 269. The bracketed words are repealed, Act 1875, sect. 5 (3). The rights of his creditors are defined in this Act, sect. 11, and Act 1882, sect 3. Where the deed of entail provided that, on the expiry of sixty-eight years from its date and the lifetime of the person then in possession, the estate should become fee-simple in the person of the next substitute, the heir in possession at the end of the sixty-eight years was not the only heir of entail in existence for the time—Gardyne, 3d Nov. 1883, 21 Sc. L.R. 56.

[7] As to consents generally, see sect. 50 and note. They may now be given *pendente processu*, Act 1875, sect. 5 (1); and may all be dispensed with on terms, Act 1875, sect. 5; Act 1882, sect. 13.

[8] See Gibb, 29th May 1857, 19 D. 768.

[9] *I.e.*, the date of the first interlocutor—Act 1853, sect. 19.

[10] Defined, sect. 52. Therefore it is not enough to get the consents of the eldest son and his daughter, an only child. See Leith, 1855, in Dunc. p. 217.

[11] Now 21, Act 1875, sect. 4; but see as to consent by a curator *ad litem*, applicable here—Act 1882, sect. 12.

[12] This section, so far as requiring certain consents, is amended by Act 1875, sect. 5,

and Act 1882, sect. 13. They may now be given *pendente processu*; and the consents of all may be dispensed with on certain conditions.

Heir of entail may sell, charge, lease, and feu, with the like consents as enable him to disentail.

4. And be it enacted,[1] that it shall be lawful for any heir of entail, being of full age,[2] and in possession of an entailed estate in Scotland, with such and the like consents as by this Act would enable him to disentail such estate, to sell, alienate, dispone,[3] charge with debts or encumbrances,[4] lease and feu such estate,[5] in whole or in part, and that unconditionally, or subject to conditions, restrictions, and limitations,[6] according to the tenor of such consents, the authority of the Court of Session being always obtained thereto in the form and manner hereinafter provided;[7] and such heir of entail shall be entitled to make and execute, at the sight of the Court, all such deeds of conveyance and other deeds as may be necessary for giving effect to the sales, dispositions, charges, leases, or feus so made and granted.

[1] The greater power of the foregoing sections involves the lesser here bestowed, and it is amended, in a way similar to that described in last note, by Act 1875, sect 6, and Act 1882, sect. 4, which latter section applies the provisions of sect. 3, *supra*, to new entails as regards these minor powers.

[2] The application may now be made by a minor with consent of his curators, by tutors for a pupil, or by a curator or other administrator for one otherwise incapacitated; but the court must then be satisfied that the application is for the benefit of the heir in possession—Act 1882, sect. 11.

[3] Contrast this general power with those of the Rosebery Act, *supra*, p. 904, and of sect. 25 of this Act, and sects. 9, 10 of Act 1868, and with the ampler powers of sale contained in Act 1882, sect. 19 *et seq.* It may be doubted if the last-recited section of the Act of 1868 applies to sales under the present power the same restriction of mode as in the Rosebery Act, sect. 8; so that there is nothing to hinder sale by private bargain, though it is usually carried through by public roup.

[4] Contrast this general power with the special powers of sects. 18 and 21. See a case of exercise of this general power in Nairne, 11th March 1851, 13 D. 956.

[5] Contrast with this general power the special powers in the Montgomery Act, *supra*, p. 882, the Rosebery Act, *supra*, p. 901, and the Act 1882, sects. 8 and 9, to lease: and those of this Act, sect. 24; Act 1853, sect. 6; Act 1868, sects. 3-5; and Act 1882, sects. 4-6, to feu or lease. These amendments get over the cumbrous procedure in Campbell, 4th July 1850, 13 D. 42; Cleland, 15th July 1852, 24 Sc. Jur. 628. Query, Does Act 1853, sect. 6, apply to this power as its general words seem to indicate, or only to the powers given by sect. 24?

[6] The Court will not interfere with these conditions, unless they are outrageous—Macdonald *v.* Lindsay, 21st Feb. 1857, 19 D. 506, 511.

[7] Sect. 33 *et seq.*

Heir of entail under existing entail may excamb, with certain consents.

5. And be it enacted,[1] that it shall be lawful for any heir of entail, being of full age, and in possession of an entailed estate in Scotland holden by him by virtue of any tailzie [dated prior to the said first day of August one thousand eight hundred and forty-eight,][2] with the consent[3] of the whole heirs of entail if there be less than three in being at the date of such consents and at the date of presenting application[4] for the authority of the Court as after mentioned, or otherwise with the consent of the three nearest heirs who at the said dates are for the time entitled to succeed to such estate in their order successively immediately after such heir in possession, or otherwise with the consent of the heir apparent under the entail, and of the heir or heirs, in number not less than two, including such heir apparent, who in order successively would be heir apparent,[5] to excamb such estate, in whole or in part, the authority of the Court of Session being always obtained thereto in the form and manner herein-after provided, and such heir of entail in posses-

sion shall be entitled to make and execute, at the sight of the Court, all such contracts of excambion and other deeds as may be necessary in order to give effect to such excambions, by the substitution of the lands to be acquired in the room and place in all respects of the lands to be disponed.[6]

[1] Contrast this general power with the special powers of the Montgomery Act, *supra*, p. 892; and Rosebery Act, *supra*, p. 901; and the amendment of the latter by sect. 37 of this Act.

[2] Repealed Act 1868, sect. 18.

[3] All the consents may be dispensed with—Act 1875, sect. 5; Act 1882, sect. 13.

[4] Hamilton, 26th Jan. 1867, 5 Macph. 324.

[5] The proviso at the end of sect. 3 is not here added; so that the next heir need not be of age—Burton, 27th Feb. 1851, 13 D. 955.

[6] This section applies to all trusts of whatever date under which land is held for the purpose of being entailed, Act 1868, sect. 18.

Provision for disclosure of entailer's debts which affect the estate disentailed.

6. And be it enacted,[1] that where any heir of entail in possession of an entailed estate in Scotland shall apply to the Court of Session under this Act in order to disentail such estate, in whole or in part, or to sell, alienate, dispone, charge with debts or encumbrances,[2] lease, feu, or excamb the same or any part thereof, he shall make and produce in such application an affidavit setting forth that there are no entailer's debts or other debts, and no provisions to husbands, widows, or children, affecting or that may be made to affect the fee[3] of the said entailed estate or the heirs of entail, or, if there are such debts or provisions, setting forth the particulars of the same, with the amounts thereof respectively, principal, interest, and expenses, and the vouchers by which the same are instructed, and the names, designations, and residences of the parties in right of the same; and the Court shall not proceed with such application until such affidavit is lodged; and, if the Court shall see cause, intimation of such application may be ordered to be made to the parties in right of the said debts or provisions or any of them, with a view to such parties appearing for their interest, if they shall see fit; and it shall be lawful for the Court to order such provision as may appear just to be made for such debts or provisions, or for the protection of the parties in right of the same, before granting the authority sought for in such application, or as the condition of granting the same; and any person who shall wilfully make such affidavit falsely shall be deemed to be guilty of perjury, and be punishable accordingly.[4]

[1] Amended by Act 1853, sect. 17, defining the meaning attachable to the affidavit, and allowing of its being produced *pendente processu*; and superseded by Act 1875, sect. 12 (5). See Kinnaird, 29th May 1849, 21 Sc. Jur. 406; Stewart, 22d June 1849, 11 D. 1191; and Crawfurd, *infra*. Cf. the schedule required in selling the estate, Act 1882, sect. 20.

[2] The section does not seem to apply to sect. 15; see Dunc. p. 230, and cases there; nor to sect. 26—E. Glasgow, 20th July 1855, 17 D. 1140.

[3] Whether the heir in possession be debtor or creditor in the debt—Crawfurd, 2d March 1853, 15 D. 456. A marriage-contract provision for children, by an heiress of entail at the date of the affidavit childless and past child-bearing, does not require to be entered—Primrose, 7th Feb. 1850, 22 Sc. Jur. 420.

[4] The ordinary rules seem to apply to the taking of affidavits both within and furth of Scotland. See Kerr *v.* Ms. Ailsa, 1851 and 1852, 14 D. 240, 865, affd. 1 Macq. 736; Shirrefs, Dunc. 306; and see Mr Duncan's chapter on the subject, p. 233.

Creditors in entailer's

7. And be it enacted, that any party in right of an entailer's debt or of any other debt, or of any provision to a husband, widow, or younger

debts, &c., using inhibition not to be affected by instrument of disentail.

child, affecting or that may be made to affect the fee of any entailed estate in Scotland, and who before the expiry of one year from the date of recording an instrument of disentail of such estate in the register of tailzies shall use and record inhibition in reference to such debt against the heir of entail in possession of such estate for the time, shall be entitled to affect such estate in respect of such debt or provision as if no such instrument of disentail had been recorded as aforesaid, and no debt or charge on such estate, or right whatsoever therein, which would not have competed with such debt or provision had such instrument of disentail not been recorded, shall be allowed to compete therewith by reason of the recording of such instrument of disentail.

Settlements by marriage contract not to be disappointed.

8. And be it enacted, that where any heir of entail in possession of an entailed estate in Scotland holden by virtue of any tailzie dated prior to the said first day of August one thousand eight hundred and forty-eight, or the heir apparent to such estate, shall, together or separately, have secured by obligation in any marriage contract the descent of such estate upon the issue of the marriage in reference to which such contract is entered into, it shall not be competent for such heir of entail in possession, or heir apparent, or either of them, to apply for or to consent to the disentail of such estate, until there shall be born a child of such marriage capable of taking the estate in terms of such contract, and who, by himself or his guardian, shall consent to such disentail,[1] or until such marriage shall be dissolved without such child being born, unless the trustee or trustees named in such contract, or the party or parties at whose sight the provisions of the contract are directed to be carried into execution, shall concur in such application or consent.

[1] Maxwell, 27th Feb. 1857, 19 D. 571. The section is followed in Act 1882, sect. 17, which applies to all entails.

Heirs of entail not to give consent in opposition to creditors in debts now existing.

9. And be it enacted,[1] that where any heir of entail called to the succession of an entailed estate in Scotland by any tailzie dated prior to the said first day of August one thousand eight hundred and forty-eight shall have borrowed money previous to the passing of this Act on the security or credit of his right of succession to or interest in such entailed estate, such heir shall not be entitled to give consent to any application under this Act which shall be opposed by any creditor to whom such heir stands indebted in respect of money borrowed as aforesaid, and who shall either hold infeftment in the entailed estate, duly recorded, in security of his said debt, or shall enter appearance, and prove the same, in the course of the proceedings under such application: Provided always, that it shall be competent to the Court of Session, if, with reference to any offer of adequate security, or otherwise in the circumstances, it shall deem the opposition on the part of such creditor to be unreasonable, to disallow the same, and to give effect to the consent of such heir.

[1] See the supplementary provision regarding bonds of annuity, and bonds and dispositions in security, Act 1853, sect. 20; cases in note to next section; and the adaptation of these provisions to the new law of dispensing with all consents, by Act 1882, sect. 13.

Heir apparent not to give

10. And be it enacted,[1] that where any heir apparent[2] of an entailed estate in Scotland under a tailzie dated prior to the said first day of

August one thousand eight hundred and forty-eight shall subsequent to the passing of this Act borrow money on the security or credit of his right of succession to or interest[3] in such entailed estate, such heir apparent shall not be entitled to give consent to any application under this Act, except under the like circumstances as would have enabled him to give consent, and to have his consent allowed, had such money been borrowed previous to the passing of this Act;[4] but the consents of the other heirs substitute shall be given and allowed independently of the rights of any such creditors.

consent in opposition to his creditors.

[1] See note to last section and the similar supplementary provisions as to bonds of annuity, and bonds and dispositions in security, Act 1853, sect. 21.

[2] Defined, sect. 52.

[3] Only when this is *pars contractus*—Hepburn *v.* Davis, 16th July 1868, 6 Macph. 1094; and a simple personal debt is not improved in this respect by inhibition prior to the proceedings for which consent is required—ibid.

[4] The 'adequate security' mentioned in sect. 9, and here incorporated, is illustrated by undertakings which rendered the opposition of creditors to a petition to charge debt 'unreasonable,' in Hepburn *v.* Justice; Id. *v.* Semple, 19th June 1868, 6 Macph. 929, 930.

11. And be it enacted, that any creditor of an heir of entail in possession of an entailed estate in Scotland who is by this Act empowered by himself alone, without the consent of any other party, to acquire such estate in fee simple, by executing and recording an instrument of disentail as aforesaid, shall be entitled to affect such estate for payment of debt, and have the same rights and interests therein as if such instrument of disentail had been duly executed and recorded, albeit such heir in possession may not have duly executed and recorded such instrument of disentail.

Creditor of an heir empowered to disentail may affect the estate for payment of his debt.[1]

[1] This is extended to all cases (to new entails and wherever no consents are required) by Act 1882, sect. 3. See the further extensive powers of creditors in Act 1882, sect. 18.

[**12.** And whereas an Act was passed in the tenth year of the reign of his Majesty King George the Third, intituled *An Act to encourage the Improvement of Lands, Tenements, and Hereditaments in that Part of Great Britain called Scotland held under Settlements of strict Entail;* and another Act was passed in the fifth year of the reign of his Majesty King George the Fourth, intituled *An Act to authorise the Proprietors of entailed Estates in Scotland to grant Provisions to the Wives or Husbands and Children of such Proprietors;* be it enacted, that neither of the two last recited Acts shall be applicable to any tailzie dated on or after the first day of August one thousand eight hundred and forty-eight.]

[Acts 10 Geo. 3. c. 51, and 5 Geo. 4. c. 87, not to apply to future tailzies.][1]

[1] First relaxed, Act 1853, sect. 12; and then repealed, Act 1868, sect. 8.

13. And be it enacted,[1] that where an heir of entail in possession of an entailed estate[2] holden by virtue of any tailzie dated prior to the said first day of August one thousand eight hundred and forty-eight shall have executed improvements on such estate previous to the passing of this Act,[3] and shall have obtained decree for three fourth parts of the sums expended thereon, in terms of the said recited Act of the tenth year of the reign of his Majesty King George the Third,[4] and shall also have obtained the authority of the Court of Session as after mentioned, it shall

Heir having obtained decree for expense of improvements may grant bond of annual rent.

be lawful for such heir to execute, in favour of any party he may think fit, a bond of annual rent in ordinary form over such entailed estate or any portion thereof, binding himself and his heirs of tailzie to make payment of an annual rent during the period of his own life,[5] and twenty-five years thereafter, such annual rent during his own life not exceeding the legal interest of the said three fourth parts[6] of the sums expended as aforesaid, and during the twenty-five years after his decease not exceeding the sum of seven pounds two shillings for every one hundred pounds of such three fourth parts as aforesaid, and so in proportion for any greater or less sum, and such annual rent being payable by equal moieties half-yearly at the terms of Whitsunday and Martinmas, beginning the first term's payment at the first term of Whitsunday or Martinmas after the date of the bond, for the proportion of annual rent then due, with legal interest, and penalties in case of failure.

[1] This, and the following sections, 14-19, relate to the securing of outlay for Montgomery improvements. Instead of the rent-charge of that Act, originating only on the death of the disburser (*supra*, p. 885), the disburser may here grant bond of annual rent, so as to wipe off the debt 25 years after his death, in case of old improvements, sect. 13; and 25 years after the date of the decree of constitution, in case of new improvements, sect. 14. In both cases the claim is set up during his lifetime. There is next an alternative mode, by charging the fee with a bond and disposition in security, sect. 19. And similar remedies are given to the executors or assignees of the disburser, sect. 15. Again, sects. 13 and 14 apply to cases in which decree under the Montgomery Act has been obtained; sect. 16 to cases in which it has not. The scope of improvements has been extended and borrowing powers granted by Act 1875, sects. 3, 7-9, 11; Act 1878, sect. 3; Act 1882, sects. 5-6. These new modes of discharging an improvement debt are alternative to that of the Montgomery Act, which is held to be abandoned *in toto* on their being adopted—Breadalbane's Trs. *v.* Campbell, 6th June 1866, 4 Macph. 775, revd. 6 Macph. H.L. 43.

[2] Being the disburser—Munro, 28th Nov. 1849, 12 D. 213; though the title may be in trustees—Fleeming, 1851, Dunc. p. 361.

[3] 14th August 1848.

[4] Sect. 26, *supra*, p. 890.

[5] Not joint lives and that of survivor—Craufurds, 1850, Dunc. 356.

[6] Cf. sect. 14.

Heir in future expending money in improvements may grant bond of annual rent.

14. And be it enacted,[1] that where any heir of entail in possession of an entailed estate [holden by virtue of any tailzie dated prior to the said first day of August one thousand eight hundred and forty-eight][2] shall execute improvements on such estate subsequent to the passing of this Act, and obtain decree for three fourth parts of the sums expended thereon, in terms of the said recited Act of the tenth year of the reign of his Majesty King George the Third, and shall also obtain the authority of the Court as after mentioned, it shall be lawful for such heir of entail to execute, in favour of any party he may think fit, a bond of annual rent in ordinary form over such entailed estate or any portion thereof, binding himself and his heirs of tailzie to make payment of an annual rent during the period of twenty-five years from and after the date of such decree, or during such part of the said period of twenty-five years as may remain unexpired at the date of such bond, such annual rent not exceeding the sum of seven pounds two shillings for every one hundred pounds of the whole[3] of the sums expended as aforesaid, and so in proportion for any greater or less sum, and being payable half-yearly by equal moieties at the terms of Whitsunday and Martinmas, beginning the first term's payment at the first term of Whitsunday or Martinmas after the

date of the bond, for the proportion of annual rent then due, with legal interest, and penalties in case of failure.

[1] See the foregoing section.
[2] Deleted. Act 1882, sect. 4.
[3] Not merely three-fourths, as in the foregoing section—Gordon, 7th July 1851, 14 D. 15. If there be an unexhausted balance left over, uncharged by former proceedings under this section or sect. 18 or 26, it may still be brought under this section—E. Kintore, 31st Jan. 1857, 19 D. 343; E. Eglinton, 31st Jan. 1857, 19 D. 346. There is no restriction by 'free rent'—see note [5] to sect. 16.

Executor may call on heir in possession to grant bond of annual rent.

15. And be it enacted, that where any heir of entail in possession of an entailed estate in Scotland shall have executed improvements on such estate prior to the passing of this Act, and recorded the same in terms of the said last-recited Act, and died without having executed a bond of annual rent as herein-before authorised, or having charged the estate as herein-after authorised, and where decree shall have been obtained, in terms of the said last-recited Act, for three fourth parts of the sums expended thereon, it shall be lawful for the executor or personal representative of such heir of entail, or for any party to whom such heir may have conveyed or assigned such debt, to make application by summary petition to the Court of Session, praying the Court to decern and ordain the heir in possession of such entailed estate to execute, in favour of any party such petitioner may think fit, a bond of annual rent[1] in ordinary form over such entailed estate or any portion thereof, binding himself and his heirs of tailzie to make payment of an annual rent during the period of twenty-five years from the date of the death of the heir of entail who shall have executed the improvements, such annual rent not exceeding the sum of seven pounds two shillings for every one hundred pounds of such three fourth parts aforesaid, and so in proportion for any greater or less sum, and such annual rent being payable half-yearly by equal moieties at the terms of Whitsunday and Martinmas, beginning the first term's payment, notwithstanding the date of such bond of annual rent, at the first term of Whitsunday or Martinmas after the date of the death of the heir of entail who shall have executed the improvements, for the proportion of annual rent then due, with legal interest, and penalties in case of failure, which bond such heir of entail in possession shall be bound to execute accordingly at the sight of the Court: Provided always, that the heir of entail in possession required to grant and granting such bond shall be entitled to impute towards payment of the sums thereby due any excess of sums which may have been paid by or recovered from him in payment of the said improvement debt beyond the amount of annual rents due from and after the decease of the heir who shall have executed such improvements.[2]

[1] Or bond and disposition in security, sect. 18—Murray's Assignees, 8th June 1850, 13 D. 41; Ramsay, 1853, Dunc. 383; Lockhart, 2d July 1852, 24 Sc. Jur. 587; Sinclair, 6 Mar. 1857, 19 D. 660. But the option rests not with the heir in possession, but with the executors or assignees—Nasmyth's Exrs. *v.* Nasmyth, 30th June 1877, 4 Ret. 973.
[2] Where a petition was brought under this section by an heir of entail in possession, the defect in the instance was cured by the actual creditors getting themselves sisted as petitioners. The claim is for the sum constituted without deducting the third part of the rents which, under the Montgomery Act, would have been deducted, as not having been recovered from an heir possessing between the disburser and the heir called on to charge—Dalrymple, Dickson, 10th Jan. 1862, 24 D. 288, 291.

Proceedings where improvements not executed in terms of 10 Geo. 3.

16. And be it enacted,[1] that where an heir of entail in possession of any entailed estate holden by virtue of any tailzie [dated prior to the said first day of August one thousand eight hundred and forty-eight][2] shall, whether prior or subsequent to the passing of this Act,[3] have executed improvements on such estate of the nature of the improvements contemplated by the said last-recited Act, but shall not have obtained decree therefor in terms of the said Act, by reason of the provisions thereof not having been adopted or not having been duly complied with, it shall be lawful for such heir to apply by summary petition to the Court in manner herein-after provided,[4] setting forth such improvements, and the amount of money, not exceeding the amount authorised by the said Act,[5] expended thereon, and praying the Court for authority to grant bond of annual rent[6] as is herein-before provided in the case of improvements for which decree in terms of the said Act has been obtained;[7] and the Court shall, after such proceedings as they may think fit to direct or to adopt, proceed to consider such application, and to take such evidence,[8] and institute such inquiry into the facts alleged in such petition, as they shall judge necessary; and if it shall appear to the Court that such improvements are of the nature contemplated by the said Act, and that such expenditure was *bonâ fide* made, they shall find accordingly, and shall also grant warrant for execution of a bond of annual rent as herein provided in the cases of improvements for which decree in terms of the said Act has been obtained.[9]

[1] See Montgomery Act, sect. 26, and notes, *supra*, p. 890; Farquharson, 16th Feb. 1849, 11 D. 649.

[2] The bracketed part is repealed, Act 1868, sect. 18.

[3] These may be brought up in the same petition—D. Athole, 3d July 1855, 17 D. 1015; Lawrie, 6th July 1855, 27 Sc. Jur. 245; E. Kintore, 19th Jan. 1857, 19 D. 343.

[4] Sect. 33 *et seq.*

[5] Whatever this means, it does not mean any restriction by free rent, as in said Act, sects. 10, 28, since the date there mentioned is that of the disburser's death—Hamilton, 11th March 1857, 19 D. 723; Mosman, 25th Jan. 1867, 5 Macph. 303.

[6] Or bond and disposition, sect. 18.

[7] *I.e.*, under sect. 13 or sect. 14, as the case may be.

[8] By remit to men of skill.

[9] This section applies to all trusts of whatever date under which land is held for the purpose of being entailed—Act 1868, sect. 18.

No adjudication for annual rent.

Annual rent, how to be recovered.

Annual rent to be kept down.

17. And be it enacted,[1] that so long as any entailed estate remains subject to the tailzie thereof, or is not liable to be disentailed by the heir of entail in possession without the consent of any other party, no bond of annual rent to be granted under the authority of this Act shall be made the ground of adjudication or eviction of such entailed estate or any part thereof; and the annual rents contained in such bond shall be recoverable as accords of law from and out of the rents and profits of such entailed estate, and from the heir in possession thereof for the time being: Provided always, that the heir in possession of any such entailed estate, and the heirs substitute to him, shall be bound, each during his own possession, yearly and each year to pay and keep down such annual rents accruing during their respective possessions of such entailed estate; and no remedy shall be competent to the creditor in such bond of annual rent against the rents and profits of the said estate for any arrears beyond

two years annual rent, and interest thereon, and corresponding penalties; without prejudice to his remedy for such arrears against the heirs in possession respectively bound to pay and keep down the same, and against the representatives of such heirs, and the separate estates of such heirs, including the rents of such entailed estate during their respective periods of possession.

[1] Cf. sect. 22.

Heir of entail may charge estates by granting bond and disposition in security.

18. And be it enacted, that in all cases in which it may be competent[1] for an heir of entail in possession of an entailed estate in Scotland, or in which such heir of entail may be called upon[2] to grant a bond of annual rent in terms of this Act, it shall be lawful for such heir of entail, and such heir of entail may be called upon, to charge under the authority of the Court of Session, as after mentioned, the fee and rents of such estate other than the mansion house, offices, and policies thereof, or the fee and rents of any portion of such estate other than as aforesaid, with two third[3] parts of the sum on which the amount of such bond of annual rent if granted would be calculated in terms of this Act, by granting, in favour of any creditor who may advance the amount of such two third parts, bond and disposition in security over such estate or any portion thereof other than as aforesaid for such amount, with the due and legal interest thereof from the date of such advance till repaid, and with corresponding penalties; and such bond and disposition in security may be in the like form, and shall have the like effect and operation, and be subject to the like conditions and provisions as to keeping down interest, and as to the extent of remedy against the fee and rents of the entailed estate, and otherwise, as are herein-after made and provided in regard to bonds and dispositions in security by this Act authorised to be granted in respect of provisions to younger children.[4]

[1] Sects. 13, 14, 16, *q.v.*

[2] Sect. 15, *q.v.* See further enactments in Act 1875, sects. 7-9, 11; Act 1878, sect. 3, which, *inter alia*, provide for substituting the permanent form of security for the other.

[3] Now three fourth; and where one-fourth of a sum borrowed on rent-charge has been defrayed by the heir, he may substitute a bond and disposition in security for the remainder, Act 1882, sect. 6 (1, 4).

[4] Sect. 21; with power of sale, Act 1853, sect. 23. See a case under sect. 4 hereof, in which the heir's personal obligation was found necessary—Gammell, 16th July 1856, 18 D. 1297.

Bonds of annual rent or of dispositions in security for improvements to operate as discharges.

19. And be it enacted, that the granting under the authority of this Act of any bond of annual rent, or bond and disposition in security, in respect of any improvements executed or to be executed on an entailed estate in Scotland, shall operate as a discharge of all claims for or on account of such improvements, against such estate, and the rents and profits thereof, and the heirs of entail succeeding thereto, save and except the claims under such bond of annual rent or bond and disposition in security themselves.[1]

[1] See Breadalbane's Trs. *v.* Campbell, *supra*, note [1] to sect. 13.

Private roads to be deemed improvements under 10 Geo.

20. And be it enacted, that private roads which shall from and after the first day of August one thousand eight hundred and forty-eight be made through any entailed estate, or by way of immediate access thereto,

3. c. 51, and under this Act.[1]

may be deemed to be improvements falling under the said recited Act passed in the tenth year of the reign of his late Majesty King George the Third and also under this Act, in the same way and manner in all respects as enclosing, planting, and draining.

[1] Supplementary to Montgomery Act, sect. 9; see note thereto, *supra*, p. 885. Cf. Act 1875, sect. 3 (5).

Provisions to younger children may be made charges upon the entailed estate.

21. And be it enacted,[1] that in all cases where an heir of entail in possession of an entailed estate in Scotland shall be liable to pay or to provide by assignation of the rents and proceeds of such estate for any sum or sums of money granted by any former heir of entail by way of provisions to younger children, in terms of the said recited Act passed in the fifth year of the reign of his Majesty King George the Fourth,[2] or in virtue of the powers to that effect contained in any deed of entail[3] under which the heir of entail in possession holds, and in all cases where any heir of entail in possession as aforesaid shall in the marriage contract of his younger child have validly granted provision for such younger child out of the rents and proceeds of such entailed estate, in terms of the said recited Act,[4] or in terms of such deed of entail, it shall be lawful for such heir of entail in possession[5] to charge the fee and rents of such estate other than the mansion house, offices, and policies thereof, or to charge the fee and rents of any portion of such estate other than as aforesaid, with the amount of such provisions, by granting bond and disposition in security[6] over such estate, or such portion thereof other than as aforesaid,[7] for such amount, with the due and legal interest thereof from the date of such bond and disposition in security, or any subsequent date, till repaid, and with corresponding penalties; and such bond and disposition in security may be in ordinary form, binding the granter and his heirs of entail in their order successively to repay the principal sum therein, with interest and penalties as aforesaid, and may contain all clauses usual in bonds and dispositions in security granted over estates in Scotland held in fee simple.[8]

[1] This and the two following sections allow of charging children's provisions on the fee of the estate. They thus let in the powers of sale in sect. 25; and give a better remedy than the rent-charge of the Aberdeen Act, sect. 4, *supra*, p. 896. As there noticed, there are further enactments for the benefit of children of heirs-apparent and for representation in Act 1868, sect. 6; 1875, sect. 10. Cf. also the general power in sect. 4 of this Act. As to trust money, see this Act, sect. 29, and Act 1868, sect. 8. The charge may be transferred to another estate destined to the same heirs—Act 1882, sect. 10.

[2] *Supra*, p. 896, sect. 4.

[3] Text, *supra*, p. 589. The section does not apply if inconsistent with these special powers—Campbell, 26th Jan. 1854, 16 D. 396; Baillie, 1852, Dunc. 339. Cf. Seymer, 29th Jan. 1859, 21 D. 361. Campbell's case was doubted, and distinguished from a case of permanent burden in which the provision was payable by instalments of 10 per cent, together with interest due at the time; the section applied—Hope Johnstone, 27th Nov. 1880, 8 Ret. 160.

[4] *Supra*, p. 896, sects. 2, 3, notes.

[5] Before 1882 tutors of a pupil could not apply—Muirhead, 4th July 1849, 11 D. 1249; though *semble*, a minor, with consent of his curators, might—see cases in Dunc. p. 36; but application may now be made on behalf of all persons under disability—Act 1882, sect. 11.

[6] Cf. sect. 18, *supra*.

[7] Either to the 'younger child, or any other party in right of such provision; or to 'any party or parties advancing the amount thereof in order to the payment of such 'younger child,' Act 1853, sect. 7. Cf. E. Airlie, 20th July 1852, 14 D. 1063 (a case

in which there were three estates burdened each with separate Aberdeen provisions); Robertson, 13th July 1872, 10 Macph. 966.

[8] As to power of sale, see Act 1853, sect. 23. All the bonds must be of even date, and, if one of the provisees has died without representatives, a judicial factor will be appointed—Lauder *v.* Lauder's Trs., 19th July 1851, 14 D. 14.

Heir in possession to keep down the interest on provisions to children.

22. And be it enacted,[1] that such heir of entail in possession, and the heirs substitute to him in their order successively, shall be bound, each during his own possession of such estate, yearly and each year, to pay and keep down the interest on such bonds and dispositions in security accruing during their possession respectively of such entailed estate; and the remedy competent to the creditor against the fee and rents of such estate on such bonds and dispositions in security shall be limited to the principal sum therein contained, with two years' interest thereon, and corresponding penalties; without prejudice to the remedy of the creditor for any further arrears of interest against the heir or heirs in possession bound to pay and keep down the same, and against his or their representatives, or his or their separate estate or estates, including the rents of the said entailed estate during his or their possession of the same.

[1] Cf. sect. 17.

Provisions to children not to be charged without authority of Court.

23. And be it enacted, that no heir of entail in possession of an entailed estate shall charge the same under this Act with any provision to any younger child or children until he shall have applied for and obtained the authority of the Court thereto in the form and manner herein-after provided;[1] and such application to the Court shall set forth in a schedule[2] to be annexed thereto the specific portion of the estate which it is proposed to include in such bonds and dispositions in security.

[1] Sect. 33 *et seq.*

[2] This is unnecessary when the whole estate, except the mansion-house, &c., is embraced—Gollan, 28th Feb. 1851, 13 D. 956.

Power to grant feus or long leases.

24. And be it enacted,[1] that, notwithstanding any prohibitory, irritant, and resolutive clauses, or any limitation by way of maximum or minimum of the extent of ground to be feued or to be granted in each separate feu, contained in any tailzie dated prior to the first day of August one thousand eight hundred and forty-eight,[2] it shall be lawful for an heir[3] of entail in possession of an entailed estate in Scotland, upon notice to the heir of entail next entitled to succeed to such estate immediately after such heir of entail in possession with the approbation of the Court, to be obtained in the form and manner herein-after provided, to grant feus or long leases of any part of the said entailed estate for the highest feu-duty or rent that can be got for the same,[4] such feus or long leases[5] so granted by him not exceeding in all one eighth part in value for the time of such estate; provided always, that it shall not be lawful for such heir to take any grassum or fine or valuable consideration other than the tack duty or rent for granting any such feu or lease, nor to grant any such feu or lease of the mansion house, offices, or policies of the estate; and such heir shall be entitled to make, at the sight of the Court, all such feu charters or other feu rights, or tacks or leases, as shall be necessary; and in case any such grassum, fine, or consideration shall be taken, and in case any feu or lease hereby prohibited shall be granted,

such feu or lease shall be null and void; but nothing herein contained shall prevent or be construed to prevent any heir of entail in possession from exercising any power of granting feus or leases which may be contained in the tailzie under which he possesses, more extensive than the power of granting feus or leases hereby conferred.

[1] See note [4] to sect. 4. On feuing, the text, *supra*, p. 583. On leases, the text, *supra*, p. 586; Montgomery Act, *supra*, p. 882; and Rosebery Act, *supra*, p. 894. On both, see the amendments on the present section in Act 1853, sect. 6, permitting continuing petitions; and in Act 1868, sects. 3-5, by which powers to feu and lease, unlimited as to area, may be obtained from the sheriff. All applications for authority to grant leases may now come before the sheriff, Act 1882, sect. 5. The statutes authorising feuing and leasing for churches, schools, scientific or public purposes, are cited in the text, p. 585. Authority once granted is now available to succeeding heirs—Act 1882, sect. 6 (3).

[2] As to new entails, see Act 1853, sect. 13.

[3] Formerly, not being a pupil or his guardian—Boyle, 19th Feb. 1853, 15 D. 420; but now applications may be made by or on behalf of all persons under disability, Act 1882, sect. 11. An heir in possession and infeft, pending an appeal in a competition of service, may apply, and the competitor cannot prevent him—Livingstone *v.* Fenton, 8th July 1858, 20 D. 1231. The heir in possession is the proper petitioner, though he has sold his life-interest—Gordon *v.* P. Albert, 28th Nov. 1851, 14 D. 114. He must be infeft, at least in the parts to which the petition relates—E. Stair, 1852, 1 Stuart, 578.

[4] Not necessarily by public roup—Hastings, 13th July 1849, 12 D. 918.

[5] It has been decided that this term means longer than ordinary leases of the kind of subject let, or than what is allowed by the entail; and that it applies to a lease of land out and out, whose only value was for sporting purposes, *sed quære*. Lord Deas thought the leases meant must be similar to feus, substantially conveying the rights of ownership—*e.g.*, building leases—Farquharson *v.* Farquharson, 3d Nov. 1870, 9 Macph. 66; see Act. 1853, sect. 13. As to feuing with a privilege of water-supply, see Stewart *v.* Steuart, 5th July 1877, 4 Ret. 981; 8th Nov. 1878, 6 Ret. 145.

Where entailed estate may be charged with debt, estate may be sold for payment thereof.

25. And be it enacted,[1] that in all cases in which it is made competent by this Act for any heir of entail in possession[2] of an entailed estate in Scotland to charge the same with debt, by granting bonds and dispositions in security[3] therefor over such estate, freed from all the clauses prohibitory, irritant, and resolutive contained in the tailzie in virtue whereof such estate is holden, and also in all cases in which such charge is made competent by an Act of Parliament,[4] but no power of sale granted to the heir of entail, and in all cases in which the fee of an entailed estate is validly charged with debt,[5] it shall be lawful for the heir of entail in possession for the time being to sell and dispose of any portion or portions[6] of such estate, other than the mansion house, offices, and policies thereof, which may be necessary, and which the Court of Session may select as most suitable and proper to be sold and disposed of for the purpose of paying off the debt in respect of which such charge has been or might be competently made;[7] and it shall be lawful for such heir of entail in possession to grant, at the sight and under authority of the Court,[8] valid and effectual dispositions in fee simple in ordinary form of such portion or portions of the said estate, to the purchaser thereof, and his heirs or assignees; and the price to be obtained for the portion or portions of the estate to be so sold shall be previously approved of by the Court, and shall be paid into court, under the application for sale, by the purchaser, who shall by such payment be fully discharged of such price, and have no interest, concern, or responsibility as to the application thereof; and such price shall be applied, at the

sight of the Court, in or towards payment or extinction of the said debt; and the surplus of such price[9] remaining after payment of the said debt, and of the expenses attending the application for sale and procedure thereon, shall, if more than two hundred pounds, be invested in other lands or heritages, to be added to the remainder of such entailed estate, or be laid out and expended in or towards payment of entailer's debts, or in or towards payment of any money charged on the fee of such entailed estate under this or any other Act, or in redemption of the land tax affecting such entailed estate, or in permanently improving the same, or in repayment of money already expended in such improvements, as may be deemed most advisable;[10] and if such surplus shall be invested in other lands or heritages, to be added to the remainder of such entailed estate, the tailzie of such other lands or heritages shall, whatever be its actual date, be taken to be of equal date with the tailzie of the remainder of such entailed estate,[11] and if such surplus be less than two hundred pounds, the same shall be paid to the heir of entail in possession of such entailed estate for the time, for his own use and behoof, all at the sight and under the direction of the Court of Session.[12]

[1] Cf. this special power with the general power of sale in sect. 4, and with the ampler power conferred by Act 1882, sect. 19 *et seq.* Further special powers are contained in Act 1853, sect. 9, and Act 1868, sects. 9, 10, 11.

[2] Whether under disability or not (through tutor, curator, or other administrator), Act 1882, sect. 11. As to the *curator bonis* of a lunatic, see Lawson *v.* Lawson, 20th Feb. 1863, 1 Macph. 424, 2 Macph. 1422.

[3] Sects. 18, 21.

[4] See text, p. 582, and case (of a private Act of this sort) in which power of sale was given under this section—Mackenzie, 7th June 1849, 11 D. 1115; and see Act 1853, sect. 10.

[5] *E.g.*, contracted before the entail was recorded; and entailer's debts. As to what these are, see Fraser *v.* L. Lovat, 1875, H.L. 12 Sc. L.R. 399. This section, therefore, relates to the same matters as the latter part of the Rosebery Act (see *supra*, p. 904, note to sect. 7 thereof), and has practically superseded it.

[6] Not necessarily the portion actually burdened with the debt—Erskine, 13th June 1850, 13 D. 41. As to the mode of sale, see Act 1868, sects. 9, 10.

[7] Not merely a personal debt of the entailer; it had first to be made real—Erskine, 6th Feb. 1852, 14 D. 766. This is altered by 1853, sect. 9.

[8] The application requires no consents—Riddell, 13th July 1853, 15 D. 904.

[9] Not the interest, since that goes to the heir as *surrogatum* for the use of the estate—see Dunc. p. 25. The interest on the debt is taken out of the price, as also the expenses of process—Riddell, 17th Jan. 1857, 19 D. 282.

[10] See the cases on similar terms in next section.

[11] The destination may be incorporated in the deed by reference to it, as set forth in the original tailzie, Act 1853, sect. 11.

[12] See similar provisions in sect. 30.

Money arising from sale of estate, and trust money, may be applied in payment of entailer's debts, &c.

26. And be it enacted, that in all cases where money has been derived or may hereafter be derived from the sale or disposal of any portion of an entailed estate in Scotland, or of any right or interest in or concerning the same, or in respect of any permanent damage done to such estate, under any private or other Act of Parliament,[1] or where any money has been invested in trust for the purpose of purchasing lands to be settled upon the series of heirs entitled to succeed to such entailed estate,[2] and where such money would fall to be invested in lands or heritages to be entailed on the same series of heirs as are called to the succession of such entailed estate by the tailzie thereof, and under the same prohibitions, conditions, restrictions, and limitations as are contained in such

tailzie, and where the heir in possession of such entailed estate[3] could by virtue of this Act acquire to himself such estate in fee simple by executing and recording an instrument of disentail as aforesaid,[4] it shall be lawful for such heir to make summary application to the Court, in manner herein-after provided, for warrant and authority, and the Court upon such application shall have power to grant warrant and authority to and in favour of such heir of entail, for payment to such heir of such sums of money, as belonging to himself in fee simple; but if such heir of entail shall not be entitled to acquire such estate in fee simple, then it shall be lawful for such heir, with the approbation of the Court, to lay out such money or any portion thereof in or towards payment of entailer's debts,[5] or in or towards payment of any money charged on the fee of such entailed estate under this[6] or any other Act, or in redemption of the land tax affecting such entailed estate,[7] or in permanently improving the same, or in repayment of money already expended in such improvements;[8] and in such case such heir[9] shall apply summarily to the Court in manner hereinafter provided, setting forth the amount of the sums proposed to be laid out, and the special purpose to which it is intended to apply the same; and if the Court shall be satisfied of the propriety of the proposed application,[10] they shall issue a finding or decree to that effect, and authorising such application; and it shall thereafter be lawful for the heir so applying to lay out such money or any part thereof, according as the Court shall have authorised the application of the same, to all or any of the before-mentioned purposes; and if there shall be any surplus[11] of such money after the purposes authorised by the decree of the Court shall be fulfilled, the same shall, if more than two hundred pounds, be applied as the whole money would have been applied but for the provisions of this Act, and if less than two hundred pounds shall be paid to the heir of entail in possession of such entailed estate for the time, for his own use and behoof.[12]

[1] See the Lands Clauses Act and notes thereto, sect. 67 *et seq.*, *supra*, p. 834. This section, besides dealing with other than compensation funds, gives two facilities not contained in that Act—viz., for uplifting the fund in fee simple, and for applying it for permanent improvements. These may be either made or to be made at the date of the petition. This section may be used concurrently with and does not exclude the improvement sections, 13-18, *supra*—E. Eglinton, note to sect. 14; Eliott, 1861, 23 D. 882. A useful amendment is introduced by Act 1853, sect. 8.

[2] See sect. 27.

[3] E. Strathmore, 1856, 18 D. 1212, 21 D. 68. Including a pupil—Bute, 1855, 17 D. 378. See case of an heir under trust—Stirling, 1857, 19 D. 767.

[4] Without or with consents, as the case may be; see Graham, 1857, Dunc. p. 203.

[5] See text p. 580, and the Rosebery Act, sect. 9 *et seq.*, *supra*, p. 905. Where, under leases granted by the entailer and her father, the cost of meliorations performed by the tenants was repayable at the ish, this was an entailer's debt, though it became payable during the subsistence of the entail—Hay, 27th June 1879, 6 Ret. 1104.

[6] See sects. 18, 21, 25.

[7] See text, p. 579.

[8] See Act 1875, *infra*, sect. 7 *et seq.* The present enactment covers repayment of improvement expenditure on the part sold—Hay, *supra*, [5]. By it (differing from the Montgomery Act) the whole, not merely three-fourths, of the expenditure may be paid—Fleeming, 17th Feb. 1855, 17 D. 451. Prospective outlay may be taken out of the fund; and 'permanent' are at once more comprehensive and more restricted than Montgomery improvements. 1. The latter are not necessarily 'permanent'—Moncreiffe, 16th July 1858, 20 D. 1264. 2. There are many permanent improvements which are not Montgomery improvements (see *supra*, p. 885), *e.g.*, trenching—Skene, 10th July 1857, 19 D. 964; Gordon, 28th July 1860, 22 D. 1503; embankments—

Stirling, 1852, 24 Sc. Jur. 647. See case of renunciation of a long building-lease being allowed as a permanent improvement—Huntly, 1868, 6 Macph. 553. In regard to improvements on the mansion-house and policies, there seems to be little distinction between the two Acts—see *supra*, p. 891, and Morison, 1847, 9 D. 1394; Muirhead, 1853, 15 D. 517; Carnegie, 1856, 18 D. 323; Munro, 1856, 18 D. 994; Huntly, 1857, 19 D. 818, and cases of Athole there cited; Eglinton, 1857, 19 D. 346; and other cases in Duncan, chap. 13. See as to cottages, note to Act 1868, sect. 12, *infra*.

[9] Being the disburser—Stewart, 1863, 1 Macph. 897; or if Montgomery improvements by a prior heir have been constituted against him—Lockhart, 1852, 24 Sc. Jur. 587. But the fund may have accrued during a prior heir's possession—Leith, 1855, 17 D. 511.

[10] If the fund and the improved land are held by different deeds of entail, the competency of using the one for the other will depend on the identity of the destination still running—Cochrane, 1850, 13 D. 293; Maitland, 1854, 16 D. 651; E. Northesk, 3d Nov. 1882, 10 Ret. 77 (here discrepancies in the destinations were smoothed out). There must be a new petition for a new fund—Buchanan, 1851, Dunc. p. 129. The fund, as in next section, being a *surrogatum* for, is treated as, the entailed land—Panmure, 1853, 2 Stuart, 553, and note to Wauchope, 1855, 17 D. 1031. As to the form of the petition, see sect. 33 and notes. The expenses are not taken out of the fund; but in the case of compensation money they are regulated by the Lands Clauses Act, sect. 79. See notes thereto, p. 840.

[11] This does not apply to the case of a fund originally under £200; there must be an 'application' before there can be a surplus. See case in Dunc. p. 136. As to interest, see same case, and note to last section.

[12] This should be craved specially—D. Athole, 1856, 18 D. 730.

Money vested in trust for the purchase of land to be entailed may be dealt with as if it were the entailed land.

27. And be it enacted, that where any money or other property, real or personal, has been or shall be invested in trust[1] for the purpose of purchasing land[2] to be entailed, or where any land is or shall be directed to be entailed, but the direction has not been carried into effect, it shall be lawful for the party who, if the land had been entailed in terms of the trust, would be the heir in possession of the entailed land, and who in that case might by virtue of this Act have acquired to himself such land in fee simple by executing and recording an instrument of disentail as aforesaid,[3] to make summary application to the Court, as herein-after provided, for warrant and authority for the payment to him of such money, or for the conveyance to him of such land in fee simple; and the Court shall, upon such application, and with such consents, if any, as would have been required to the acquisition of such land in fee simple, have power to grant such warrant and authority.

[1] See an old case in which the heir was trustee, and his creditors were therefore excluded—Paul *v.* M'Leod, 20th May 1828, 6 S. 826.

[2] See a useful relaxation in Act 1853, sect. 8.

[3] See note [4] on similar words in last section; and a case in which an heir being the sole heir, and unmarried, obtained, under sect. 3, the fee-simple of trust-funds—Black, 5th Nov. 1873, 1 Ret. 133.

Date of Act Parliament, &c., directing entail deemed to be the date at which land should have been entailed.

28. And be it enacted, that for the purposes of this Act, the date at which the Act of Parliament, deed, or writing placing such money or other property under trust, or directing such land to be entailed, first came into operation,[1] shall be held to be the date at which the land should have been entailed in terms of the trust, and shall also be held to be the date of any entail to be made hereafter in execution of the trust, whatever be the actual date of such entail.

[1] This, in case of a *mortis causâ* trust, is the death of the testator; and this rule holds, although it was a provision of the deed that the land was to be bought and entailed at a date which actually occurred much later, and though no right whatever vested in the heir till this later date—Black, note [3] to last section. See Dickson, note to next

section ; and cf. the cases as to date of entail in note [3] to section 3. This retrospective date validates a claim for uplifting and applying money in repayment of expenditure on improvements made by the heir when he erroneously believed himself to have a fee-simple right—Fraser *v.* L. Lovat, 24th June 1852, 14 D. 916. See also Hamilton, 14th June 1852, 14 D. 1003. The obtaining of a private Act of Parliament may materially affect the right of parties in other ways than those expressly provided for. Thus, where trustees, proceeding under the powers of such an Act, passed in 1866, sold an entailed estate and with part of the proceeds purchased another estate and entailed it on the same series of heirs, the date of the subsisting entail was held to be, not the date of the old entail, but that of the private Act. The heir in possession was born after 1848 but before 1866, and was thus not entitled to disentail at his own hand (this Act, sects. 1 and 2)—Buchanan, 16th March 1883, 10 Ret. 809.

Provisions to wives and children may be granted out of money vested in trust for the purchase of lands to be entailed.

29. And be it enacted, that where any money or other property, real or personal, has prior to the first day of August one thousand eight hundred and forty-eight been invested in trust for the purpose of purchasing land to be entailed, or where any land has prior to the said date been directed to be entailed, but the direction has not been carried into effect, it shall be lawful for the party who, if the land had been entailed in terms of the trust, would be the heir in possession of the entailed land for the time, to grant provisions in favour of his or her husband or wife and younger children out of such money or other property, or out of such land, as the case may be,[1] of such and the like amount and extent as he or she would have been entitled to grant out of the land if entailed, and if subject to the provisions and enactments of the said recited Act passed in the fifth year of the reign of his Majesty King George the Fourth.

[1] Where the estate was of both sorts, and the date of entailing by the trustees was postponed by the deed till the death of a liferentrix of the money part, and after her death, but before the entail was executed, the heir died, leaving a widow's provision, it was held that the provision was good, and that the heir was heir in possession, at all events after the death of the liferentrix. There was a leaning to the view that the date of the entail was the truster's death—Dickson *v.* Dickson, 8th June 1855, 17 D. 814. See note [6] to Aberdeen Act, sect. 1, *supra*, p. 901. The limitation to old entails was in conformity with the now repealed 12th section of the present Act, and is now done away with by Act 1868, sect. 8, which supersedes the present section, and contains further powers.

Creditor not to sell land in excess of what is necessary to pay debt affecting the estate, and reinvestment of surplus.[1]

30. And be it enacted, that no creditor acting under powers of sale contained in any bond or disposition in security or other deed of security affecting any entailed estate in Scotland, by virtue of this or any other Act, shall be entitled to sell such entailed estate, or any portion or portions thereof, in manifest excess of what is necessary or proper in order to payment and extinction of the debt, principal and interest, and whole expenses appertaining thereto, for which such sale is made; and any judgment of the Court of Session pronounced in any suspension of any such intended sale on the ground of manifest excess shall be final, and not subject to appeal; and wherever upon a sale of such entailed estate or of any portion or portions thereof by such creditor acting under such powers as aforesaid there shall arise a surplus of the price after payment of such debt, principal and interest, and whole expenses effeiring thereto, such creditor shall only be entitled to payment from the purchaser of the amount of such debt, principal and interest, and whole expenses effeiring thereto; and such creditor and purchaser shall be bound forthwith to present or cause to be presented an application to the Court, setting forth such surplus, and praying for the reinvestment thereof in other lands or heritages, to be entailed, at the sight of the Court, on the

same series of heirs, and, as far as may be, in the same terms, and subject to the same prohibitions, conditions, restrictions, limitations, and clauses irritant and resolutive as are contained in the tailzie under which the estate or the portion or portions thereof so sold was or were holden previous to such sale, or for the disposal of such surplus in such other manner as the Court may direct consistently with the provisions of this Act; and on such application being presented the Court shall ordain the petitioner, or other party in whose hands the admitted surplus may be, to pay the same into bank, and to produce a receipt therefor taken payable as the Court may direct, and shall also appoint such intimation and advertisement of the application as they may deem proper; and it shall be competent to the Court under such application to ascertain and determine the just amount of such surplus, and to give decree for the same, and to exonerate and discharge the creditor and purchaser, and all others thereof, and also, if such surplus shall exceed two hundred pounds, to see to the reinvestment thereof in other lands or heritages, and to the entailing of such lands or heritages as aforesaid, or to the disposal of such surplus in such other way and manner as may be consistent with the provisions of this Act, and as may appear to the Court to be suitable and proper; and if such surplus shall be reinvested in other lands or heritages as aforesaid, the tailzie of such other lands or heritages shall, whatever be its actual date, be taken to be of equal date with the tailzie of the remainder of such entailed estate; and if such surplus shall not exceed two hundred pounds the Court shall order the same to be paid over to the heir of entail in possession, for his own use and behoof.

[1] For further powers of creditors, see Act 1882, sect. 18.

Guardians may consent for minors.

31. And be it enacted, that, unless where inconsistent[1] with any other provisions of this Act, it shall be competent for the Court of Session, where any heir of entail whose consent is required under this Act shall be under age, or subject to any legal incapacity, to appoint, in the course of any application to which such consent is required, a separate tutor *ad litem*, or curator *ad litem*, or curator *bonis*, or other guardian, to each such party;[2] and such tutor *ad litem*, or curator *ad litem*, or curator *bonis*, or other guardian, being so appointed by the Court, shall be charged with the interest of such party in reference to such application, and shall be entitled, with or without consideration, to act and to give consent on the behalf of such party; and no tutor or curator or other legal guardian who may give any consent under this Act on behalf of any heir substitute shall incur any responsibility on account of such consent in respect of any alleged error in judgment, or inadequacy of consideration, or want of consideration therefor, unless it shall also be alleged and proved that he acted corruptly in the matter; and such consent by such tutor or curator or other legal guardian shall be in all respects as effectual as if the same had been given by such heir himself when of full age and of legal capacity to act in his own affairs;[3] Provided always that no heir of entail in possession of an entailed estate in Scotland, or whose own consent shall be required in the application, shall be entitled to give consent on the behalf of any other party in reference to any application for disentail[4] of such estate.

[1] *I.e.*, where full age is required, as in the case of next heirs, in sects. 1-4, as amended by Act 1875, sect. 4. This requirement, being a statutory condition and not referable to incapacity to consent, is not abrogated by Act 1882, sect. 12.

[2] Hamilton, 3d Feb. 1853, 15 D. 371, and Dalrymple, 10th July 1857, 19 D. 964, as explained in Dunc. p. 208. Where consents are not required, but minor heirs are called, there is no uniform rule. See Duncan, p. 209. The curator *ad litem* may be one of the ward's general tutors, curators, or administrators, Act 1882, sect. 12.

[3] See this further provided for by Act 1853, sect. 18.

[4] And wherever consents of minors are required—Hamilton, *supra*. The proviso is not repeated, but is not repealed in Act 1882, sect. 12; and in any case would guide the Court in appointing.

Form and effect of instrument of disentail, and registration thereof.

32. And be it enacted, that an instrument of disentail under this Act may be in the form or as nearly as may be in the form set forth in the schedule to this Act annexed, and it shall be the duty of the keeper of the register of tailzies for the time being to record such instrument, when duly presented, under authority of the Court for that purpose, in the register of tailzies along with the decree of Court on which it proceeds, upon payment of such fee for the same as may be fixed by the Court by Act of Sederunt; and such instrument, when duly executed, and recorded in the register of tailzies, under authority of the Court, in terms of this Act, shall have the effect of absolutely freeing, relieving, and disencumbering the entailed estate to which such instrument applies, and the heir of entail in possession of the same, and his successors, of all the prohibitions, conditions, restrictions, limitations, and clauses irritant and resolutive of the tailzie under which such estate is held, and of entitling such heir in possession to alter the course of succession prescribed by such tailzie, and to alienate and dispone such estate, onerously or gratuitously, and to burden the same with debt, and to do any other act or deed in relation thereto competent by law to any absolute proprietor in fee simple:[1] Provided always, that such instrument of disentail shall in no way defeat or affect injuriously any charges, burdens, or encumbrances, or rights or interests, of whatsoever kind or description, held by third parties, and lawfully affecting the fee or rents of such estate, or such heir in possession or his successors, other than the rights and interests of the heirs substitute of entail in or through the tailzie under which such estate is held, but that all such charges, burdens, and encumbrances, and rights and interests, other than as aforesaid, shall remain at least as valid and operative in all respects as if no such instrument of disentail had been executed or recorded.[2]

[1] On the meaning of these words see the obs. of L.P. Inglis in Bruce, 6th March 1874, 1 Ret. 740, 753: 'They mean, that the heir of entail shall come to be in the 'same position, not as a person who takes as an heir of provision under a destination, '—that is certainly not the meaning of them,—but he is to be in the same position as 'a direct disponee or heir-at-law, making up his title by special service and infeft-'ment.' Cf. Grant *v.* Grant's Trs., and Stewart *v.* Nicolson, 2d Dec. 1859, 22 D. 53, 72, text, p. 573. On the other hand, L. Gifford, at 1 Ret. 775, regarded the destination as still subsisting. This seems the most obvious construction of this section (see also 1 Ret. pp. 764, 768), and it has been adopted (though not necessary for the decision) in the recent case of Gray *v.* Gray's Trs., 24th May 1878, 5 Ret. 820. In any case the disentailer will be entitled to resettle the estate, and thus free it from clauses of devolution or return.

[2] Irving *v.* Irving, 22d Feb. 1871, 9 Macph. 539; neither advantaged nor prejudiced thereby; though overburdened fee-simple lands were added after the date of the obligation to provide—D. Roxburghe *v.* Russell, 28th June 1881, 8 Ret. 862.

Application to the Court.

33. And be it enacted,[1] that it shall be lawful for any heir of entail in possession of an entailed estate in Scotland, desiring to take advantage of any of the provisions of this Act as to which the authority of the Court is by this Act required, to make application to that effect by way of summary petition to the Court,[2] and such petition shall set forth the tailzie under which such estate is held, and the date of the petitioner's infeftment therein, if any be, and the names, designations, and places of abode, so far as known to the petitioner, of the heirs substitute of entail (if any) whose consents are required to such petition, and whether such heirs substitute are of age to consent on their own behalf, and if not then the names, designations, and places of abode of their fathers, or tutors or curators or other legal guardians, and if such heirs substitute or any of them are the children of such heir of entail in possession himself, and are minors, or legally incapacitated to act in their own affairs, the same shall be stated in such petition, and such petition shall also set forth specifically to what extent and in what way and manner such estate is proposed to be affected.

[1] On this and the three following sections, since they go beyond the scope of this work into matter of pure procedure, it will be enough to refer to the amendments in Act 1853, sects. 1-6; to the A.SS., 18th Nov. 1848; 23d Dec. 1848; 22d May 1849; to Mr Duncan's Manual; Mr Mackay's chapter, 2 C. of Session Practice, 386; and to the superseding provisions (applicable to all entail petitions) of Act 1875, sect. 12.

[2] Now addressed to the Court, but presented to the Junior Lord Ordinary, and in vacation to the Lord Ordinary on the Bills—20 & 21 Vict. c. 56; Act 1853, sect. 2; and Act 1875, sect. 12. See Suttie's Tutors, 16th Oct. 1883, 21 Sc. L.R. 2. The Sheriff Court is competent in certain cases, for which see Act 1868, sect. 4; Act 1882, sect. 5; and 3 & 4 Vict. c. 48 referred to in text, *supra*, p. 585.

Intimation of petitions.

34. And be it enacted,[1] that the Court, on any such petition being presented to it in terms of this Act, shall appoint intimation thereof to be made in the minute book and on the walls in common form, and shall also appoint the same to be publicly advertised once in the Edinburgh Gazette, and at least once weekly for six successive weeks, or for any longer period the Court shall deem fit, in such newspaper or newspapers as shall be appointed by the Court; and it shall be sufficient in such advertisements to state the leading name of such lands by which the same are commonly known, without any detailed description thereof.

[1] Act 1868, sect. 7; Act 1875, sect. 12 (4).

Procedure in Court.

35. And be it enacted, that after intimation and advertisement as aforesaid in terms of such deliverance of the Court it shall be competent to such petitioner to move the Court to grant the prayer of such petition; and if the procedure shall appear to the Court to be regular and proper, the Court shall interpone their authority, and give decree authorising such petitioner to do and perform the act or acts proposed in such petition, in so far as the same may appear to the Court to be permitted by this Act, or the Court shall do otherwise in reference to such petition as may appear to them to be proper, and consistent with this Act: Provided always, that it shall be competent, at any time before decree is actually pronounced and extracted, for any person or persons having interest to compear and object on any relevant ground to the prayer of such petition; and in the event of such objection being offered the Court shall

investigate and dispose of the same by such form of procedure as may seem to the Court to be expedient and proper; and in all applications presented under this Act it shall be competent to the Court to decern for costs of suit against the parties to the proceedings, or any of them, or to decern for payment thereof out of the estate or fund to which such applications respectively relate.

Heirs to be called in proceedings under this Act.[1]

36. And be it enacted, that it shall not be necessary in any proceedings under this Act to call as parties thereto any heirs of entail other than those whose consent would be required by the heir in possession for the time to an instrument of disentail; and no heir of entail other than those whose consent would be required as aforesaid shall be entitled to appear or to be heard in such proceedings.

[1] See the discretion allowed in Act 1875, sect. 12 (4); Riddell, 13th July 1853, 15 D. 904; M'Dougall, 9th March 1850, 12 D. 906. This section does not apply to cases where no consents are required—Riddell, *per* L. Rutherfurd; Davys, 1870, 9 Macph. 44.

Excambions under the Act 6 & 7 Will. 4. c. 42, may be carried through under the forms of this Act.[1]

37. And whereas by the said recited Act passed in the session of Parliament holden in the sixth and seventh years of the reign of his late Majesty King William the Fourth certain powers to make excambions are conferred upon heirs of entail, certain notices being given to heirs substitute and others, and certain advertisements made, and certain procedure had before the Court of Session, all as in the said recited Act especially provided; and it is expedient to simplify the mode of effecting excambions under the said Act, and to diminish the expense thereof; be it enacted, that from and after the passing of this Act it shall not be necessary for any heir of entail in possession intending to effect any excambion under or by virtue of the said recited Act to adopt any of the procedure thereby required, but it shall be competent to such heir of entail to present an application to the Court by way of summary petition in the form and manner provided by this Act, and the Court shall entertain, proceed with, and dispose of the same in every respect as if the powers to effect excambions conferred by the said recited Act had been contained in and conferred by this Act; and further, it shall not be necessary to record any contract of excambion which shall be executed at the sight and with the approbation of the Court, as required by the said recited Act, in any other register than the register of tailzies.[2]

[1] See the effect of this section in note to the Rosebery Act, sect. 3, *supra*, p. 901.
[2] And the destination may be incorporated by special reference to it as set forth in the original tailzie—Act 1853, sect. 11.

Instruments of disentail to be final.

38. And be it enacted,[1] that any instrument of disentail recorded in the register of tailzies under the authority of the Court, where the judgment of the Court allowing such instrument of disentail has not been brought under review of the House of Lords by appeal, or where such judgment has not been brought under reduction upon any relevant ground during the period within which such judgment might have been appealed from, shall, as regards any third parties acting *bonâ fide* on the faith thereof, be no longer reducible on any ground of irregularity or non-compliance with the provisions of this Act, but in respect of any such ground of challenge be final and conclusive.

[1] The finality here prescribed is extended to all decrees pronounced under this Act and Act 1853, and the exception of minority and of *non valens* excluded, by Act 1853, sect. 24, *q.v.* Cf. the similar finality clause in Act 1882, sect. 29.

In future entail, irritant and resolutive clauses implied in warrant to record.[1]

39. And be it enacted, that in any tailzie dated on or after the first day of August one thousand eight hundred and forty-eight, containing an express clause authorising registration in the register of tailzies, it shall not be necessary to insert any irritant or resolutive clauses in order to render such tailzie effectual in terms of an Act of the Parliament of Scotland passed in the year one thousand six hundred and eighty-five, intituled *Act concerning Tailzies*, but such clause of registration shall have in every respect the same operation and effect as the most formal irritant and resolutive clauses duly applied to every prohibition, condition, restriction, and limitation contained in such tailzie, except only such prohibitions, conditions, restrictions, and limitations as by the terms of such tailzie may be specially excepted; and such clause authorising registration in the register of tailzies shall be engrossed as part of such tailzie in the register of tailzies when such tailzie is recorded therein, and shall also be inserted or duly referred to in all procuratories of resignation, charters, decrees of special service, precepts, and instruments of seisin following on such tailzie, in the same manner, or as nearly as may be in the same manner, as irritant and resolutive clauses are now required to be so inserted or referred to.

[1] Extended to the cardinal prohibitions (as in the Titles Acts of 1858 and 1860) by 31 & 32 Vict. c. 101, sect. 14: 'Where a deed of entail contains an express clause 'authorising registration of the deed in the register of tailzies, it shall not be neces- 'sary to insert clauses of prohibition against alienation, contracting debt, and altering 'the order of succession, and irritant and resolutive clauses, or any of them; and such 'clause of registration contained in any deed of entail of lands not held by burgage 'tenure dated on or after the 1st day of October 1858, or of lands held by burgage 'tenure dated on or after the 10th day of October 1860, shall have in every respect 'the same operation and effect as if such clauses of prohibition and such irritant and 'resolutive clauses had been inserted in such deed of entail, any law or practice to 'the contrary notwithstanding.'

Irritancy not to affect conveyances of securities.[1]

40. And be it enacted, that no irritancy committed or that may be committed by any heir of entail in possession of an entailed estate in Scotland shall operate to set aside, impair, or in any way affect, directly or indirectly, in the person of any purchasers or *bonâ fide* onerous creditors, any conveyances, deeds, or securities granted in reference to such estate, or the rents thereof, prior to the execution of the summons of declarator on which decree in respect of such irritancy shall proceed, and not invalid as being inconsistent with the provisions of the entail under which such estate is held.

[1] See Lothian *v.* Willison, 1725, M. 15554; Bontine *v.* Graham, 2d March 1837, 15 S. 711; 20th Dec. 1838, 1 D. 286. An undeclared irritancy does not bar forfeiture to the Crown for treason—Gordon *v.* King's Adv. 1750, M. 4728, Elchies, 'Tailzie,' No. 35, 5 B.S. 782, affd. on this point, 1 Pat. 508; Kinloch *v.* King's Adv. 1751, M. 15389.

39 & 40 Geo. 3. applied to heritable property in Scotland.

41. And whereas an Act was passed in the thirty-ninth and fortieth years of the reign of his Majesty King George the Third, intituled *An Act to restrain all Trusts and Directions in Deeds or Wills whereby the profits or Produce of Real or Personal Estate shall be accumulated, and the beneficial Enjoyment thereof postponed beyond the time therein limited*,[1] by

which Act it is provided and enacted, 'that nothing in this Act contained 'shall extend to any disposition respecting heritable property within 'that part of Great Britain called Scotland;' and it is expedient that the provisions of the said Act should be extended to heritable property in Scotland; be it enacted, that the said provision and enactment of the said recited Act shall be and the same is hereby repealed, and the said Act shall in future apply to heritable property in Scotland.

[1] Commonly called the Thellusson Act. It is c. 98. It enacts, in substance, that no settlement of real or personal property shall be so made as that the rents or produce shall be accumulated for a longer period than the life of the settlor, or 21 years after his death, or during the minority of any party living at his decease, or the minorities of persons beneficially entitled (sect. 1), without extending to provisions for the payment of debt, or for children, or to directions concerning timber (sect. 8). The disentailing sections of the present statute are directed to the same end.

Proceedings may be taken under this Act, though entail not recorded or heir infeft.

42. And be it enacted, that all the Acts hereby permitted to be done by an heir in possession of an entailed estate, in virtue of the deed of entail under which such estate is held, may be done by such heir, whether such deed of entail be recorded in the register of tailzies or not, or whether such heir be duly infeft in such estate or not.[1]

[1] See text, p. 569, *supra*.

Entail defective in any one prohibition to be bad as to all.

43. And be it enacted, that where any tailzie shall not be valid and effectual in terms of the said recited Act of the Scottish Parliament passed in the year one thousand six hundred and eighty-five, in regard to the prohibitions against alienation and contraction of debt, and alteration of the order of succession,[1] in consequence of defects either of the original deed of entail or of the investiture following thereon, but shall be invalid and ineffectual as regards any one of such prohibitions, then and in that case such tailzie shall be deemed and taken from and after the passing of this Act to be invalid and ineffectual as regards all the prohibitions; and the estate shall be subject to the deeds and debts of the heir then in possession, and of his successors, as they shall thereafter in order take under such tailzie; and no action of forfeiture shall be competent at the instance of any heir substitute in such tailzie against the heir in possession under the same by reason of any contravention of all or any of the prohibitions; and where any money or other property, real or personal, has been or shall be invested in trust for the purpose of purchasing lands to be entailed, or where any lands are or shall be directed to be entailed, but the direction has not been carried into effect, such trust money or other property, and such lands, though still unentailed, may be dealt with under this Act in all respects as such lands might have been dealt with if entailed in terms of such trust or directions.

[1] It was long doubted whether a defect in, or omission of, the fencing clauses applicable to the prohibition against altering the order of succession broke the entail in a question *inter hæredes*. The question has now been settled in the affirmative—D. Hamilton *v.* Hamilton, 20th Nov. 1868, 7 Macph. 139, affd. 8 Macph. H.L. 48. Lord Deas was of opinion, in Padwick *v.* Stewart, 4th March 1874, 1 Ret. 697, 724, that if objections to the validity of an entail have been, since this Act, fairly tried and disposed of *inter hæredes*, the judgment will be *res judicata* in a question with purchasers or creditors raising the same objections. For a case of a clause of devolution, see Munro *v.* Johnstone, 18th Dec. 1868, 7 Macph. 250. The section is not retrospective —Urquhart *v.* Urquhart, 20th Feb. 1851, 13 D. 742, affd. 1 Macq. 658; Cochrane *v.* Baillie, 9th March 1855, 17 D. 659, affd. 2 Macq. 529; Scott *v.* Scott, 6th Dec. 1855,

18 D. 168. See obs. on this section in the House of Lords—Catton *v.* Mackenzie, 1st March 1872, 10 Macph. H.L. 12.

Instruments of disentail may be registered in the registers of sasines.

44. And be it enacted, that it shall be lawful for and incumbent upon the keepers of the registers of sasines of every county[1] in which any lands contained in any instrument of disentail are situated and of the keepers of the general register of sasines at Edinburgh respectively to record any such instrument of disentail, and any decree of the Court pronounced under this Act, when presented to them for that purpose, on payment of such fees for the registration thereof as may be fixed by the Court by Act of Sederunt.

[1] Now abolished—31 & 32 Vict. c. 64, sect. 8. The fact has not been adverted to in the present enactment that there may be an entail of a burgage subject.

No irritancy or forfeiture to be incurred for anything done under this Act.

45. And be it enacted, that no heir of entail or other person shall, by taking advantage of the provisions of this Act, or by acting under the same, incur any irritancy or forfeiture under any tailzie, any thing in such tailzie to the contrary notwithstanding; and no disposition, or bond and disposition in security, or bond of annual rent, or other deed, instrument, or writing, granted under authority of this Act, shall be held as any contravention of or be in any way affected by any prohibitions, conditions, restrictions, limitations, or clauses prohibitory, irritant, and resolutive contained in any tailzie.

Act 1685 to remain in force, except as affected by this Act.

46. And be it enacted, that the before-recited Act of the Parliament of Scotland passed in the year one thousand six hundred and eighty-five shall be and the same is hereby repealed, to the effect of making the provisions of this Act operative, but no further.

Act not to be defeated by trusts;[1]

47. And be it enacted, that where any land or estate in Scotland shall, by virtue of any trust disposition or settlement or other deed of trust whatsoever dated on or after the first day of August one thousand eight hundred and forty-eight, be in the lawful possession, either directly or through any trustees for his behoof, of a party of full age born after the date of such trust disposition or settlement or other deed of trust, such party shall not be in any way affected by any prohibitions, conditions, restrictions, or limitations, which may be contained in such trust disposition or settlement or other deed of trust, or by which the same or the interest of such party therein may bear to be qualified, such prohibitions, conditions, restrictions, or limitations being of the nature of prohibitions, conditions, restrictions, or limitations of entail, or intended to regulate the succession of such party, or to limit, restrict, or abridge his possession or enjoyment of such land or estate in favour of any future heir, and such party shall be deemed and taken to be the fee simple proprietor of such land or estate, and it shall be lawful to such party to make application by way of summary petition to the Court of Session, setting forth the facts, and referring to this Act, and craving the Court to pronounce an act and decree declaring him fee simple proprietor of such land or estate, and unaffected by any such conditions, provisions, restrictions, or limitations; and the Court shall proceed in such petition as may be just, and shall have power to pronounce an act and decree declaring such party to being fee simple proprietor of such land or estate, and unaffected as aforesaid; and such act

and decree may be recorded in the register of sasines, and being so recorded shall have all the operation and effect of the most formal and valid disposition to such party, and his heirs and assignees whomsoever, of such lands or estate, with infeftment thereon in favour of such party duly recorded: Provided always, that the rights of the superior of such lands or estate, and of all parties holding securities thereon, and all rights which are held independently of such trust disposition or settlement or other deed of trust, shall be as they are hereby reserved entire.

[1] Cf. sects. 1, 41, 48.

or by life-rents;[1]

48. And be it enacted, that from and after the passing of this Act it shall be competent to grant an estate in Scotland limited to a liferent interest in favour only of a party in life at the date of such grant; and where any land or estate in Scotland shall, by virtue of any deed dated on or after the said first day of August one thousand eight hundred and forty-eight, be held in liferent by a party of full age, born after the date of such deed, such party shall not be in any way affected by any prohibitions, conditions, restrictions, or limitations which may be contained in such deed, or by which the same or the interest of such party therein may bear to be qualified, and such party shall be deemed and taken to be the fee simple proprietor of such estate, and it shall be lawful to such party to obtain and record an act and decree of the Court of Session in the like form and manner and in the like terms and with the like operation and effect as is herein-before provided with reference to an act and decree of the said Court in the case of deeds of trust: Provided always, that the rights of the superior of such lands or estate, and of all parties holding securities thereon, and all rights which shall be held independently of the deed by which such liferent is constituted, shall be as they are hereby reserved entire.

[1] Cf. sects. 1, 41, 47; and Act 1868, sect. 17.

or by leases.

49. And be it enacted, that where any land or estate in Scotland shall, by virtue of any tack, assignation of tack, or other deed or writing dated on or after the said first day of August one thousand eight hundred and forty-eight, be held in lease, either directly or through trustees for his behoof, by a party of full age born after the date of such tack, assignation of tack, or other deed or writing, such party shall not be in any way affected by any prohibitions, conditions, restrictions, or limitations which may be contained in such tack, assignation of tack, or other deed or writing, or by which the same or the interest of such party therein may be qualified, such prohibitions, conditions, restrictions, or limitations being of the nature of prohibitions, conditions, restrictions, or limitations of entail, or intended to regulate the succession of such party, or to limit, restrict, or abridge his possession or enjoyment of such land or estate in favour of any future heir: Provided always, that it shall be lawful to the proprietor of whom such lease is held to enforce any prohibitions, conditions, restrictions, or limitations contained in such tack, assignation of tack, or other deed or writing which shall have been inserted therein for the *bonâ fide* purpose of protecting the just rights and interests of such proprietor, in so far as such enforcement may be necessary in order to such protection.

Consents to be in writing, and to be irrevocable.

50. And be it enacted, that all consents of heirs of entail, or of their tutors or curators or other legal guardians, under this Act, shall be in the form of writings duly tested according to the law of Scotland, and otherwise in such form as may be fixed by the Court of Session by Act of Sederunt;[1] and no consent duly given in the manner provided by this Act shall be revocable by the grantor thereof.

[1] See A.S., 18th Nov. 1848. Cf. in this Act sects. 1-5, 8-10, 31. As to aliens, see Stewart, 13th Feb. 1857, 19 D. 430.

Court may make Acts of Sederunt.[1]

51. And be it enacted, that it shall be lawful to the Court to pass such Act or Acts of Sederunt as the Court may deem proper for the further regulation of the forms of procedure under this Act, and otherwise for rendering this Act more effectual, according to the true intent and meaning hereof.

[1] See sect. 33, note.

Interpretation of Act.[1]

52. And be it enacted, that in construing this Act, except where the nature of the provision shall be repugnant to such construction, the words 'Court of Session' or 'the Court' shall be construed to mean either Division of the Court of Session;[1] and the words 'heir' and 'heir of entail' shall include the institute; and the words 'heir apparent' shall be construed to mean the heir who is next in succession to the heir in possession, and whose right of succession, if he survive, must take effect; the words 'land' and 'lands' shall extend to and comprehend all heritages; the words 'entailed estate' shall extend to and comprehend all heritages which by the law of Scotland may be made the subject of entail; the words 'creditor' and 'creditors' shall extend to and comprehend the heirs and assignees of such creditor or creditors; and all words used in the singular number shall be held to include several persons or things; and words in the plural shall be held to include the singular number; and all words importing the masculine gender shall extend and be applied to females as well as males.

[1] See sect. 33, note, and Act 1853, sect. 25; Act 1868, sect. 2; Act 1875, sect. 3; Act 1882, sects. 2, 27.

SCHEDULE to which the foregoing Act refers.

Form of Instrument of Disentail.

At [*state place*] the [*state date*] in presence of [*name notary public*] notary public, and of the witnesses subscribing, I [*name and designation of heir in possession*], heir of entail in possession of the lands and others after mentioned, viz., [*take in full description from titles*], which lands and others are held by me under a deed of entail dated [*state date of entail*], and recorded [*state particulars of registration*], take instruments in the hands of the said notary public subscribing that the said lands and others are now held by me free from the conditions, provisions, and clauses prohibitory, irritant, and resolutive of the entail, by virtue of the Act [*specify this Act*]; and I consent to the registration hereof in the

register of tailzies, and also in the Books of Council and Session and others competent, therein to remain for preservation, and thereto constitute my procurators, &c.

In witness whereof I and the said notary public have subscribed this instrument of disentail, [*complete the testing clause in ordinary form.*]

[*Signature of heir of entail in possession.*]
[*Signature of notary public.*] *N.P.*

A. B., Witness.
C. D., Witness.

No. XXII.

16 & 17 VICTORIA, c. 94.

An Act to extend the Benefits of the Act of the Eleventh and Twelfth Years of her present Majesty, for the Amendment of the Law of Entail in Scotland.—[*20th August* 1853.]

WHEREAS an Act was passed in the Session of Parliament holden in the eleventh and twelfth years of the reign of her present Majesty, intituled *An Act for the Amendment of the Law of Entail in Scotland*, the provisions of which Act have been found to be highly beneficial, and it is expedient to extend the benefits and to facilitate the operation of the said Act, and still further to simplify the procedure under the same: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

11 & 12 Vict. c. 36.[1]

[1] The foregoing Act.

Forms of procedure under recited Act and this Act merely directory.[1]

1. No interlocutor, judgment, or decree following or that has followed upon any petition presented or which shall be presented under the said recited Act or this Act shall be questionable or reducible upon the ground of any want of compliance with the provisions of the said recited Act and of this Act, and of any relative Act or Acts of Sederunt which have been or shall be passed by the Court of Session in Scotland, in so far as such provisions regard applications or petitions to the Court of Session under the authority of the said recited Act or of this Act, the matters to be set forth in such applications or petitions, the intimation and service, and advertisement thereof, the persons to be called as parties thereto, and the mode of calling them, the making and producing of affidavits therein, the matters to be set forth in such affidavits, and generally the procedure under such applications or petitions: Provided always, that no injury shall have been suffered by any person through such want of compliance; provided also, that nothing herein contained shall be held to support or validate any interlocutor, judgment, or decree as aforesaid obtained or

which may be obtained without the requisite consents prescribed by the said recited Act, or without service of the petition upon any party expressly required by the said recited Act to be called in the application, or shall be held to support or validate any interlocutor, judgment, or decree as aforesaid, in so far as such interlocutor, judgment, or decree shall go beyond what was or may be concluded or prayed for in the application under which it was or may be pronounced.

[1] Cf. sect. 24 of the present Act; Act 1848, sects. 6, 33-36; Carmichael, 22d Dec. 1853, 16 D. 296; Kerr v. Ms. Ailsa, 18th Dec. 1851, 12th June 1852, 14 D. 240, 864, affd. 1 Macq. 736; E. Kintore, 4th March 1856, 18 D. 725.

Applications or petitions may during vacation be presented to Lord Ordinary officiating on Bills, who may proceed as may be requisite, &c.[1]

2. Every application or petition which under the said recited Act or under this Act may be presented to the Court of Session during the sittings of the said Court, may, during any vacation or recess of the said Court, be presented to the Lord Ordinary officiating on the Bills; and it shall be competent for the Lord Ordinary officiating on the Bills in each time of vacation or recess to appoint or grant warrant for such intimation, service, and advertisement with respect to such application or petition as may be requisite or may be deemed proper, and all such procedure which shall take place under the authority of such Lord Ordinary officiating on the Bills shall be equally valid and effectual to all intents and purposes as if the same had taken place under the authority of the Court: Provided always, that every such application or petition shall be addressed to the Court, and shall, during the sitting of the Court, be proceeded with in the same manner as if any procedure which may have taken place before the Lord Ordinary on the Bills in time of vacation or recess under the authority of this Act had taken place before the Court in time of Session.

[1] Cf. Act 1848, sect. 33, note.

Applications, &c., may be amended where authorised by the Court.[1]

3. Every application or petition under the said recited Act or under this Act may be amended, where such amendment shall be authorised by the Court; and it shall not be necessary in respect of such amendment to make any intimation or service or advertisement, except such intimation or service or advertisement, if any, as the Court may in the circumstances of the case think fit to appoint.

[1] Farquharson, 1853, Dunc. 377.

Instruments of disentail may be executed, and the sanction and authority of the Court to record the same afterwards applied for.[1]

4. It shall be lawful for any heir of entail who is or shall be in a position to obtain his lands disentailed under the provisions of the said recited Act to execute an instrument of disentail thereof without the previous sanction of the Court, and to produce such executed instrument of disentail either along with an application to the Court for authority to record such instrument of disentail in the register of tailzies, or at any time in the course of the proceedings under such application when he shall think fit or when such production shall be ordered by the Court; and the whole provisions of the said recited Act with reference to applications to the Court by the said recited Act authorised shall be applicable and apply to such applications as aforesaid, and to all applications under this Act; and on such application being presented and such consents, if any, as are required by the said recited Act being obtained,

and on the Court being satisfied that the procedure is regular and in conformity with the provisions of the said recited Act and of this Act, the Court shall grant warrant for recording such instrument of disentail in the register of tailzies, and such instrument of disentail, when so recorded, shall have the like effect and the like privileges in all respects as any instrument of disentail duly recorded under the provisions of the said recited Act.

[1] See Act 1848, sect. 1, notes and sects. 2, 3.

Conveyances, excambions, &c., may be made, and the authority of the Court afterwards interponed.[1]

5. It shall be lawful for any heir of entail who is or shall be in a position to sell, alienate, dispone, charge with debts or encumbrances, lease, feu, or excamb his entailed estate, in whole or in part, under the provisions of the said recited Act, to execute without the previous sanction of the Court a deed of conveyance or contract of excambion, or other deed for giving effect to such sale, disposition, charge, lease, feu, or excambion, and to produce such executed deed either along with an application to the Court for its sanction thereto, or at any time in the course of the proceedings under such application when he shall think fit or when such production shall be ordered by the Court; and on such application being presented, and such consents, if any, as are required by the said recited Act being obtained, containing express consent to and approval of such deed of conveyance, or contract of excambion or other deed executed as aforesaid, and on the Court being satisfied that the procedure is regular, and in conformity with the provisions of the said recited Act and of this Act, the Court shall pronounce an interlocutor approving of such sale, disposition, charge, lease, feu, or excambion, as the case may be, and of the deed executed as aforesaid for carrying the same into effect, and thereupon such deed shall have the same force and effect in every respect as if the same had been made and executed at the sight of the Court, in terms of the said recited Act.

[1] This applies most obviously to applications under Act 1848, sects. 4, 5, 37. It is of no value where (as under sects. 21 and 25 of that Act) the sum must be ascertained by the Court. It may be applied in some cases under sect. 18 of the same Act. As to feuing and leasing, see next section.

Competent to present continuing petitions for authority to grant feus and long leases.[1]

6. It shall be lawful for the Court, upon an application by an heir of entail, entitled, in terms of the said recited Act, to apply for the authority and approbation of the Court to the granting of feus and long leases, to an extent not exceeding in all one eighth part in value for the time of the entailed estate, to fix and determine the minimum rates of feu duty or tack duty at which the lands specified in such application, or the different portions of such lands where the same are of different values, may be feued or let on long leases; and such minimum rate or rates of feu duty or tack duty, being so fixed by interlocutor of the Court, shall be acted upon with reference to all feus or long leases which may be granted from time to time under such application, unless the Court, upon being moved to that effect by such heir of entail, or by any other party entitled to appear, shall afterwards alter the same, (which the Court is hereby authorised to do, from time to time, upon motion to that effect as aforesaid), in which case such altered rate or rates of feu duty or tack duty shall be substituted for the rate or rates of feu duty or tack duty

previously established; and in like manner it shall be lawful for the Court, upon such application as aforesaid, to approve, by interlocutor, of a form of feu charter, feu contract, or feu disposition, or a form of long lease, to be made use of under such application, from time to time as such feus or long leases shall be granted, and to grant authority to such heir of entail to grant feus or long leases in the form so approved of, from time to time, as he shall think proper, subject to any conditions or stipulations which the Court may deem necessary; and such form may be altered by the Court from time to time as the Court shall see fit in the course of the proceedings:[2] Provided always, that it shall not be lawful for such heir of entail to take any grassum or fine or other valuable consideration other than the feu duty or rent for granting any such feu or lease, nor to grant any such feu or lease of the mansion house, offices, or policies of the estate; and in case any such grassum, fine, or consideration shall be taken, and in case any feu or lease hereby prohibited shall be granted, such feu or lease shall be null and void.

[1] See Act 1848, sects. 4, 24; Act 1868, sects. 3-5; Campbell, 1850, 13 D. 42 (under Act 1848, sect. 4); Butter, 1852, Dunc. p. 343; Cleland, 1852, 24 Sc. Jur. 628.

[2] See case of such alteration—E. Kinnoull, 1862, 24 D. 379. Though model charters for different sorts of feus are approved of—*e.g.*, for villas, shops, &c.—the selection of the nature of each feu is left to the discretion of the heir,—ibid. There is usually a relative plan, which is incorporated in the deeds—Dunc. p. 59.

Bond and disposition in security for provision to younger child may be granted to any party advancing the amount thereof.[1]

7. Where an heir of entail in possession of an entailed estate in Scotland entitled or allowed under the said recited Act to charge the fee and rents of such estate, or of any portion thereof, with the amount of any provision to a younger child, and corresponding interest and penalties, has granted or shall grant bond and disposition in security therefor over such estate or any portion thereof, under the authority of the said Act, such bond and disposition in security shall be valid and effectual whether the same be granted to such younger child or any other party in right of such provision, or to any party or parties advancing the amount thereof, in order to the payment of such younger child: Provided always, that if such bond and disposition in security be not granted directly to such younger child or other party in right of such provision, such provision be formally discharged by such younger child, or the amount of such provision, with any interest due thereon, be paid over to or consigned or invested for behoof of such younger child or other party in right of the same at the sight of the Court.

[1] Cf. Act 1848, sect. 21, note.

Money placed in trust prior to 1st August 1848 to purchase land to be entailed may be partly invested in land and partly employed for the benefit of such land.[1]

8. Where, under any deed executed prior to the first day of August one thousand eight hundred and forty-eight, any money is or shall be held in trust for the purpose of purchasing land to be entailed, and such trust has been or shall be partially implemented by the investment in land of a portion of such trust money, and also where under any deed executed as aforesaid any land has been invested in trust with a view to the same or any part thereof being entailed, and any money is or shall be held under such or any other deed executed as aforesaid in trust to be invested in land to be added to such entailed estate, and where in either of the cases aforesaid the heir of entail in possession of such land

for the time being, if such land has been entailed in terms of such trust, or the party who, if such land had been entailed or money had been invested in land, which land had been entailed in terms of such trust, would be the heir of entail in possession thereof, shall have made or shall make summary application to the Court for authority to lay out the uninvested portion of such money, or any part thereof, in or towards payment of any money charged, under this or the said recited Act or under any other Act, upon the fee of the land purchased or directed to be entailed as aforesaid, or in the redemption of the land tax affecting such land, or in building or repairing mansion house or offices,[2] or otherwise permanently improving the same, or in repayment of money already expended in such improvements, (such application to the Court always setting forth the amount of money so proposed to be laid out, and the special purpose to which it is intended to apply the same,) the Court, if satisfied of the propriety of the proposed application, shall issue a finding or decree to that effect, and authorising such application; and it shall thereafter be lawful for the petitioner, or other party having the control of such money, and for the petitioner to call upon such party having such control, to lay out such money or any part thereof, according as the Court shall have authorised the application of the same, to all or any of the before-mentioned purposes; and if there shall be any surplus of such money after the purposes authorised by such decree of Court shall be fulfilled, the same shall, if more than two hundred pounds, be applied as the whole money would have been applied but for the provisions of this Act, and if less than two hundred pounds, shall be paid to the petitioner for his own use and behoof.

[1] Cf. Act 1848, sects. 26, 27.

[2] See an old case in which this was done with approval—Sprot's Trs. *v.* Sprot, 11th March 1830, 8 S. 712. See also Carnegie, 10th Jan. 1856, 18 D. 323; Dunlop, 19th June and 6th July 1855, 17 D. 956, 1071.

Sales may be made to pay off entailer's debts.[1]

9. In all cases where there are or shall be entailer's debts or other debts or sums of money which might lawfully be made chargeable upon the fee of an entailed estate, the heir of entail in possession of such estate for the time being shall have all the like powers with regard to sale and disposal of any portion or portions of such estate, for the purpose of paying off such debts or sums of money, as are conferred by the said recited Act with reference to the payment of debt which is validly charged on the fee of such estate; and all the provisions of the said recited Act respecting sales which may be made in order to pay off debt which is validly charged on the fee of such estate as aforesaid, and respecting the dispositions which may be granted for carrying such sales into effect, and respecting the approval of the prices for which such sales shall be made, and respecting the application of the prices to be obtained upon such sales, and respecting the tailzies which may be executed of any lands to be purchased by means of such prices, shall be applicable and apply, *mutatis mutandis*, to sales which may be made under this Act for paying off entailer's debt or other debts or sums of money as aforesaid, and to dispositions which may be granted for carrying such last-mentioned sales into effect, and to prices for which such last-men-

tioned sales may be made, and to tailzies which may be executed of any lands to be purchased by means of such prices.

[1] See Act 1848, sect. 25, note [7], and sect. 11 hereof.

Where, at passing of this Act, entailed estates may be sold under judicial authority, parties entitled to sell may make application to the Court, in form prescribed by recited Act.[1]

10. Where at the date of the passing of this Act any entailed estate in Scotland may be sold and disposed of, in whole or in part, under judicial authority, in virtue of the provisions of any special Act of Parliament, or otherwise, it shall be competent for any party entitled to sell or dispose of such entailed estate, in whole or in part as aforesaid, to make application to the Court in the form and manner prescribed by the said recited Act with reference to applications under the said recited Act, and with such consents, if any, as may be requisite to such sale and disposal in terms of such special Act of Parliament, or otherwise, and without any other consents, in order to obtain the authority of the Court to sell and dispose of such entailed estate, in whole or in part; and the Court shall, under such application, grant warrant for and authorise the sale of such entailed estate in whole or in part, as the case may be, upon such reasonable advertisement, and on such terms and conditions as the Court may deem proper in the circumstances, without regard to any forms of procedure prescribed by such special Act of Parliament, or otherwise; and all sales and conveyances which may be made and granted under any such application as aforesaid shall be equally valid and effectual in all respects as if made under such special Act of Parliament or otherwise, and according to the forms which, if this Act had not been passed, it would have been necessary to follow.

[1] See Act 1848, sect. 25, note [4].

In contracts of excambion, &c., the destination, &c., may be omitted, provided such destination, &c., be referred to as set forth in the original tailzie.[1]

11. In all contracts of excambion which may be made and executed in virtue of the said recited Act, and in all deeds of entail which may be made and executed in virtue of the twenty-fifth section of the said recited Act, or of the ninth section of this Act, and in all instruments of sasine following on such contracts of excambion and deeds of entail, it shall be competent to omit the insertion of the destination, and of the conditions and provisions and clauses prohibitory, irritant, and resolutive, contained in the original tailzie, provided such destination and such conditions and provisions and clauses prohibitory, irritant, and resolutive, shall in such contracts of excambion and deeds of entail and instruments of sasine be specially referred to as being set forth in such original tailzie, which shall be referred to by its date and by the date of recording the same in the register of tailzies or in the Books of Council and Session; and the reference so made to such destination and to such conditions and provisions and clauses, prohibitory, irritant, and resolutive, shall be equivalent to the full insertion thereof, and shall in all questions whether with third parties or *inter hæredes*, and to all intents and purposes whatever, have the same force and effect as if such destination and such conditions and provisions and clauses, prohibitory, irritant, and resolutive, had been inserted at length in such contracts of excambion and deeds of entail and instruments of sasine; and that notwithstanding any provisions contained in an Act of the Parliament of Scotland, made

in the year one thousand six hundred and eighty-five, intituled *Act concerning Tailzies*, or any law or practice to the contrary now in force.

[1] As to excambions, see Rosebery Act, sect. 3, *supra*, p. 901; Act 1848, sects. 5, 37, notes.

[Where in any tailzie executed after 1st Aug. 1848 the maker of the tailzie declares that 10 Geo. 3. c. 51, and 5 Geo. 4. c. 87, are applicable they shall be deemed to be so.]

12.[1] [Where in any tailzie executed after the first day of August one thousand eight hundred and forty-eight, the maker of such tailzie has declared or shall declare that an Act passed in the tenth year of the reign of his Majesty King George the Third, intituled *An Act to encourage the Improvement of Lands, Tenements, and Hereditaments in that Part of Great Britain called Scotland held under Settlement of strict Entail*, and an Act passed in the fifth year of the reign of his Majesty King George the Fourth, intituled *An Act to authorise the Proprietors of entailed Estates in Scotland to grant Provisions to the Wives or Husbands and Children of such Proprietors*, or either of the said Acts of Parliament, shall be applicable to such tailzie, then and in that case such Act or Acts, as the case may be, shall be deemed and taken to be and shall be applicable to such tailzie in like manner as if such tailzie had been executed prior to the said first day of August one thousand eight hundred and forty-eight.]

[1] Repealed by Act 1868, sect. 8, along with Act 1848, sect. 12.

Where tailzie executed after 1st Aug. 1848 does not expressly prohibit the granting of feus, &c., heir of entail in possession may execute powers of granting feus, &c.

13. Where any tailzie executed after the first day of August one thousand eight hundred and forty-eight does not expressly prohibit the granting of feus or building leases of the entailed estate, or any part thereof, though containing a prohibition against alienation and long leases generally, the heir of entail in possession of such entailed estate for the time shall have the same powers of granting feus and building leases for more than twenty-one years as are by the said recited Act,[1] or by any other Act of Parliament,[2] conferred upon heirs of entail in possession of entailed estates holding the same under tailzies dated prior to the said first day of August one thousand eight hundred and forty-eight: Provided always, that application shall be made in the form prescribed by the said recited Act with reference to applications authorised to be made under the said Act, for the authority of the Court of Session to the granting of such feus or building leases; and such Court, having regard to the interests of the heirs substitute of entail, shall be satisfied that the granting of such feus or leases is an act of beneficial administration of the entailed estates.

[1] This does not seem to apply to the power of feuing and leasing with consents under Act 1848, sect. 4, but to the power given by sect. 24 of that Act as amended by sect. 6 of the present statute. Observe the difference between 'long leases' in Act 1848, sect. 24 (and notes thereto), and 'building leases for more than 21 years' here.

[2] *E.g.*, Montgomery Act, sect. 4 *et seq.*, *supra*, p. 883.

Heirs of entail in possession entitled to sell portion of estates, &c., under 8 & 9 Vict. c. 19, may do so to any company authorised to

14. It shall be lawful for any heir of entail in possession of any entailed estate in Scotland who is or shall be entitled to sell, convey, and dispose of any portion of such entailed estate, or any right or interest therein under the powers conferred by 'The Lands Clauses Consolida-'tion (Scotland) Act, 1845,' to sell and convey such portion of such entailed estate, or such right or interest therein, to the company who by the said Consolidation Act may be authorised to acquire the same in

consideration of an annual feu duty or a ground annual payable by such company to such heir of entail and his successors in the land or in the right or interest therein so conveyed, and that in the form prescribed by the said Consolidation Act with respect to conveyances in feu by parties entitled absolutely to grant the same.

acquire the same in consideration of annual feu duty, &c.[1]

[1] This and the two following sections amend 8 & 9 Vict. c. 19, sect. 10. See notes thereto, *supra*, p. 817.

15. Provided always, that it shall not be lawful for such company to pay, nor for such heir of entail to receive or take, any grassum, fine, or premium, or any consideration in the nature thereof, for the lands or rights or interests to be so conveyed, other than the annual feu duties or ground annuals made payable by such conveyance, and the amount of such feu duties or ground annuals shall, in case of difference, be ascertained and settled by valuators in the manner prescribed by the said Consolidation Act with respect to the valuation of lands sold by agreement by parties under legal disability or incapacity to convey.

Company not to pay, nor heir of entail to receive, any grassum, &c., for any rights conveyed but annual feu duties, &c.

16. All feu duties or ground annuals made payable under any such conveyance to such company shall be a first charge on the tolls and rates and other revenues of such company, preferable to all debenture and bond and mortgage debt and other debt of such company, anything in any Act of Parliament now in force to the contrary notwithstanding; and if at any time any such feu duties or ground annuals remain unpaid for thirty days after they respectively became payable, it shall be lawful to the person entitled for the time being to payment of such feu duties or ground annuals to recover the same from such company, with interest and costs, by action in the sheriff court of the county within which the lands in respect of which such feu duty or ground annual is payable are locally situated, or summarily by poinding and sale of the goods and effects of such company on application by petition to such sheriff; and such feu duty or ground annual shall to all intents and purposes whatever be deemed and taken to be part and portion of the entailed estate, and subject to the destination and to all the conditions, provisions, and limitations, and to all the clauses prohibitory, irritant, and resolutive of the tailzie under which such estate is holden.

All feu duties, &c., made payable by company to be a first charge on the revenues of company.

17. It shall be sufficient, in any affidavit directed by the said recited Act to be made and produced in any application thereby authorised, that such affidavit bear that the particulars required by the said recited Act to be specified therein are so specified to the best of the knowledge and belief of the maker of such affidavit; and where such affidavit has not been or shall not be made and lodged at the outset of the proceedings under such application, the Court shall direct such omission to be supplied, and shall, on such omission being supplied, proceed as if such affidavit had been timeously given in.

Affidavit sufficient if stated to the best of belief.

As to affidavits not lodged in time.[1]

[1] Cf. Act 1848, sect. 6, note, and Act 1875, sect. 12 (5); Gordon *v.* P. Albert, 1851, 14 D. 114; Stewart, 1849, 11 D. 1191; Hastings, 1850, 12 D. 918.

18. Every consent which, on the behalf of any heir of entail being under age, or subject to any legal incapacity, whose consent has been or is or shall be required under the said recited Act, has been or shall be given by any tutor or curator or other legal guardian duly authorised to

Provision as to consents for minors and incapacitated persons.[1]

consent in terms of the said recited Act on the behalf of such heir of entail, shall be deemed and taken to be and shall be valid and sufficient, except in any case of application for disentailing,[2] without the concurrence of such heir of entail, and without any consent to or approval of the actings of such tutor or curator or other legal guardian, by such heir of entail; but the consent of such curator or other guardian on behalf of such heir of entail, in terms of the said recited Act, shall not in any future application under the said recited Act or this Act, or in any application under the said recited Act not yet finally disposed of (unless in any case in the circumstances of which the Court shall be of opinion that the consent of the tutor, curator, or other legal guardian alone is sufficient), be received or acted on where such heir of entail, being of sound mind, and above the age of fourteen years, shall, in the course of the application wherein such consent may be tendered, enter appearance and oppose the reception of such consent, which such heir of entail is hereby authorised to do.

[1] Cf. Act 1848, sect. 31, and Act 1882, sect. 12.
[2] Act 1882, sect. 12 is quite general.

Rights of heir of entail obtaining consents and presenting application not to be affected by alteration of circumstances afterwards occurring.[1]

19. The date of presenting any application under the said recited Act or under this Act shall be held to be the day on which the first interlocutor under such application has been or shall be pronounced, and no alteration of circumstances which has occurred or which shall occur subsequent both to the date of presenting such application and to the last date of the consents required to the same, whether by the birth of any intervening heir or by the death of any grantor of such consent, or otherwise, except as herein-before specially provided, shall be deemed to have or shall have any effect upon the rights of the party who shall present or who has presented such application, or shall affect the procedure taken therein.

[1] Cf. Act 1848, sect. 3, note [9], and Act 1875, sect. 5.

Heirs of entail not to give consents where opposed by heritable creditors.[1]

20. Where any heir of entail called to the succession of an entailed estate by any tailzie dated prior to the first day of August one thousand eight hundred and forty-eight shall previous to the passing of the said recited Act have granted any bond of annuity or other deed disponing or bearing to dispone, or containing obligation to dispone, such estate or any portion thereof in security, such heir of entail shall not be entitled to give consent to any application under the said recited Act or this Act which shall be opposed by any creditor in such bond of annuity or other deed as aforesaid, and who shall either hold infeftment in such entailed estate, duly recorded, or shall enter appearance and prove his debt or claim in the course of the proceedings under such application: Provided always, that it shall be competent to the Court, if, with reference to any offer of adequate security, or otherwise in the circumstances, it shall deem the opposition on the part of such creditor to be unreasonable, to disallow the same, and to give effect to the consent of such heir.

[1] With the next, supplementary to Act 1848, sects. 9, 10. See Act 1882, sect. 13.

Heir apparent of entail not to

21. Where any heir apparent of an entailed estate under a tailzie dated prior to the said first day of August one thousand eight hundred

and forty-eight shall, subsequent to the passing of the said recited Act, have granted any bond of annuity or other deed disponing or bearing to dispone, or containing obligation to dispone such estate or any portion thereof, in security, such heir apparent shall not be entitled to give consent to any application under the said recited Act or this Act, except under the like circumstances as would have enabled him to give consent, and to have his consent allowed, had such bond of annuity or other deed been granted previously to the passing of the said recited Act;[1] but the consents of the other heirs substitute shall be given and allowed independently of the rights of any such creditors.

give consent in opposition to such creditors

[1] Under the new system, according to which the nearest heir's consent may be dispensed with, this is not done till arrangements have been made for paying or securing debts due prior to 18th August 1882, and wives' and children's provisions, and the assignee of his life-interest may appear to support his preference on the value thereof, Act 1883, sect. 13.

22. Where any heir of entail in possession of an entailed estate under an entail created before the passing of the said Act shall have lawfully propelled or shall hereafter lawfully propel such estate, under reservation of his own liferent, to the heir entitled to succeed him therein, any application which has been or shall be made by him under the recited Act or under this Act, and all procedure following thereon, shall be equally effectual in all respects as if he had not propelled the succession, provided the consents of the persons whose consents would have been required to such application if he had not propelled the succession as aforesaid be obtained thereto.

Propelling of succession, under reservation of liferent, to have no effect upon applications under this or the recited Act.[1]

[1] L. Wharncliffe, 1852, 24 Sc. Jur. 553; see V. Dupplin v. Hay, 15th Nov. 1871, 10 Macph. 89; fuller in Act 1868, sect. 13.

23. Every bond and disposition in security hereafter to be granted under the said recited Act or under this Act may, in the option of the party upon whose application to the Court the same shall be executed, contain a power of sale in ordinary form.

Bonds and dispositions in security may contain power of sale.[1]

[1] Cf. Act 1848, sects. 18, 21, notes.

24. Every judgment and decree pronounced, and that shall be pronounced upon any application under the said recited Act or under this Act, where such judgment or decree has not been or shall not be brought under review of the House of Lords by appeal, or brought under reduction upon any relevant ground during the period within which such judgment or decree might have been appealed from, shall, as regards third parties[2] acting *bonâ fide* on the faith thereof, be no longer reducible on any ground of irregularity or noncompliance with the provisions of the said recited Act or of this Act, but in respect of any such ground of challenge be final and conclusive; and the period during which challenge or appeal is competent, under the said recited Act, or under this Act, of any such judgment or decree, or of any instrument of disentail, or other deed executed in virtue of such judgment or decree, shall not be extended in respect of the minority or want of capacity to act of any person or persons whatever.

Judgments and decrees to be final.[1]

[1] Cf. Act 1848, sect. 38, and Act 1882, sect. 29. The present section was held by majority of the First Division to protect a bond and disposition in security granted

by an heir of entail subsequently to an invalid disentail, the ground of which invalidity was, that the petition was laid on Act 1848, sect. 3, instead of sect. 1, and that it therefore proceeded on insufficient consents. *Sed quære* for the reasons stated by L.P. Inglis,—V. Fincastle *v.* E. Dunmore, 14th Jan. 1876, 3 Ret. 345.

[2] Including marriage-contract trustees acting on the faith of a decree authorising an excambion—Mackenzie *v.* Catton's Trs., 14th Dec. 1877, 5 Ret. 313.

Interpretation of terms.[1]

25. The following words occurring in this Act shall, except where the nature of the provision shall be repugnant to such construction, be construed as follows; that is to say, the words 'Court of Session,' or 'the Court,' shall be construed to mean either Division of the Court of Session; the words 'heir of entail' shall include 'institute;' the word 'lands' shall extend to and comprehend all heritages; and the words 'entailed estate' shall extend to and comprehend all heritages which by the law of Scotland may be made the subject of entail.

[1] See Act 1848, sects. 33, 52; Act 1868, sect. 2; Act 1875, sect. 3; Act 1882, sects. 2, 27.

No. XXIII.

31 & 32 VICTORIA, c. 84.

An Act to amend in several Particulars the Law of Entail in Scotland. —[31*st July* 1868.]

WHEREAS it is expedient to amend in several particulars the law of entail in Scotland: Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited for all purposes as the 'Entail Amendment '(Scotland) Act, 1868.'

Interpretation of terms.[1]

2. The following words occurring in this Act shall, except where the nature of the provision shall be repugnant to such construction, be construed as follows; that is to say, the words 'Court of Session,' or 'the Court,' shall be construed to mean either Division of the Court of Session, or the junior Lord Ordinary, or the Lord Ordinary on the Bills, as the case may be; the word 'sheriff' shall include 'sheriff substitute;' the words 'heir of entail' shall include, 'institute;' the word 'lands' shall extend to and comprehend all heritages; the words 'entailed estate' shall extend to and comprehend all heritages which by the law of Scotland may be made the subject of entail; and the words 'feu charter' shall comprehend a feu contract, a feu disposition, and every other grant of a like kind.

[1] Cf. the sections cited at end of foregoing Act.

Power to grant feus, building leases, &c.[1]

3. It shall be lawful for any heir in possession of an entailed estate, notwithstanding any prohibitions or limitations in the deed of entail or in any Act of Parliament, in the manner and subject to the conditions herein-after mentioned, to grant leases for the purpose of building for

any number of years not exceeding ninety-nine years, or feus of any part of such estate (but reserving the minerals therein and the right of working the same), except the garden, orchards, policies, or enclosures, adjacent to or in connexion with the manor place, in so far as such garden, orchards, policies, or enclosures are necessary to the amenity of the manor place, or, if the estate be held by burgage tenure, to dispone any part thereof, reserving and excepting as aforesaid, subject to a ground annual: Provided always, that the feu duty, rent, or ground annual to be stipulated for shall not be less than the amount ascertained as hereinafter provided: Provided also, that it shall not be lawful for such heir to take any grassum or fine or valuable consideration [2] other than the feu duty, rent, or ground annual for granting any such charter, lease, or disposition; and in case any such grassum, fine, or consideration shall be taken, such charter, lease, or disposition shall be null and void; but nothing herein contained shall prevent any heir of entail in possession from exercising any power of granting feu charters, leases, or other grants which may be contained in the entail under which he possesses, more extensive than the powers hereby conferred.

[1] The powers thus conferred, under the supervision of the sheriff, may be compared with the general power of feuing and leasing with consents (Act 1848, sect. 4, *supra*, p. 912, and Act 1882, sect. 4, *infra*, p. 970); with the building-lease sections of the Montgomery Act, sects. 4 *et seq.*, *supra*, p. 883; and with the powers—limited as to area, and subject to the control of the Court of Session—granted by Act 1848, sect. 24; Act 1853, sect. 6; and Act 1882, sect. 6, *supra*, pp. 921, 938; and *infra*, p. 971.

[2] A reservation by the superior, in granting a feu, of power to resume part of the land, subject to corresponding abatement of feu-duty, is not a valuable consideration in this sense, not being for the benefit of the heir in possession alone. A reservation of timber by the grantor for his own behoof will probably depend for its validity on the maturity of the wood, and its amount and value—Stewart *v.* Murdoch, 27th Jan. 1882, 9 Ret. 458.

Procedure in granting feus, building leases, &c.

4. For ascertaining whether the land so proposed to be feued, leased, or disponed may be feued, leased, or disponed in terms of the provisions of the preceding section, and the value of the same, an application shall be made by the heir in possession of the entailed estate to the sheriff of the county within which the entailed estate, or the portion thereof proposed to be feued, leased, or disponed, is situated, who thereupon shall direct notice to be given to the next heir of entail entitled to succeed to the entailed estate in such manner as shall seem proper (and in the event of such next heir of entail being under age or subject to any legal incapacity, the sheriff shall appoint a tutor *ad litem* or curator *ad litem* to such heir), and shall appoint one or more skilful persons to inquire and report as to the value of the lands proposed to be feued, leased, or disponed, and whether from their position or otherwise they may or ought to be feued, leased, or disponed in terms of the preceding section either in whole or in lots; and upon such person or persons reporting that the feu duty, rent, or ground annual offered is in their opinion, having regard to all the circumstances, fair and adequate, and that such land may, from its position, be feued, leased, or disponed in terms of the preceding section either in whole or in lots, the sheriff, on consideration of the whole circumstances, may and is hereby empowered to authorise such heir in possession or his successor in the entailed estate at any time within ten years from the date of such deliverance to feu, lease, or

dispone the said land in one or more lots at such rate of feu duty, rent, or ground annual as he can obtain for the same, not being less than the rate fixed by the said skilled persons, subject to such conditions as the sheriff may think essential to secure such feu duty, rent, or ground annual, and any other conditions he may see fit, and also subject to a nominal taxed sum of one penny sterling in lieu of all casualties on the entry of heirs and singular successors, and to grant the necessary feu charter, lease, or disposition, and which being executed and recorded in the register of sasines shall be effectual to all intents and purposes; and the lands so feued, leased, or disponed shall, from the date of recording the feu charter, lease, or disposition in the register of sasines, and so long as such feu charter, lease, or disposition shall remain in force, be held as out of the entail, and be liberated from all the prohibitory, irritant, and resolutive clauses or clause of registration thereof; provided always, that the superiority of the lands so feued, leased, or disponed, and the feu duties, rents, and ground annuals thereof, shall be and shall remain subject to the said entail in the same manner as the lands themselves were subject thereto previous to the granting of such feu charter, lease, or disposition; and it is hereby provided, that the decree of the sheriff pronounced on such application and proceeding shall not be subject to review by suspension, advocation, or reduction, or in any other form, except by a short note of appeal[1] to be presented to the Court of Session in one or other of the Divisions thereof, which appeal shall be disposed of by such Division as a summary cause: Provided always, that unless such note of appeal shall be lodged with the clerk of the Division of the Court of Session, and notice thereof given in writing to the opposite party, or his known agent, or lodged with the sheriff clerk, within six months of the date of the decree of the sheriff, such decree shall be final and conclusive; and, in the event of an appeal being duly taken and lodged, the judgment of the Court of Session thereon shall be final and conclusive.

[1] See Court of Session Act of the same year, sect. 64 *et seq.*

Feu charters, &c., to be void unless buildings of certain value erected and kept in repair.

5. Provided always, that every such feu charter, lease, or disposition shall contain a condition that the same shall be void, and the same is hereby declared void, if buildings of the annual value of, at the least, double the feu duty, rent, or ground annual therein stipulated shall not be built within the space of five years from the date of such grant upon the ground comprehended therein, and that the said buildings shall be kept in good, tenantable, and sufficient repair, and that such grant shall be void whenever there shall not be buildings of the value foresaid, kept in such repair as aforesaid, standing upon the ground so feued, leased, or disponed.[1]

[1] Cf. Montgomery Act, sect. 5, *supra*, p. 884. The section was not complied with where the feu-charter set out that buildings of the requisite value had been already erected, and contained an irritancy in the event of there ever ceasing to be buildings on the feu in good repair of the statutory value—Stewart *v.* Murdoch, 27th Jan. 1882, 9 Ret. 458 (conversion of long lease into feu).

Power to grant provisions to wife and children of heir apparent.

6. It shall be lawful for the heir apparent to any entailed estate, with the consent of the heir in possession of such estate, to grant provisions in favour of his wife, and of the lawful child or children of such heir ap-

parent who shall not succeed to such entailed estate, to the same extent, in the same manner, and subject to the same conditions to, in, or under which it is now competent for the heir in possession of such entailed estate to grant such provisions, either under the Act of the fifth George the Fourth, chapter eighty-seven,[1] or under the powers of the entail: Provided that such provisions shall not exceed in any case the amount authorised to be charged on the entailed estate and rents thereof, either under the said Act or under the entail of the said estate, and that the same shall become payable at the death of such heir apparent; and provided also, that such provisions to be granted by such heir apparent shall not interfere with or affect any provisions which have been granted by the heir in possession of such estate, and shall be postponed to the provisions granted by such heir in possession; and that the provisions to be granted by such heir apparent shall be calculated under the said Act, or under the provisions of the entail on the footing of the rental of such entailed estate, after deducting the burdens and provisions directed to be deducted by the said Act or by the deed of entail, and also after deducting the burdens and provisions granted by the heir in possession to his or her wife or husband and child or children, so far as chargeable on such entailed estate, or on the rents thereof.

[1] See Act 1824, sects. 4 *et seq.*, and notes, *supra*, p. 896; Act 1848, sects. 21-23, 29; Act 1853, sect. 7; sect. 8 hereof; sect. 10 of Act 1875; and Act 1882, sects. 10, 24.

Intimation of petitions under Entail Acts.

7. Notwithstanding the provisions contained in any of the statutes relating to entails, and particularly in the thirty-fourth section of the Act eleventh and twelfth of Victoria, chapter thirty-six, it shall be sufficient advertisement of any petition presented to the Court of Session under these Acts, or any of them, if the presenting of such petition is advertised once in the Edinburgh Gazette, and once weekly for three successive weeks[1] in such newspaper or newspapers as may be appointed by the Lord Ordinary or the Court; and it shall be sufficient in such advertisements to state the leading name of the lands by which the same are commonly known without any detailed description thereof, and the leading purpose of the petition without any detailed statement of such purpose, and such advertisement may be in the form, or as nearly as may be in the form, of Schedule (A.) hereto annexed: and in all cases of parties called under such petitions who may be resident furth of Scotland the induciæ for citing such parties shall be thirty days.

[1] Once in a local paper, now enough, Act 1875, sect. 12 (4).

Repeal of 11 & 12 Vict. c. 36, s. 12, and 16 & 17 Vict. c. 94, s. 12. 10 Geo. 3. c. 51, and 5 Geo. 4. c. 87, to apply to all entails.[1]

8. The twelfth section of the Act eleventh and twelfth Victoria chapter thirty-six, and the twelfth section of the Act sixteenth and seventeenth Victoria, chapter ninety-four, are hereby repealed; and it is enacted, that the Act tenth George the Third, chapter fifty-one, intituled *An Act to encourage the Improvement of Lands, Tenements, and Hereditaments in that Part of Great Britain called Scotland, held under Settlements of strict Entail*, and the said Act fifth George the Fourth, chapter eighty-seven, intituled *An Act to authorise the Proprietors of Entailed Estates in Scotland to grant Provisions to the Wives or Husbands and Children of such Proprietors*, shall, from and after the passing of this Act, be applicable to all entails, whether dated before or after the first day

of August one thousand eight hundred and forty-eight, and to all trusts, of whatever date, under which land is held for the purpose of being entailed, or by which money or other property, real or personal, is invested in trust for the purpose of purchasing land to be entailed; and the powers conferred by the said two last-mentioned Acts, or either of them, may be exercised with reference to such land, money, or other property by the person who if such land had been entailed in terms of the trust would be the heir in possession of the entailed land, and by the person who if such money or other property had been invested in the purchase of land to be entailed would be the heir in possession under the entail to be executed of such purchased land if such entail had been executed; and the apparent heir of such person who would be heir of entail in possession of such land if it were entailed, or if it were purchased and entailed, shall have the same powers with reference to such land, money, or other property as are conferred on heirs apparent under the sixth section of this Act with reference to granting provisions to their wives or husbands and child or children: Provided always, that where the operation of the said two last-mentioned Acts, or the power granted by the sixth section of this Act, are, or any one of them is, expressly excluded by the deed of entail or trust deed, the powers conferred by the said Acts, or by the Act so excluded, or by the sixth section of this Act when so excluded, shall not be competent to the heir of entail in possession under such entail, or to the person who would be heir of entail in possession under the entail directed to be made if such entail were executed as aforesaid, or to the heir apparent of such heir of entail or person.

[1] See notes to these Acts and to Act 1848, sect. 29.

When estate may be sold, sale may be by private bargain.[1]

9. It shall be competent for the Court of Session, where any entailed estate is subject to or may be charged with debt affecting, or that may be made to affect, the fee of the estate, on a petition to be presented by the heir of entail in possession of such estate, to approve of an agreement to sell by private bargain the whole or any portion of such estate for payment of the whole or any part of such debt; and the Court may authorise such sale under such agreement where they are satisfied, after making such inquiry as they consider necessary, that the sale is advantageous and beneficial for the heir of entail in possession of such estate, and not detrimental to the interests of the succeeding heirs of entail; and the said Court may authorise such sale even though the price to be paid under such agreement is considerably above the total amount of the debt affecting such entailed estate as aforesaid, provided they are satisfied of the advantage and benefit likely to accrue from such sale as aforesaid; and in the event of such sale being effected as aforesaid, and of any surplus remaining after paying off the said debts and the expenses attending the sale, such surplus, if less than two hundred pounds, shall belong to the heir of entail in possession, and if more than two hundred pounds shall be applied under the authority of the Court in buying other lands in the neighbourhood of the remainder of the entailed estate, if the whole estate is not sold, or, if the whole estate is sold, in buying lands in Scotland, to be approved of by the Court; and until a suitable purchase of land is

found, such surplus may be invested by trustees to be appointed by the Court, on the application of the petitioner in the course of the proceedings or in any application to be presented by him for the purpose, on heritable security in Scotland to the satisfaction of the said trustees, or may be applied otherwise under the provisions of the Acts of Parliament relating to entails in Scotland; and the form of petitions to be presented under this section and the procedure thereon shall, as nearly as may be, be similar to the form and procedure prescribed with reference to petitions presented to the Court under the said Acts; and until such surplus is invested in the purchase of land for the purpose of being entailed, the free annual proceeds thereof shall be paid to the person who would be the heir in possession if such land were purchased and entailed; and it is hereby provided that it shall be competent to any heir of entail in possession of an entailed estate in Scotland who has or whose predecessors have sold the whole or part of the entailed estate, and where the price or the balance of the price is available for the purchase of land, to apply to the Court in like manner for the appointment of trustees by whom the said price or balance thereof may be invested on heritable security in Scotland, or may be applied otherwise under the provisions of the Acts of Parliament relating to entails in the same manner, till the same event, and to the same effect in all respects as is herein-before provided with reference to the price or the balance of the price of lands sold under the provisions of this section.

[1] See Act 1848, sect. 25, and notes.

Provisions as to sale by public roup.

10. When the upset price of any entailed lands, the sale of which has been authorised by the Court, shall have been fixed, the Court may authorise the lands to be exposed by the heir of entail in possession, in presence of the judge of the roup appointed by the Court, at such time and at such upset price, not being under the said fixed upset price, as the heir of entail in possession may arrange, and in the event of the lands not being sold at such upset price, then the heir of entail in possession may re-expose the lands at a reduced upset price, not being under the said fixed upset price, in presence of the judge of the roup, and so on thereafter if the said lands shall not be sold at such re-exposure: Provided always, that such heir of entail in possession shall advertise the land in the first and subsequent exposures, if any, in terms of the interlocutor which shall have been pronounced by the Court on authorising the sale, and upon the heir of entail effecting a sale in virtue hereof the Court shall approve of such sale according to the existing law and practice.

Entailer's debts, &c., may be charge on entailed estate by bond and disposition in security.[1]

11. In all cases where there are or shall be entailer's or other debts or sums of money which might lawfully be made chargeable,[2] by adjudication or otherwise, upon the fee of an entailed estate, the heir of entail in possession of such estate for the time being shall have all the like powers of charging the fee and rents of such estate, or any portion thereof, other than the mansion house, offices, and policies thereof, with the full amount of such debts or sums of money, and of granting, with the authority of the Court of Session, bonds and dispositions in security for the full amount of such debts and sums of money, as by the Act eleventh

and twelfth Victoria, chapter thirty-six,[3] and the Act sixteenth and seventeenth Victoria, chapter ninety-four,[4] are conferred with the reference to provisions to younger children; and such bonds and dispositions in security may be granted in favour of any parties in the right of such debts or sums of money at the date when such bonds and dispositions in security are executed.[5]

[1] This section is repeated from the Titles Act of 1860, sect, 29, and dropped out of the Titles Consolidation Act of 1868.

[2] See Blair, 11th March 1865, 3 Macph. 698; and Act 1848, sect. 25.

[3] Sect. 21.

[4] Sect. 7.

[5] This section is applied to road debts by 41 & 42 Vict. c. 51, sect. 70: 'Whereas 'by section sixty-eight of the Act passed in the first and second years of the reign of 'his Majesty King William the Fourth, chapter forty-three, it is enacted "that it '"shall and may be lawful for any proprietor or heir of entail in possession of any '"entailed estate, or the tutor or curator of such proprietor or heir of entail, who '"may be desirous of advancing or lending any sum or sums of money for the pur-'"pose of making or maintaining any turnpike road or building any bridge on the '"same to be made or built subsequent to the passing of this Act, either to bind '"himself personally as a trustee of such turnpike road, and also to bind the suc-'"ceeding heirs of entail for the repayment of any such sum or sums of money to '"any person or persons who may advance the same to the trustees of such turnpike '"road, or to advance such sum or sums, and to render the same a burden upon the '"said entailed estate and the succeeding heirs of entail, or, having advanced such '"sum or sums, to borrow the like sum or sums, and to bind himself and the said '"estate and the heirs of entail succeeding thereto for the same; and all bonds and '"obligations for money so to be advanced or borrowed and applied shall be held to '"bind such proprietors, in cases where they have personally bound themselves '"and also the heirs of entail in such estates for the repayment of such money, and '"such bonds and obligations shall be valid and effectual against the granter of the '"same and also against the heirs of entail succeeding to them in such entailed '"estates, and such sums shall be and continue to be a real burden on such estates '"till repaid out of the tolls and duties levied on such turnpike road: Provided '"also, that the share or proportion of such sum or sums of money so to be advanced '"or borrowed affecting such succeeding heirs of entail shall not exceed one year's '"free rent of the entailed lands of such proprietor situated in each parish respec-'"tively through which any such turnpike road or any part thereof shall run, or on '"which such bridge or any part thereof shall be built, and that the heir of entail '"in possession of such entailed estate shall be obliged to keep down the interest of '"such sum or sums of money so advanced or borrowed: Provided also, that it shall '"not be lawful to the creditor or creditors in right of any such debt to adjudge or '"otherwise evict the entailed estate for payment thereof, or any part thereof, but '"it shall and may be competent to such creditor or creditors to prosecute such '"remedy or remedies against the rents thereof as are given and allowed by the law '"of Scotland to heritable creditors:"

'And whereas the obligations for such debts were incurred in reliance upon the 'continuance of a right to levy tolls, which right will be abolished after the com-'mencement of this Act; and whereas it may happen that under the provisions of 'this Act the full amount of such debts for which such heirs of entail became liable 'may not be found included in the amount for which certificate of debt is herein-'before directed to be granted to the creditor or creditors therein: Be it enacted, that 'the heirs of entail personally liable for payment of such debts, or for the portion 'thereof not included in such certificate, shall have all the like powers of charging 'the fee and rents of the entailed estate, or any portion thereof other than the 'mansion house, offices, and policies thereof, with the full amount of such debts not 'included in such certificate, and of granting with the authority of the Court of 'Session bonds and dispositions in security for the full amount of such debts as afore-'said, as by the Act passed in the thirty-first and thirty-second years of the reign 'of her present Majesty, chapter eighty-four, section eleven, are conferred with ref-'erence to entailers' debts; and such bonds and dispositions in security may be 'granted in favour of any parties in the right of such debts at the date when such 'bonds and dispositions in security are executed.'—(See Breadalbane's Trs. *v.* Bread-albane, 7th July 1846, 8 D. 1062; Stewart *v.* Stewart, 1877, 14 Sc. L.R. 238.) The words 'such debts' include 'sums of money advanced by any person to the trustees

'acting under any Act of Parliament for the purpose of making or maintaining any 'turnpike road or building any bridge in Scotland, notwithstanding that such 'turnpike road was made or such bridge was built prior to the passing of the Act 'of the first and second years of the reign of his Majesty King William the Fourth, 'chapter forty-three.'—43 Vict. c. 7.

Provisions of Act 10 Geo. 3. c. 51, to apply to dwellings for the labouring classes.

12. Whereas it is expedient to grant further facilities for the building of cottages for labourers, farm servants, artisans, and others residing on entailed estates in Scotland, and for that purpose to amend the Act of the twenty-third and twenty-fourth years of the reign of Queen Victoria, chapter ninety-five:[1] Be it therefore enacted, that it shall be sufficient compliance with the provisions of the said Act and of the Acts of the tenth year of the reign of King George the Third, chapter fifty-one, the eleventh and twelfth years of the reign of Queen Victoria, chapter thirty-six, and the sixteenth and seventeenth years of the reign of Queen Victoria, chapter ninety-four, therein recited, if it be shown that the cottages in respect of which a charge is proposed to be created, or towards the erection of which monies are sought to be applied, have been completed in a proper and substantial manner, and it shall not be necessary to prove that they are required for the accommodation of the labourers, farm servants, artisans, and others employed on or connected with the entailed estate on which they have been or may be erected.

[1] The Act referred to, after reciting the Montgomery Act (see sect. 9 thereof, and note [2], *supra*, p. 885), and the Acts of 1848 and 1853, enacts as follows:—

'I. *Provisions of recited Acts as to Improvements of Entailed Estates to include Erection of Cottages.*—All the provisions of the recited Acts which relate or apply to improvements of entailed estates shall be held and construed as including and applying to the erection of cottages for the labourers, farm servants, and artisans upon such estates, in the same manner in all respects as if the erection of such cottages had been specified in the ninth section of the first-recited Act among the other improvements therein mentioned.

'II. *Erection of Cottages to be held as permanent Improvements contemplated by* 11 & 12 *Vict. c.* 36, *and* 16 & 17 *Vict. c.* 94.—The erection of cottages for the labourers, farm servants, and artisans upon entailed estates, or upon lands towards the improvement of which such monies or balances of monies as aforesaid are applicable under the powers of the second and third recited Acts, shall be held to be one of the permanent improvements of such estates or lands contemplated by the second and third recited Acts; and all the provisions of those Acts which relate to permanent improvements of such estates or lands shall be held and construed as including and applying to the erection of such cottages.

'III. *Court or Sheriff to be satisfied that Entailed Estates will be permanently benefited, and that Cottages have been substantially erected.*—Provided always, that nothing in this Act contained shall authorise the creation of any charge upon entailed estates, or against succeeding heirs of entail, in respect of the erection of cottages, or shall authorise the application towards the erection of cottages of any monies in which succeeding heirs of entail are interested, unless the Court before which proceedings in pursuance of the recited Acts, or any of them, shall be taken, shall be satisfied that the said estates or the succeeding heirs of entail will be permanently benefited to the extent of the charge so created or monies so applied, and that the cottages in respect of which such charge is created, or towards the erection of which such monies are applied, have been completed in a proper and substantial manner.'

Where estate propelled, applications under 11 & 12 Vict. c. 36, and 16 & 17 Vict. c. 94, may be made

13. Where any heir of entail in possession of an entailed estate under an entail dated prior to the first day of August one thousand eight hundred and forty-eight shall have lawfully propelled, or shall hereafter lawfully propel, such estate under reservation of his own liferent to the heir entitled to succeed him therein, any application which has been or shall be made under the Acts of the eleventh and twelfth Victoria, chapter

either in name of liferenter or of fiar.[1]

thirty-six, and of the sixteenth and seventeenth Victoria, chapter ninety-four, and all procedure following thereon, shall be equally effectual in all respects whether made in the name of the heir of entail who has propelled the estate or in the name of the heir to whom it has been propelled; and during the lifetime of such last-mentioned heir it shall be sufficient that the consents of the persons whose consents would have been required to such application if the estate had not been propelled be obtained thereto; and provided also, that where the application is presented in the name of the heir to whom the entailed estate has been propelled, the presentation of such application shall be sufficient evidence of his consent thereto.

[1] Cf. Act 1853, sect. 22, *supra*, p. 945. Are these sections extended by Act 1882, sects. 3-4, to the case of new entails, to which the consents introduced by Act 1848, sect. 3 now apply?

Repeal of sect. 33 of Act of 10 Geo. 3. c. 51.[1]

14. So much of the thirty-third section of the Act of the tenth year of the reign of George the Third, chapter fifty-one, as provides that not more than thirty acres of arable land, nor more than one hundred acres of lands consisting of hills or other grounds incapable or improper by their nature for culture by the plough, of such entailed estates lying together in one place or plot shall be given in exchange, and that an equivalent in land contiguous to the entailed estate with which the exchange is to be made shall be received in place of the land given in exchange, is hereby repealed; and in lieu thereof it is enacted, that not more than three hundred acres of lands of such entailed estates lying together in one place or plot shall be given in exchange, and that an equivalent in land shall be received in place of the land given in exchange; and the said section shall be read as if this last-mentioned enactment was contained therein.

[1] See *supra*, p. 893.

Court of Session may cause entails to be registered for preservation.

15. It shall be competent to any heir of entail, trustee, or other person interested in any entail to apply to the Court of Session for warrant to register such entail in the Books of Council and Session for preservation, as well as in the register of entails for publication, where not previously so registered; and it shall be lawful for the Court, under such application, to cause such registration to be made at the expense of the applicant, or of the heir of entail in possession, as the Court shall direct, and, with a view to such registration, to order production of such entail, or grant diligence for its recovery.[1]

[1] As to exhibition for recording in the register of tailzies, see Houston *v.* Shaw, 1715, M. 15366; More, 1753, M. 15602; Nairne *v.* Nairne, 1757, M. 15605; Ker, 1804, M. 14984; Jessop, 7th Feb. 1822, 1 S. 294 (N.E. 273).

Court may make Acts of sederunt.

16. It shall be lawful for the Court to pass such Act or Acts of Sederunt as they may deem proper for the further regulation of the forms of procedure under this Act, and otherwise for rendering the same more effectual according to the true intent and meaning thereof.

Liferents of personal estate beyond certain limits prohibited.[1]

17. From and after the passing of this Act, it shall be competent to constitute or reserve, by means of a trust or otherwise, a liferent interest in moveable and personal estate in Scotland in favour only of a party in

life at the date of the deed constituting or reserving such liferent, and where any moveable or personal estate in Scotland shall, by virtue of any deed dated after the passing of this Act (and the date of any testamentary or *mortis causa* deed shall be taken to be the date of the death of the grantor, and the date of any contract of marriage shall be taken to be the date of the dissolution of the marriage), be held in liferent by or for behoof of a party of full age born after the date of such deed, such moveable or personal estate shall belong absolutely to such party, and where such estate stands invested in the name of any trustees such trustees shall be bound to deliver, make over, or convey such estate to such party: Provided always, that where more persons than one are interested in the moveable or personal estate held by trustees as hereinbefore mentioned, all the expenses connected with the transference of a portion of such estate to any of the beneficiaries in terms of this Act shall be borne by the beneficiary in whose favour the transference is made.

[1] Cf. Act 1848, sects. 41, 47-49.

11 & 12 Vict. c. 36, ss. 5, 16, to apply to entails dated after 1848, and to all trusts.

18. The provisions of the fifth and sixteenth sections of the said Act eleventh and twelfth Victoria, chapter thirty-six, shall from and after the passing of this Act be extended to entails dated on or after the first day of August one thousand eight hundred and forty-eight, and shall apply to such entails in the same manner and to the same effect in all respects as if these provisions had been by the said sections made to apply expressly to such entails, as well as to entails dated prior to the first day of August one thousand eight hundred and forty-eight; and the provisions of these sections shall apply to all trusts of whatever date under which land is held for the purpose of being entailed.

SCHEDULE (A.)[1]

Intimation is hereby given that *A.B.*, heir of entail in possession of the entailed lands and estate of in the county of has presented a petition to the Lords of Council and Session (Division, Lord Ordinary, Clerk), in terms of the Acts eleventh and twelfth Victoria, chapter thirty-six, and sixteenth and seventeenth Victoria, chapter ninety-four, and (*this Act*), and relative Acts of Sederunt, for authority to disentail the lands and estate of in the county of (*or* to charge the lands of in the county of with the sum of , *or otherwise, as the case may be*). Date of interlocutor ordering intimation day of one thousand eight hundred and .

C.D., Agent of the Petitioner.
Address and Date.

[1] See sect. 7.

No. XXIV.

38 & 39 VICTORIA, c. 61.

An Act to further amend the Law of Entail in Scotland.—[11*th August* 1875.][1]

WHEREAS it is expedient further to amend the law of entail in Scotland:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

[1] The Duke of Argyll's Act of 1878, *infra*, is to be read and construed as one with the present statute; see sect. 5 thereof.

Short title.

1. This Act may be cited for all purposes as 'The Entail Amendment (Scotland) Act, 1875.'

Commencement of Act.

2. This Act shall commence and come into operation on the passing thereof.

Interpretation of terms.[1]

3. In this Act the following terms shall have the meanings hereby assigned to them, unless the same are inconsistent with the context; that is to say,

'The Court' shall mean the Court of Session, and shall include either Division of the Inner House thereof, or the Lord Ordinary, as the case may be:

'The Lord Ordinary' shall mean the junior Lord Ordinary or the Lord Ordinary officiating on the Bills in time of vacation or recess, as the case may be:

'Land' shall include all heritages:

'Heir of entail' shall include the institute:

'Entailed estate' shall include all heritages which by the law of Scotland may be made the subject of entail, and also all lands or other heritages held in trust for the purpose of being entailed, and all money or other property real or personal invested in trust for the purpose of purchasing land to be entailed, and also all money consigned in respect of the taking of any land forming part of any entailed estate:

'Entail Act' shall mean the Act of the Parliament of Scotland passed in the year one thousand six hundred and eighty-five, intituled 'Act concerning Tailzies,' and any other Acts of Parliament in force relating to entailed estates in Scotland:

'Creditor' shall include the heirs and assignees of a creditor:

'Improvements'[2] shall include all or any of the following matters, and all operations necessary for carrying into effect any of such matters; that is to say,

(1.) The draining, or the straightening, widening, deepening, or otherwise improving the drains, streams, and watercourses of an entailed estate, or the conducting of water

to any house or houses or offices or mill or works, or to any town, village, or populous place situated on the estate;

(2.) The embanking, warping, or weiring of land from the waters of the sea, or of any lake, river, or stream;

(3.) The enclosing of land, and the straightening of fences, and re-division of land;

(4.) The reclamation of land;

(5.) The making of private roads through the estate, and the forming of roads or streets in any town, village, or populous place in so far as situated on the estate, and the making of tramways or railways or navigable canals for the benefit of and in so far as made within the estate;

(6.) The trenching of land, the clearing of land, or the planting of land;

(7.) The erecting or improving of, or the making additions to—

(*a.*) The mansion-house or any of the mansion-houses and offices or outbuildings of the same on an entailed estate;

(*b.*) Farmhouses and offices, or outbuildings for the same, and cottages for labourers, farm-servants, and artisans, whether employed on the estate or not;

(*c.*) Factors', ground officers', and overseers' houses, with suitable offices and outbuildings;

(*d.*) Inns or hotels and offices, or outbuildings of the same on the estate;

(*e.*) Shooting lodges and offices, or outbuildings for the occupation of the tenants of any shootings which may be let on the estate, and of the servants of such tenants of shootings;

(*f.*) Engine houses, water wheels, water or horse mills, saw mills, kilns, shafts, wells, ponds, tanks, reservoirs, dams, leads, pipes, conduits, watercourses, bridges, weirs, sluices, flood gates, or hatches, with all fixed machinery appertaining thereto, which will increase the value of the land for agricultural purposes, or otherwise be beneficial to the estate.

(*g.*) Jetties or landing places on the shores of the sea or of a lake, or on the banks of a navigable river, for facilitating the transport of agricultural stock and produce, or of manures, or other articles needed for agricultural purposes.

[1] Cf. the other interpretation clauses of the Entail Acts:—Act 1848, sect. 52; Act 1853, sect. 25; Act 1868, sect. 2; Act 1882, sects. 2, 27.

[2] Cf. the enumeration under the Montgomery Act, sects. 9, 27 and notes, and the permanent improvements of Act 1848, sects. 25, 26, and notes, *supra*, pp. 885, 891, 922, 923. Many improvements rejected from one or both of these categories are here admitted. See the interpretation of a special clause in a deed of Entail—E. Dalhousie's Trs. *v.* E. Dalhousie, 27th June 1876, 3 Ret. 882, 1st Nov. 1878, 6 R. 141.

Nearest heir of entail may consent when 21 years of age instead of when 25 years of age as formerly.

4. Where under the terms of the Act of the eleventh and twelfth years of the reign of her Majesty, chapter thirty-six,[1] or under any Acts amending the same, it is provided that the nearest heir of entail for the time entitled to succeed to an entailed estate giving his consent in any application under the said Act or Acts, shall be of the age of twenty-five years complete, it shall be sufficient, after the passing of this Act, if such heir shall be of the age of twenty-one years complete, and the said Act and any amending Acts shall be read and construed as if for the provision therein in regard to the age of such heir the provision of this Act were inserted.

[1] Sects. 1-4, *supra*, pp. 908-912.

Amendment of section 3 of 11 & 12 Vict. c. 36.

5. Whereas it is expedient that section three[1] of the Act of the eleventh and twelfth years of the reign of her Majesty, chapter thirty-six, should be amended: Be it enacted as follows:

Consents to disentail estates entailed before 1st August 1848, may be given in course of application, and when such consents are not given the Court may assess the value of the heirs interests and dispense with such consents, on payment or security of such value.

(1.) In any application to the Court of Session for authority to disentail an entailed estate in Scotland, [holden by virtue of any tailzie dated prior to the first day of August one thousand eight hundred and forty-eight,][2] the consent of any of the heirs of entail mentioned in the recited section entitled to succeed to such estate may competently be given after such application has been presented to the Court, and in the course of the same:

(2.) In the event of any of the foresaid heirs, except the nearest heir for the time, whether an heir apparent or not, entitled to succeed,[3] declining or refusing to give or being legally incapable of giving his consent, the Court may dispense with such consent in terms of the provisions following; (that is to say,)

In case of nearest heir consent must be given by himself.

(*a.*) When any of the foresaid heirs entitled to succeed, except the nearest heir for the time, declines or refuses to give, or is legally incapable of giving his consent, the Court shall, on a motion to that effect by the petitioner in the application, and on a statement by him of the declinature or refusal or incapacity of such heir or heirs aforesaid, and after such intimation to the heir or heirs so declining or refusing, or to the guardians or other persons interested in the heir or heirs incapacitated as aforesaid, as the Court shall think necessary, ascertain the value[4] in money of the expectancy or interest in the entailed estate with reference to such application of such heir or heirs declining or refusing, or incapacitated to give consent as aforesaid.

(*b.*) Upon such value in money being ascertained to the satisfaction of the Court, the Court shall direct the sum so ascertained to be paid into bank in name of the heir or heirs the value of whose expectancy or interest has been ascertained as aforesaid, or that proper security shall be given over the estate which is the subject of application for the amount so ascertained in favour of the heir or heirs aforesaid.

(*c.*) Upon such value in money being so paid or secured, to the satisfaction of the Court, the Court shall dispense with the consent or consents of the heir or heirs the value of whose

expectancy or interest has been ascertained as aforesaid, and shall thereupon proceed as if such consent or consents had been obtained:[5] Provided always, that nothing herein contained shall render it competent to dispense with the consent of the nearest heir for the time entitled to succeed to any entailed estate sought to be disentailed.[2]

(3.) So much of the recited section as provides that the heir of entail in possession, being the only heir of entail in existence for the time, shall be unmarried when he exercises the powers conferred upon him by the recited section, is hereby repealed; but nothing herein contained shall affect the provisions of section eight of the recited Act.

[1] See this section, and notes thereto, *supra*, p. 910.

[2] Bracketed part repealed by Act 1882, sect. 13.

[3] There is now no exception, Act 1882, sect. 13; but provision is there made for creditors, wives, children, and assignees. There is consequently now no bar to disentail, except in personal disability and in certain circumstances the necessity of getting the consent of marriage contract trustees, Act 1848, sect. 8; Act 1882, sect. 17.

[4] The value is depreciated from the old customary actuarial reckoning by this compulsory power. What is valued is not, as formerly, a 'consent,' but an 'expectancy or 'interest,' not including any interest on behalf of the heir's children. Both the chance of disentailing and the chance of becoming entitled to grant children's provisions may be taken into account; but the latter may be neutralised by loss of free rental through provisions by previous heirs. The basis of the valuation is the life-interest of the heir in possession and of those substitutes whose consents would have been required but for this Act. Lord Shand suggested that the surplus left after these life-interests were satisfied should be divided proportionally—De Virte *v.* Wilson, 19th Dec. 1877, 5 Ret. 328. In arriving at the value of the expectancy or interest, it is relevant to prove any facts bearing on the probable duration of life of a party interested, in the state of his health or his suffering from ailments which reduce his prospect of life below the average, the *onus* lying on those who seek to disturb the ordinary calculations of life; but see L. Blackburn's obs. on the limits of such an inquiry—M'Donald *v.* M'Donalds, 16th Jan. 1879, 6 Ret. 521; 19th March 1879, 6 Ret. 869, revd. 12th March 1880, 7 Ret. H.L. 41. Further, it was there held that the chance of the survivor of two (the second and third) substitutes taking the estate in fee simple by surviving the fourth and only other existing heir must be taken into account—ibid. The value of each expectancy or interest is calculated as at the date of the instrument of disentail—Sprot, 1882, 19 Sc. L.R. 738. After consignation the consigner cannot object to the *quantum*—De Virte. The rule as to expenses is that if the respondents appear and disputes occur about valuation, yet if they do not unnecessarily cause expense or take unfounded and frivolous objections, they will not be mulcted in expenses, though the disentailer substantially succeeds—M'Donald *v.* M'Donalds, 7th June 1879, 6 Ret. 1011.

[5] The emergence of a nearer heir before the completion of these formalities (which are the equivalents of the old consents) puts an end to the application—Shand, 4th March 1876, 3 Ret. 544; cf. Act 1853, sect. 19.

Provisions of preceding section as regards consents to apply to applications for selling, burdening, &c.[1]

6. The provisions of the preceding section with reference to applications for authority to disentail shall apply also where an heir of entail in possession of an entailed estate in Scotland, holden by virtue of any tailzie dated prior to first August one thousand eight hundred and forty-eight, applies for power to sell, alienate, dispone, charge with debts or encumbrances, lease or feu, or excamb such estate in whole or in part: Provided always, that nothing contained in this Act shall render it necessary in any application with reference to an entailed estate, to obtain the consent (or the dispensing with the consent) of any heir of entail whose consent would not have been necessary before the passing of this Act.

[1] Amending sects. 4, 5, of Act 1848, in consistency with last section.

Court empowered to authorise heir of entail to borrow money to defray the cost of improvements on the entailed estate.[1]

7. From and after the passing of this Act, it shall be lawful for the Court,[2] on the application of the heir of entail in possession of an entailed estate in Scotland holden by virtue of any tailzie [dated prior to the first day of August one thousand eight hundred and forty-eight],[3] to grant authority to such heir of entail to borrow money to defray the cost of improvements on such estate, whether the same have already been executed by him or are in the course of execution, or are merely contemplated at the date of the application, and whether the same if executed prior to the date of the application were executed before or after the passing of this Act, and to grant security therefor to the lender in the manner herein-after provided, such heir of entail having paid the cost of such improvements as may have been executed prior to the date of the application, or being liable for the same so far as unpaid: Provided as follows:

(1.) The Court shall be satisfied that any improvements executed prior to the date of the application are of a substantial nature and beneficial[4] to the estate as at the date of the application to the extent of at least the sum authorised to be borrowed:

(2.) The Court shall be satisfied with respect to any improvements in course of execution, or contemplated, that the same, if well executed, will be of a substantial nature and beneficial to the estate:

(3.) The amount to be borrowed to defray the cost of improvements executed prior to the date of the application shall be instructed by such evidence as the Court shall deem reasonable:

(4.) The Court may determine the amount to be borrowed to defray the cost of improvements in course of execution, or contemplated, upon an estimate of the probable amount of such cost made by a person or persons of skill:

(5.) It shall not be necessary in any application that the vouchers of the expenditure shall be produced; but it shall be in the power of the Court, or of any reporter or other person appointed to inquire into the facts, and examine the improvements, to call for the production of the vouchers of the expenditure, or any of them, if the Court or such reporter or other person shall think it is desirable or necessary that such vouchers, or any of them, should be produced:

(6.) In every case the Court shall, in fixing the amount to be borrowed under their authority, add to the actual or estimated amount of the cost of the improvements, the actual or estimated amount of the cost of the application, and the proceedings therein, and of obtaining the loan, and granting security therefor:[5]

(7.) When the application is for authority to borrow money on the security of the estate to defray the cost of improvements thereon executed prior to the date of the application, the process shall be at an end on the Court granting the prayer of the application; in every other case the process shall subsist as a depending process until the whole money authorised to be borrowed shall be paid away under the authority of the Court, as herein-after provided:

(8.) In every such case as that last mentioned, the Court in granting their authority shall make an order for the consignation in bank of the whole amount of the loan authorised on a receipt payable to the orders of Court, and such order for consignation shall be set forth in the security to be granted by the heir of entail as after mentioned, and shall be obligatory on the lender; and thereafter the Court may make such orders and give such directions in the process as they may think necessary from time to time for the inspection of the works of improvement in course of execution, for insuring that the improvements shall be well executed, and may, on motion made on the process, grant orders from time to time for payment out of the consigned money to the applicant, or in the case of his death to his personal representative or other successor entitled thereto and sisted in the process as herein-after provided,[6] of the cost of the improvements so far as executed to their satisfaction, paid for by him or for which he is liable, and of the expenses of the loan and security and of the process.

Provided also, that nothing in this Act shall authorise any heir of entail to charge the entailed estate with money expended on any improvement which may have been executed more than twenty years before the application for authority to charge the estate in respect of such improvement shall have been made to the Court.

[1] Cf. Montgomery Act, *supra*, pp. 885, 891; Act 1848, sect. 13 *et seq.*, *supra*, p. 916, and notes. The present and following sections differ from these provisions, as referring to a larger list of improvements, and as extending to cases of improvements in course of being made or only contemplated, and to borrowing in prospect of their being made. They are further extended to money expended under Act 1878, sects. 1 & 2, by sect. 4 thereof.

[2] 'Court' now includes sheriff and sheriff-substitute, subject to appeal to the Court of Session, Act 1882, sect. 5.

[3] This limitation to old entails was first relaxed by Act 1878, sect. 3, and then swept away entirely by Act 1882, sect. 4, *infra*, pp. 968, 970.

[4] Improvements of this description on a mansion-house and grounds, costing £3099, were all allowed, though the free rent of the estate (inclusive of improvement charges, and exclusive of the rent of the house) was only £531—Fogo, 14th Dec. 1877, 5 Ret. 319. See Act 1848, sect. 16, note.

[5] This did not apply to new entails—Maclaine *v.* Ranken, 12th July 1878, 5 Ret. 1053, but now see note[3].

[6] See sect. 12 (3).

Heir of entail with authority of the Court may grant bond over the estate; form and effect of bond.[1]

8. It shall be lawful for an heir of entail in possession of an entailed estate in Scotland holden by virtue of any tailzie [dated prior to the first day of August one thousand eight hundred and forty-eight][2] (notwithstanding any provisions to the contrary contained in the tailzie,) who has obtained the authority of the Court to borrow money under this Act on the security of the estate, to charge the fee and rents of such estate other than the mansion-house, offices, and policies thereof, or the fee and rents of any portion of such estate other than as aforesaid, with a bond of annual rent, binding himself and his heirs of tailzie to make payment of an annual rent for twenty-five years from and after the date of such authority of the Court, or, where the money has been consigned as aforesaid, from and after the expiration of two years from the date of consignation, such annual rent to be payable by equal moieties half

yearly, and to be at a rate not exceeding seven pounds two shillings per annum for every one hundred pounds so authorised to be borrowed, and so in proportion for any greater or less sum; or, [where the improvements were executed before the date of the application to the Court][3] in the option of such heir in possession, and in lieu of such bond of annual rent, with a bond and disposition in security over such estate, or any portion thereof, other than as aforesaid, for two thirds[4] of the sum on which the amount of such bond of annual rent, if granted, would be calculated in terms of this Act, with interest thereof at the rate to be stated in such bond and disposition in security from the date aforesaid till repaid, with corresponding penalties, and such bond and disposition in security may be in the like form and shall have the like effect and operation, and be subject to the like conditions and provisions as to keeping down interest as are made and provided by the said Act of the eleventh and twelfth years of the reign of her Majesty, chapter thirty-six,[5] and any Acts amending the same, in regard to bonds and dispositions in security authorised to be granted in respect of provisions to younger children, and the granting of such bond of annual rent or bond and disposition in security shall operate as a discharge of all claims for or on account of the improvements with reference to which such bonds of annual rent or bonds and dispositions in security are hereby authorised to be granted.

[1] Cf. Act 1848, sects. 13-19, 21, *supra*, p. 916, and notes.
[2] See note [3] to last section.
[3] The rule is now general, Act 1882, sect. 6 (1).
[4] Now three-fourths, Act 1882, sect. 6 (1); and where one-fourth of a loan on rent-charge has been paid up, the rest may be secured by bond and disposition in security, ibid., sub-sect. 4. And in petitions for disentail, improvement expenditure may now be approved and deducted from the value, in fixing compensation, without being separately charged, Act 1882, sect. 7. The price of the estate may similarly be used to defray uncharged improvement outlay, Act 1882, sect. 23 (7).
[5] Sect. 21; cf. sect. 18, *supra*, pp. 919, 920.

Provision as to entailed estates now charged for improvements.

9. And whereas it is expedient that where an estate in Scotland holden by virtue of any tailzie [dated prior to the first day of August one thousand eight hundred and forty-eight][1] has, before the passing of this Act, been duly charged with the cost of improvements executed thereon, and shall continue charged therewith after the passing of this Act, the heir of entail in possession thereof at or after the passing of this Act should be entitled to relief in the manner but subject to the conditions herein-after provided: Be it therefore enacted as follows:

(1.) It shall be lawful for such heir of entail, with the consent of the nearest heir for the time entitled to succeed to the said estate, in case he or any of his predecessors in possession of the estate shall have granted a bond or bonds of annual rent over the estate or any portion thereof, or otherwise imposed or created a rentcharge or rentcharges thereon in respect of improvements executed under the Act of the tenth year of the reign of his Majesty King George the Third, chapter fifty-one, or under the Act of the eleventh and twelfth years of the reign of her present Majesty, chapter thirty-six, or any Act amending either of these Acts, or under 'The Improvement of Land Act, '1864,'[2] or any Act amending the same, or any other Act

authorising the loan of money for the improvement of land, and in case such bond or bonds of annual rent or rentcharge or rentcharges continues or continue to affect the estate at the time, to agree with the creditor in any such bond of annual rent or rentcharge for the substitution therefor of a bond and disposition in security over the estate or any portion thereof, other than as in the preceding section mentioned,[3] for the portion then remaining unpaid of the sum on which the amount of such bond of annual rent, or of such rentcharge, was calculated, or otherwise to obtain, from any person willing to advance the same, money on loan to pay to the creditor the portion of such sum then unpaid as aforesaid under such bond of annual rent or rentcharge, if the creditor will consent to receive the same, and, having obtained the sanction of the Court to such agreement, to grant bond and disposition in security in terms thereof, in favour of such creditor or other person, and such bond and disposition in security, if in favour of the creditor, shall operate as an absolute discharge by him of such bond of annual rent or rentcharge:

(2.) Bonds and dispositions in security granted in terms of this section shall set forth the rate of interest stipulated to be paid from the date of the advance until repayment, with corresponding penalties, and may be in the form, and shall have the effect and operation, and be subject to the conditions and provisions as to keeping down interest, which are mentioned in the preceding section.

[1] This section now applies to all entails—Act 1878, sect. 3, *infra*, p. 968.

[2] See end of the present Act.

[3] *I.e.*, the mansion-house, offices, and policies. Now under Act 1882, sect. 6 (4), *infra*, p. 971, if one-fourth of a capital sum, borrowed on rentcharge as above, has been defrayed by the heir in possession, he may avail himself of the powers contained in this section, without its limitations, *i.e.*, without the consent of the nearest heir, and whether the cost shall have been charged prior or subsequent to the date of the present Act.

Amendment of the law as to provisions for younger children of heirs of entail.

10. In all cases in which an heir of entail in possession of an estate in Scotland, holden by virtue of a tailzie [dated prior to the first day of August one thousand eight hundred and forty-eight,][1] shall have granted or shall grant provision for a lawful child in terms of the Act of the fifth year of the reign of his Majesty King George the Fourth, chapter eighty-seven,[2] and any Acts amending the same, or in virtue of the powers in that behalf contained in the deed of entail of such estate, and such child shall either before or after the passing of this Act pre-decease the grantor of such provision leaving lawful issue who shall survive the grantor, such issue shall on the death of the grantor take the said provision and be entitled to receive payment thereof in like manner as their parent would have done if he or she had survived the grantor, subject to any settlement or apportionment of the same by such grantor; and it shall also be lawful for any heir of entail in possession as aforesaid to grant provision to the issue of a pre-deceasing child, and to apportion the same, whether such pre-deceasing child shall have been heir apparent or a younger child to the same extent and subject to the same conditions

as if the provision were made under the foresaid Acts or any of them or under the entail of the estate in favour of a younger child of the grantor; and in the respective cases aforesaid the heir of entail in possession liable to pay such provision shall be entitled to charge the estate therewith in the same manner and to the same extent and subject to the same conditions as if the provision sought to be charged had fallen to be paid to a child of the grantor and not to the issue of such child: Provided that the whole provisions granted by such heir of entail shall not exceed in any case the amount authorised to be charged on the entailed estate and rents thereof, under the said Acts or any of them, or under the entail of the said estate:[3] Provided also, that nothing contained in this section shall operate to defeat any right which shall have vested before the passing of this Act.

[1] This section now applies to all entails—Act 1878, sect. 3, *infra*, p. 968.
[2] *Supra*, p. 896, and notes.
[3] *Supra*, p. 897.

Improvement expenditure may be conveyed or bequeathed.[1]

11. Where any heir of entail in possession of an estate in Scotland, holden by virtue of a tailzie [dated prior to the first day of August one thousand eight hundred and forty-eight],[2] shall have executed improvements on such estate, of the nature contemplated by this or any other Entail Act as the case may be, and shall have died after the passing of this Act without having charged the estate with the amount which he is entitled to charge of the sums expended on such improvements, it shall be lawful for any person to whom such heir of entail may have expressly[3] bequeathed, conveyed, or assigned such sums or any part thereof, to make application by summary petition to the Court, praying the Court after such inquiry as to the Court shall seem proper, to find and declare that the sums specified in the petition, or any part thereof have been expended on improvements on the said estate by the deceased heir of entail; and that the petitioner is in right thereof; and to decern and ordain the heir in possession of such entailed estate to execute in favour of the petitioner or of any other person such petitioner may think fit, a bond and disposition in security over the said estate other than the mansion-house, offices, and policies thereof, or over some sufficient portion of the said estate other than as aforesaid for the amount with which the deceased heir of entail himself might under the provisions of this Act have charged the estate, which bond and disposition in security shall contain all clauses proper to be inserted in bonds and dispositions in security which in virtue of this Act may be granted by an heir of entail in possession for sums expended by himself on improvements on his estate; provided always, that the said sums shall only be deemed to be a debt against the entailed estate and the heirs of entail therein, and shall only bear interest from and after the date of the decree of the Court pronounced in such petition.

[1] Cf. Act 1848, sects. 15, 18, *supra*, pp. 917, 919; Act 1882, sect. 4, *infra*, p. 970.
[2] This section now applies to all entails—Act 1878, sect. 3.
[3] *Semble*, this does not apply to a *mortis causâ* general disposition and settlement—Maxwell, 17th July 1877, 4 Ret. 1112.

Procedure in applications

12. Subject to such rules in regard to the matters in this section mentioned as the Court are hereby authorised and required to make by

Act of Sederunt, on or before the fifteenth day of November one thousand eight hundred and seventy-five, and thereafter from time to time to vary or extend as they shall see fit,[1] the following provisions shall have effect with reference to all applications to the Court under this or any other entail Act:[2] under Entail Acts.

(1.) The application shall be addressed to the Court, but shall be presented to the junior Lord Ordinary, and during any vacation or recess of the Court to the Lord Ordinary officiating on the Bills, who shall have all jurisdictions, powers, and authorities necessary for dealing with the same:[3]

(2.) Applications, except for authority to disentail, sell, alienate, dispone, charge with debt or encumbrances, may be made and prosecuted by the tutor, curator, or other legal guardian of a pupil or minor, or person under legal incapacity:[4]

(3.) Should the applicant die, his personal representative or his successor in the entailed estate, or his disponee, legatee, or assignee, or any of them, according to their respective rights and interests, shall, except in the case of applications in which it is necessary to obtain the consent or the dispensing with the consent of one or more heirs of entail,[5] be entitled to be sisted in the process, at whatever stage the death may happen, and to prosecute the same:[6]

(4.) The Lord Ordinary shall appoint intimation of every application to be made in the minute-book and on the walls in common form, and shall also appoint the same to be once advertised in the Edinburgh Gazette, and once in some newspaper published or circulating in a county in which the estate or some portion thereof is situated:

It shall be sufficient in the advertisements to state the leading name by which the lands are commonly known, without any detailed description thereof, and the leading purpose of the application, without any detailed statement of such purpose:

The Lord Ordinary may also order such service as he may think proper, the inducíæ of which may be the same as the inducíæ upon summonses in terms of 'The Court of Session 'Act, 1868,'[7] and may permit any person not called as a respondent to appear in the process for his interest:

(5.) In any application for authority to disentail an estate in whole or in part, or to sell, alienate, dispone, charge with debts or encumbrances, lease, feu, or excamb the same, or any part thereof, it shall be sufficient that in lieu of lodging an affidavit[8] as at present, a schedule shall be produced, signed by the petitioner and deponed to by him as correct, setting forth that there are no entailer's debts or other debts, and no provisions to husbands, widows, or children affecting or that may be made to affect the fee of the estate or the heirs of entail that are not secured by having been placed on the record; or if there are any such debts or provisions that are not so secured, setting forth as regards such debts or provisions the amounts or sums thereof in figures, the dates when the same

were constituted, and the names and designations or residences of the parties who at the date of the application are in right of the same:

(6.) In every application it shall be competent to decern for payment of expenses of process against any of the parties to the proceedings, or to decern for payment thereof out of the entailed estate concerned or out of the money consigned under the application:[9]

(7.) Power is hereby conferred on the Court, by Act of Sederunt to establish, and from time to time to alter or vary, a scale of fees payable to reporters in entail applications, such as in their opinion shall afford to the said reporters a sufficient remuneration for performing the duties of their offices.

[1] See obs. as to this by L.J.-C. Moncreiff and Lord Ormidale in **Maxwell**, *supra*, p. 964.

[2] See Act 1848, sect. 33, note.

[3] See Grant Suttie's Tutors, 16th Oct. 1883, 21 Sc. L.R. 2.

[4] Powers of guardians extended, but still to the exclusion of disentails, by Act, 1882, sect. 11.

[5] See Act 1848, sect. 3, and note[5], *supra*, pp. 910, 911.

[6] This sub-section, like the rest of the section, is framed to regulate procedure only, and does not entitle the representatives of a deceased heir of entail to be sisted in a petition at his instance to charge improvement debt—Maxwell, *supra*. It appears to apply only to cases where the substantial interest descends to representatives, or is capable of being and has been assigned—ibid., *per* L.J.-C. Moncreiff, 4 Ret. 1116.

[7] 31 & 32 Vict. c. 100, sect. 14.

[8] See Act 1848, sect. 6; Act 1853, sect. 27.

[9] This sub-section was, till 1882, inapplicable to those improvement petitions under new entails which were not provided for by Act 1878, sect. 3. Cf. therewith sect. 7 (6) hereof, and Maclaine *v.* Ranken, 12th July 1878, 5 Ret. 1053. But this is altered by Act 1882, sect. 4.

Effect of destination to heirs whomsoever.[1]

13. Where any tailzie under which any estate is held, shall not be valid and effectual in virtue of the recited Act of the Parliament of Scotland passed in the year one thousand six hundred and eighty-five, in respect the destination contained in such tailzie is in favour of the institute or heir in possession and his heirs whomsoever, or his heirs general, such estate shall be deemed and taken to be a fee simple estate without any declarator or other judicial procedure; and where any money or other property, real or personal, has been, or shall be, invested in trust for the purpose of purchasing lands to be entailed under the same or like destinations, or where any lands are or shall be directed to be entailed under the same or like destinations, but the direction has not been carried into effect, such trust money or other property, and such lands, though still unentailed, may be dealt with under this section in all respects as such lands might have been dealt with if entailed in terms of such trust or direction.

[1] See text, *supra*, p. 571, and the cases of such destinations collected in 1 M'Laren on Wills, p. 515 *et seq.*

Saving of power to improve estates under 'The 'Improvement 'of Land Act, '1864.'

14. Nothing herein contained shall operate to prevent any heir of entail in possession of an entailed estate from taking proceedings under 'The Improvement of Land Act, 1864,'[1] or any other Act authorising the loan of money for the improvement of land, or any Act amending the same respectively, to charge the estate with the amount of sums

expended for improvements thereon or affect the validity of any proceedings or charge under these Acts.

[1] 27 & 28 Vict. c. 114, repealing 12 & 13 Vict. c. 100, and amended by 30 & 31 Vict. c. 101, sect. 115, and 31 & 32 Vict. c. 89, sect. 6. Its purpose is to amend and consolidate the law relating to the improvement of land by owners of limited interests, and to enable such owners to charge their lands with money subscribed for the construction of railways and navigable canals, which will permanently increase the value of such lands. It is the last of a series of statutes—9 & 10 Vict. c. 101; 10 & 11 Vict. c. 11; 11 & 12 Vict. c. 119; 13 & 14 Vict. c. 31; 14 & 15 Vict. c. 91; 19 & 20 Vict. c. 9—which authorise the advance of public money by, at first special commissioners, and then the English Enclosure Commissioners, for the improvement of land, repayable in a certain time by rentcharge. Improvement companies participate in the benefits of the Act, sects. 53, 54. It is not necessary to print these Acts here, since they are easily accessible, and have been seldom submitted to judicial construction. The cases are—Macalister *v.* Macalister, 10th July 1867, 5 Macph. 1008 (relation to the Montgomery and Rutherfurd Acts); Edmonstone, 24th Feb. 1877, 4 Ret. 585 (railway); Mackintosh *v.* Mackintosh's Trs., 2d March 1870, 8 Macph. 627 (burden on the lands); Learmonth *v.* Sinclair's Trs., 23d Jan. 1878, 5 Ret. 548 (apportionment of burden); and case of Maitland *v.* Maitland there quoted. See powers similar to those granted by the above Act, conferred by the Agricultural Holdings Act, 1883, sects. 24 and 33, printed *infra*, notes to Entail Act, 1882, sects. 6 and 23 (7).

No. XXV.

41 & 42 VICTORIA, c. 28.

An Act to further amend the Law of Entail in Scotland.—[22*d July* 1878.]

WHEREAS it is expedient further to amend the law of entail in Scotland: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Obligations to tenants for improvements to devolve on the heir, to the relief of the executor.[1]

1. All obligations undertaken, whether prior or subsequent to the passing of this Act, by an institute or heir in possession of an entailed estate in Scotland, in any lease granted by him as proprietor of such estate, or in any agreement with reference to such lease, for the execution by the proprietor, or with reference to the execution by the tenant, of any improvements of the description contained in the third section of the Entail Amendment (Scotland) Act, 1875, shall, in case of his death after the passing of this Act, and before complete fulfilment of such obligations, and to the extent to which, if he had himself made and paid for said improvements and had survived till payment is actually made he would have been entitled to charge them upon the estate (if the estate had been an entailed estate under the said Act), devolve upon the heirs succeeding to the estate after him, who shall in their order be bound to relieve his executors, or other personal representatives, of such obligations, so far as unfulfilled, and to repay to such executors, or other personal representatives, any sums of money which they may be called upon to pay and may have paid in virtue of such obligations: Provided that this

38 & 39 Vict. c. 61.

enactment shall not apply to any case in which the granter of the obligation has in express terms, either in the obligation itself or in any separate writing, declared his intention to impose the obligation upon his executors to the relief of his heirs of entail.

[1] The law prior to this enactment is stated, and many hard cases cited in the text, p. 586; and see an exception allowed before the date of this Act, in case of a local custom—Learmonth *v.* Sinclair's Trs., 23d Jan. 1878, 5 Ret. 548. See, as to the working of this and the following section, sect. 5 hereof. The improvements referred to are those set forth *supra*, pp. 956, 957.

Liabilities under other contracts for improvements to devolve on heir.[1]

2. The heirs succeeding to such institute or heir in possession as aforesaid shall in like manner as above provided be bound, unless otherwise expressly directed by him, to relieve to the extent aforesaid his executors, or other personal representatives, of all liabilities which he may have undertaken in any contracts or agreements for or with reference to the execution of improvements of the description aforesaid on the mansion-house and offices of the entailed estate, or any other parts of the estate not under lease, and to repay to the extent aforesaid to such executors or other personal representatives any sums of money which they may be called upon to pay and may have paid in virtue of such contracts or agreements.

[1] See E. Breadalbane *v.* Jamieson, 16th March 1877, 4 Ret. 667, where, in an action against the personal representatives of an heir who had during his possession taken down an old house, and was in process of rebuilding at the date of his death, the succeeding heir was found not entitled to demand either completion according to the plans or restoration to its original value.

Part of 38 & 39 Vict. c. 61, to apply to entails dated on or after 1st August 1848.

3. The provisions of the seventh, eighth, ninth, tenth, and eleventh sections of the Entail Amendment (Scotland) Act, 1875, shall be applicable to entailed estates in Scotland holden under tailzies dated on or after the first day of August one thousand eight hundred and forty-eight, subject to the provision following; (that is to say,)

[The provisions of the seventh and eighth sections of the said Act shall be applicable only in regard to improvements executed after the date of the application to the Court in terms of the said Act.][1]

[1] This proviso is repealed, Act 1882, sects. 4 and 6 (1).

Part of 38 & 39 Vict. c. 61, to apply to expenditure under this Act.

4. The provisions of the seventh, eighth, and eleventh sections of the Entail Amendment (Scotland) Act, 1875, as amended by this Act, shall be applicable to moneys paid by an institute or heir of entail under the provisions of this Act in respect of improvements on the entailed estate.[1]

[1] These provisions, as so extended, may now be competently exercised at the sight of the sheriff or his substitute—Act 1882, sect. 5.

Construction of Act.

5. This Act shall be read and construed as one with the Entail Amendment (Scotland) Act, 1875.[1]

[1] *Supra*, p. 956 *et seq.*

Short title.

6. This Act may be cited for all purposes as the Entail Amendment (Scotland) Act, 1878.

No. XXVI.

45 & 46 VICTORIA, c. 53.

An Act to amend the Law of Entail in Scotland.—[18*th August* 1882.][1]

WHEREAS it is desirable to amend the law of entail in Scotland:[2] Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

[1] Soon after the passing of this Act, it was ably and carefully annotated and explained by Mr J. P. Wood, W.S. The index appended to his redaction is a very serviceable abstract of all the Entail Acts under appropriate headings.

[2] The amendments are so extensive as to place this statute alongside of the Rutherfurd Act in order of importance. (*a*) It annuls the distinction between old and new entails, except in so far as the former are still regarded as dated on 1st August 1848, the latter as on their actual or constructive (Act 1848, sect. 28) date (sects. 3, 4, 17). (*b*) It extends the sheriff's jurisdiction (sect. 5). (*c*) It makes certain minor alterations in the mode and scope of recovering improvement expenditure, feuing, leasing, and charging with debt or provisions (sects. 6, 10). (*d*) It bestows ampler powers on persons under disability and their guardians (sects. 11, 12). (*e*) It puts the nearest heir in the same position as remoter heirs with respect to consents (sect 13). (*f*) It follows out the policy of the Presumption of Life Limitation (Scotland) Act in the case of absentee heirs in possession and substitutes (sects. 14-16). (*g*) It entitles creditors in debts incurred after the passing of the Act, and the trustee in a sequestration taken out for such debts, to force disentail, unless stopped by marriage contract (sects. 18, 17). And (*h*) it gives the heir in possession practically unlimited powers of sale, subject to resettlement of the price, or what remains of it after satisfying claims, or what is purchased with it (sects. 19-25, 27); and entailed money is put in the same position as this price (sects. 26-28). It is not too much to say that the alterations marked (*a*) (*e*) and (*h*) work a revolution in the law of entails.

1. This Act may be cited as the Entail (Scotland) Act, 1882, and shall apply to Scotland only. Short title.

2. The expression 'Entail Acts' shall mean the Acts and sections of Acts mentioned in the schedule to this Act[1] and this Act, and they may be cited by the short titles therein mentioned, and shall for all purposes and to all effects be read as one Act. Definitions.

Other expressions shall have the same meanings as in the Entail Acts.[2]

[1] The scheduled Acts and sections are the Acts printed in this appendix, Nos. 17-25; along with (1) the sections of the two Acts of 1746 mentioned in the text, page 579, (2) the 20th section of the Roads and Bridges Act; its amendment, 43 Vict. c. 70, and the now repealed 68th section of the Turnpike Act, all printed on p. 952; (3) the Act 3 and 4 Vict. c. 48 (mentioned in the text, p. 585) enabling entailed proprietors to feu or lease for church and school sites; (4) the Entail Cottages Act, 1860, printed on page 953.

[2] The interpretation clauses of these Acts are Act 1848, sect. 52; Act 1853, sect. 25; Act 1868, sect. 2; Act 1875, sect 3. The words there construed are, Court, Lord Ordinary, heir, heir of entail, heir apparent, lands, entailed estate [which extends further in Act 1875 than in Act 1848—see sects. 23, 26 of the present Act for the similar use of 'entailed estate' and 'entailed land,'] creditor, sheriff, feu-charter.

3. It shall be lawful for an heir of entail in possession of an entailed estate held under an entail, dated on or after the first day of August one thousand eight hundred and forty-eight, to disentail the estate and acquire it in fee simple, by applying to the Court in the manner provided by the Entail Acts if he shall be the only heir of entail in existence, or if he Heirs under new entails may disentail with the same consents as heirs under old entails.

shall obtain the like consents as are required by the third section of the Entail Amendment Act, 1848, in the case of entails dated prior to the said date.[1]

11 & 12 Vict. c. 36.

Provided that any creditor of an heir of entail in possession who is empowered by this section by himself alone, without the consent of any other party to acquire the estate in fee simple,[2] shall have the like powers of affecting the estate for payment of debt, and shall have the like rights and interest therein as if the entail had been dated prior to the said date.[3]

[1] This application of the third section of the Rutherfurd Act to new entails does away with much of the importance of ascertaining the true date of the tailzie, as to which see, Riddell[1], 6th Feb. 1874, 1 Ret. 462; Riddell *v.* L. Polwarth, 24th June 1876, 3 Ret. 879; Blair, 24th Jan. 1877, 4 Ret. 308; V. Fincastle *v.* E. Dunmore, 14th Jan. 1876, 3 Ret. 345. Taken in connection with sects. 11, 13, and 17, it enables every heir in possession to disentail at any moment without necessity for any consents, provided he be *capax* and of full age, and not barred by his own or his heir apparent's marriage contract. See notes to sects. 1, 2, 3, of Act 1848, and sect. 5 of Act 1875.

[2] *I.e.*, by being the only heir in existence.

[3] In other words, just as if an instrument of disentail had been duly executed and recorded, Act 1848, sect. 11.

Heirs under new entails may sell, lease, feu, and charge on the same conditions as heirs under old entails.[1]

4. It shall be lawful for an heir in possession of an entailed estate held under an entail, dated on or after the first day of August one thousand eight hundred and forty-eight, to sell the estate and to grant feus and long leases, and to charge the estate with debts or incumbrances and for improvement expenditure, and to convey, bequeath, or assign the amount of such expenditure all in like manner and with the like consents[2] as if the entail were dated prior to the said date.

[1] This completes the process of gradual enfranchisement which had been in operation ever since the moment when the heir in possession under a new entail became, by the Rutherfurd Act, more crippled in his management than the heir under an old entail. See Act 1853, sects. 12 and 13; Act 1868, sects. 8 and 18; Act 1878, sect. 3. The provisions of the present section have been given effect to in the notes to the earlier Acts *passim*. They are involved in the preceding section, just as sect. 4 of the Act 1848 was a necessary corollary of the earlier sections of that Act.

[2] That is, the consents in sect. 3 of Act 1848, not of sect. 2; Campbell, 1883, 20 Sc. L.R. 474, *per* L. Kinnear.

Applications for authority to charge for improvements and grant leases may be made in the sheriff court.

38 and 39 Vict. c. 61.

41 and 42 Vict. c. 28.

5. Any application under the Entail Amendment Act, 1875,[1] and the Entail Amendment Act, 1878,[2] for authority to borrow and charge for improvement expenditure, and any application for authority to grant leases[3] under the Entail Acts may be made in the sheriff court. And it shall be lawful for the sheriff (including the sheriff substitute) to grant such authority and to exercise all necessary powers for carrying out the provisions of the said Acts in those particulars.

In such applications the procedure with regard to notice and inquiry shall be as nearly as possible the same as in applications to the sheriff for authority to feu under the Entail Amendment Act, 1868,[4] and there shall be the like appeal to one of the divisions of the Court of Session, but there shall be no appeal from the sheriff substitute to the sheriff.

31 & 32 Vict. c. 84.

[1] Sects. 7-9, *supra*, p. 960.

[2] Sects. 1, 2, 4, *supra*, p. 967.

[3] As to leases, see Rosebery Act, sect. 1, note [3], and sections there referred to. The sheriff was already competent to sanction building leases (Act 1868, sects. 3-5) under certain conditions. So that the present enactment refers not to cases under Act 1868, nor to Montgomery or Rosebery leases, both of which require no sanction, but to

the powers conferred by Act 1848, sects. 4 and 24; Act 1853, sect. 6; Act 1875, sect. 6. It will be necessary to be careful in setting forth which power is applied for.

[4] Sect. 4, *supra*, p. 947.

Provisions for applications for authority to borrow, charge, lease, and feu.

6. (1.) Where application is made for authority to borrow and charge for improvement expenditure, the Court or sheriff may grant authority to execute bonds and dispositions in security for three-fourths[1] of the sum authorised to be borrowed, and whether the improvements shall have been executed at the date of the application or are contemplated.[2]

(2.) Where application is made for authority to grant a feu or a lease of a portion of an entailed estate, not exceeding two acres in extent, for a scientific purpose, or other purpose of public utility, the Court or the sheriff, if satisfied that it would be for the public advantage, and not prejudicial to the estate, may grant such authority for such yearly feu duty or rent as may be agreed upon, though inadequate and below the just value, subject to such conditions as the Court or the sheriff may think fit.[3]

Provided that it shall not be lawful for the applicant to take any grassum or consideration for granting such feu or lease other than the feu duty or the rent, and if any such grassum or consideration shall be taken such feu or lease shall be null and void.[4]

(3.) In every case in which authority to feu or grant leases has been or shall be granted to the heir in possession of any entailed estate, such authority shall be available to the succeeding heirs.[5]

(4.) When at least one-fourth part of a capital sum borrowed for improvements on an entailed estate upon the security of a terminable rentcharge, in manner provided by the Entail Acts, shall have been defrayed by the heir in possession, it shall be lawful for such heir, without the consent of the nearest heir being required, and whether the cost of such improvements shall have been charged prior or subsequent to the passing of the Entail Amendment Act, 1875, to avail himself of the provisions of the said Act, for the substitution of a bond or * disposition in security over the estate for the remainder of such capital sum.[6]

* *Sic.*

[1] Instead of two-thirds, as before, Act 1848, sect. 18; Act 1875, sect. 8.

[2] Not, as before, in the former case only, ibid. By the Agricultural Holdings (Scotland) Act, 1883 (46 & 47 Vict. c. 62), sect. 24, 'a landlord on paying to the 'tenant the amount due to him in respect of compensation under this Act, or in re- 'spect of compensation authorised by this Act to be substituted for compensation 'under this Act, or on his defraying himself the cost of improvements proposed to be 'executed by the tenant, shall be entitled to obtain from the sheriff authority to 'charge the holding, or the estate of which it forms part in respect thereof.

'The sheriff shall have power, on proof of the payment, and on being satisfied of 'the observance in good faith by the parties of the conditions imposed by this Act, 'to grant authority to the landlord to charge the holding, or the estate of which it 'forms part, by executing and registering in the Register of Sasines a bond and dis- 'position in security over it for repayment of the amount paid or any part thereof, 'with such interest and by such instalments as the sheriff may determine. . . . 'But where the landlord obtaining the charge is not absolute owner of the building 'for his own benefit, no instalment or interest shall by such bond and disposition in 'security . . . be made payable after the time when the improvement in respect 'whereof the compensation is paid will, where an award has been made, be taken to 'have been exhausted according to the declaration of the award, and in any other 'case after the time when any such improvement will in the judgment of the 'sheriff, after hearing such evidence (if any) as he thinks expedient, have been 'exhausted; and such bond and disposition in security . . . shall specify the

'times at which the total amount charged and each instalment thereof shall be 'payable. The instalments and interest shall be charged in favour of the landlord, 'his executors, administrators, and assignees. Any charge under this section 'shall rank after all prior charges and burdens heritably secured upon the hold-'ing or estate. Where a holding or estate is charged by the landlord under this 'section, such charge shall not be deemed to be a contravention of any prohibition 'against charging or burdening contained in the deed or instrument under which the 'holding or estate is held by the landlord.' And by sect. 33, 'a landlord, whatever 'be his estate or interest in his holding, may give any consent, make any agreement, 'or do or have done to him any act in relation to improvements, in respect of which 'compensation is payable under this Act which he might give or make, or do or have 'done to him, if he were absolute owner of the holding.' See further *infra*, sect. 23 (7) note.

[3] This subsection owes its origin to the Ben Nevis Observatory, and follows closely 3 & 4 Vict. c. 48, sect. 1 (Entail Sites Act) noticed in the text, p. 585.

[4] See Stewart *v.* Murdoch, 27th Jan. 1882, 9 Ret. 458, noted *supra*, p. 947, on a similar clause in Act 1868, sect. 3.

[5] Provision had been made for 'continuing' petitions by Act 1853, sect. 6. By the present sub-section the authority in all cases transmits to heirs. See Act 1875, sect. 12 (3).

[6] This subsection is a natural corollary of subsection 1, and is an amendment of Act 1875, sect. 9, *supra*, p. 962. See note there.

Improvements chargeable on estate to to be deducted from valuation.[1]

7. In all applications for disentail under this Act, where the heir in possession shall have expended sums in improving the estate which he is entitled to charge upon the entailed estate without consents, such heir shall be entitled to produce a statement of such expenditure, and upon the Court declaring such expenditure to be properly chargeable upon the estate, the amount thereof, or such portion as the Court may declare properly chargeable, shall be deducted from the valuation of the estate before fixing the amounts of compensation payable to the next heirs.

[1] Where disentail is in view, the only benefit of charging improvements would be to diminish the value on which compensation would be calculated. The same end is here obtained by decree *incidenter* in the disentail process, and unnecessary expense is avoided.

Leases may be granted at diminished rent.

8. Notwithstanding any prohibition contained in any deed of entail against granting leases unless such leases are without diminution of rental, it shall be lawful for any heir of entail in possession of an entailed estate to grant leases for such period as it may be otherwise competent for him to do, at a fair rent.[1]

Provided, that it shall not be lawful for such heir to take any grassum or other consideration for granting such lease other than the rent; and if the rent shall be less than a fair rent, or if any such grassum or consideration shall be taken, such lease shall be null and void.[2]

[1] This section relates specially to leases of ordinary duration (Act 1836, sect. 1) not requiring the sanction of the Court or sheriff. In most old entails (see the Queensberry Leases Cases) a prohibition against diminution of rental is inserted. Its effect has never been judicially determined, but since the recent droop of rents proprietors have had to ignore its most obvious meaning. They are here justified in so doing, provided they act fairly to their successors. The section does not, however, alter the similar *statutory* prohibition in Act 1770, sect. 7.

[2] See sect. 6, note [4].

Lease may be renewed two years before expiration.

9. It shall be lawful for the heir in possession of an entailed estate, where any portion of the estate is held by a tenant under a current lease for not less than seven years, at any time within two years previous to the expiration of such lease, to grant a new lease at a fair rent, to com-

mence at such expiration, and if such heir in possession shall die before the commencement of the new lease, it shall be as valid as if he were still alive.[1]

Provided, that it shall not be lawful for such heir in possession to take any grassum or consideration for granting such lease other than the rent, and if the rent fixed shall be less than a fair rent, or if any such grassum or consideration shall be taken, such lease shall be null and void.[2]

[1] This section is not confined to agricultural leases, but may be taken as part of the modern policy of prolonged warning and early rearrangement at the ish of a lease of land. The strict rule requiring possession for the protection of a tenant under a lease granted by an heir of entail since deceased,—here and in the Montgomery Act, sect. 7 relaxed—is set forth in 1 Hunter, L. and T., 104.

[2] See sect. 6, note [4].

Charge upon a disentailed estate may be transferred to another estate entailed on same series of heirs.

10. Where an entailed estate which is charged with debt or provisions shall be disentailed, it shall be lawful for the heir in possession, in substitution for such charge, and with consent of the creditor or creditors, to charge with such debt or provisions any other estate belonging to him, and entailed upon the same series of heirs[1] to the extent to which such other estate might have been lawfully charged with such debt or provisions.

[1] As to what is and what is not the same series of heirs, see Cochrane, 11th Dec. 1850, 13 D. 293; E. Northesk, 3d Nov. 1882, 10 Ret. 77.

Applications may be made by guardians on behalf of minors and persons under disability.[1]

11. In every case in which it is competent for an heir in possession of an entailed estate, being of full age and not subject to any legal incapacity, to make an application to the Court[2] under the Entail Acts, it shall hereafter be competent for an heir in possession, though a minor, with consent of his curators, or for the tutors of an heir in possession, if he is a pupil, or for his curator or other administrator if he is otherwise incapacitated, to make such application, not being an application for authority to disentail the entailed estate or any part thereof, and to execute and carry into effect any authority which may be given by the Court.

Provided that the Court shall not grant such application unless they are satisfied that it is for the benefit of the heir by whom or on whose behalf it is made.

[1] This is a large addition to the powers of guardians—see Act 1875, sect. 12 (2). How far this section may take the acts it authorises out of the general rule that the authority of the Court does not make the acts of wards or guardians unchallengeable, and does not free guardians of responsibility, may be a question. It will probably be held that the section does nothing more than give the Court the same powers in entail cases as it possesses at common law with regard to fee simple proprietors under disability; and that the ascertainment of benefit (under the proviso) will not be *res judicata* in case of challenge.—See Vere *v.* Dale, 1804, M. 16389; Wood, 6th March 1855, 17 D. 580; Auld, 5th Feb. 1856, 18 D. 487; Milne, 10th June 1837, 15 Sh. 1104; Mathieson, 26th June 1857, 19 D. 917. In any case, third parties are protected against challenge on the ground of irregularity by sect. 29.

[2] The Court of Session, Act 1848, sect. 52; Act 1853, sect. 25; Act 1868, sect. 2; Act 1875, sect. 3.

Curator to be appointed to persons unable to consent.[1]

12. In any application under the Entail Acts, to which the consent of any person is required, where such person is disabled under the provisions of the Entail Acts or otherwise from consenting by reason of being under age or subject to other legal incapacity, the Court shall appoint his tutor,

curator, or other administrator, or one of his tutors, curators, or administrators, or another person to be curator *ad litem* to the person under disability, and such curator *ad litem* may consent on his behalf, and no curator *ad litem* who may give any consent under this Act shall incur any responsibility on account of such consent in respect of any alleged error in judgment or inadequacy of consideration, or want of consideration therefor unless it shall be alleged and proved that he acted corruptly in the matter.

[1] Amending the Acts, 1848, sect. 31, and 1853, sect. 18, by allowing one of the ordinary guardians to be the curator *ad litem*.

Consent of nearest heir may be valued and dispensed with.[1]

13. In any application under the Entail Acts to which the consent of the heir apparent or other nearest heir is required, and such heir or the curator *ad litem* appointed to him in terms of this Act shall refuse or fail to give his consent, the Court shall ascertain the value in money of the expectancy or interest in the entailed estate of such heir with reference to such application, and shall direct the sum so ascertained to be paid into bank in name of the said heir, or that proper security therefor shall be given over the estate, and shall thereafter dispense with the consent of the said heir, and shall proceed as if such consent had been obtained, and the provisions of sections five and six of the Entail Amendment (Scotland) Act, 1875, shall apply to the nearest heir as well as to other heirs, and shall apply to all applications to which consents are required, and to entails dated on or after the first day of August one thousand eight hundred and forty-eight, as well as to entails dated prior to that date.

Provided that if the application is opposed by any creditor of such heir who shall prove that prior to the passing of this Act he has lent money to such heir on the security of his right of succession to or interest in the entailed estate, or by the wife or children of such heir in whose favour he shall have granted provisions under the Entail Acts, the consent of the heir shall not be dispensed with until arrangements have been made for the payment or security of the creditor or wife or children to the satisfaction of the Court. If the heir apparent or other nearest heir whose consent is required as aforesaid shall have assigned his expectancy or interest, and the assignee shall have intimated the assignation to the heir in possession for the time being, at any time prior to the recording of the instrument of disentail, such assignee shall be entitled to appear at any time prior to such recording, and to demand that the value in money of such expectancy or interest shall be ascertained, and shall be entitled to a preference upon such value according to the date of the intimation of his assignation, and such preference shall be given effect to in his favour when the value of such expectancy or interest is paid or secured.[2]

[1] This section carries further than Act 1875, sects. 5 and 6, the amendment of the leading sections of the Act 1848. See these at pp. 908-910, 958, 959, and notes thereto. The nearest heir is placed in precisely the same position as remoter substitutes whose consent was formerly required, except in so far as the remedy of his creditors and assignees is different as set forth in the proviso, and in so far as he, being heir apparent, has, under Act 1868, sect. 6, made provisions for widow or children, or has barred disentail by marriage contract, sect. 17 hereof. The effect of thus putting it

in the power of an heir in possession, of full age, unfettered by marriage contract, and *capax*, to disentail at his own hand, is considered, *infra*, sect. 18, note.]

[2] There is no similar proviso in Act 1875, sect. 5, with reference to claimants against remoter heirs. In that case the compensation money is consigned; creditors and assignees must resort to a multiplepoinding; wife and children have of course no claim.

Procedure when heir in possession has disappeared.

14. If the heir in possession of an entailed estate shall have been absent from Scotland or shall have disappeared for a period of fourteen years and cannot be found, it shall be lawful for the next heir to make affidavit to that effect, and to apply to the Court, and the Court, if satisfied that such affidavit is true, and that there is no evidence that such heir in possession has been in life during the preceding fourteen years, may appoint a factor *loco absentis* to such heir in possession, and may grant authority to and ordain such factor *loco absentis* to execute an instrument of disentail of the estate, and such instrument shall be as valid and effectual as if it were executed by the heir in possession himself.

The value in money of the expectancy or interest in the entailed estate of the heirs whose consents to the disentail must be obtained or dispensed with under the provisions of the Entail Acts shall be ascertained and may be secured upon the estate, or on the application of the factor *loco absentis*, or of the next heir, the Court may grant authority to the factor *loco absentis* to sell the estate at the sight of the Court, and the balance of the price, after paying the value of the interests of the heirs whose consents are required or must be dispensed with as aforesaid, shall be paid into bank or invested for behoof of the heir in possession, and shall be held to be moveable, subject to the provisions of the Presumption of Life Limitation (Scotland) Act, 1881.[1] 44 and 45 Vict. c. 47.

If the heir in possession shall have been absent from Scotland or shall have disappeared for any shorter period than fourteen years and a factor *loco absentis* shall have been appointed under the provisions of the Presumption of Life Limitation (Scotland) Act, 1881, or otherwise, it shall be lawful for such factor to apply to the Court or the sheriff, as the case may be, for authority to feu, lease, borrow, and charge for improvement expenditure, in the same manner as the heir in possession himself might have done. 44 & 45 Vict. c. 47.

[1] The provisions of this Act (as construed by the Court), so far as here of importance, are in substance these:—In the case of any person who [having been in Scotland—Rainham *v.* Laing, 2d Dec. 1881, 9 Ret. 207] has been absent from Scotland, or who has disappeared and has not been heard of for seven years, and who at the time of his leaving or disappearance was possessed of or entitled to heritable or moveable property in Scotland, or who has become entitled to such estate in Scotland [within seven years of his being last heard of, if there be no other presumption of the date of his death arising from the facts, sect. 8—Craig, 20th Jan. 1882, 9 Ret. 434], any one entitled to succeed to him may obtain authority from the Court of Session to uplift and enjoy the yearly income, himself or through a judicial factor (sect. 1). Seven years later, the petitioner or his representative may, if the absentee has not been heard of, obtain similarly authority to make up a title to and enjoy the capital of the *moveable* estate (sect. 2). Alternatively (where there has been no deliverance as to income), after fourteen years disappearance of the owner of moveable property as aforesaid, the person entitled to succeed may obtain authority to make up title to and enjoy the capital of the moveable estate, as if the absentee were dead (sect. 4). The second period as to heritage is thirteen years, and the whole period twenty years (sects. 3 and 5). After thirteen years more in each case (*i.e.*, twenty-seven and thirty-three in all) all claim by the absentee or nearer heirs to the capital or fee or its

proceeds is barred (sect. 7). The present section recognises the interim arrangement of sect. 1 as to income, and suggests, though it does not demand, that the proper course in regard to an entailed estate would be to adopt the second alternative, the appointment of a judicial factor, who is then to possess entail powers of management. Whether this interim management has been adopted or not, the interest of the absentee in the *corpus* of the estate, sold or not sold, is regarded as moveable and intromitted with at fourteen instead of twenty years after *disappearance*—here there is a slight change of phraseology—and consigned or invested as moveable. The rest of the section is occupied with satisfying the claims of consenters; and this again, as well as the consignation or investment, demands the services of a judicial factor.

Consent of heir who has disappeared.[1]

15. In any application to the Court under the Entail Acts to which the consent of an heir is required, and the applicant shall make affidavit that such consent cannot be obtained in consequence of the absence from Scotland or disappearance of such heir, and that such heir is absent from Scotland, or has disappeared and cannot be found, the Court, after such inquiry as it may think fit, shall, if satisfied that the statements contained in the affidavit are true, ascertain the value in money of the expectancy or interest of such heir in the estate, and shall direct the sum so ascertained to be paid into bank in name or for behoof of such heir, or invested in such security and in such way as the Court may direct, and thereupon the Court shall dispense with such consent, and shall proceed as if such consent had been obtained.

[1] There is here no presumption of death. The heir's consent might have been dispensed with even had he been present.

Provision for disposal of fund deposited or invested after fourteen years.

16. If the fund deposited or invested in terms of the preceding section shall remain unclaimed by the absent heir for a period of fourteen years from the date when he was last heard of as being alive, or by any one deriving right or title through or from him, an application may be made to the Court by any one or more of the heirs of entail whose consent to the original application would have been required if at the date of the original application the death of the absent heir had been legally established, or by his or their representatives, and the Court shall order intimation of the application to be made to the other heir or heirs whose consent would have been required as aforesaid, or by * his or their representatives, and if satisfied that the said absent heir has not been heard of during that period of fourteen years, shall ascertain by the best evidence which can then be obtained the value in money of the expectancy of such heir or heirs entitled to succeed after the absent heir, at the date of the disentail, as if the absent heir had been dead at that date,[1] and shall apportion the fund among such heirs, or their representatives, according to their respective interest in so far as it shall be sufficient, and grant warrant for uplifting and paying the fund accordingly; and if there shall be any surplus over the ascertained value of the interests of such heirs, it shall be paid to the heir in possession at the date of the disentail, or his executors or assignees.

* *Sic.*

[1] Contrast this presumption of death at some date before the disentail with the seven years' presumption of the principal Act of 1881, sect. 8.

Settlements by marriage contract not to be disappointed.

17. Where any heir of entail in possession of an entailed estate, or the heir apparent to such estate, shall, together or separately, have secured by obligation in any marriage contract entered into prior to the passing

of the present Act[1] the descent of such estate upon the issue of the marriage in reference to which such contract is entered into, it shall not be competent for such heir of entail in possession or heir apparent, or either of them, to apply for or to consent to the disentail of such estate until there shall be born a child of such marriage capable of taking the estate in terms of such contract, and who by himself or his guardian shall consent to such disentail, or until such marriage shall be dissolved without such child being born, unless the trustee or trustees named in such contract, or the party or parties at whose sight the provisions of the contract are directed to be carried into execution, shall concur in such application or consent.[2]

[1] And whether entered into before or after he came into possession—Douglas, 9th June 1833, 10 Ret. 952 (the marriage contract empowered the trustees to buy and entail lands, and there was no issue of the marriage).

[2] A collation of this section with the similar 8th section of the Act 1848 reveals one of the few remaining distinctions between old and new entails. The former are protected by marriage contracts, whether entered into before or after the passing of the present Act; the latter are protected only by such as were entered into before 18th August 1882. The two sections are the only existing bar to disentail by an heir in possession of full age and *capax*.

Powers of creditors of heir entitled to disentail.[1]

18. Where any heir of entail in possession is entitled to disentail the estate, with the consent of any other heir or heirs, or upon such consent being dispensed with by the Court,[2] any creditor of such heir in possession, in respect of debt incurred after the passing of this Act,[1] who has obtained decree against him for payment and charged upon the decree, shall in the event of the debt so incurred not being paid for six months after the expiration of the charge, be entitled to apply to the Court, and the Court shall, if the said debt is not paid within three months after the date of the application, order intimation to be made to the heirs whose consents would be required or must be dispensed with by the Court in an application for disentail by the heir in possession, and in the event of any of the said heirs, or his curator *ad litem*, appointed in terms of this Act,[3] refusing to give his consent, the Court shall ascertain the value in money of the expectancy or interest in the entailed estate[4] of such heir, and shall ordain the heir in possession to grant a bond and disposition in security over the estate for the amount so ascertained in favour of such heir, and if he refuses or fails to do so, the Court shall grant authority to the clerk of Court to execute such a bond and disposition in security, and such bond and disposition in security so executed shall be as valid as if it were executed by the heir in possession himself; and the Court shall thereafter ordain the heir in possession to execute an instrument of disentail of the estate; and if he refuses or fails to do so the Court shall grant authority to the clerk of Court to execute such instrument, and, after provision is made for the interests of any other creditors whose debts are secured on the estate,[1] the creditor aforesaid shall be entitled to affect the estate for payment of such debt, and shall have the same rights and interests therein as if an instrument of disentail had been executed and recorded by the heir in possession himself.

If the estates of such heir of entail in possession of an entailed estate shall be sequestrated for debt incurred after the passing of this Act,[1] the trustee on his sequestrated estates shall be entitled to apply to the Court

for authority to disentail the estate, and the Court shall forthwith proceed in the same manner as is directed in this section with regard to the application of a creditor.

[1] Many curious questions may be expected to arise regarding the rights of creditors, secured or ordinary, of an heir of entail in possession under the changed aspect of entail law. Mr Wood, in his note to this section, puts one of these—viz., whether interest accruing after the date of the Act on a previously existing debt is a 'debt 'incurred after the passing of this Act.' The answer seems to be that the whole drift of the section is in favour only of those creditors who have contracted under the new conditions. Another question is, whether the disentail forced on by a creditor is a disentail for all purposes, so as to throw the estate open to all creditors. The section seems to point at a more limited scope; but it is hard to see how creditors—other than the applicant, creditors secured and consenters for their interest—can be shut out from doing diligence without a new entail, specially protected against them, for which the section gives no warrant. But the more important, even fundamental, question remains behind—viz., Whether, without this section, and apart from its limitations, any creditor, whatever the date of his debt, or a bankruptcy trustee of the heir without any exception, may not proceed against the estate as a fund of credit, which the heir in possession may now make use of without obtaining the consent of any third party, and which (on the analogy of adjudication of a faculty to reduce on deathbed under our old law, of the power of creditors to interfere with a right of election, and of Act 1848, sect. 11, *supra*, p. 915, and the present Act, sect. 3, *ad fin.*) he is not entitled to withhold from the general body of his creditors or from any one of them to their prejudice. Though this section proceeds on a different theory, there is nothing in it to exclude this important question. It may be noticed as somewhat curious, that in no case between 1875 and 1882 did creditors proceed by arranging terms of consent with the next (and only efficient) consenter, and demanding disentail.

[2] That is, where he is of full age and *capax* (sect. 11), and not hampered by sect. 16, or by Act 1848, sect. 8.

[3] Sect 12.

[4] See sect. 2, note [2].

Application for order of sale.[1]

19. It shall be lawful for the heir of entail in possession of any entailed estate,[2] or where an entailed estate consists of land held in trust for the purpose of being entailed for the person who if the land had been entailed would have been the heir in possession, or for the tutors, curators, or administrators of such heir or other person, to apply to the Court for an order of sale of the estate, or part of it.[3]

[1] Before this Act there were powers of sale in these cases—(1) for payment of entailer's debts under Act 1836, sect. 7, *supra*, p. 904; (2) a general power with certain consents under Act 1848, sect. 4, Act 1875, sect. 6, as supplemented by sect. 4 of the present Act; and (3) under Act 1848, sect. 25, Act 1853, sect. 9, Act 1868, sects. 9, 10, for payment of debts charged on the estate. To these is added by this and the following sections a power absolute, except in the cases mentioned in sect. 21, to sell subject to resettlement of the price or its surrogate.

[2] What is elsewhere (sects. 23 (4, 5), 28, rubric) called entailed money is specially provided for by sect. 26, so that the expression entailed estate must be read here and in the immediately following sections in the sense of Act 1848, sect. 25, rather than in the sense of Act 1875, sect. 3.

[3] In selling part of an estate, it is competent to create servitudes over the land retained, subject to the sanction of the Court, so as to enhance the price; the Lord President (Inglis) being of opinion that 'the effect of this statute seems to be that 'the heir of entail in possession of an entailed estate is to be in exactly the same 'position as a fee simple proprietor in regard to selling the estate'—Ballantine, 30th June 1883, 20 Sc. L.R. 718 (there a servitude not to build except a certain class of houses); but power to sell the servitude should be applied for, ibid. —contrast Cleland *v.* Morrison, 9th Nov. 1878, 6 Ret. 157.

Procedure.

20. In every application for an order of sale, in addition to the procedure prescribed for applications under the Entail Acts, the applicant shall produce and depone to a schedule signed by him, or his tutors,

curators, or administrators, setting forth the debts and charges [1] affecting the estate, and the Court shall order intimation to be made to the heirs of entail whose consents would have been required to an application for disentail, and to the creditors, if there be any, and such heirs and creditors shall be entitled to appear for the purpose of seeing that their respective interests are protected, but shall not be entitled to oppose the application.

[1] Therefore not confined, as in the schedule required by Act 1875, sect. 12 (5), to debts that are not secured by being placed on the record.

Order of sale.

21. The Court shall procure a report as to the value of the estate, and as to the rights and charges affecting it, and shall, unless it appear that any patrimonial interest would be injuriously affected thereby, order the estate, or a part of it, to be sold in such manner as they think proper.

Provided that in the case of any such application by or on behalf of a married woman, minor, pupil, or other person under disability, the Court shall not make the order unless they are satisfied that it will be for the benefit of the applicant.[1]

[1] This extends the protection, by which the large powers conferred on guardians by sect. 11 are safeguarded, to married women in case of such sales.

Court may prescribe manner of sale.

22. The Court shall fix the time and place and manner of sale, and may authorise the sale of the estate, or such part of it, in whole or in lots, and either by public auction at such upset price or by private bargain at such price as the Court may direct, or partly by public auction and partly by private bargain, and if more advantageous to the parties, may direct the sale to be for a feu-duty instead of a price to be immediately paid, or partly for a feu-duty and partly for a price.[1]

Provided that the sale shall not be by private bargain if either the applicant or the next heir shall intimate within one month after the order for sale that he desires the sale to be by public auction.

When the estate is sold by public auction any creditor or person interested, other than the applicant, may be the purchaser.[2]

[1] Cf. Act 1848, sect. 25; Act 1868, sects. 9, 10.

[2] Any creditor has a similar right in a sale under the Bankruptcy Act 1856, sect. 120: and where common property is sold, power may be reserved in the articles of roup to any one interested to bid—Thom *v.* Macbeth, 26th Nov. 1875, 3 Ret. 161.

Price to be consigned.

23. Upon a sale of entailed estate, or such part of it, under the orders of the Court as aforesaid, the following provisions shall have effect:

(1.) The price shall be paid into a bank to be named by the Court on a consignation receipt subject to the future orders of the Court,[1] or, if the applicant desires it, instead of the price being paid in money the equivalent according to the current price of the day in consolidated stock of the United Kingdom shall be transferred into a special account to be opened in the name of the Accountant of the Court of Session, subject to the order of the Court.

Where price paid in consols, dividends to be paid to applicant and his successors.

(2.) Where the estate, or such part of it, is unencumbered, and where the price is paid in consolidated stock, unless desired by the applicant or his successors in the estate,[2] no further proceedings in the nature of investment shall be necessary. The Court shall grant an order in such general form as it, after consulting

the Bank of England, may settle, which order shall be an authority to the bank to pay the dividends to the applicant during his life. After the death of the applicant a similar order shall be granted to his heir of tailzie and provision on production of a decree of service.

Where estate encumbered.

(3.) Where the estate is encumbered the Court shall provide for the payment out of the price of all debts secured upon the estate,[3] and the surplus, if desired by the applicant, may be invested in consolidated stock as aforesaid under the conditions expressed in the preceding subsections.

Where applicant desires investment, trustees may be appointed.

(4.) If the applicant desires that the price or surplus should be invested in any of the Government stocks, public funds, or securities of the United Kingdom, or heritable security in Great Britain, or in stock of the Bank of England, or in East India Stock, or the mortgages or debentures or debenture stocks of such municipal corporations or public trusts, or railway companies,[4] as may be approved by the Court after inquiry, it shall be invested as entailed money[5] in the names of trustees to be appointed by the Court,[6] in trust for the applicant and the heirs of entail in their order, and it shall be sufficient in the deed of security to refer to the deed of entail without setting forth the terms of the destination or the conditions and clauses of entail. The trustees shall be not less than three in number, and a majority of the trustees in all cases shall be a quorum. They shall receive such remuneration, if any, as the Court may fix, as well as all charges and expenses incurred by them. If the purchaser of the estate sold as aforesaid and the applicant desire it, a part of the price may be secured on the estate. Subsisting debts affecting the estate may, if desired, be left secured thereon and allowed for in the settlement of the price instead of being paid off.

Powers of trustees.

(5.) If the money is called up or a change of investment is desired, the trustees shall not be bound to obtain the authority or approval of the Court in relation to new investments, but may themselves make such new investments in accordance with the provisions of this Act, or they may apply to the Court, if they think proper, for such authority. Until the first investment is found, or while it is waiting for re-investment, the entailed money shall remain in bank on a consignation receipt. The Court shall have power to accept the resignation of or to remove any trustee or trustees, and to appoint new or additional trustees,[7] and the petition shall remain a depending process for all purposes until the entail comes to an end.

Purchase of lands.

(6.) If it is desired that the price or surplus, whether before or after it has been invested as aforesaid, shall be applied in the purchase of other lands, the Court, after inquiry and report, may grant the requisite authority, and the purchased lands shall be settled in conformity with the subsisting destination.[8]

Price may be applied to improvements.

(7.) The price of any part of an entailed estate which shall be sold under the provisions of this Act may be applied in payment of

the cost of improvements executed but not charged upon the entailed estate, or executed but not charged upon any other estate belonging to the applicant and entailed upon the same series of heirs, or in course of execution, or contemplated, upon the remaining portion of the entailed estate, or upon any other estate belonging to the applicant, and entailed upon the same series of heirs.

Provided that the Court shall be satisfied that such improvements, if already executed, are of a substantial nature and beneficial to the estate at the date of the sale, or, if in course of execution or contemplated, that they will be, if well executed, of a substantial nature and beneficial to the estate.[9]

(8.) All applications for investment or re-investment or other application of the price or surplus which might be made by the applicant may be made by his heir of tailzie and provision for the time being after the applicant's death.[10] Investment after applicant's death.

(9.) The costs, charges, and expenses incurred in an application to the Court for an order of sale under this Act, and other applications or procedure following thereon shall, in so far as the same properly affect the capital of the estate, form a deduction from the price, and shall be payable out of the sum paid into bank, or deducted from the sums to be invested or applied as aforesaid, and all such costs, charges, and expenses as properly affect income shall be payable out of the income of the fund so paid into bank or invested. Costs of application.

[1] Cf. Act 1848, sect. 25.

[2] Subsection 6.

[3] See sect. 24.

[4] This is a wider field for investment than is open to trustees under the Trusts Act, 1867 (30 & 31 Vict. c. 97, sect. 5), and the Debenture Stock Act, 1871 (34 Vict. c. 27).

[5] A novel phrase, to be found also in the next subsection and in the rubric of sect. 28. It does not, of course, sustain any argument in favour of an entail of moveable property; since in all cases it is regarded as a *surrogatum* for heritage.

[6] Therefore the Trust Acts of 1861 and 1877 do not apply. See next note.

[7] They cannot resign at will, nor assume new trustees—24 & 25 Vict. c. 24 not being applicable, and 30 & 31 Vict. c. 97, sect. 13, being in complete accord with the present subsection.

[8] By the Agricultural Holdings (Scotland) Act, 1883 (46 & 47 Vict. c. 62), sect. 24, 'the price of any entailed land sold under the provisions of the Entail Acts, where 'such price is entailed estate within the meaning of those Acts, may be applied by the 'landlord in respect of the remaining portion of the entailed estate, or in respect of 'any other estate belonging to him and entailed upon the same series of heirs, in pay-'ment of any expenditure and costs incurred by him in pursuance of this Act for exe-'cuting or paying compensation for any improvement mentioned in the first or second 'parts of the schedule hereto, or in discharge of any charge with which the estate is 'burdened in pursuance of this Act in respect of such improvement.' The improvements referred to are (Part I.) erection or enlargement of buildings, formation of silos, laying down of permanent pasture, making of water-meadows or works of irrigation, making of gardens, making or improving of roads or bridges, making or improving of watercourses, ponds, wells, or reservoirs, or of works for supply of water for agricultural or domestic purposes, making of permanent fences, reclamation of waste land, weiring or embanking of land and sluices against floods, and (Part II.) drainage. See further, *supra*, sect. 6, note.

[9] As to charging improvements generally, see Act 1875, sects. 3, 7, 8, 9, and the earlier and later Acts referred to in the notes thereto. The object of this subsection (like sect. 7 *supra*) is to save expense by ascertaining chargeability incidentally to a petition for authority to sell, instead of resorting to a separate petition.

[10] The petition continues for this purpose to be a depending process (subsect. 5). Cf. sect. 5 (3).

Provisions to husbands, wives, and children, &c., to be secured upon the fund.

24. Where provisions to husbands, wives, and children, annuities or terminable charges, are secured [1] upon the estate, or where courtesy or terce are not excluded, due provision shall be made under the authority of the Court for their payment out of the capital or income, as the case may be, of the estate or fund into which the entailed estate is converted, or otherwise to the satisfaction of the Court, and the entailed estate shall thereafter be effectually freed and disencumbered of such provisions, annuities, charges, courtesy, or terce, by discharges to be granted by the persons in right thereof, or by a decree of the Court declaring the entailed estate to be so freed and disencumbered, which discharges or decree shall be recorded in the appropriate register of sasines.

[1] It may be doubted whether the intention of the clause was not to include all claims of the sort here mentioned, actually due and payable at the time of the sale or of the application of the price, though these claims might not have been charged on the estate by infeftment (as illustrated by the cases of courtesy and terce); but a strict construction of the term 'secured' is undoubtedly aided by the closing words of the section, by its use in sects. 18, 25, and 23 (3 and 4), and by the contrasted use of the phrase 'debts affecting the estate' in sects. 20, 21, and 23 (4).

Disposition to be granted at sight of Court.

25. Upon payment of the price in money or stock as above provided (or without payment, where the sale is for a feu-duty), the applicant, or his tutors, curators, or administrators, or his heirs, shall grant a disposition at the sight of the Court containing all clauses usual and necessary for the purposes of the conveyance (according to the nature of the transaction), and in particular a clause providing that the purchaser shall have warrandice against the price, so long as the same shall remain extant, deposited or invested as aforesaid, and binding the applicant and his heirs of provision in warrandice to the extent of the shares of the price received by them respectively, in the event of the price being disentailed and divided among the applicant and his heirs of provision according to their respective interests therein.[1] Where a portion of the price is to be secured on the estate, a bond and disposition in security containing all usual classes shall be granted, or, if the Court shall declare that any sum of money shall be a real burden on the estate, such decree on being recorded in the appropriate register of sasines shall have the same force and effect as a bond and disposition in security duly recorded in such register.

[1] This is the nearest approach to the absolute warrandice of a fee-simple vendor that is possible in the circumstances.
[2] See Conveyancing Act, 1874 (37 & 38 Vict. c. 94), sect. 30.

Money in trust for purchase of land to be entailed.

26. Where any money or other property, heritable or moveable, is held in trust for the purpose of purchasing land to be entailed,[1] it shall be lawful, when the direction to purchase and entail has become operative, for the person who, if the land were entailed in terms of the trust, would be the heir entitled to possession thereof, to make summary application to the Court for warrant and authority to the person or persons by whom the said money or property is held in trust at the time, to deal with and apply the same or the proceeds thereof as if it were the price

of entailed land sold in pursuance of this Act, and such money or property shall be subject to the provisions of this Act applicable to the price of entailed lands.

[1] Not land held in trust for the purpose of being entailed, for that has to be sold in order to reduce it to the conditions here contemplated (sect. 19). The phraseology of the part of the present section which relates to heritable property and moveable property, other than money, is elliptical. This section and sect. 28 taken together show that the expression, 'entailed estate,' in sect. 19 hereof must be read in the narrower sense, as explained in note [2] thereto.

Price of land sold to remain entailed estate.

27. The price of an entailed estate or any part thereof sold under the provisions of this Act shall be entailed estate [1] within the meaning of the Entail Acts.

[1] See note [2] to sect. 2 of the present Act for the meaning of this term in the Acts 1848 and 1875.

Investment of entailed money.

28. The provisions of this Act with regard to the descriptions of securities and stocks in which the price of land sold may be invested shall apply to all entailed estate consisting of money.[1]

[1] See sect. 23, note [4].

Deeds granted under authority of Court to be final.

29. Any instrument of disentail, disposition, bond and disposition in security, or other deed granted under the authority of the Court in terms of this Act, where the judgment of the Court allowing such deed has not been brought under review of the House of Lords by appeal, or where such judgment has not been brought under reduction upon any relevant ground during the period within which such judgment might have been appealed from, shall, as regards any third parties acting *bonâ fide* on the faith thereof, be no longer reducible on any ground of irregularity or non-compliance with the provisions of this Act, but in respect of any such ground of challenge be final and conclusive.[1]

[1] Cf. Act 1853, sect. 24, and notes thereto, *supra*, p. 945.

Act to apply to future entails.

30. This Act shall apply to future as well as to existing entails.

No. XXVII.

INCOME TAX ACT.[1]

5 & 6 VICTORIA, c. 35.

Duties in Schedule (A) to be charged under the following rules.

60. And be it enacted, that the duties hereby granted and contained in the said schedule marked (A.) shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of this Act, and to refer to the said duties, as if the same had been inserted under a special enactment.

[1] See text, *supra*, p. 706.

Schedule (A.) *Rules.*

SCHEDULE (A.)

No. I.—*General Rule for estimating Lands, Tenements, Hereditaments, or Heritages mentioned in Schedule* (A.)

Annual value to be ascertained by this rule, except as after stated.

The annual value of lands, tenements, hereditaments, or heritages charged under Schedule (A.) shall be understood to be the rent by the year at which the same are let at rack rent,[1] if the amount of such rent shall have been fixed by agreement[2] commencing within the period of seven years preceding the fifth day of April next before the time of making the assessment, but if the same are not so let at rack rent, then at the rack rent at which the same are worth to be let by the year; which rule shall be construed to extend to all lands, tenements, and hereditaments, or heritages, capable of actual occupation,[3] of whatever nature,[4] and for whatever purpose occupied or enjoyed, and of whatever value, except the properties mentioned in No. II. and No. III. of this schedule.

[1] That is, 'a rent of the full value of the tenement, or near it'—2 Blackst. Com. 43. But the rent is not conclusive, if it can be shown to embrace repayment by instalments of the value of moveables given over with the premises — Campbell *v.* L. Adv., 25th Oct. 1879, 7 Ret. 82.

[2] See sect. 69 as to the production of leases in Scotland. For procedure where no written lease exists, see sect. 67.

[3] See the note to Schedule (B.), VII., *infra*. For mode of valuation, see sect. 64.

[4] Brick-rents seem to come under this part of the schedule, not under No. III.—Edmonds *v.* Eastwood, 2 H. and N. 811. They here consisted of surface-rent, fixed brick-rent, and royalty. Commissioners of Supply are liable in income-tax as owners and occupiers of police stations, used partly as strong-rooms and partly as lodgings for constables—Clark *v.* Dumfries Comrs., 16th July 1880, 7 Ret. 1157.

No. II.—*Rules for estimating the Lands, Tenements, Hereditaments, or Heritages herein mentioned, which are not to be charged according to the preceding General Rule.*

Manner of charging certain properties, &c.

The annual value of all the properties herein-after described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited:

Tithes in kind.

First.—Of all tithes, if taken in kind, on an average of the three preceding years:

Ecclesiastical dues.

Second.—Of all dues and money payments in right of the church or by endowment, or in lieu of tithes (not being tithes arising from lands,) and of all teinds in Scotland, on the like average:[1]

Tithes compounded.

Third.—Of all tithes arising from lands, if compounded for, and of all rents and other money payments in lieu of tithes arising from lands (except rent-charges confirmed under the Act passed for the commutation of tithes,) on the amount of such composition, rent, or payment for one year preceding:

The said duty in each case to be charged on the person entitled to such tithes or payments, or his lessee or tenant, agent or factor,[2] except in the cases mentioned in the fourth Rule of No. IV. of Schedule (A):

Manors.

Fourth.—Of manors and other royalties, including all dues and other

services, or other casual profits, (not being rents or other annual payments reserved or charged,) on an average of the seven preceding years, to be charged on the lord of such manor or royalty, or person renting the same: [2]

Fifth.—Of all fines received in consideration of any demise of lands or tenements (not being parcel of a manor or royalty demisable by the custom thereof) on the amount so received within the year preceding, by or on account of the party; provided that in case the party chargeable shall prove, to the satisfaction of the commissioners for general purposes in the district, that such fines, or any part thereof, have been applied as productive capital, on which a profit has arisen or will arise otherwise chargeable under this Act, for the year in which the assessment shall be made, it shall be lawful for the said commissioners to discharge the amount so applied from the profits liable to assessment under this rule: Fines.

Sixth.—Of all other profits arising from lands, tenements, hereditaments, or heritages not in the actual possession or occupation of the party to be charged, and not before enumerated, on a fair and just average of such number of years as the said commissioners shall, on the statement of the party to be charged, judge proper, (except such profits as may be liable to deduction in pursuance of the ninth or tenth rule in Number IV. herein-after mentioned),[3] to be charged on the receivers of such profits, or the persons entitled thereto. Other profits from lands.

[1] For the mode of levying duty on teinds, see sect. 71.
[2] For the mode of levying these, see sect. 72.
[3] *Infra*, pp. 988, 989.

No. III.—*Rules for estimating the Lands, Tenements, Hereditaments, or Heritages herein-after mentioned, which are not to be charged according to the preceding General Rule.*[1]

The annual value of all the properties herein-after described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited. Manner of charging certain other properties.

First.—Of quarries of stone, slate, limestone, or chalk, on the amount of profits in the preceding year: Quarries.

Second.—Of mines of coal, tin, lead, copper, mundic, iron, and other mines, on an average of the five preceding years, subject to the provisions concerning mines contained in this Act: [2] Mines.

Third.—Of iron works, gas works, salt springs or works, alum mines or works, waterworks, streams of water, canals, inland navigations, docks, drains, and levels, fishings, rights of markets and fairs, tolls,[3] railways [4] and other ways, bridges, ferries, and other concerns of the like nature, from or arising out of any lands, tenements, hereditaments, or heritages, on the profits of the year preceding: Ironworks, &c.

The duty in each of the last three rules to be charged on the person, corporation, company, or society of persons, whether corporate or not corporate, carrying on the concern, or on their respective agents, treasurers, or other officers having the direction or management thereof, or Duty in last three rules how to be charged.

being in the receipt of the profits thereof, on the amount of the produce or value thereof, and before paying, rendering, or distributing the produce or the value, either between the different persons or members of the corporation, company, or society engaged in the concern, or to the owner of the soil or property, or to any creditor or other person whatever having a claim on or out of the said profits; and all such persons, corporations, companies, and societies respectively shall allow out of such produce or value a proportionate deduction of the duty so charged, and the said charge shall be made on the said profits exclusively of any lands used or occupied in or about the concern:—

Duty on mines to be charged on the company jointly, but any adventurer may claim to be charged separately, in order to set off his loss in one concern against his profits in another.

The computation of duty arising in respect of any such mine carried on by a company of adventurers, shall be made and stated jointly in one sum; provided that if any adventurer shall declare his proportion or share in such concern, in order to a separate assessment, it shall be lawful to charge such adventurer separately, and nothing herein contained shall be construed to restrain any adventurer so separately assessed from deducting or setting against his profits acquired in one or more of such concerns, his loss sustained in any other of the said concerns over and above the profits thereof, provided that such loss shall not exceed the proportion of such adventurer which shall have been duly proved by the company in their computation of duty, and shall have been allowed by the respective commissioners, and in every such case one assessment only shall be made on the balance of such profit and loss of the adventurer so separating his account in the parish or place where such adventurer shall be chargeable to the greatest amount, and the amount of each person's share so proved and allowed shall be deducted from the general assessment of the company or companies to which such adventurer shall belong, and the respective commissioners shall cause the assessments on the said companies to be rectified as the case may require; and the certificate of the commissioners making such separate assessment shall be an authority to the commissioners acting in another district to cause the assessments on the respective companies to which such assessment shall belong to be rectified; and in case such loss shall arise in a different district than where such separate assessment shall be to be made, the certificate of the commissioners acting for such other district of the amount of such loss, and the proportion of such adventurer therein, shall be proof of the deduction to be made by the commissioners making such assessment.

[1] The concerns here described are now charged and assessed in the manner here mentioned, 'according to the rules prescribed by Schedule (D.), so far as such rules are 'consistent with the said No. III., provided that the annual value or profits and gains 'arising from any railway shall be charged and assessed by the commissioners for 'special purposes,' 29 Vict. c. 36, sect. 8. See Addie *v.* Inland Revenue, 16th Feb. 1875, 2 Ret. 431; Knowles *v.* M'Adam, 3 Exch. D. 23; Miller *v.* Farie, 29th Nov. 1878, 6 Ret. 270; Coltness Iron Co. *v.* Inland Revenue, 6th Feb. 1879, 6 Ret. 617; rem. 1st Aug. 1879, 6 Ret. H.L. 122; 7th Jan. 1881, 8 Ret. 67, aff. 7th April 1881, 8 Ret. H.L. 67.

[2] In the close of this No., and in Sched. (A.) No. IV., 5, *infra*, p. 988.

[3] The mode of levying duty for markets, fairs, tolls, fisheries, &c, is set forth herein and in sect. 72.

[4] The proviso in note [1] saved the earlier enactment, 23 Vict. c. 14, sect. 5.

No. IV.—*Rules and Regulations respecting the said Duties.*

First.—All properties chargeable to the duties in Schedule (A.) shall be charged in the parish or place where the same are situate,[1] and not elsewhere, except as herein-after is excepted: To be charged in the parish:

Provided that the profits arising from canals, inland navigations, streams of water, drains or levels, or from any railways or other roads or ways of a public nature, and belonging to or vested in any company of proprietors or trustees, whether corporate or not corporate, may be stated in one account, and charged in the city, town, or place at or nearest to the place where the general accounts of such concern shall have been usually made up; and it shall be lawful for the said proprietors or trustees, having paid the duties so chargeable, either to deduct a just proportion thereof from the interest payable to the creditors of the said properties, or any of them, or to pay such interest in full, without making any such deduction; and it shall be lawful for the said creditors to receive such interest in full, and they shall not be liable thereupon to the penalty herein-after contained:[2] Except canals, railways, &c., which are to be charged where the general accounts are made up. Duties may be deducted from interest payable to creditors.

Second.—All lands occupied by the same person shall be brought into every account thereof required to be delivered by such person under this Act, whether the same shall be occupied by such person as owner or tenant, or as tenant under distinct owners, or shall be situate in the same or in different parishes or districts; but the charge thereon shall be in each parish or district in proportion to the value of the property situate therein, of which proportion the occupier shall be required to deliver an account in each parish wherein any part of such lands is situate, and a separate estimate shall be given of lands in the same occupation belonging to distinct owners; and if any occupier of lands situate in different parishes or places shall wilfully omit to deliver an account of the lands so occupied in each parish or place, although such occupier may not reside in one or more of such parishes or places, he shall be charged for the lands so omitted at treble the rate contained in this Act over and above the penalty herein imposed: Lands in the same occupation to be charged according to the parishes. Proportions in each parish, and belonging to distinct owners, to be stated.

Provided always, that lands held under the same demise, or in the occupation of the same person as owner, although situate in different parishes, but wholly in the same district of commissioners, may be charged in either parish, at the discretion of the said commissioners, if they shall be satisfied that the proportion in each parish, either in respect of quantity, rent, or value of the said lands, cannot be ascertained; and if the said lands extend into different districts of commissioners, then the assessment shall be made in that district where the occupier of such lands doth reside: Lands in different parishes to be charged in either where the proportions cannot be ascertained.

Third.—For any dwelling house in the occupation of a tenant which, with the buildings or offices belonging thereto and the land occupied therewith, shall be under the annual value of ten pounds, and for all lands and tenements let to any tenant for a less period than one year,[3] the assessment thereupon shall be made on the landlord, but so as not to impeach the remedy of recovery of the duty from the occupier, in default of payment by the landlord: Houses under £10 charged on landlords.

Tithes may be charged on occupiers of land.

Fourth.—For any compositions, rents, or other payments in lieu of tithes, the assessment thereupon may, if the commissioners think fit, be made on the respective occupiers of the lands from which such tithes arise, or on the respective persons liable to the payment of such compositions, rents, or other payments; and the said commissioners may direct notices to be delivered to such persons respectively, for the purpose of obtaining returns of the value of such compositions, rents, and payments, subject to the like penalties and under the regulations of this Act for returns of the annual value of lands:[4]

Mines failing, how to be charged.

Fifth.—If any mine, enumerated in the Fifth[5] Rule, No. III., of this schedule, has, from some unavoidable cause, been decreased and is decreasing in the annual value thereof, so that the average of five years will not give a fair and just estimate of the annual value thereof, it shall be lawful after due proof before the commissioners for general purposes in the district where such mine shall be situate, to compute such annual value on the actual amount of such profits and gains in the preceding year ending as aforesaid, subject to such abatement on account of diminution of duty within the current year, as is herein provided in other cases; and if any such mine shall, from some unavoidable cause, have wholly failed, it shall be lawful for the said commissioners, on due proof thereof, wholly to discharge any assessment made thereon:

If failed, the assessment may be discharged.

Mines to be charged where situate, or produce manufactured.

Provided always, that whenever any such mine shall be situate, or the produce thereof shall be manufactured, in any place other than where the produce thereof shall be sold, the profits arising therefrom shall be assessed and charged in the parish and district, where the said mine is situate, or where the produce thereof is manufactured, and not elsewhere:

Duties in certain cases to be estimated according to profits accrued since commencement of possession.

Sixth.—If in estimating the value of any of the properties enumerated in No. II. or No. III. of this schedule, as before mentioned, it shall appear that the account required by the said rules cannot be made out by reason of the possession or interest of the party to be charged thereon having commenced within the time for which the account is directed to be made out, the profits of one year shall be estimated in proportion to the profits received within the time elapsed since the commencement of such possession or interest:

Official houses charged on the occupiers.

Eighth.—The duty to be charged in respect of any house, tenement, or apartment belonging to her Majesty, in the occupation of any officer of her Majesty, in right of his office or otherwise (except apartments in her Majesty's royal palaces), shall be charged on and paid by the occupier of such house, tenement, or apartment, upon the annual value thereof:

Occupiers to recover from landlord, according to the rate, by deducting the duty out of the rent.

Ninth.—The occupier of any lands, tenements, hereditaments, or heritages, being tenant of the same, and paying the said duties, shall deduct so much thereof in respect of the rent payable to the landlord for the time being (all sums allowed by the commissioners being first deducted) as a rate of seven-pence[6] for every twenty shillings thereof would by a just proportion amount unto, which deduction shall be made out of the first payment thereafter to be made on account of rent;[7] and the receivers of her Majesty, and all landlords, both medi-

ate and immediate, their respective heirs, executors, administrators, and assigns, according to their respective interests, and their respective receivers or agents, shall allow such deduction upon receipt of the residue of the rent, under the penalty herein contained;[8] and the tenant paying the said assessment shall be acquitted and discharged of so much money as if the same had actually been paid unto the person to or for whom his rent shall have been due and payable;[9] and the occupier of lands charged on the amount of any composition, rent, or payment for tithes arising therefrom, and paying the said duties, shall be entitled to make the like deduction from such composition, rent, or payment, on paying the same:

Landlords may recover from others having interest at the like rate.

Tenth.—Where any such lands, tenements, or hereditaments are subject or liable to the payment of any rent-charge, whether under the Act passed for the commutation of tithes, or otherwise, or any annuity, fee-farm rent, rent service, quit rent, feu-duty, teind-duty, stipends to licensed curates, or other rent or annual payment thereupon reserved or charged, the landlord, owner, or proprietor by whom any deduction[10] shall have been allowed as aforesaid, and the owner or proprietor being also occupier and charged to the said duties, shall deduct and retain out of every such rent-charge, annuity, fee-farm rent, rent service, quit rent, feu-duty, teind-duty, stipend, or other rent or annual payment aforesaid, so much of the said duties or payments on account of the same, (the just proportion of the sums allowed by the commissioners in the cases authorised by this Act being first deducted,) as a like rate of sevenpence[11] for every twenty shillings on such rent-charge, annuity, fee-farm rent, rent service, quit rent, feu-duty, teind-duty, or stipend, or other rent or annual payment aforesaid, respectively, shall by a just proportion amount unto; and the receivers of her Majesty, and all persons who shall be anyways entitled unto such rents, duties, stipends, or annual payments, their receivers, deputies, or agents, are hereby required to allow such deduction, upon the receipt of the residue of such monies as shall be due and payable for such rents, duties, or annual payments, without any fee or charge for such allowance, and under the penalty herein contained; and the landlord, owner, proprietor, and occupier respectively, being charged as aforesaid, or having allowed such deduction, shall be acquitted and discharged of so much money as if the same had actually been paid unto such person to whom such rent-charge, annuity, fee-farm rent, rent service, quit rent, feu-duty, teind-duty, stipend, or other rent or annual payment aforesaid, shall have been due and payable:

Mortgagees in possession liable.

Eleventh.—Where any mortgagee or creditor in any heritable bond or wadset, shall be in the possession of the lands, tenements, hereditaments, or heritages mortgaged or secured, such mortgagee or creditor shall be chargeable as occupier when in the actual occupation of the same, and when not in the actual occupation of the same shall be liable to such deduction as any other landlord would be;[12] and upon the settlement of accounts between such mortgagee or other creditor as aforesaid, and the mortgager or debtor, the duty payable in respect of the amount of the interest payable upon such mortgage or other debt as aforesaid shall be taken and allowed as so much money received by

such mortgagee or other creditor as aforesaid on account of such interest:

Owner dying, how the duty is to be paid.

Twelfth.—Where any lands, tenements, hereditaments, or heritages shall be occupied by the owner at the time the assessment shall be made, who shall die before payment of the duty, the heirs, executors, administrators, or assigns, or other person who on such death may become entitled to the rents and profits thereof, shall be liable to the payment of all arrears of the said duty due at the time of such death, and to all subsequent instalments for that year, according to their respective interests, without any new assessment:

Houses divided into distinct properties.

Thirteenth.—Where any house shall be divided into distinct properties, and occupied by distinct owners or their respective tenants, such properties shall be charged distinct on the respective occupiers:[13]

Deductions not to be allowed, unless authorised by the Act, and an account thereof delivered to the assessor.

Fourteenth.—No deduction from the estimate or assessment on any lands, tenements, hereditaments, or heritages shall be allowed in any case not authorised by this Act,[14] nor unless an account in writing, signed by the occupier thereof, or by the party claiming such deduction, stating the nature and amount thereof, shall have been delivered to the assessor within the time and pursuant to the notice delivered by such assessor;[15] and if any such deduction shall be made or allowed contrary to this Act, or without such account in writing as aforesaid, it shall be lawful for the surveyor or inspector to surcharge the assessment, and to charge therein a sum equal to the amount of duty by which the assessment shall have been diminished on occasion of such deduction, which surcharge shall not be annulled or vacated under any pretence whatever, but shall stand part of the assessment.

[1] In case of doubt the Commissioners of Inland Revenue may direct in which district a taxpayer shall be assessed. It is the same if he is assessed or assessable in two or more districts—Taxes Management Act, 1880, sect. 53 (2). If a parish lies in two or more counties, the county in which the church is situate claims the whole; if any dwelling-house or any other premises occupied therewith lie in more than one parish, the assessor chooses the most expedient, and notifies his choice to the commissioners for either, ibid., sect. 53 (1). If a doubt arises as to the parish in which any lands are situate the central board annexes them for the purposes of the Act to a neighbouring parish and division, ibid., sect. 54.

[2] In sect. 103.

[3] The sidenote omits this important case.

[4] Sect. 55. See text, p. 709.

[5] *Sic.* Really the second.

[6] Or as the case may be. See 16 & 17 Vict. c. 34, sect. 40, which is now the general enactment as to deductions, as amended by 27 Vict. c. 18, sect. 15. The 42d section of the said Act, 16 & 17 Vict. c. 34, provides for any person who pays any rent-charge, leviable under any Lands Improvement Act, deducting one-third of the sum which the rate of duty computed thereon will amount to, and no more.

[7] It has been decided in England that the tenant's right to deduct is not lost, though the landlord has a claim of exemption from payment of the tax, which has been subsequently allowed—Swatman *v.* Ambler, 24 L.J. Exch. 185. Other cases are noticed in Dowell's note to this section, but they turn on English pleading. See further, on these deductions and the power of the commissioners to settle differences, sects. 159, 160, *infra*, p. 1006.

[8] Sect. 103, £50, now regulated by 16 & 17 Vict. c. 34, sect. 40.

[9] Provided always that he do not retain more than he has actually paid—16 & 17 Vict. c. 34, sect. 40. The tenant may prove his payment of the tax by producing the receipts, if there be no question as to their correctness. If they are blundering receipts, the true criterion is the assessment. See the English cases on the old Acts—Gabell *v.* Shevell, 5 Taunt. 81; Philips *v.* Beer, 4 Camp. 266.

[10] See notes to last subsection hereof.

[11] Or as the case may be.
[12] See rule 9 of the present part of the schedule.
[13] 'Any house or building let in different apartments or tenements, and occupied by 'two or more persons severally, shall nevertheless be charged to the duty under this 'Act as one entire house or tenement, and the assessment thereof shall be made on 'the landlord; but in default of payment by him the duty so charged and assessed 'may be levied on the occupier or occupiers respectively, and, being paid by them or 'one of them, shall be deducted and allowed out of the next or any subsequent pay-'ment on account of rent.'—16 & 17 Vict. c. 34, sect. 36.
[14] See sect. 159.
[15] Sections 47, 48. See text, p. 708.

No. V.—*Particular Deductions and Allowances in respect of the Duties under Schedule* (A.) Deductions.

Fifth.—For the amount of the land tax charged on lands, tenements, hereditaments, or heritages under the said Act passed in the thirty-eighth year of the reign of King George the Third,[1] where the charge thereon shall not have been redeemed: Land-tax.

Sixth.—For the amount charged on lands, tenements, hereditaments, or heritages by a public rate or assessment in respect of draining, fencing, or embanking the same:[2] Drainage, &c.

In all which cases there shall be allowed (unless such payments, or any part thereof, shall be made by a tenant,) such sum of money as a like rate of seven-pence[3] for every twenty shillings of the sums paid would by a just proportion amount unto; and the sum so allowed shall be deducted from the assessment to be made on the property charged with such payments, except in the cases herein-after otherwise provided for; (that is to say,) [the exception does not apply to Scotland.] Rate of deduction.

[1] Chap. 5. See text, p. 691.
[2] And for the amount expended by an owner of lands on an average of 21 years 'in 'making or repairing of sea-walls or other embankments necessary for the preserva-'tion or protection of such lands against the encroachment or overflowing of the sea 'or any tidal river, although the sums expended may not have been charged on such 'lands by any public rate or assessment,'—16 & 17 Vict. c. 34, sect. 37. Burgh customs in Scotland are relieved, so far as expended in defraying paving, lighting, cleansing, and police expenses, and discharging other similar public burdens—ibid., sect. 38.
[3] Or as the case may be.

61. And be it enacted, that the person entitled to any of the allowances mentioned in the next preceding rule, which are directed or authorised to be made by certificate, and which shall not have been made by deduction or abatement from the assessment, shall claim such allowance at any time after the expiration of the year of assessment, before the commissioners for general purposes of the district in which the property charged with the payments and charges mentioned in the said rule shall be situate; and the said commissioners, upon due proof before them that the claimant is entitled to such allowance, shall certify the particulars and the amount thereof to the commissioners for special purposes at the head office for Stamps and Taxes[1] in England, and thereupon the said last-mentioned commissioners shall grant an order for the payment of such allowance, directed to the Receiver-General of Stamps and Taxes,[1] or to an officer for receipt or collector of the duties granted by this Act, or to a distributor or sub-distributor of stamps, as may be most convenient for the party Mode of proceeding in order to the payment of certain allowances granted under No. V. Schedule (A.)

entitled to such allowance, and such receiver-general or officer as aforesaid is hereby required, on production and delivery to him of such order, to pay the amount of such allowance to the party entitled thereto out of any money in the hands of such receiver-general or officer arising from any duties placed under the management of the Commissioners of Stamps and Taxes, taking the receipt of the party entitled to such allowance for the same, by endorsement on such order.[2]

[1] Now Inland Revenue, 12 Vict. c. 1.

[2] This section is only of force in Scotland, in so far as referred to in sect. 62. The certificate here mentioned relates to allowances, which, not being applicable to Scotland, are omitted on last page.

No. VI.—*Allowances to be made in respect of the said Duties in Schedule* (A.)

Allowances for colleges and halls in universities;

For the duties charged on any college or hall in any of the universities of Great Britain,[1] in respect of the public buildings and offices belonging to such college or hall, and not occupied by any individual member thereof, or by any person paying rent for the same, and for the repairs of the public buildings and offices of such college or hall, and the gardens, walks, and grounds for recreation repaired and maintained by the funds of such college or hall:

Hospitals, public schools, almshouses, and literary institutions.

Or on any hospital, public school, or almshouse, in respect of the public buildings, offices, and premises belonging to such hospital, public school, or almshouse, and not occupied by any individual officer or the master thereof, whose whole income, however arising, estimated according to the rules and directions of this Act, shall amount to or exceed one hundred and fifty pounds *per annum*, or by any person paying rent for the same, and for the repairs of such hospital, public school, or almshouse, and offices belonging thereto, and of the gardens, walks, and grounds for the sustenance or recreation of the hospitallers, scholars, and almsmen, repaired and maintained by the funds of such hospital, school, or almshouse, or on any building the property of any literary or scientific institution, used solely for the purposes of such institution, and in which no payment is made or demanded for any instruction there afforded, by lectures or otherwise: Provided also, that the said building be not occupied by any officer of such institution, nor by any person paying rent for the same:

The said allowances to be granted by the commissioners for general purposes in their respective districts:

Rents of lands belonging to hospitals, public schools, and almshouses, or vested in trustees for charitable purposes.

Or on the rents and profits of lands, tenements, hereditaments, or heritages belonging to any hospital, public school, or almshouse, or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes:

The said last-mentioned allowances to be granted on proof before the commissioners for special purposes of the due application of the said rents and profits to charitable purposes only, and in so far as the same shall be applied to charitable purposes only:

The said last-mentioned allowances to be claimed and proved by any steward, agent, or factor acting for such school, hospital, or alms-

house, or other trust for charitable purposes, or by any trustee of the same, by affidavit to be taken before any commissioner for executing this Act in the district where such person shall reside, stating the amount of the duties chargeable, and the application thereof, and to be carried into effect by the commissioners for special purposes, and according to the powers vested in such commissioners, without vacating, altering, or impeaching the assessments on or in respect of such properties; which assessments shall be in force and levied notwithstanding such allowances.

[1] Now the United Kingdom—16 & 17 Vict. c. 34, sect. 5.

Special commissioners to certify allowances granted under No. VI. Schedule (A.), and order payment thereof.

62. And be it enacted, that where any allowance mentioned in Number VI. of the said Schedule (A.) shall be granted by the commissioners for special purposes, under the authority of this Act, they shall give a certificate thereof, together with an order for payment of the same, directed to the Receiver-General of Stamps and Taxes,[1] or to an officer for receipt or collector of the duties granted by this Act, or to a distributor or sub-distributor of stamps in the manner herein provided with respect to allowances to be granted under Number V. of the said Schedule,[2] and such allowance shall in like manner be paid to the party entitled thereto.

[1] Now the Receiver-General of Inland Revenue, 12 Vict. c. 1, sect. 17.
[2] By sect. 61.

Duties in Schedule (B.) and rules deemed part of the Act.

63. And be it enacted, that the duties hereby granted, contained in the Schedule marked (B.), shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of this Act, and to refer to the said last-mentioned duties as if the same had been inserted under a special enactment.

SCHEDULE (B.)

Schedule (B.) *Rules.*

No. VII.—*Rules for assessing and charging the Properties under Schedule* (B.)

To be charged in addition to Schedule (A.) on the same properties, except for dwelling houses distinct from farms, and for buildings occupied for trade or professions.

The duties last before mentioned shall be charged in addition to the duties to be charged under Schedule (A.) on all the properties in this Act directed to be charged to the said duties, according to the general rule in Number I. Schedule (A.)[1] before mentioned, on the full amount of the annual value thereof estimated as by this Act is directed,[2] (except a dwelling house, and the domestic offices thereunto belonging, and which dwelling house and offices shall not be occupied by virtue of one and the same demise with a farm of lands for the purpose of farming such lands, or with a farm of tithes for the purpose of farming the same; and except warehouses or other buildings occupied for the purpose of carrying on a trade or profession);[3] . . . Provided also, that the several properties herein-after described in Number VIII. shall be assessed and charged in manner therein mentioned.

[1] *Supra*, p. 984.
[2] The lessee of a deer-forest is an occupier of heritages in the sense of the statute, as in the sense of the Poor Law Act, and is chargeable on the rent actually paid, not on the value of the ground as an agricultural or pastoral subject. The question of grouse-shooting was not raised—Middleton *v.* L. Adv., 16th March 1870, Exch. cases, printed for the Inland Revenue, No. 19, 3 Ret. 599.
[3] The part omitted relates to tithes beyond Scotland, and to teinds taken in kind.

No. VIII.—*Rules for estimating the Properties herein-after next mentioned under Schedule* (B.)

Nurseries, market gardens, and hop-grounds.

The profits arising from lands occupied as nurseries or gardens for the sale of the produce, and lands occupied for the growth of hops, shall be estimated according to the rules contained in Schedule (D.),[1] and the duty shall be charged at the rate contained in the said Schedule; and when the said duty shall have been so ascertained, the same shall be charged under Schedule (B.) as profits arising from the occupation of lands, except where the lands so occupied for the growth of hops shall be part of a farm held under one demise, or by the same person as owner, and shall not exceed one-tenth part of such farm, in which case the duty thereon under this Schedule shall be charged together in one sum as for a farm by the said general rule in Schedule (A.) mentioned.

[1] Hop-lands are restored to Schedule (B.), 16 & 17 Vict. c. 34, sect. 39.

No. IX.—*Rules for charging the said Duties under Schedules* (A.) *and* (B.)

To be paid by the occupier.

First.—The said duties, except where other provisions are made as aforesaid for estimating particular properties, shall be estimated according to the general rule contained in Schedule (A.), and shall be charged on and paid by the occupier for the time being, his executors, administrators, and assigns.[1]

Who shall be deemed occupiers.

Second.—Every person having the use of any lands or tenements shall be taken and considered, for the purposes of this Act, as the occupier of such lands or tenements.

Assessments to be levied on the occupier.

How paid on change of occupation.

Third.—The said several duties shall on each assessment thereof be levied on the occupier for the time being without any new assessment, notwithstanding any change in the occupation thereof: Provided that every tenant on quitting the occupation shall be liable for the arrears[2] at the time of so quitting, and for such further portion of time as shall then have elapsed, to be settled and levied by the respective commissioners, and repaid to the occupier by whom the same shall have been paid; and the executors or administrators of any tenant who shall die before the payment of such assessment shall be liable in like manner as the testator or intestate would have been if living: Provided also, that every tenant quitting before the time of making the assessment shall be liable for such portion of the year as shall have elapsed at the time of his so quitting, to be adjusted and settled by the respective commissioners.

[1] See *supra*, Schedule (A.) No. IV. 9-11, and sect. 103, for the right of tenants, &c., to deduct in paying rents, feu-duties, &c. It is a very general, if not universal, custom in Scotland, which the Court will give effect to in questions between landlord and tenant as to ultimate liability at least, that the landlord of a house let furnished, even for a term of years, is liable for all public burdens in respect of occupancy, including income-tax, Sched. (B.)—Macome *v.* Dickson, 6th June 1868, 6 Macph. 898.

[2] 'Where any occupier for the time being of any lands, tenements, or hereditaments, being tenant thereof, shall be called upon and required to pay and shall have paid any sum or sums assessed upon or in respect of such lands, tenements, or here-

'ditaments under Schedule (A.) of this Act, and which said sum or sums or any 'portion thereof ought, under the rules for charging the duties under the said 'schedule, to have been paid or to be paid by any former tenant or occupier of the 'same lands, &c., or his executors or administrators,' he may deduct and retain from any subsequent payment of rent to his landlord the said sum or sums, provided nothing either in the Act of 1842 or of 1853 shall authorise levying on such occupier arrears ultimately chargeable on any former occupier, or prejudice the remedies given by the rules of the Act 1842 for recovering arrears from the latter—16 & 17 Vict. c. 34, sect. 35.

No. X.—*Rules for estimating the annual Value of Properties before described in Schedules* (A.) *and* (B.) *or either of them.*

Tenant's rates and taxes paid by landlord to be deducted from the rent.

First.—Where any landlord shall be subject to any covenant or agreement to pay or satisfy, out of the rent reserved on any lands or tenements, any parochial rates, taxes, or assessments which by law are a charge on the occupier,[1] or any composition for tithes; or where any rector, vicar, or other person entitled to any rent or other annual payment to be made in lieu of tithes, (except a rent-charge confirmed under the Act passed for the commutation of tithes) or any composition for tithes, shall pay or satisfy out of the amount thereof any such parochial rates, taxes, or assessment charged on such tithes, rent, composition, or other annual payment aforesaid, then and in every such case the annual value shall be estimated for the purposes of this Act exclusive of such rates, taxes, or assessments, and of such composition for tithes, to be computed on the amount thereof *bonâ fide* paid by such landlord or other person aforesaid in and for the year preceding the year of assessment; or where the owner shall be also occupier of such lands or tenements, and shall have paid any parochial rates, taxes, or assessments charged on the same, or any composition for tithes thereon, then the said annual value shall be also estimated exclusive of such rates, taxes, and assessments and composition for tithes, to be computed in like manner as aforesaid.

Landlord's rates and taxes paid by tenant to be added to the rent.

Second.—Where any tenant of lands or tenements shall be subject to any covenant or agreement to pay or satisfy any aids, taxes, rates, or assessments by law chargeable on or payable by the landlord, the amount thereof which shall have been *bonâ fide* paid by such tenant in and for the year preceding the year of assessment shall, in making the estimate for the purpose of charging the duty in respect of occupation, be added to the rent reserved, in case the same shall have been let within the period of seven preceding years, and if not so let, the estimate shall be made according to the general rule in Schedule (A.), with the like addition thereto of the amount of such payment.

Amount of rent depending on price of corn or grain, how to be ascertained.

Third.—Where the amount of rent of lands or tenements reserved in money shall depend in the whole or in part on the price of corn or grain, the estimate for the purpose of charging the duties in Schedule (A.) shall be made on the amount payable according to the average prices or fiars fixed in the year preceding the year appointed for payment of the duty, and in the same manner by which such rents have usually been ascertained between the landlords and tenants; but where the whole or a part of the rent shall be reserved in corn or grain, then the said estimate shall be made on the like average price or fiar computed on the quantity of corn or grain delivered or to be delivered in

the year appointed for payment of the duty; or where such computation cannot be made, the estimate aforesaid may be made on the annual value of such lands estimated according to the said general rule:

Amount of rent depending on produce.

Fourth.—Where the amount of rent reserved on lands or tenements shall depend on the actual produce thereof, either in respect of the price or quantity of such produce, the estimate for the purpose of charging the duties in Schedule (A.) shall be made on the amount or value of such produce in the year preceding the year appointed for payment of the duty, according to the prices fixed and according to the quantity produced in that year, by the same rules and in the same manner by which such rents have usually been ascertained between the proprietors and their lessees or tenants, and where the prices or fiars shall vary in the two years of assessment, or the amount of produce shall vary in those years, the assessment shall, on appeal of surcharge, be rectified accordingly:

In Scotland the estimate to be made according to the general rule in Schedule (A.)

Fifth.—Every estimate of such property in Scotland shall be made without reference to the cess or tax roll or valued rents[2] heretofore used in Scotland, or any stent thereon, and shall be made according to the general rule contained in Schedule (A.) to the best of the belief and judgment of the commissioners, assessors, and others employed in charging the said several duties.

[1] On the narrative that 'certain public rates and taxes which in England are a 'charge on the occupiers of lands, are in Scotland charged on the landlords, and that 'other public burdens, the like whereof do not exist in England, are also charged on 'the landlords in Scotland,' the Act 19 & 20 Vict. c. 80, sect. 1, enacts that where this shall be made to appear to the satisfaction of the Commissioners of Inland Revenue, 'the said Commissioners shall cause such relief to be given to the said landlords 'in Scotland as shall be just and reasonable in regard to the charge of the income tax 'on them, in respect of annual value exceeding by the amount of such rates, taxes, 'assessments, and public burdens, the charge of the said tax on landlords in England; and such relief shall be given either by abatement from the assessment or by 'repayment of the tax, and under such rules, regulations, and directions as the said 'Commissioners shall think fit to make or give in that behalf.'

[2] See text, pp. 191, 689.

Assessment of lands and tenements, on what amount to be made by the assessor.

64. And be it enacted, that upon every account of the annual value of the several properties aforesaid, to be charged under Schedules (A.) and (B.) delivered in manner before directed to the assessor,[1] he shall make an assessment of the said property on the amount of the sum ascertained by such account, if he shall be satisfied with such amount; but if he shall not be satisfied therewith, or if no such account shall have been returned, or if the occupier or other person aforesaid shall not be resident within the limits of the district of such assessor, and no such return shall have been made, then the said assessor shall estimate, to the best of his judgment, the annual value of the said property of which no sufficient account shall have been delivered, and make an assessment of the same accordingly;[2] and in doing so it shall be lawful for such assessor in every case relating to lands or tenements to be estimated according to the said general rule by the annual value thereof, where such annual value cannot be otherwise ascertained, and he is hereby required in every such case, to make such assessment according to the following rules, (*videlicet*,)

Where the annual value cannot be otherwise ascertained.

[1] This refers to sect. 52. See text, p. 709.

[2] The value entered in the valuation roll is the rule here, when the roll is made up by the surveyor acting under this statute—20 & 21 Vict. c. 58, sects. 1, 3; not otherwise, since, unless the Commissioners of Supply and magistrates take advantage of the Crown's offer to conduct the valuation, the said roll is applicable only to local burdens —Menzies *v.* Inland Revenue, 19th Jan. 1878, 5 Ret. 531.

No. XI.

First.—Where the last rate made for the relief of the poor in any parish or place shall be made throughout by a pound rate on the annual value, as the same would be estimated according to Schedule (A.), the assessment thereon to be made under this Act shall be made on the same sums respectively as in such rate: To be made on the same sums if rated to the poor on full value.

Second.—Where the said rate shall be made throughout by such pound rate on any proportionate part of the annual value as aforesaid, the proportion thereof shall be observed as in the said rate, but the assessment thereon to be made under this Act shall be made at the same sums respectively as they would have been estimated at if the said rate had been made on the full amount of such annual value: To be increased to full value if made on proportionate sums.

Third—Where properties of different kinds shall be rated in the said rate according to different proportions of the value thereof as aforesaid, or shall be rated therein at different rates of such value, but nevertheless the properties of the same kind shall be rated in a due proportion to each other, both as to the value and rate of charge, in every such case the rule of rating lands, both as to the value and the rate of charge, shall, in making the assessment under this Act, be observed throughout, as well with respect to such lands as to the other properties therein rated, so far as relates to such rates as shall be made either on the full value of the properties or on any proportionate part thereof. If in different proportions, the rate for lands to be the guide throughout.

Fourth.—In all cases not falling within the three preceding rules, but nevertheless where the properties shall appear to the assessor to be rated in the said rate in the same proportion to each other, though the proportion of such rate to the value of the property rated be not known, and the assessor is able to ascertain the rack rent[1] of all or any of the properties which shall have been so let within the period of seven years preceding within the limits of the parish or place where the said assessors shall act, he shall make an estimate of such properties on the amount of such rents respectively, and the amount contained in the estimates so made shall form the basis on which the estimates of other properties, of which the rack rent shall not have been so ascertained, shall be made, and he shall make his estimate of all other property in a sum bearing the same proportion, as near as the same can be computed, to the amount of such first estimates, as the sums at which all such other properties of which the rent has been so ascertained are valued at in such rate bear to the sum charged in the said rate on the said properties first estimated; and he shall apportion the sum so estimated on such other properties in the same proportion, as near as the same can be computed, as they are respectively rated at in such rate, and shall make his assessment under this Act accordingly; and in cases where the same rule of proportion shall not have been observed in rating different kinds of property, then the Where the proportions of the rate are not known.

assessor shall make an estimate as above directed upon each of such kinds of property, for the purpose of forming a basis on which the estimates of other properties of the same kind may be made.[2]

[1] See note to Schedule (A.) No. I., *supra*, p. 984.

[2] Somewhat similar provisions are contained in the Inhabited-House Duty Act of 1808, Schedule (B.) See text, p. 704.

Assessor allowed to estimate dwelling houses, &c., under £10, without a return.

65. Provided always, and be it enacted, that where any dwelling house or tenement, together with the offices, gardens, and lands occupied therewith, or any lands separately occupied, shall be under the annual value of ten pounds,[1] and the assessor shall be able to estimate the said value, either by the rules before mentioned, or from his own knowledge, or otherwise, it shall be lawful for him to estimate such property accordingly, to the best of his judgment, and to make an assessment thereon, without requiring a return of the annual value as aforesaid,[2] unless the surveyor or inspector shall object to such estimate, and shall require a notice for that purpose to be delivered; and if any assessor, not having given such notice, shall neglect to estimate the true annual value of the said properties, and to assess the same according to this Act, he shall forfeit any sum not exceeding ten pounds.

[1] Such houses, though occupied by tenants, are assessed on the landlord. See Schedule (A.) No. IV. 3, *supra*, p. 987.

[2] Sect. 52. See text, p. 709.

Assessors may make their assessments of lands on the production of the lease by the tenant, according to the reserved rent.

66. And be it enacted, that in case any tenant at rack rent[1] shall produce to the assessor the lease or agreement in writing under which he immediately holds any premises to be charged as aforesaid according to the general rule, the production of which lease or agreement every such assessor is hereby authorised to demand whenever the same shall appear to him necessary; and in case it shall appear by such lease or agreement that the same premises shall have been let within the period of seven preceding years, and no other consideration in money than the rent reserved shall be contained in such lease or agreement, it shall be lawful for such assessor to make his assessment according to such rent, any thing before contained to the contrary notwithstanding; but such assessment shall not be binding, in case it shall appear to the commissioners that the said lease or agreement doth not express the full consideration, whether in money or value, for the demise, or the rent *bonâ fide* paid for the same, or that the rent reserved is less than the rack rent on occasion of repairs or improvements done or to be done by the lessee or assigns, or is made in any other respect with intent to conceal the annual value of such premises, or to diminish the estimate to be made thereon, or hath been assigned to such tenant, or any former tenant, for any consideration in money or value paid or agreed to be paid: Provided always, that regard shall be had to the cases before mentioned,[2] where the amount of the reserved rent shall be increased by reason of any covenant or agreement by the landlord to discharge the tenant's taxes, rates, assessments, or duties before mentioned, or where the same shall be decreased by reason of any covenant or agreement by the tenant to discharge the landlord's taxes, rates, or assessments, or on occasion of any expenses incurred or to be incurred by the lessee or assigns, whether mentioned or not mentioned in such lease or agreement, and to the deductions to be made on

If such lease shall be *bonâ fide* at rack rent.

account of any aid or public rate or assessment before described: Provided also, that upon every demise for years of lands made or to be made in consideration of a rent reserved, and also in consideration of certain improvements to be made in the lands demised at the proper cost and charge of the lessee or tenant, if it shall be proved to the satisfaction of the commissioners for general purposes acting for the division where such lands are situate that the rent reserved hath been settled on the estimate of the medium annual value of the said lands, computed on an average for the whole term granted in expectation of the progressive improvement of the said farm at the cost and charge of the said lessee or tenant, and the said annual rent is fixed and made payable to the same amount in each year on the said average, whereby the said rent so estimated and made payable did or doth exceed the just annual value of the said lands as the same were or are worth to be let at rack rent at the commencement of the term granted by the said demise, then and in such case the estimate of the annual value of the said lands, and the assessment thereupon, shall be made and computed according to the following rules; (that is to say,) in regard that the rent reserved hath been settled on a fair average of the annual value of the said lands computed on the whole of the term so granted, the said commissioners, on due proof of the circumstances before mentioned, shall cause the said duty payable in respect of the property in the said lands to be computed and charged on the amount of the rent so reserved and made payable as aforesaid, for each year of assessment, without variation, during the said term, subject nevertheless to such deductions as by this Act are allowed; and the said commissioners shall also cause the said duty payable in respect of the occupation of the said lands to be computed and charged on the full and just value of the said lands, to be ascertained at the times and in manner herein-after mentioned; (that is to say,) on all such demises made before the passing of this Act, the annual value of the said lands shall be the rack rent at which the same are worth to be let by the year, to be ascertained at the commencement of the first year of assessment after the passing of this Act, by a valuation to be made thereof under the powers and according to the directions herein contained, and to the satisfaction of the said commissioners, which valuation shall be in force for the term limited for the continuance of this Act, if the said demise shall not sooner expire; and the amount ascertained by such valuation shall be deemed to be the rack rent at which the said lands are worth to be let for the said term, if the said demise shall not sooner expire, and the assessment thereupon shall in each year of the said term be made on the said valuation; and on all such demises to be made after the passing of this Act the annual value of the said lands shall be the rack rent at which the same are worth to be let by the year, to be ascertained at the commencement of the said demise, by a like valuation to be made thereof in manner aforesaid.

Rules to be observed in assessing land at reserved rent, and for improvement.

[1] See note to Schedule (A.) No. I., *supra*, p. 984.
[2] In Rule No. X. 1 and 2, *supra*, p. 995.

67. And be it enacted, that in case any tenant at rack rent under any parol demise from year to year, within the period[1] mentioned in the

Tenants at rack rent

under a parol demise, or not able to procure leases, to deliver an account of the value.

said general rule, or any tenant who, by reason of any mortgage or other contract, shall not have the custody or possession of or the power over any lease or agreement in writing under which he holds the premises demised within the said period, and who shall give reasonable proof to the commissioners why he is unable to produce the same, shall deliver to the assessor an account in writing signed by such tenant of the actual amount of the annual rent reserved on such demise, such account so delivered shall be deemed a compliance with this Act, in all cases where he may be called upon under the authority of this Act to produce such lease or agreement; and it shall be lawful for such assessor to make his assessment according to such rent, any thing before contained to the contrary notwithstanding; but such assessment shall not be binding in case it shall appear to the said commissioners that the said account doth not express the full consideration for such demise, or the rent *bonâ fide* paid for the same, or that the rent reserved is less than the rack rent on occasion of any payments as aforesaid[2] made or to be made by such tenant, or is made in any other respect with intent to conceal the annual value of the premises held under such demise, or to diminish the assessment to be made thereon: Provided always, that lands held for a longer period than seven years by any tenant under a demise from year to year, or at will, shall be estimated and assessed at the annual value thereof, unless the tenant shall show and prove to the satisfaction of the said commissioners that the same lands are held under a demise which commenced by agreement made and a rent fixed within the period of seven years, on the determination of the former demise thereof, by due notice within the said period.

Lands held under a tenancy from year to year, or at will, to be rated by value, unless the rent be fixed on a demise within seven years.

[1] Seven years. See Schedule (A.) No. I., *supra*, p. 984.
[2] In last section.

Penalty on tenants delivering false accounts of the value of the premises, or concealing the true value thereof.

68. And be it enacted, that every person who shall wilfully deliver any such account as aforesaid which shall be false, or who shall wilfully refuse, neglect, or omit to produce any lease or agreement with intent to conceal the annual value of the premises therein comprised, or to diminish the estimate to be made thereon, shall forfeit the sum of twenty pounds, and shall be liable to be charged in treble the duty hereby directed to be charged as aforesaid, computed on the annual value of the premises held under such demise, estimated according to this Act; and the inspector and surveyor are hereby respectively required to surcharge the same, and the commissioners are required to make an assessment accordingly.

Tenants in Scotland to produce their leases on notice;

69. And be it enacted, that every tenant of lands, tenements, or heritages in Scotland shall, within ten days after the assessor shall have left at his usual place of abode, or at any dwelling house or other place on the premises to be charged with the assessment, a note in writing requiring the same, produce to such assessor the tack or lease or other agreement or articles in writing, under which such tenant holds such lands or tenements, or where the same shall not be in the power, custody, or possession of such tenant, or there shall be no such tack, lease, or agreement or articles, then he shall leave with such assessor, or at his dwelling house, within the time before mentioned, a note in writing of the actual rent annually reserved and payable, and of any other valuable considera-

tion given or to be given to the landlord of such lands and tenements as a further consideration for such tenancy, under the penalty of treble the duty hereby chargeable thereon, in case of any wilful neglect to comply with such notice; and it shall be lawful for such assessor to make his assessment on the production of such lease or agreement or articles, according to the rent therein reserved and made payable; and in case of non-production of such lease or agreement or articles in writing, then upon the rent reserved or made payable, according to the account thereof delivered as aforesaid, if he shall be satisfied that the said lands, tenements, or heritages have been *bonâ fide* let at the reserved rent notified to him as aforesaid, without other valuable consideration; but in case such assessor shall not be satisfied with the notification given to him, or in case no such notification shall be given, then such assessor shall make the assessment as directed in the foregoing rules: Provided always, that if the farm occupied by such tenant shall be distant more than ten miles from the dwelling house of such assessor, it shall be competent to such tenant to lodge his lease or note in writing of the rent with the nearest Justice of the Peace, or with the clergyman of the parish where the farm is situated; and the said Justice of the Peace or clergyman respectively shall be obliged to show the said lease or note of the rent to the said assessor when required.

or leave them with a Justice of Peace, or clergyman in certain case.

70. And be it enacted, that the said several duties shall be assessed on all lands, tenements, and hereditaments, whether occupied at the time of assessment or not; and so far as respects the duties chargeable under Schedule (A.), in case any lands charged to the said duties shall be unoccupied, and no distress[1] can be found on the same at the time such duties shall be payable, it shall be lawful for the collector of the parish or place where the said lands are situate for the time being, at any time after, to enter upon the said lands when there shall be any distress thereupon to be found, and the distress to seize and sell, under the like powers as he might have distrained on the same lands if in the occupation of such person at the time the duties became due: Provided always, that the said duties, or either of them, shall not be levied on any house which shall be or become unoccupied for such year, or portion of the year, as the same shall be unoccupied, but the assessment thereupon for such year, or portion of the year, as aforesaid, shall, upon appeal, be discharged or diminished by the commissioners, on due proof of the time during which such house remained unoccupied.

All properties to be assessed whether occupied or not.

Assessments on houses to be discharged for the period they are unoccupied.

[1] *I.e.*, poindable goods.

71. And be it enacted, that where by any assessment the duties shall be charged on tithes or teinds, and the same shall not be paid within the respective times limited by this Act, it shall be lawful for the collector and officer respectively to distrain upon[1] such tithes or teinds, or any other goods or chattels of the owner of such tithes or teinds, wherever the same can be found, and to seize, take, and sell so much thereof as shall be sufficient for levying the said assessment, under and subject to the like powers granted by the said Acts relating to the duties of assessed taxes in other cases.[2]

Mode of levying the duties charged on tithes.

[1] Poind.

[2] See text, p. 712.

Mode of levying the duties on compositions for tithes, or on manors or royalties, markets, fairs, tolls, fisheries, &c.

72. And be it enacted, that when any assessment shall be charged on any composition for tithes or teinds, or any rent or payment in lieu thereof, the occupier of the lands and premises charged with such composition, rent, or payment shall be answerable for the duties so charged, and may deduct the same out of the next payment on account thereof; and where any assessment shall be charged on the profits of manors or royalties, or of markets or fairs, or on tolls, fisheries, or any other annual or casual profits not distrainable, the owner or occupier, or receiver of the profits thereof, shall be answerable for the duties charged thereon, and may retain and deduct the same out of such profits; and in every such case the collector shall distrain upon such persons respectively by any of the ways and means prescribed by the said Acts relating to the duties of assessed taxes.

Contracts between landlords and tenants or other persons not to be binding contrary to this Act.

73. Provided always, and be it enacted, that no contract, covenant, or agreement between landlord and tenant, or any other persons, touching the payment of taxes and assessments to be charged on their respective premises, shall be deemed or construed to extend to the duties charged thereon under this Act, nor to be binding contrary to the intent and meaning of this Act;[1] but that all such duties shall be charged upon and paid by the respective occupiers, subject to such deductions and repayments as are by this Act authorised and allowed; and all such deductions and repayments shall be made and allowed accordingly, notwithstanding such contracts, covenants, or agreements.

[1] See note to sect. 103, *infra*, p. 1005.

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Amount of assessments and day of appeal to be notified.

80. And be it enacted, that so soon as the assessments for any parish or place under Schedules (A.) and (B.) shall be allowed and signed as aforesaid[1] the commissioners shall cause notice thereof and of the day for hearing appeals therefrom to be given in such manner as they shall judge expedient, which notice may be given, either by delivering a copy of such assessment to the assessor of such parish or place, for the inspection of the parties charged thereby, together with a public notice of the day of appeal, to be affixed on or near to the church door or on any other public place in the parish, or by delivering to each party charged the amount of his assessment, together with a note of the day of appeal, and such notices shall be made and given at least fourteen days before the day of appeal so fixed.

[1] Sect. 79. See text, p. 709.

The value of lands may be ascertained by actual valuation by order of the commissioners.

81. And be it enacted, that if upon appeal any dispute shall arise touching the annual value of any lands, tenements, hereditaments, or heritages, and the commissioners[1] shall deem it necessary that a valuation thereof should be taken and made by any person of skill, it shall be lawful for them to direct the appellant to cause such valuation to be made by any person to be named by the said commissioners, the costs and charges whereof shall abide the final determination of the said commissioners, and it shall be lawful for them to make an assessment according to such valuation, and to require the same to be verified on the oath of the person making the same; but in case the appellant shall not proceed with effect to cause such valuation to be made as aforesaid, the said commis-

sioners shall make an assessment according to the best of their judgment: Provided always, that it shall be competent to the said commissioners, in every such case where the valuation so made shall exceed the value put upon the same lands, tenements, hereditaments, or heritages by the appellant, to direct the costs and charges attending the same to be paid by him; but if they shall be of opinion that such costs and charges have not been incurred through any default of the said appellant, they shall direct the same to be paid by the collector of the parish or place, who, on the certificate of the commissioners present at the time of the determination, shall pay the same, and the sum so paid shall be allowed to such collector in his accounts with the proper officer for receipt, on delivering to him such certificate, together with the receipt and voucher for such payment.

By whom the costs of such valuation are to be paid.

[1] Or the appellant—16 & 17 Vict. c. 34, sect. 47.

82. Provided always, and be it enacted, that if on appeal the occupier of any premises held under a demise at rack rent[1] shall produce and show to the commissioners the lease, tack, or agreement in writing, or shall prove by any lawful evidence to be produced on his part, in case there shall be no such lease, tack, or agreement in writing, the annual amount of the rent at which such premises are let, it shall be lawful for the said commissioners, in case such rent hath been fixed by agreement commencing within the period of seven years mentioned in the said general rule,[1] and they shall be satisfied that such lease, tack, or agreement doth express the full consideration for the demise under which such occupier shall hold the same, or that the rent *bonâ fide* paid by such occupier for the same hath been duly shown to them in evidence, and that such demise is made wholly in consideration of such reserved rent without any intention to conceal or diminish the annual value of such premises, or other fraudulent intention whatever, to abate and deduct from such assessment so much as in their judgment will reduce the rate to a just rate on such rent: Provided always, that if it shall appear to the said commissioners that any lands, tenements, hereditaments, or heritages shall have been assessed at an annual value less than the actual rent at which the same shall be let, or (if not let) at less than the rent at which the same might be let, it shall be lawful for the said commissioners to enlarge and increase such assessment to such sum as a like rate on such rent would amount unto, as well with respect to the rate on the property as the rate on the occupation of such lands, tenements, hereditaments, or heritages.[2]

In case of appeal, occupier showing lease, or if no lease, proving his annual rent, the commissioners may reduce the rate.

Where lands are assessed at less than the value, the assessment may be rectified.

[1] See Schedule (A.) No. I., *supra*, p. 984; and sects. 66, 69.
[2] As to further appeal, see text, p. 711.

83. And be it enacted, that whenever by any flood or tempest loss shall be sustained on the growing crops, or on the stock on lands demised to a tenant at a reserved rent, without fine or other sum paid, given, or contracted for in lieu of a reserved rent, or any part thereof, or the said lands, or any part thereof, shall by such flood or tempest be rendered incapable of cultivation for any year, and it shall be proved on oath to the satisfaction of the commissioners for general purposes acting for the division where the said lands are situate, that the owner of the said lands

Relief to be granted to occupiers and owners for losses caused by flood or tempest.

hath in consideration of such loss abated or agreed to abate to his tenant the whole or any portion of the rent reserved or payable by such tenant for any year of such demise, it shall be lawful for the said commissioners to abate in the assessment made in respect of the property in the said lands for the same year for which such rent hath been abated, and to discharge therefrom the whole or the like proportion of duty as the said owner shall appear on such proof as aforesaid to have abated of or from the rent reserved and made payable to him on such demise; and it shall also be lawful for the said commissioners in every such case to abate in the assessment made in respect of the occupation of the said lands for the same year, and to discharge therefrom the like proportion of duty as shall have been abated or discharged from the assessment made in respect of the property on the said lands for the cause aforesaid.

The like relief extended to occupiers and owners where the owners are incapable of consenting to abatement of rent.

84. And be it enacted, that whenever from the cause aforesaid the like loss shall be sustained on the lands of any infant, idiot, lunatic, or other proprietor incapable of consenting to any abatement in the rent as aforesaid, being in the occupation of any such tenant as aforesaid, and the same shall be proved on oath before the said commissioners to their satisfaction, it shall be lawful for them to abate in the assessment made in respect of the occupation of the said lands, and to discharge the whole or any part of the said duty, and in proportion to the loss so sustained, and to the amount which the said commissioners shall be of opinion would or ought to have been abated as aforesaid, if the said lands had belonged to a proprietor of full age and of sound mind, and capable of such consent as aforesaid.

Abatement of assessment in case of losses on lands in the occupation of owners.

85. And be it enacted, that whenever from the cause aforesaid the like loss shall be sustained on lands in the occupation of the owner, and the same shall be proved on oath before the said commissioners to their satisfaction, it shall be lawful for them to abate in the several assessments made in respect of the property in or occupation of the said lands, and to discharge the whole or any part of the said respective duties, and in proportion to the loss so sustained, and to the amount which the said commissioners shall be of opinion would or ought to have been abated as aforesaid if the said lands had been demised to a tenant, and a proportionate abatement had been made to such tenant under the circumstances of the said loss.[1]

[1] In addition to these abatements in sects. 83-5, it is enacted by 14 Vict. c. 12, sect. 3, 'that if at the end of the year of assessment of the said duties under this Act, 'any person occupying lands for the purpose of husbandry only, and obtaining his 'livelihood principally from husbandry, who shall have been assessed in the said year 'to the duties chargeable under Schedule (B.) in respect of such lands, shall find and 'shall prove to the commissioners by whom the assessment was made, that his profits 'and gains arising from the occupation of such lands during the said year fell short 'of the sum on which the assessment was made, it shall be lawful for the said com-'missioners, upon appeal made to them in that behalf, within three calendar months 'after the expiration of the said year, and of which notice in writing shall be given 'to the surveyor of taxes for the district, to cause an abatement to be made from the 'amount of the said taxes charged on such appellant proportionate to the deficiency 'of his said profits and gains; and in case the whole sum assessed shall have been 'paid, the amount of the sum overpaid shall be certified and repaid in like manner, 'as is provided by sect. 133' of this Act of 1842, 'in case of any overpayment of the 'duties assessed under Schedule D. of the same Act.' (The mode of repayment in sect. 133 is similar to that set forth in sect. 61, *supra*, p. 991.) The above abatement is extended by 16 & 17 Vict. c. 34, sect. 46, 'to every person occupying lands as

'tenant thereof, for the purposes of husbandry only, although he may not obtain his 'livelihood principally from husbandry, as well as to every person occupying lands 'for the purposes aforesaid, being the owner thereof, and obtaining his livelihood 'principally as aforesaid.'

Penalty for making false claim for such abatement.

86. And be it enacted, that if any person shall be guilty of making any false claim for such abatement as aforesaid, or shall be guilty of any fraud or contrivance in making such claim, or in obtaining any such abatement, or shall fraudulently or untruly declare the amount or value of such loss, or the amount or value of any abatement made or agreed to be made in the rent of the lands in his occupation, on account of such loss, with intent fraudulently to obtain any such abatement, he shall forfeit the sum of fifty pounds, and treble the amount of duty charged on him in respect of the said lands; and if the owner of any such lands, or any other person whatever, shall aid, abet, or assist any person charged to the said duties in making such false or fraudulent claim, or shall fraudulently or untruly declare the amount or value of any abatement made or agreed to be made in the rent of the said lands or the amount of such loss, with intent fraudulently to obtain for himself, or for his tenant, or for the owner or tenant of the said lands, any such abatement as aforesaid, every such owner or other person aforesaid shall forfeit the sum of one hundred pounds.

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Penalty on refusing to allow deductions.

103. And be it enacted, that if any person shall refuse to allow any deduction authorised to be made by this Act out of any payment of annual interest of money lent, or other debt bearing annual interest, whether the same be secured by mortgage or otherwise, he shall forfeit for every such offence treble the value of such principal money or debt; and if any person shall refuse to allow any deduction authorised to be made by this Act out of any rent or other annual payment mentioned in the ninth and tenth rules of No. IV. Schedule (A.),[1] or out of any annuity or annual payment mentioned in Schedules (C.) or (E), or in the next preceding clause,[2] save such annual interest as aforesaid, every such person shall forfeit the sum of fifty pounds; and all contracts, covenants, and agreements[3] made or entered into, or to be made or entered into, for payment of any interest, rent,[4] or other annual payment aforesaid, in full, without allowing such deduction as aforesaid, shall be utterly void.[5]

[1] See p. 990, note [8] *supra*.

[2] Relating to Schedule (D.)

[3] See also sect. 73. This does not include *mortis causâ* deeds—Festing *v.* Ds. Somerset, 32 L.J.Q.B. 41; Mackie's Trs. *v.* Mackie, 15th Jan. 1875, 2 Ret. 313; but includes the case of a widow accepting a free annuity in lieu of her legal rights—Rodger's Trs. *v.* Rodger, 9th Jan. 1875, 2 Ret. 294; not, however, the case of a widow entitled, by antenuptial marriage contract, to a free annuity, afterwards increased by her husband's testament—Kinloch's Trs. *v.* Kinloch, 24th Feb. 1880, 7 Ret. 596.

[4] This did not strike at a reservation in a lease of an increased rent of £10, pending the existence of an income tax—Colbron *v.* Travers, 31 L.J.C.P. 257; nor at an agreement that if the tenant will continue to pay his rent in full, the landlord will repay to him all sums paid for landlord's income tax; the object of the enactment being to prevent the tenant becoming liable and the landlord exempt—Lamb *v.* Brewster, 4 Q.B.D. 607.

[5] That is, void *quoad* the stipulation for payment without deduction. See a case under the same enactment in 46 Geo. III. c. 65, sect. 115—Howe *v.* Synge, 15 East 440, quoted with approval in Blair *v.* Allen, 17th Nov. 1858, 21 D. 15. Freedom

from income-tax is implied in the expression 'annuity free from all burdens, taxes, and deductions whatsoever'—Mackie's Trs. *v.* Mackie, *supra;* but not if the word 'taxes' or some equivalent expression is omitted—Kinloch's Trs., *supra:* see also Blair *v.* Allen, *supra.* Cf. Att.-Gen. *v.* Shield, 3 H. and N. 834; Floyer *v.* Banks, 32 L.J. Ch. 610; Lovat *v.* Ds. Leeds, 2 Dr. and Sm. 62; and see Rodger's Trs. *v.* Rodger, *supra.*

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When duties are to be detained.

158. Provided always, and be it enacted, that such of the said duties granted by this Act which may be detained or stopped and deducted out of the sums in respect whereof they shall be charged or deducted, shall be respectively detained at such times in each year as the said sums shall be payable to the person entitled thereto.

What deductions shall not be allowed in computing the duties to be charged under this Act.

159. And be it enacted, that in the computation of duty to be made under this Act in any of the cases before mentioned, either by the party making or delivering any list or statement required as aforesaid, or by the respective assessors or commissioners, it shall not be lawful to make any other deductions therefrom than such as are expressly enumerated in this Act,[1] nor to make any deduction on account of any annual interest, annuity or other annual payment to be paid to any person out of any profits or gains chargeable by this Act, in regard that a proportionate part of the duty so to be charged is allowed to be deducted on making such payments, nor to make any deduction from the profits or gains arising from any property herein described, or from any office or employment of profit, on account of diminution of capital employed or of loss sustained in any trade, manufacture, adventure, or concern, or in any profession, employment, or vocation.

[1] See Schedule (A.) No. V., and Schedule (B.) No. VII., *supra*, pp. 991, 993.

Commissioners to settle differences respecting deductions to be made on account of duties.

160. And be it enacted, that if any difference shall arise between tenant and landlord, or any other persons to whom any interest, rent, rent-charge, annuity, fee-farm rent, rent service, quit rent, feu-duty or other rent or annual payment shall be payable, touching the sums to be deducted thereout on account of the duties hereby charged having been paid, or between the occupier for the time being and any former occupier of any lands, tenements, hereditaments, or heritages, his executors, administrators, or assigns, touching the proportion of duty to be paid or allowed by either party, the respective commissioners for general purposes in their several districts shall have authority and they are hereby required to settle the proportions of such payments and deductions as shall be according to the directions of this Act, and in default of payment to levy the same respectively under the like powers as they might have levied the same if the assessment had been made in the same proportions, and to pay over the same to the collector or party, as the case may require; and the judgment and determination of such commissioners shall be final.

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